No. 2019-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT M. SELLERS,
Claimant-Appellee,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 16-2993, Chief Judge Davis and Judges Schoelen and Allen

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SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT

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On May 8, 2020, the Court ordered the parties to submit supplemental briefs that address a veteran's right to obtain his or her medical records from the Department of Veterans Affairs (VA) or the relevant military department, and explain: "(1) when and how a veteran may gain access to such records; (2) which records any such access is granted to, including any limitations on that access; and (3) whether a veteran incurs any costs in obtaining access to such records." Respondent-Appellant, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits this supplemental brief in response to the Court's order.

ARGUMENT

I. Veterans Have The Right To Obtain Their Service Treatment Records

Veterans may obtain service treatment records and other military records by simply asking for the records. The National Archives and Records Administration has established a mechanism for requesting these records with a veteran submitting a Standard Form (SF) 180 (Request Pertaining to Military Records) to the relevant records center enumerated on page 2 of that form. *See* 36 C.F.R. § 1233.18(d)(2); SF 180 (Rev. 11/2015),

available at https://www.archives.gov/files/sf180-request-pertaining-to-military-records-exp-april2018-1.pdf (last visited June 8, 2020).[1]

As the SF 180 Instruction and Information Sheet indicates, release of these records is subject to "restrictions imposed by the military services consistent with Department of Defense regulations, the provisions of the Freedom of Information Act (FOIA) and the Privacy Act of 1974." SF 180 at ¶ 2(a). Nevertheless, veterans can receive "access to almost any information contained" in their own records. *Id.* There is generally "no charge" for the provision of records to veterans, though a "nominal fee" may be charged in certain situations and, in "most instances, services fees cannot be determined in advance." *Id.* at ¶ 2(b).

Also, if a veteran files a "[s]ubstantially complete application" for VA benefits, VA must obtain relevant Federal records, which may include service treatment records. 38 C.F.R. § 3.159(a)(3), (c)(2); *see* 38 U.S.C. § 5103A(c)(1)(A). These records would then be available to the veteran-claimant by request, through the process described in the next section. At the time Mr. Sellers filed his VA application in 1996, this VA duty to obtain Federal records commenced only upon the filing of a "well grounded" claim.

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[1] Claimants are now able to submit online requests, as well. *See* https://www.archives.gov/veterans/military-service-records#evetrecs (last visited June 8, 2020).

See Epps v. Gober, 126 F.3d 1464, 1468-69 (Fed. Cir. 1997); 38 U.S.C. § 5107(a) (1996); 38 C.F.R. § 3.159 (1996).

II. Veterans Have The Right To Obtain Their VA Medical Records

Irrespective of whether a veteran has filed a claim, veterans who have received VA health care can obtain a copy of their VA medical records by submitting a VA Form 10-5345a (Individuals' Request for a Copy of Their Own Health Information), or any written request that meets the requirements of the Privacy Act, to the relevant VA health care facility.[2] 5 U.S.C. § 552a(d)(1); 38 C.F.R. §§ 1.475(d), 1.477, 1.577(a) ("[E]xcept as otherwise provided by law or regulation any individual upon request may gain access to his or her record or to any information pertaining to him or her which is contained in any system of records maintained by [VA].").

Moreover, veterans who have filed an application for VA benefits (and their authorized representatives) can obtain a copy of their complete claims file (which may include VA medical records and/or service treatment records) by filing a VA Form 3288 (Request for and Consent to Release of Information from Individual's Records), or any written request that meets

[2] Portions of VA medical records can now be viewed online, as well. *See* https://www.va.gov/health-care/get-medical-records/ (last visited June 8, 2020).

the requirements of the Privacy Act. 5 U.S.C. § 552a(d)(1); 38 C.F.R. §§ 1.503[3], 1.526(a), 1.577(a).

There is no fee for the initial provision to the veteran of a copy of the complete claims file or VA health records. 38 C.F.R. §§ 1.526(i)(2), 1.577(f). Additional copies cost $.15 per page after the first 100 one-sided pages or, for non-paper copies (e.g., CD-ROMs), the actual direct cost to VA. Id. §§ 1.526(i)(1), 1.577(e).

