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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1209, Peake v. Sanders et al.

Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

MR. MILLER: Mr. Chief Justice, and may it please the Court.

Congress has directed the Veterans Court to take due account of the rule of prejudicial error in reviewing administrative determinations of veterans benefits. For four reasons, the court of appeals erred in holding that the Veterans Court should presume the existence of prejudice whenever it finds that the VA has erred in providing notice to a claimant.

First, section 7261, the Veterans Court prejudicial error statute, uses language that is essentially identical to that of the APA's prejudicial error provision. And when Congress adopted that language in 1988, it was understood to place upon the party challenging an agency's action the burden of showing that any error was prejudicial.

Second, a notice error of the kind at issue

1 here does not have the natural effect --

2 JUSTICE SCALIA: Why do you say that? That  
3 it was understood so? Because of the Attorney General's  
4 commentary on the APA?

5 MR. MILLER: The principal reason that it  
6 was understood is because the uniform practice in the  
7 courts of appeals as of 1988 was to place upon  
8 challengers to agency action the burden of showing  
9 prejudice from an error. And the Congress was well  
10 aware of that, and in particular the Senate Veterans  
11 Affairs Committee, in explaining its choice of the rule,  
12 cited the Ninth Circuit's decision in *Seine & Line*  
13 *Fishermen's Union*, which expressly stated that the  
14 burden lies --

15 CHIEF JUSTICE ROBERTS: You basically have  
16 four cases in the courts of appeals to support that  
17 proposition, right?

18 MR. MILLER: No, Your Honor, it's  
19 considerably more than that. And the only -- and the  
20 only cases that even suggest -- that lend any support to  
21 a contrary rule are in the very different context of  
22 notice and comment rulemaking under rule -- under  
23 section 553.

24 And the reason that that's different is  
25 really for two reasons, and that is that the -- the

1 interest that section 553 is intended to protect is not  
2 the interest of any particular commenter or any  
3 particular outcome of the rulemaking. It's the interest  
4 of the public in having the agency's decisionmaking  
5 fully informed by all of the relevant comments.

6 CHIEF JUSTICE ROBERTS: Well, but this is --  
7 I mean, it's kind of the -- it's the first notice. It  
8 gets the ball rolling. I mean, I think it's like you  
9 have two teams and you don't tell one of the teams when  
10 the game starts, and then you say, well, it doesn't  
11 matter because they would have lost anyway, there's no  
12 prejudice.

13 MR. MILLER: Well, I mean, the reason that  
14 in a great many cases there's not going to be prejudice  
15 from error of the kind at issue here is that the VA has  
16 an informal nonadversarial system that provides multiple  
17 layers of review and many opportunities to correct the  
18 effect of any official notice error. And that's  
19 illustrated by the procedural history of these cases.  
20 To take Ms. Simmons's case for an example --

21 JUSTICE GINSBURG: Well, can we go back to  
22 the question that was first posed? We have never held  
23 that every agency -- you know, agencies come in many  
24 sizes and shapes -- that in all cases, the APA places  
25 the burden on the appellant or the petitioner. But this

1 Court has never held that across the board, no matter  
2 what agency we are talking about, that's the rule.

3 MR. MILLER: That's correct. This Court has  
4 not held that. But Congress was aware that the uniform  
5 practice, certainly in agency adjudications in the  
6 courts of appeals, was to place the burden on the  
7 challengers, and Congress --

8 JUSTICE STEVENS: When was Congress aware of  
9 this, when the Administrative Procedure Act was passed,  
10 you mean?

11 MR. MILLER: No, the statute at issue here  
12 is part of the Veterans Judicial Review Act of 1988.  
13 And so the relevant time we're looking at what the  
14 practice was is as of 1988 when Congress incorporated  
15 the language from the APA and placed it in section 7261.  
16 And as of 1988, it was clear that the burden was on  
17 challengers.

18 JUSTICE ALITO: Can I -- can I ask you to  
19 clarify exactly what you mean by the "burden" of showing  
20 prejudice? Is it correct that neither of the following  
21 -- to borrow the terminology that you would use in  
22 formal litigation, and I understand this is not formal  
23 litigation before an agency, but to borrow that  
24 terminology, is it correct that the issue here doesn't  
25 concern either the burden of production or the risk of

1 nonpersuasion before the administrative agency, before  
2 the regional office? In other words, if there's -- if  
3 there is evidence that the veteran as opposed to the VA  
4 has to produce, that doesn't change, and whatever the  
5 standard is that has to be met to show an entitlement to  
6 benefits, that doesn't change either, so that all that's  
7 involved here is whether -- whatever showing needs to be  
8 made is to be made on appeal or on remand?

9 MR. MILLER: That's -- that's correct. We  
10 are talking about what showing needs to be made on  
11 appeal. And as this Court suggested in O'Neal, you  
12 know, the burden language is perhaps more appropriate  
13 for the context where there's -- you know, people are  
14 presenting competing evidentiary submissions to a  
15 factfinder, and that's not quite what we have here.

16 JUSTICE BREYER: That's in O'Neal. It says  
17 that --

18 MR. MILLER: That's right.

19 JUSTICE BREYER: -- which most of the Court  
20 joined, and the reason that it says it is because it  
21 just confuses everybody, at least me, to talk about  
22 "burden" in this context. I think if O'Neal is right,  
23 it says what this is, is not involving a jury, not  
24 involving -- it's just what Justice Alito says, and  
25 following that through, what you'd -- you say to the

1 judge: Judge, your job is to decide this. Decide.  
2 Decide whether you think that the one side has shown --  
3 whether there is error or whether the error is harmless  
4 or whether it isn't. Decide it.

5 Now, it could be in a rare instance the  
6 judge just can't decide. He's in grave doubt. And so  
7 what we are talking about is what to do in that -- what  
8 should be a very, very rare instance.

9 Now, when I read this case, I thought that  
10 the Veterans Affairs is absolutely common sense on this.  
11 It says: When you really don't know what to do, Judge,  
12 if the veteran got no notice at all, then probably the  
13 error was harmful. But if he got the basic notice, and  
14 all that's at issue is who should produce what or  
15 whether he thinks that he didn't know that he's supposed  
16 to produce a lot of information, well, there, you know,  
17 it would be pretty rare that it was harmful. And so  
18 you'd better say to him: Veteran, why did this hurt  
19 you?

20 You know, that's all common sense, and it  
21 seemed to me that that's what the Veterans Court was  
22 saying, and then the Federal Circuit unfortunately, like I  
23 might have done, too, got it all mixed up with this burden  
24 of proof language. Now, you tell me, legally, is that  
25 result which I am talking about sensible, and if so, how

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2 do I get there legally?

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MR. MILLER: To clarify, the reason that we have used the language of "burden" is simply --

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JUSTICE BREYER: I'm not criticizing you for that. I'm not -- it's not a criticism. I'm just really trying to figure out how to get to what I see as common sense legally.

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MR. MILLER: I appreciate that. I -- the point that we're trying to emphasize is that, in the ordinary course, the Veterans Court, like any court, is going to act on the basis of arguments that are presented to it by the party. And so when we -- when we speak of a "burden," we mean that the challenger has the obligation, if it wants the Veterans Court to find prejudice, to articulate some theory of how there was prejudice. And that --

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JUSTICE BREYER: The theory is he didn't know anything about this, got no notice whatsoever, so he didn't know that he's supposed to produce some more information or he'll lose. That's the theory.

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MR. MILLER: But in order to -- in order to connect that error -- I mean, that's -- that's an identification of an error under the Veterans Claims Assistance Act. But to connect that error to some --

1 JUSTICE BREYER: But you connect it by  
2 saying normally a veteran who isn't that knowledgeable  
3 -- not everybody is a genius in law -- when he doesn't  
4 get a notice that tells him you got to produce something  
5 more or you lose, he might forget to produce something  
6 more. That's the theory.

7 MR. MILLER: If he has something more. And  
8 what we are saying is that in order to get a remand, the  
9 claimant who, by the time they get to the Veterans  
10 Court, has already identified the error, has made an  
11 argument to explain to the court that there was in fact  
12 an error, at that point they ought to explain how the  
13 error affected them. If it prevented them from putting  
14 some piece of evidence, they ought to tell the court:  
15 Here's the piece of evidence that I would have put in.

16 CHIEF JUSTICE ROBERTS: Well, usually, when  
17 you have an appellate court -- you know, it's a hard  
18 question, they're evenly divided, the case is resolved  
19 on the basis of the standard of review. What is the  
20 presumption, if it's a close case? And why isn't that  
21 all sort of what we are talking about here? It's a  
22 close case, and the judge -- the panel says, well, this  
23 side has the burden of persuasion, so we're going to  
24 come out the other way.

25 MR. MILLER: Because I think in a case where

1 the -- like these, where claimant has not identified  
2 anything that they would have done differently, it isn't  
3 a close case with respect to the question of prejudice.

4 Now, we have to be clear: If a claimant can  
5 articulate something they would have done differently,  
6 we are not saying they have the obligation of showing  
7 that the outcome definitely would have been different or  
8 even, more likely than not, it would have been  
9 different. It would be sufficient after identifying  
10 with some particularity what they would have done  
11 differently, if they could show that there's some  
12 reasonable probability --

13 CHIEF JUSTICE ROBERTS: Well, what if what  
14 they would have done differently is get a different  
15 medical test, or done something like that, or had the  
16 doctor in the prior testing who prepared the diagnosis  
17 look at something that they didn't have them look at  
18 before? In other words, it's not simply the absence of  
19 documents that they know they can submit or could have  
20 submitted. It's that type of question. And nobody  
21 knows. I mean, you don't know what would have happened  
22 if they had the doctor look at this issue that now turns  
23 out to be critical, but when they -- if they had gotten  
24 the right notice they might have had time to do that.

25 MR. MILLER: Well, depending on the state of

1 a record -- the record in a particular case, that might  
2 be sufficient to show a reasonable probability that the  
3 outcome would have been different. But in a lot of  
4 cases it won't be, and I think Ms. Simmons's case is a  
5 pretty good example of that. Her claim --

6 JUSTICE GINSBURG: But if the government has  
7 the obligation at the very first to tell the veteran  
8 what the veteran must produce to substantiate the claim  
9 and the government doesn't do that, why shouldn't it be  
10 the responsibility of the government to say to the  
11 court: This is what -- if we had done what we were  
12 supposed to do, this is what we would have included in  
13 our notice. And looking at that, the court can tell  
14 whether there's anything the veteran might have done.  
15 But why shouldn't the government at least have the  
16 obligation to say what it would have done had it  
17 complied with the statute, what it would have said  
18 specifically in this case?

19 MR. MILLER: Well, I mean, had the  
20 government complied -- to take Simmons's case as an  
21 example, when the VA sent her the notice letter, her  
22 claim was for an increased rating. She had hearing  
23 loss that had already been determined to be  
24 service-connected but was not sufficiently severe to be  
25 compensable, and she said: My hearing has gotten worse.

1 It now is severe enough to be a compensable disability.

2 The notice letter that was sent to her,  
3 which is at page 43 of the joint appendix, was incorrect  
4 in that it simply described the general requirements for  
5 establishing a service connection. It didn't  
6 specifically say, to make out an increased rating claim,  
7 you have to show that your hearing has become worse.

8 But as soon as she got a decision from the  
9 regional office, which is the first-line decisionmaker  
10 in the VA system, she was told that the reason her claim  
11 had been denied was because her hearing loss was not  
12 sufficiently severe under the table, and there's a  
13 fairly mechanical application of a certain number of  
14 decibels and a certain -- in each ear yields a certain  
15 disability rating, and the notice that she got from the  
16 regional office explained all of that and cited the  
17 regulation that reproduced the tables.

18 So at that point she was aware of why her  
19 claim had been denied and what was missing, namely,  
20 evidence that her hearing had become worse. And she had  
21 been given at that point a series of hearing  
22 examinations - of examinations of her hearing by the --  
23 by VA doctors, and the results of those were all  
24 reproduced in the decision that she got. And yet, the  
25 Veterans Court found that the government had failed to

1 carry its burden of showing a lack of prejudice, because  
2 we hadn't -- we couldn't show as a matter of law that  
3 there was no way she could obtain additional evidence.

4 JUSTICE BREYER: So -- so fine. If I get  
5 that record and if it is the way you describe, I'm not  
6 in grave doubt. No problem. If the record's the way  
7 you describe it, she knew everything she was supposed to  
8 know, so there's no harmful error, okay? We are only  
9 talking about cases where there is real doubt in the  
10 judge's mind about whether this failure of the agency  
11 did or did not hurt the woman or man. Now, when in  
12 doubt, we have the Veterans Court telling us the best  
13 way to administer this stuff is when they get no notice  
14 at all, and you are really in doubt, Judge, you don't  
15 know if it was harmful or not, here's what you do:  
16 Assume it was harmful. They're the ones who know. I  
17 don't know.

18 MR. MILLER: With respect, Your Honor, I  
19 don't think that that's a fair description of the effect  
20 of the rule adopted by the court below.

21 JUSTICE BREYER: Well, but suppose then we  
22 look at O'Neal, we read the first paragraph. It was  
23 what this court said, and we all held it and, therefore,  
24 we say, those are the cases we're talking about where  
25 you're in doubt, and when you're in doubt, go proceed as

1 the Veterans Court told you in terms of who has to show  
2 what.

3 MR. MILLER: I think -- and again, this case  
4 is a good illustration about why that sort of grave  
5 doubt you are describing doesn't arise in a case like  
6 this, where at no stage of the proceedings has the  
7 claimant offered anything that they would have done any  
8 differently. If they can't say, you know, here's what  
9 would have happened differently, than there really isn't  
10 any doubt as to what will happen on remand. If there's  
11 a remand and they don't do anything different, the  
12 result is not going to be any different. And so --

13 JUSTICE STEVENS: Maybe I'm not following as  
14 well as I should, but it seemed to me you are suggesting  
15 there was no error here.

16 MR. MILLER: No, that there -- there  
17 certainly -- there was an error.

18 JUSTICE STEVENS: And what was the error?

19 MR. MILLER: The error was that the initial  
20 letter that was sent to her describing what the evidence  
21 needed to -- that she needed to submit in order to  
22 establish her claim, misidentified that evidence; it  
23 described the elements of a general claim for service  
24 connectedness; it didn't specifically explain what was  
25 needed to establish an increased rating claim.

1                   JUSTICE STEVENS: Are you saying that that  
2 error was not prejudicial because the earlier  
3 information she had received gave her everything she  
4 needed?