III. A Veteran's Ability To Obtain Or Cite Specific Medical Records Should Have No Impact On The Scope Of A Formal Application

As reflected above, veterans have a right to obtain their service treatment records or VA medical records, generally at no cost, by filing a request with the appropriate entity. Some veterans exercise that right, or are otherwise familiar with their records, and therefore are able to cite specific records in their VA benefits applications. Others are not able to provide such specific citations. But, crucially, nothing in the law governing formal

[3] To the extent section 1.503 suggests that disclosure is only permitted when it "would not be injurious to the physical or mental health of the veteran," that limitation has not been enforced since 2013 as a matter of Veterans Health Administration policy.

applications[4] suggests that the scope of a claim should hinge on the specificity of a veteran's medical record citations.

As discussed in our briefs, the law governing formal applications "requires applicants to submit a claim in a particular format, containing specified information . . . as called for by the blocks on the application form." *Fleshman v. West*, 138 F.3d 1429, 1431-32 (Fed. Cir. 1998); 38 U.S.C. § 5101(a)(1)(A); 38 C.F.R. § 3.151(a). The blocks of VA's prescribed application form require claimants to identify the general nature of the medical conditions being claimed (which they are uniquely competent to do), not to cite specific medical records (to which, as discussed above, they may not have immediate access). Appx137.

Thus, there is no basis in law for the notion that two formal applications identifying the same disability but differing in the specificity of their medical records citations should have vastly different scopes. For example, if two applications claim a "foot problem," a holding that one application has just claimed a foot condition, while the other application has

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[4] As discussed in our briefs, while *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019), was decided under the law governing informal claims, the parties agree that Mr. Sellers's case involves the law governing formal applications. *See* Respondent-Appellant's Reply Brief (Reply) at 21-22; Claimant-Appellee's Brief at 15. Mr. Sellers's case also differs from *Shea* in other critical ways. *See* Reply at 17-23.

claimed a foot condition, bronchitis, and a mental disability—simply because the specific medical record cited in the second application notes "foot pain," a "cough," and "irritability"—has no support in the law. Indeed, such a holding would arbitrarily penalize veterans who cannot recall details of their medical treatment or did not secure medical records on their own—while also diverting VA resources to the investigation of symptoms (e.g., "cough," "irritability") that may not have developed into current disabilities, hence the veteran not claiming them on the application form. Neither the government, Mr. Sellers, nor the Veterans Court has advocated for or identified any statute or regulation that premises the scope of claim on the specificity of medical record citations.[5] VA's "requir[ement] that claimants identify symptoms or medical conditions at a high level of generality" on formal applications is, according to this Court, "a permissible

[5] Rather, Mr. Sellers's position—as confirmed by his Rule 28(j) letter filed on May 11, 2020—is that the filing of a formal application for compensation (no matter the conditions claimed, if any) creates claims for all diagnoses noted in records, which all remain pending until explicitly adjudicated. ECF No. 54, at 2-4. As noted in our reply brief, this argument would effectively upend finality in veterans law, as every finally-decided application in the history of VA jurisprudence would now be considered to contain pending claims on the basis of VA not adjudicating unclaimed conditions. Reply at 21. And while a "medical record citations" test may narrow the number of those pending claims based on unclaimed conditions, such a test would still open up to litigation every finally-decided application in the history of VA jurisprudence for an assessment of whether the medical record citations were sufficiently specific to create additional claims.

construction of the statute"; it cannot and should not be replaced with a judicially-created "medical record citations" test. *Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1356 (Fed. Cir. 2016).

CONCLUSION

For these reasons and the reasons stated in our briefs, we respectfully request that the Court reverse the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman, 14-point font. This brief also complies with the limit of 15 pages set forth in the Court's order requesting this supplemental brief.

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I hereby certify under penalty of perjury that on this 8th day of June, 2020, a copy of the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT was filed electronically.

_X_ This filing was served electronically to all parties by operation of the Court's electronic filing system.

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_/s/ David R. Pehlke____