5                   MR. MILLER: The principal reason why that  
6 error was not prejudicial is because the only way that  
7 she could have received benefits for an increased rating  
8 claim is if there were evidence that her hearing had  
9 become worse. And she had a VA hearing test that said  
10 that her hearing did not meet the schedule or criteria  
11 for being a compensable disability.

12                   JUSTICE STEVENS: Well, if that's the case,  
13 why wasn't that statement you just made sufficient to  
14 discharge your burden of showing no prejudice?

15                   MR. MILLER: The -- the fact -- I mean, I --  
16 we believe that it should have been, but under the rule  
17 as imposed by the courts below, it clearly wasn't.

18                   Under the decision of the Federal Circuit,  
19 the VA has the burden of showing that there was no way  
20 that benefits could have been awarded as a matter of  
21 law. And that, in effect, requires the VA to prove a  
22 negative by demonstrating the nonexistence of any  
23 evidence anywhere that might have been material to the  
24 claim.

25                   CHIEF JUSTICE ROBERTS: You know, it's easy

1 -- it's easy to look back and view this in sort of  
2 abstract legal terms, but we are dealing with lay people  
3 who are trying to get something from the government,  
4 which is always a difficult thing. And they get one  
5 notice saying you have got to show that this was during  
6 the service. Then they get another notice or decision  
7 saying it wasn't severe enough. Why is it so difficult,  
8 when the government made a mistake in dealing with this  
9 layperson who is just trying to get benefits to which  
10 they are entitled, to say that the government has to  
11 show that it didn't make any difference, rather than  
12 requiring the -- the layperson to do that?

13 MR. MILLER: Well, because -- there are two  
14 responses to that: The first is it's important to keep  
15 in mind the stage of the proceedings at which this  
16 inquiry was relevant. The prejudicial error is only an  
17 issue once the claimant has reached the Veterans Court,  
18 which is an adversarial judicial proceeding where most  
19 claimants do have counsel, and they've identified an  
20 error, and they've explained to the court, you know,  
21 here's what the error was. So that's the stage at which  
22 it would be incumbent upon them to articulate how the  
23 error might have affected them.

24 And I think the other point to be made is  
25 that, under the rule of the court of appeals, it's going

1 to be very, very difficult in many cases for the  
2 government to discharge the burden of showing that there  
3 was no evidence that could possibly have been produced.  
4 And what's -- what that is going to result in is a large  
5 number of remands --

6 JUSTICE KENNEDY: And as between the two  
7 courts, the Court of Appeals for Veterans Claims and the  
8 Court of Appeals for the Federal Circuit, do we owe  
9 either of them -- maybe not deference in the Chevron  
10 sense -- but some deference just because of their  
11 expertise in dealing with these claims? And if that is  
12 so, do we owe more deference to the Court of Appeals for  
13 the veterans' claims?

14 THE WITNESS: I'm not -- not aware that this  
15 Court has ever suggested that it would be --

16 JUSTICE KENNEDY: I mean, would -- it's --  
17 it's an issue of law, so I take it it's de novo.

18 MR. MILLER: Yes, it is -- and it's  
19 certainly that, and it is --

20 JUSTICE KENNEDY: But in -- in the exercise  
21 of that review, don't we have to give some weight to the  
22 determination of the Court of Appeals for Veterans  
23 Claims which sees these claims all the time? I -- I  
24 actually thought that that's where you were going to  
25 start out because you cited 7261, which says that the

1 Court of Appeals for the Federal Claims shall, what,  
2 give due effect to -- take due account of the rule of  
3 prejudicial error. And I think you could get from that  
4 that they have a certain amount of latitude in  
5 determining what the best rule is. But you're not going  
6 to -- you don't tell us that?

7 MR. MILLER: No, and I think that by  
8 adopting language from the APA, using the same language  
9 that applies to all kinds of judicial review of agency  
10 actions, Congress strongly suggested that it didn't want  
11 a unique rule for judicial review of VA determinations.  
12 And so I think there's -- there's no reason to defer to  
13 either the Veterans Court or the Federal Circuit on this  
14 general question of the standard of prejudicial review  
15 --

16 JUSTICE STEVENS: May I ask a factual  
17 question? You said most of these people were  
18 represented by counsel. There used to be a rule that  
19 they could only be paid \$10 a case. Is that still in  
20 effect?

21 MR. MILLER: When I said they were  
22 represented by counsel, I meant in the Court of Appeals  
23 for Veterans Claims, not at the administrative --

24 JUSTICE STEVENS: I see. But not during the  
25 nisi prius proceeding.

1                   MR. MILLER: In the -- in the administrative  
2 proceeding, the restrictions on payment of counsel have  
3 now been relaxed at the Board of Veterans' Appeals  
4 stage. So there generally -- there is not counsel at  
5 the regional office, but once the case reaches the  
6 board, there can be counsel. And --

7                   JUSTICE STEVENS: There can be counsel, but  
8 is it really typical?

9                   MR. MILLER: I -- the don't know the  
10 statistics on that, because that -- the statute is quite  
11 recent.

12                  JUSTICE STEVENS: That would be a dramatic  
13 change, because years ago, I remember a case in which  
14 the Court upheld a \$10 fee limit on the notion that  
15 these people didn't need lawyers at all, which struck me  
16 as a little strange.

17                  (Laughter.)

18                  MR. MILLER: Well, in any event, that is no  
19 longer the case at the board level, and even those  
20 claimants who do not have counsel, the great majority of  
21 them, I think about three-quarters at the regional  
22 office level and 98 percent at the board level, are  
23 represented by some sort of non-attorney representative,  
24 either service organizations like the American Legion,  
25 or many States have organizations that assist claimants.

1 Like Ms. Simmons, for example, was represented by a  
2 North Carolina State agency before the VA. So there is  
3 some assistance to claimants there, but --

4 JUSTICE SOUTER: Mr. Miller, could you help  
5 me out on how the system works in -- in practice in a  
6 different way? One of your answers a few moments ago  
7 was that when -- I think it was Ms. Simmons was told why  
8 she lost, she in effect got as much notice as she would  
9 have needed to have to in effect do better on a remand.  
10 My first question is: Is there an automatic right to a  
11 remand?

12 MR. MILLER: There -- if you're talking  
13 about after the initial decision from the regional  
14 office, there is not an automatic right to a remand, but  
15 there is an automatic right to a de novo review by a  
16 more senior official at the regional office --

17 JUSTICE SOUTER: With new evidence?

18 MR. MILLER: Yes. You can get a hearing.  
19 You can present new evidence to the -- it's a decision  
20 review officer. And then if you are still dissatisfied  
21 with the resolution after that, you can go to the board,  
22 and you can get a hearing before the board. The board's  
23 review is de novo.

24 JUSTICE SOUTER: Okay. But even on the --  
25 on the functioning of the system as you have explained

1 it, at the -- at the very least, the person has -- let's  
2 assume Ms. Simmons says: Oh, now I understand, and I  
3 will get the following piece of evidence, which I didn't  
4 realize was my responsibility.

5 Even on that explanation, it means that the  
6 -- that the claimant is going to have to go through  
7 another stage in the administrative litigation process.  
8 So I assume that ought to count as -- as some sort of  
9 prejudice, and I assume it's something that -- as it  
10 were, the burden of which the VA ought to bear rather  
11 than the claimant.

12 MR. MILLER: Well, I guess to the extent  
13 that the delay in adjudicating the claim is a kind of  
14 prejudice, it's not a prejudice that would in any sense  
15 be cured by a remand for further proceedings, which will  
16 just result in further delay.

17 JUSTICE ALITO: If the -- I'm sorry. I  
18 didn't mean to interrupt.

19 MR. MILLER: I would just add that the --  
20 the effective date of the claim, which is the date as of  
21 which benefits are awarded, is the date that the claim  
22 was filed, so there wouldn't -- you wouldn't be losing  
23 money when you -- except for the --

24 JUSTICE SOUTER: No, but you are going to  
25 have to go through another stage of litigation. I mean,

1 one of the functions of the burden rule -- and it may  
2 be too subtle a function to worry much about -- but one  
3 of the functions is to put the party with the burden on  
4 -- on notice that if you fail in your obligation, you're  
5 the one who is going to have to pay, unless you can  
6 convince everybody that there was in fact no harm done  
7 by this. And this induces the party with the burden to  
8 do what the primary obligation says the party ought to  
9 do.

10 And on your -- and on your analysis, since  
11 the government would not have that obligation, the  
12 government has less of an inducement to follow the  
13 statutory obligation.

14 MR. MILLER: The -- the government has a  
15 very strong inducement to follow the statutory  
16 obligation. I mean, like every agency --

17 JUSTICE SOUTER: Well, it may have a strong  
18 inducement, but I'm talking about a stronger one.

19 (Laughter.)

20 JUSTICE SOUTER: If the government knows  
21 that it is going to bear the burden of any doubt about  
22 the significance of its failure, to some extent I  
23 suppose that is -- that is going to induce the  
24 government to be on its toes.

25 MR. MILLER: Well, I suppose that's right,

1 but I think in a lot of cases -- I mean, the VA in all  
2 cases strives conscientiously to comply with its  
3 statutory obligations. The notice requirements as  
4 described in section 5103 are fairly vague. They have  
5 -- the notice has to be tailored, at least to some  
6 extent, to the nature of the claim that's presented.  
7 And every time, you know, the Veterans Court or the  
8 Federal Circuit elaborates on exactly what kind of  
9 notice is required, to the extent that the VA wasn't  
10 aware of that elaboration before, there are going to  
11 have to be remands in all those pending cases. And --

12 JUSTICE SOUTER: Well, that's -- I mean,  
13 that's the essential problem with common law  
14 adjudication. And I -- there's not much we can do about  
15 that.

16 MR. MILLER: But it's a problem that is  
17 particularly acute here, given the volume of claims that  
18 the VA has to --

19 JUSTICE GINSBURG: What is the experience?  
20 When -- when a case is remanded, it goes back to the --  
21 does it go back to the regional? Suppose the -- the  
22 veteran is now given an opportunity to present whatever  
23 additional substantiation.

24 MR. MILLER: The claim, when remanded from  
25 the Court of Appeals for the Veterans -- for Veterans

1 Claims, goes back to the board. In most instances, the  
2 board would then send it back to the regional office for  
3 further development.

4 If I could reserve the remainder of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.

6 Miller.

7 Mr. Meade.

8 ORAL ARGUMENT OF CHRISTOPHER J. MEADE

9 ON BEHALF OF THE RESPONDENT SIMMONS

10 MR. MEADE: Mr. Chief Justice, and may it  
11 please the Court:

12 I would like to make three points: First,  
13 because notice is integral to the system that Congress  
14 designed, the VA's failure to provide notice is likely  
15 to prejudice the veteran.

16 Second, it would be difficult for the  
17 veteran and comparatively easy for the government to  
18 carry a burden. It would be difficult for the veteran  
19 because under the government's rule the veteran would  
20 need to engage in a speculative exercise, identifying  
21 what evidence would have been developed had the veteran  
22 been notified and had he received the full assistance of  
23 the agency.

24 JUSTICE ALITO: Well, why is that -- why is  
25 it a speculative enterprise? It's -- if the -- if you

1 are correct, and the proper resolution of a case like  
2 this is a remand, let's say all the way back to the  
3 regional office, and if before the regional office it's  
4 the veteran who will need to come forward with some  
5 evidence supporting the claim, why does it make sense to  
6 remand the case to the regional office if there is no  
7 possibility that when the case gets back there the  
8 veteran can come forward with medical evidence that's  
9 needed?

10 MR. MEADE: Two reasons, Justice Alito:  
11 First, it's not clear even in the Veterans Court that  
12 the veteran will have notice of what's required, a point  
13 I would like to address.

14 But, second, if it's remanded, the process  
15 will develop as it should have in the first place,  
16 because under the statutory scheme there is both the VA  
17 and the veteran, the informed veteran, who have joint  
18 duties, and together during an interactive process they  
19 develop the evidence together. And during this  
20 interactive process, to answer Justice Stevens's  
21 question, the veteran is prohibited from hiring a  
22 lawyer. Without having the most basic notice of what's  
23 required, the veteran cannot participate in this  
24 process. And the only way we can know how the process  
25 would really work would be to give the veteran the

1 notice that he is entitled to in the first place and  
2 then allow the process to unfold as it should have.

3 JUSTICE ALITO: What if you have the  
4 situation -- and I think actually your -- your  
5 co-Respondent's case illustrates this better than yours.  
6 But you have a situation where the record as it is  
7 developed contains some evidence that supports the --  
8 the veteran's position, some evidence that supports the  
9 position in favor of denial of benefits. The -- the  
10 Veterans Administration, all the way up through the  
11 process, finds that the evidence contrary to the  
12 veteran's position is much stronger and denies the claim  
13 on that basis. The veteran says: I didn't get notice  
14 of what exactly I needed to prove.

15 Now, if on remand to the regional office  
16 it's still going to be -- it's going to be up to the  
17 veteran to come forward with medical evidence showing  
18 hearing loss or vision -- connecting the vision loss to  
19 something that happened in the service, why does it make  
20 sense to send it back if there's no possibility that the  
21 veteran is going to be able to do that when the case  
22 gets back?

23 MR. MEADE: Well, the answer is, first of  
24 all, that we don't know how the process would unfold  
25 once the veteran has notice. Even if there's evidence

1 in the record, we don't know what evidence would have  
2 been developed had the veteran had proper notice.

3 In addition, veterans often are not  
4 represented --

5 JUSTICE SCALIA: Excuse me. Why -- why is  
6 that? I'm not sure I follow you on that point. Once  
7 he's gone up to the next level and finds what the notice  
8 should have told him, why can't he come up with it then?

9 MR. MEADE: Well, for a few reasons. First  
10 of all --

11 JUSTICE SCALIA: You say it's a de novo,  
12 right, at this next level?

13 MR. MEADE: First of all, it's unclear  
14 whether the veteran would even have notice even at that  
15 point. None of the other requirements that the agency  
16 is required to give are the same as the notice  
17 requirement. However, if in appropriate cases they have  
18 given the actual notice by the time it reaches the  
19 Veterans Court, they can use that to rebut the  
20 prejudice. And that's what the Veterans Court said in  
21 Vazquez-Flores.

22 JUSTICE KENNEDY: In your case, did the --  
23 your client attend the initial hearing?

24 MR. MEADE: There was a medical examination  
25 that she didn't attend. There was a question of where

1 the notice was sent, and this is at 70a of the  
2 petition's appendix. There was confusion. Apparently,  
3 notices were sent to the wrong address by the agency.

4 JUSTICE KENNEDY: Well, what's the first  
5 time that your client knew that this claim was going to  
6 be processed at a particular time or the first time your  
7 client knew it had been denied? I just was never clear  
8 on the facts of what happened here. The notice was lost  
9 in the mail. So how did she know there was a hearing at  
10 all, or did she?

11 MR. MEADE: She was -- she later informed  
12 the agency that she had changed her address. But even  
13 it appears that further notices were sent to the wrong  
14 address. For --

15 JUSTICE KENNEDY: I'm just trying to -- it  
16 seems to me, at the first hearing, if she in fact is  
17 there, they say, well, now you have to give us some  
18 notice. And then at that point -- or some documentation  
19 -- and at that point, at the initial hearing, everybody  
20 knows who has to produce what.

21 MR. MEADE: Well, there's not necessarily a  
22 hearing. There was a medical examination that was  
23 supposed to be scheduled that she didn't attend, partly  
24 because of confusion of where the notice was sent. The  
25 hearing --

1 JUSTICE KENNEDY: Is there usually an  
2 initial hearing?

3 MR. MEADE: No. There's only a hearing if  
4 the veteran requests it.

5 JUSTICE KENNEDY: Okay.

6 MR. MEADE: So there's no hearing unless the  
7 veteran requests it. So here we have a situation where  
8 the veteran did not know what she needed to provide.  
9 She has two sets of claims, one for her left ear, one  
10 for her right ear. Neither claim was intuitive, and she  
11 couldn't figure out what she needed to do without the  
12 notice --

13 JUSTICE BREYER: And so, why not just say  
14 that? What's the big problem of saying, Judge -- and  
15 then you say just what you said?

16 MR. MEADE: Well --

17 JUSTICE BREYER: And then the judge again  
18 won't be in doubt anymore. So there's no need for this  
19 case because, either -- either -- either the veteran's  
20 agency will say: Look, I walked that veteran through  
21 the process, I walked him through the process; walking  
22 him through the process, he was told everything he  
23 needed to know, and there's no real problem here. It's  
24 just a formality that he didn't get the notice. And if  
25 that's true, I'm not in any doubt, unless the veteran

1 tells me that that's wrong, and here was something,  
2 okay?

3 On the other hand, we have your case. In  
4 your case, she didn't go to the doctor. If she had gone  
5 to the doctor, maybe she would have found something out.

6 Again, I have no doubt, there's harmful  
7 error. So this case is a theoretical law professor's  
8 case that's never going to come up, because there's  
9 never any doubt. Either the VA did walk him through it  
10 and there's no deal -- big deal, because she can't come  
11 up with anything, or she can come up with something.

12 MR. MEADE: I agree that burdens only matter  
13 in a handful of cases, but it makes sense to put the  
14 burden on the government for a number of reasons.

15 JUSTICE BREYER: It certainly does because  
16 it makes sense to tell the government: Government, you  
17 have to come up with every possible, conceivable factual  
18 scenario and prove there wasn't a man from Mars who came  
19 in, and -- you know, that doesn't make sense.

20 MR. MEADE: But that's not what we ask for  
21 here. First of all, if the -- the veteran actually  
22 received notice during this dialogue that the government  
23 describes, then the government can point to that as a  
24 way to disprove prejudice.

25 Second of all, veterans are often

1 vulnerable. They are often unrepresented in the  
2 Veterans Court. Under the latest statistics, 64 percent  
3 are unrepresented at the beginning of the Veterans  
4 Court, 24 percent at the conclusion of the Veterans  
5 Court. Many have psychological and mental disabilities  
6 like post-traumatic stress disorder. Twelve percent of  
7 those who currently receive disabilities receive  
8 benefits for PTSD.

9           And it's not clear -- this is not lawyers;  
10 this is not doctors trying to receive benefits. This is  
11 not just lay people. They are veterans who served the  
12 country --

13           JUSTICE BREYER: I know all this, and why  
14 don't you just tell the judge that and say: Look at my  
15 client. Judge, look at my client. My client obviously  
16 isn't going to understand what to do unless the client  
17 is told. And here my client wasn't told.

18           I'm the judge, I'm not in any doubt, you're  
19 going to win, okay?

20           So what I can't figure out is how to deal  
21 with this case, which, as I said, strikes me as a law  
22 professor's case that shouldn't make any difference in  
23 any real situation.

24           MR. MEADE: The reason is that it's helpful  
25 to have presumptions to deal with the typical case where

1 we have in our case a first element notice error, a  
2 question where the veteran does not even know what  
3 evidence he needs to put forward. That -- in that case,  
4 it makes sense, because of the high likelihood of  
5 prejudice, to have a general rule that the burden should  
6 be on the government and not on the veteran.

7 CHIEF JUSTICE ROBERTS: No court is going to  
8 accept as a showing of prejudice the idea that, here,  
9 look at my client, you know, as a layperson didn't know  
10 what to do. That's not going to be adequate, is it?

11 MR. MEADE: I don't think it would be, and  
12 that's why it makes sense to have a general presumption.  
13 In cases where the government can either show that the  
14 process worked as it should have or that the veteran  
15 actually received notice during the process, it can  
16 rebut that prejudice.

17 In fact, in 2008 alone, the government has  
18 been able to do so. And it has done so at least a dozen  
19 times in a number of cases, rebutting the burden of  
20 prejudice that was established by the Veterans Court.

21 CHIEF JUSTICE ROBERTS: What's wrong with  
22 Mr. Miller's response that, at the very first level of  
23 review, you can start all over; at that point you know  
24 precisely why your claim was denied?

25 MR. MEADE: Well, again, there are various

1 levels of review, but the notice to start that first  
2 level of appellate review does not necessarily give the  
3 veteran the notice that she is entitled to. It --

4 CHIEF JUSTICE ROBERTS: Well, that was my  
5 question. Is it -- is it -- I take it it's more than  
6 just a stamp saying "denied," right? There's some  
7 explanation in every case?

8 MR. MEADE: Exactly. There is a statutory  
9 requirement that a statement of reasons need to be  
10 provided, but the statement of reasons don't necessarily  
11 correlate to the detailed requirements under the  
12 notice statute. Under Vazquez-Flores, what the Veterans  
13 Court said was that the notice needs to be quite  
14 detailed and the denial letter in a particular case  
15 might not map onto those particular requirements.

16 In October of this year, Congress went  
17 farther and said: We want these notice letters to be  
18 even more detailed. We want to give the veterans more  
19 notice, which shows that Congress is concerned about  
20 these notice -- these notice letters and wants to make  
21 it clear to the veteran what is required.

22 I want to answer a point that Justice Alito  
23 raised before. We are not asking here for a presumption  
24 of benefits. All we are asking for is a remand so that  
25 the veteran can get notice and to have the process

1 proceed as it was meant to in the original circumstance.

2 JUSTICE GINSBURG: Does the -- notice can be  
3 given -- skipped entirely, as it was in Simmons' case,  
4 or notice could be given but it's defective. It can be  
5 defective in a major way. It can leave out -- you said  
6 Congress recently required a more detailed notice. Do  
7 we treat all those like -- as long as the notice doesn't  
8 measure up fully to the statutory requirement, then the  
9 veteran goes back to square one? And so, you wouldn't  
10 make any distinction between whether the notice was not  
11 given at all, and the case where the notice was given,  
12 but it was incomplete?

13 MR. MEADE: The question of whether the  
14 notice is okay or not, is a question for the Veterans  
15 Court, a factual finding.

16 Generally, though, I would agree with you  
17 that either no notice or incomplete notice are the same  
18 and would trigger a first notice error. There would be  
19 cases, I suspect, where the notice was erroneous, but  
20 only on a technical ground, that the Veterans Court  
21 would not think of as being a first-level notice error.

22 One final point I would like to make, Your  
23 Honor, is that in passing the statute, Congress made it  
24 clear that it wanted to assist all veterans, including  
25 those whose claims did not appear meritorious on their

1 face, and it did so by overruling the decision of Morton  
2 v. West from the Veterans Court.

3 That case had said that a veteran needs to  
4 meet a certain minimal threshold before receiving the  
5 VA's assistance, that first the veteran needs to show  
6 that the claim is well grounded. Congress rejected that  
7 in passing the statute and said: Congress wants to help  
8 all veterans, including those whose claims don't seem  
9 meritorious on their face and including those who can't  
10 make a threshold requirement. And Congress specifically  
11 rejected the policy rationale of the Veterans Court and  
12 said that they want -- Congress wants to use resources  
13 to help all veterans, including those whose claims are  
14 not meritorious on its face.

15 Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
17 Meade.

18 Mr. Lippman.

19 ORAL ARGUMENT OF MARK R. LIPPMAN  
20 ON BEHALF OF THE RESPONDENT SANDERS

21 MR. LIPPMAN: Thank you. Mr. Chief Justice,  
22 and may it please the Court:

23 Justice Breyer, I'd like to address one of  
24 the observations you've made, applying O'Neal and  
25 Kotteakos and the "grave doubt" standard.

1           The problem here is that those standards  
2           assume a fully developed record. And that's why it's  
3           not a perfect fit here because the very notice -- or  
4           failure or defective notice prevents a fully developed  
5           record. So --

6           JUSTICE BREYER: It seems -- what I was  
7           trying to get to, which I don't see how to quite get  
8           there -- it seems to me that if something really went  
9           wrong, if there's -- there's no notice, that, veteran,  
10          you have to put in some material, or you are going to  
11          lose, if there's no notice of that, and he really didn't  
12          get any notice during all this cooperative process, then  
13          I think the Veterans Court is right. At that point, I  
14          think it's fair to assume that he's hurt.

15          But if he got the notice -- I mean, there  
16          will be a few cases where he had nothing to produce, but  
17          a lot of them he would have had something to produce.  
18          So that's -- they know it. We don't know. The Veterans  
19          Court knows.

20          Now, the other three matters -- who is  
21          supposed to produce what, and do you have general  
22          knowledge, you could produce whatever you want -- I  
23          would think it would be very rare that a veteran was  
24          hurt, if he knows the first, by not knowing the second,  
25          third, and fourth. And, therefore, I'd think he better

1       come forth to explain in the brief -- in the brief, why  
2       this mattered.

3                       Now, that's what it seemed to me the  
4       Veterans Court set up. They know about it. They set  
5       that up. It's common sense. So, how do I get to a  
6       legal result that says just that? Or can I or should I?

7                       MR. LIPPMAN: I don't believe you should,  
8       and if my case could be used as an example --

9                       JUSTICE GINSBURG: Your case is one where  
10      the veteran did get what they call the first-level  
11      notice?

12                      MR. LIPPMAN: Correct.

13                      JUSTICE GINSBURG: So if Justice -- the  
14      implication of Justice Breyer's question is that your  
15      client would lose because your client did get the  
16      first-level notice. And you say, but that's not good  
17      enough.

18                      MR. LIPPMAN: That's correct. He did not  
19      get the second- and third-element notices; that is, what  
20      the government said it will get and what he was required  
21      to get.

22                      This is the letter or part of the letter --  
23      critical part of the letter he got. It said: "We are  
24      making reasonable efforts to help you get private  
25      records or evidence necessary to support your claim."

1 So he had every reason to assume that the -- that the VA  
2 would get the evidence that was necessary, which is the  
3 second- and third- --

4 JUSTICE ALITO: But why doesn't it make  
5 sense in your case? I think this illustrates what is  
6 troubling to me about the Federal Circuit's decision,  
7 but maybe I am missing a point.

8 Your client was denied benefits for failure  
9 to show a causal connection, to show that his -- his  
10 vision loss is service-related. He provided evidence  
11 from two private ophthalmologists or optometrists  
12 providing very weak causes -- evidence of causation.  
13 One said it was not inconceivable that this was the  
14 cause of it. He was examined by two VA doctors, who  
15 said it was more likely that this was caused by a  
16 post-service infection rather than by an explosion while  
17 he was in -- while he was in the service.

18 Now, if the case -- if the notice was  
19 defective, why does it not make sense to say to your  
20 client, show us that you can come up with some medical  
21 evidence that shows that this is service-related,  
22 something more than a doctor who says it's not  
23 inconceivable?

24 Then it makes sense to remand it. But if  
25 you can't do it on appeal, what sense does it make to

1 remand it, where the same failure to provide evidence is  
2 going to doom his claim?

3 MR. LIPPMAN: Well, two answers to that,  
4 Your Honor: The first is the government makes a  
5 proposition that all we need to do is offer an  
6 explanation. But in legal terms, that's a proffer on  
7 appeal, and that is every bit as evidential as the  
8 actual evidence itself. Now, if we -- if we are to have  
9 a whole practice of proffers, it opens up a Pandora's  
10 box. I mean, where -- where do you stop if you make an  
11 exception for extra-record evidence, when the statutes  
12 make it clear that the evidence or whatever you are  
13 using has to be before the agency.

14 JUSTICE BREYER: Why is that such a tough  
15 thing to do? It sounds like it's sort of -- is there  
16 some law out there that stops you from saying in the  
17 brief, in a paragraph say: We would just like you to  
18 know, Judge, that we had some evidence here. Or we have  
19 some now that we want to present to them. That's all.

20 And then if I see that, I'd say, my  
21 goodness. And you describe it in three sentences. Now,  
22 what is -- the Constitution doesn't stop you from doing  
23 that, does it? I mean, what stops you from doing that?

24 MR. LIPPMAN: The statutes stop you from  
25 doing that.

1 JUSTICE BREYER: Stop you? But the Veterans  
2 Court said to do it. So they're -- they're the ones who  
3 know this area and they said you should have to do it.

4 MR. LIPPMAN: Yes, but in all due respect, I  
5 think the Veterans Court got it wrong. I mean, the  
6 Veterans -- if you look at the line of authority of --

7 JUSTICE BREYER: Between me and the Veterans  
8 Court, as to who knows best how to work this system,  
9 it's 10 to 1, and it's not me.

10 (Laughter.)

11 MR. LIPPMAN: Okay. Let's look at it this  
12 way. Let's take it outside the VCAA context. A veteran  
13 has a right to a hearing, an evidentiary hearing, upon  
14 request. Let's say he requests the hearing, and for  
15 whatever reason the VA doesn't schedule one. He loses  
16 that right even though he requests it. Are we then now  
17 to have proffers on the court of appeals saying, well, I  
18 would have said this, I would have said this, I would  
19 have said --

20 JUSTICE BREYER: What they've decided there  
21 is if there's no notice at all, no, you don't have to  
22 have a proffer, because it's up to the agency to do just  
23 what you want. But if it's one of these other three far  
24 more technical things, which occur far more rarely, on  
25 that one, you better tell the judge in the brief how it

1 makes a difference.

2 That's their conclusion. What's wrong with  
3 that?

4 MR. LIPPMAN: Well, there's -- there's  
5 really no analysis to it. I mean, it's sort of an  
6 intuitive distinction, and in my case, it doesn't work.

7 And I think --

8 JUSTICE KENNEDY: Well, the -- the statute  
9 says -- and this is consistent with Justice Breyer's  
10 line of questioning -- that the Veterans Court -- the  
11 Court of Appeals -- the Veterans Court of Appeals, shall  
12 give due account to the notice -- to the rule of  
13 prejudicial error. That seems to me to indicate that it  
14 has some discretion in how to decide the harmless error  
15 rules that it will apply, and that it knows more about  
16 it, in Justice Breyer's terms, than either we or the  
17 Court of Appeals for the Federal Circuit. Why can't I  
18 get that out of this statute?

19 MR. LIPPMAN: Well, I guess you would have  
20 to reconcile the more specific statute that -- that  
21 deals with only being able to submit evidence or any  
22 other material at the time -- at the time of the agency  
23 adjudication. In other words, I don't see that statute  
24 allowing post-agency adjudication proffers or even  
25 submitting evidence. I mean, just by the very line of

1 your questioning, it seems to me that you find it  
2 interchangeable, whether you assert it in -- in your  
3 brief that this is what I would have gotten or whether  
4 you would have submitted the evidence itself. They are  
5 both evidential.

6 And another problem, which is really --

7 JUSTICE ALITO: Your position -- your  
8 position seems to be not that the government should have  
9 to show prejudice, but as applied to a case like yours,  
10 that there's an irrebuttable presumption of prejudice.  
11 What could the government show? That there -- they  
12 would have to show that there is not a single  
13 ophthalmologist in the country who, if he or she  
14 examined Mr. Sanders, would find that the -- that the  
15 vision loss was attributable to a bazooka explosion in  
16 World War II?

17 MR. LIPPMAN: No, Your Honor. The -- the --  
18 what the government must show is -- is well set forth in  
19 the Federal Circuit's opinion. It must show that the  
20 claimant had either actual knowledge of what he needed  
21 to submit; second, the fact that he had sort of  
22 constructive knowledge, in other words a reasonable  
23 claimant would have had notice; or, three, that the  
24 claim couldn't be entitled to benefits as a matter of  
25 law.

1                   So that's the beauty --

2                   JUSTICE BREYER: Yes, but I don't understand  
3                   that. You mean -- let's suppose, contrary to your  
4                   wishes, that the client was not hurt. He was hurt by  
5                   some other thing, nothing to do with the bazooka.  
6                   That's not your client -- that's the imaginary client.  
7                   But everything else is the same.

8                   Well, does that mean because they forgot to  
9                   tell the client that the client has to go and produce  
10                  some evidence, and she thought the Veterans  
11                  Administration would produce all the evidence? Because  
12                  they forgot that, your client wins and gets the money?

13                  MR. LIPPMAN: Well --

14                  JUSTICE BREYER: I mean, that doesn't seem  
15                  --

16                  MR. LIPPMAN: -- he wouldn't get the money,  
17                  okay, because all -- we are talking about a remand, not  
18                  an --

19                  JUSTICE BREYER: I know. Now you're going  
20                  to be back in the remand, and you now have to produce  
21                  some evidence, don't you, or you lose?

22                  MR. LIPPMAN: Correct. Correct, but why  
23                  shouldn't --

24                  JUSTICE BREYER: So then why is it a big  
25                  deal that you summarize what you're going to produce in

1 the brief? We're back where we started.

2 MR. LIPPMAN: Well, let me answer it this  
3 way: Let's assume we do make proffers, as you suggest,  
4 at the Veterans --

5 JUSTICE BREYER: If you want to call them "a  
6 proffer." I just want to say a description in the brief  
7 of how you're hurt.

8 MR. LIPPMAN: Well, in a legal sense I  
9 consider it the same thing. Maybe Your Honors don't,  
10 but I do. And -- let -- let's say he proffers or  
11 describes in his brief, you know, what medical evidence  
12 he needs to submit.

13 Now, how could he in good faith make a --  
14 make a proffer and speculate on what the doctor -- let's  
15 say he is seeing a treating doctor. And on page 49 in  
16 the footnote, there's a discussion of what I'm going to  
17 explain to you now. But let's say he alleges, well, if  
18 I had gotten notice, I would have gone to my treating  
19 doctor, and I would have submitted questions and I would  
20 have submitted the claims file, but I can't know in good  
21 faith what the doctor would say. It's inherently  
22 speculative. And that's one good policy reason, apart  
23 from the clear categorical language of the statute.

24 CHIEF JUSTICE ROBERTS: You started earlier,  
25 at one point, to say how this actually worked out in

1 your case. Could you just spend a minute to explain  
2 that?

3 MR. LIPPMAN: How --

4 CHIEF JUSTICE ROBERTS: How it makes a  
5 difference in your case.

6 MR. LIPPMAN: Sure. It was a little unclear  
7 until a case -- if I may answer it this way, Your Honor.

8 My -- the Board of Veterans' Appeals decided  
9 there was only one medical evidence it would follow, and  
10 that was a 2000 VA exam. And that exam really denied  
11 the veteran because there was no corroborating medical  
12 evidence contemporary with his injury and the  
13 symptomology thereafter. If I could have it go back  
14 down, what I would do is try to find what we call "buddy  
15 statements," lay statements, that would corroborate that  
16 he had symptoms from the time of service and well on,  
17 which would -- which under a case called Buchanan is  
18 sufficient evidence to base a finding of service  
19 connection.

20 CHIEF JUSTICE ROBERTS: So why wasn't that  
21 enough for you to establish prejudice, regardless of who  
22 had the burden?

23 MR. LIPPMAN: To make that allegation on --  
24 at the court of appeal that I would have gotten this?

25 CHIEF JUSTICE ROBERTS: Uh-hmm.

1                   MR. LIPPMAN: Well frankly, I don't know if  
2 I would have gotten it. I mean, I would try.

3                   CHIEF JUSTICE ROBERTS: Well, you would  
4 phrase the prejudice in terms of what you would have  
5 done but you weren't able to do and what you can now go  
6 back and do if it's remanded. You don't have to have  
7 the evidence that three people would say he was  
8 complaining about the vision loss at the time. It just  
9 seems a reasonable thing to -- you know, maybe it is  
10 reasonable, maybe it's not; but the Veterans  
11 Administration has more knowledge about that.

12                   MR. LIPPMAN: Your Honor, in a way, the --  
13 the third prong of the Federal Circuit's analysis does  
14 that. It tells the government: Look, if the veteran  
15 could -- could not prove his claim, no matter what the  
16 facts -- evidentiary development was, then the veteran  
17 loses.

18                   So really it's all contained in the third  
19 prong. And that's why the Federal Circuit's analysis in  
20 my opinion is so good. It's because it doesn't make you  
21 go outside of the record to reach these issues, and it  
22 allows the government a lot of room to prove that it's  
23 not worthwhile -- this claim's not worthwhile, to  
24 remand.

25                   I ask the Court to really carefully look at

1 that because I know the Federal Circuit spent -- must  
2 have spent a lot of time in coming up with that  
3 analysis.

4 JUSTICE GINSBURG: Do you know where this  
5 first level, second level -- I'm looking at the statute  
6 on page 98a of the petition. And it seems to me all  
7 part of one -- it is one notice. It doesn't seem to  
8 specify a second and a third. It's describing the  
9 contents.

10 MR. LIPPMAN: Well --

11 JUSTICE GINSBURG: "As part of that notice,  
12 the Secretary shall indicate which portion of the  
13 information and evidence is to be provided by the  
14 claimant and which portion by the Secretary." The  
15 statute seems to be talking about one notice, not "first  
16 level," "second level."

17 MR. LIPPMAN: Well, they haven't enumerated  
18 it, Your Honor, as such, but analytically it breaks down  
19 to that. The fourth element -- because it says:  
20 Look, you'll have to tell the claimant what the  
21 contents, you know, what you need. Then it says: well,  
22 what we are going to get for you, and then that's the  
23 second. And third one is what you have to get. The  
24 fourth one was engrafted upon it because in the -- in  
25 the regs -- 3.159 has a more generalized advisement in

1 addition to this --

2 JUSTICE GINSBURG: I thought that was taken  
3 out, the fourth one. No?

4 MR. LIPPMAN: Not to my knowledge, Your  
5 Honor.

6 JUSTICE GINSBURG: And tell me what that is.  
7 That's not in the statute?

8 MR. LIPPMAN: No, it's in 3.159. I don't  
9 recall the exact -- it's 38 C.F.R. 3.159. I don't  
10 recall offhand the exact subdivision, Your Honor.

11 JUSTICE KENNEDY: Well, it just tells that  
12 -- that the Secretary requests the claimant provide any  
13 evidence in the claimant's possession that pertains to  
14 the claim.

15 MR. LIPPMAN: Correct.

16 JUSTICE KENNEDY: That's fairly  
17 straightforward.

18 MR. LIPPMAN: It's not as important as -- as  
19 the first, second, and third elements of the statute,  
20 for sure, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. LIPPMAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Mr. Miller, you have  
24 four minutes remaining.

25 REBUTTAL ARGUMENT OF ERIC D. MILLER

1 ON BEHALF OF THE PETITIONER

2 MR. MILLER: Thank you, Mr. Chief Justice.

3 I would like to make just three points:

4 First, on the question of what is provided to the  
5 claimant after the denial in the regional office.  
6 Before they get to the Board of Veterans' Appeals, the  
7 regional office issues them a statement of the case, and  
8 that's described at 38 C.F.R. 19.29, and that regulation  
9 has fairly detailed requirements about what has to be in  
10 there in terms of a description of the evidence, a  
11 description of the applicable laws and regulations, and  
12 an analysis of the board's conclusions, or the regional  
13 office's conclusions and its application of the law to  
14 the evidence.

15 The second point --

16 CHIEF JUSTICE ROBERTS: So you think it's  
17 perfectly clear from that what gaps need to be filled  
18 in?

19 MR. MILLER: In many cases, it would be.  
20 But perhaps there would be some where it wouldn't, and  
21 of course in those cases if there can be some  
22 articulation of why it wasn't, then we would agree that  
23 --

24 JUSTICE SOUTER: Now, at that point, is the  
25 claimant disentitled to have a lawyer?

1                   MR. MILLER: No. Once -- once they've filed  
2 the notice of disagreement in the regional office and  
3 received the statement of the case, they can then have a  
4 lawyer in the board --

5                   JUSTICE SOUTER: But at the point they get  
6 the notice and they are trying to evaluate the  
7 significance of the notice, they are not entitled to a  
8 lawyer?

9                   MR. MILLER: If you are referring to the  
10 statement of the case, by the time they receive the  
11 statement of the case they would be at a stage of the  
12 proceedings where they could get a lawyer.

13                   JUSTICE SOUTER: Well, no -- I --

14                   JUSTICE KENNEDY: But what about the notice,  
15 the original notice?

16                   MR. MILLER: They --

17                   JUSTICE KENNEDY: They don't have a lawyer  
18 at that point? That was Justice Souter's question. I  
19 didn't -- I --

20                   MR. MILLER: Oh, if you meant the original  
21 notice required by the -- the statute, no.

22                   JUSTICE SOUTER: No, at the point -- at the  
23 point where the statute requires original notice, they  
24 are not entitled to a lawyer.

25                   MR. MILLER: Correct.

1 JUSTICE SOUTER: We -- we agree on that.  
2 Now, they've gone through stage one of litigation and  
3 they've lost. And they are getting a statement of  
4 reasons. At that point, are they entitled to have a  
5 lawyer?

6 MR. MILLER: Yes.

7 JUSTICE SOUTER: But whether -- I -- I guess  
8 the -- the situation that I am concerned with is, the  
9 person up to that moment not only does not have, but is  
10 not entitled to have, a lawyer. The person then gets a  
11 piece of paper in the mail that says: You lost; these  
12 are the reasons. If the person -- if the claimant then  
13 says, I don't know what they are talking about, I will  
14 go get a lawyer, then I can understand at that point a  
15 relatively sophisticated mind is going to come in to  
16 understand it. But if the client simply reads it and  
17 says, I really don't know what they are talking about  
18 here or at least I think I know what they are talking  
19 about, and I guess it's hopeless, the person is not  
20 likely to have legal advice.

21 And what I'm getting at is that the person  
22 at that stage, at the moment the notice arrives, is in a  
23 position, I would think, of -- of extreme relative  
24 disadvantage.

25 MR. MILLER: I think that --

1 JUSTICE SOUTER: You can see where I am  
2 going with the argument.

3 MR. MILLER: Yes. Yes. But the -- the  
4 important point is that the only way that prejudicial  
5 error becomes an issue -- and really the paradigmatic  
6 case of what we're talking about is where the veteran  
7 does get counsel and has reached the Veterans Court and  
8 has identified the error in a way that's persuasive to  
9 the Veterans Court, but nonetheless identifies no  
10 additional evidence that they would have presented.

11 JUSTICE SOUTER: No, but there's -- it seems  
12 to me that there are two points at which the veteran is  
13 at a disadvantage. And -- and you're talking about the  
14 second of the two. I'm talking about the first of the  
15 two. And the first of the two is the point at which the  
16 veteran -- I mean, following the hearing, the veteran  
17 gets the notice and the veteran is not in a very  
18 sophisticated position to evaluate what the veteran is  
19 being told.

20 MR. MILLER: Yes, and a -- and a claimant  
21 who in the Veterans Court can say, you know, I didn't  
22 understand and as a result I failed to present the --  
23 because of the defective notice and my lack of  
24 understanding of the statement of the case, I didn't  
25 present this important piece of evidence, and here's how

1 it would have been material, in that case, they would be  
2 entitled to a remand. But a remand --

3 CHIEF JUSTICE ROBERTS: When you have been  
4 saying "entitled to a lawyer," do you mean entitled to a  
5 lawyer or allowed to have a lawyer?

6 MR. MILLER: Allowed to retain counsel. The  
7 --

8 CHIEF JUSTICE ROBERTS: You can finish  
9 your --

10 MR. MILLER: I was just going to say that,  
11 given the volume of cases that the VA confronts, there  
12 is a serious harm to the system in unnecessary remands  
13 that have to be given priority over other cases and that  
14 divert resources from the adjudication of meritorious  
15 claims.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18 (Whereupon, at 11:03 a.m., the case in the  
19 above-entitled matter was submitted.)

20

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22

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25

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