

No. 24-1543

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DAVID A. HAMILL,
Claimant-Appellant,

v.

DOUGLAS A. COLLINS, Secretary of Veterans Affairs
Respondent-Appellee

On Appeal from the United States Court of Appeals
For Veterans Claims, No. 22-7344

**UNOPPOSED CORRECTED BRIEF OF AMICUS CURIAE
NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM
IN SUPPORT OF APPELLANT DAVID HAMILL AND IN FAVOR OF
REVERSAL**

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 24-1543

Short Case Caption Hamill v. Collins

Filing Party/Entity National Law School Veterans Clinic Consortium

Instructions:

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Name: Morgan MacIsaac-Bykowski

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

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**IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE,
AND SOURCE OF AUTHORITY TO FILE**

The National Law School Veterans Clinic Consortium (“NLSVCC”) submits this brief in support of the position of the Appellant, David A. Hamill. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.¹

NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC’s mission is to work with like-minded stakeholders to gain support and advance common interests with the Department of Veterans Affairs (“VA”), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

NLSVCC’s dedication to addressing the unique legal needs of U.S. military veterans extends to promoting the provision of appropriate notice to all veterans receiving decisions from VA regarding their benefits. NLSVCC respectfully requests that this Court reconcile the conflicting notice requirements under Appeals Modernization Act with the *Cogburn* factors created for the legacy system.²

¹ NLSVCC wishes to thank and acknowledge Judy Clausen, Esq. at University of Florida Levin College of Law and Meghan Brooks at University of South Carolina for their hard work and significant contributions. NLSVCC also recognizes the following students, who were instrumental in drafting and editing this brief – Christina S. Dalton, Hope Jones, and Lisa Marie Valdes of University of Florida Levin College of Law, and Sydnie Rouleau, Lauren Armstrong, and Jacey Cannon of Stetson University College of Law.

² See *Cogburn v. Shinseki*, 24 Vet. App. 205, 212 (2010).

Counsel for Appellant and Counsel for the Secretary of Veterans Affairs consented to the filing of this brief.

**STATEMENTS PURSUANT TO FEDERAL RULE OF
APPELLATE PROCEDURE 29(a)(4)(E)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and
Federal Circuit Rule 29(a), the NLSVCC states:

- a) No party's counsel has authored this brief in whole or part;
- b) No party or party's counsel has contributed money intended to fund
the preparation or submission of this brief;
- (c) No other person has contributed money intended to fund the
preparation or submission of this brief.

ARGUMENT

Notice adequate to provide meaningful opportunity to present a case in the context of a given statutory scheme is necessary for agencies to administer statutes efficiently through case-by-case adjudication as Congress intended. In the veterans benefits system, heightened notice requirements became a centerpiece of Congress's efforts to improve efficiency and accuracy in the Department of Veterans Affairs pro-claimant adjudication structure. Whereas Congress had initially only required notice of the decision and "a statement of the reasons for the decision,"³ Congress now specifically requires that claims decisions not only identify the issues within the claims that were adjudicated and the laws and regulations under which they were adjudicated, but also identify the elements of entitlement not satisfied in the case of a denial.⁴

As a matter of statutory interpretation, the specific notice requirements of the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA")⁵ call into question the continued viability of the implicit denial doctrine as the Veterans Court has articulated it in the context of the pre-AMA legacy system. Regardless of

³ Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, sec. 115(a)(1), § 3004(a)(2), 103 Stat. 2062, 2065-66 (Dec. 18, 1989) (codified at 38 U.S.C. § 5104(b) (2016)).

⁴ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, sec. 2(e), § 5104(b), 131 Stat. 1105, 1106 (Aug. 23, 2017).

⁵ *Id.*

whether this Court reaches this question, it should find that application of the legacy implicit denial doctrine to the character of discharge issue within the claims on appeal here violates the AMA.

I. Congress intentionally implemented heightened notice requirements under the AMA.

Before the AMA, VA decision letters failed to properly notify veterans of the reasons and bases behind VA decisions and the available appeals options. In order to address this issue and help veterans gain a better understanding of the status of their claims, Congress enacted the AMA, which implemented heightened notice requirements.

A. Congress Found Legacy Notice Requirements Deficient.

“The entire thrust of the VA's non-adversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process.”⁶ Although pro se accessibility has long been the adjudicatory system’s polestar, Congress has continually enacted laws over the past three decades to better ensure that VA provides veterans with a truly non-adversarial process.⁷ At the outset of the veterans benefits system, there was no statutory

⁶ *Thurber v. Brown*, 5 Vet. App. 119, 123 (1993); *see also Collaro v. West*, 136 F.3d 1304, 1309-10 (1998) (noting that the veterans benefits system is “a non-adversarial, *ex parte*, paternalistic system for adjudicating veterans' claims.”).

⁷ *See Henderson v. Shinseki*, 562 U.S. 428, 429 (2011) (finding that Congress' longstanding solicitude for veterans, “is plainly reflected in the VJRA, as well as in

requirement that the VA provide claimants with reasons or bases for an initial denial.⁸ This changed, first, with the Veterans' Benefits Amendments of 1989, which enacted notice requirements intended to remedy "the problem of notices of [Regional Office] decisions that were often unclear and not informative and that did not provide claimants with sufficient information to make an informed decision as to whether or not to accept or appeal decisions on their claims."⁹ This enactment required the Secretary, when denying a benefit, to provide (1) "a statement of the reasons for the decision," and (2) "a summary of the evidence considered by the Secretary."¹⁰

Under the legacy system, Section 5104(b) provided claimants with more information than the VA's pre-Amendment "conclusory statements," but the notice requirements were still not stringent enough to satisfy Congress's aim of ensuring that VA notices of decisions clearly conveyed information to claimants so that they could best "understand the decision" and make an informed assessment of their next

in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.") (internal citations omitted).

⁸ *Cook v. Principi*, 318 F.3d 1334, 1339 (2002) (citing Pub. L. No. 101-237, § 115(b), 103 Stat. at 2066).

⁹ *Ingram v. Nicholson*, 21 Vet. App. 232, 252 (2007) (finding that "[t]he legislative history of section 5104 highlights a congressional intent that a veteran receive notice as to the reasons for a decision on the claim.").

¹⁰ Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, § 115(a)(1), 103 Stat. 2062, 2065-66 (Dec. 18, 1989) (codified at 38 U.S.C. § 5104(b) (2016)).

steps.¹¹ These notice requirements resulted in “generic” notice of decision letters that were inconsistent from claimant to claimant and lacking in sufficient particularity to be informative and useful enough to claimants and their representatives.¹² Notices promulgated under this notice requirement were “typically long, intricate documents filled with boilerplate language” that only generally addressed the individual veteran’s case without specificity or adequate explanation.¹³ These unclear notification and development letters left claimants confused and frustrated and “more likely to contact [VA] to discuss or appeal the decision, adding to [VA’s] workload, or ... not pursue benefits to which they [were] entitled.”¹⁴ Thus, in August of 2017, Congress enacted the AMA, which “extensively [overhauled] the administrative appeals process concerning VA benefits decisions.”¹⁵

B. Congress Intended for the AMA to Remedy Notice Deficiencies.

By the 2010s, Congress recognized that among other features of the legacy system, deficient notice provisions contributed to the ever-growing backlog of

¹¹ *Ingram*, 21 Vet. App. at 252.

¹² Kenneth M. Carpenter and Sara Huerter, *Appeals Modernization: An Overview of Critical Changes*, 7 STETSON J. ADVOC. & L. 19 (2020).

¹³ Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887, 907 (2015).

¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-395, VETERANS BENEFITS ADMINISTRATION: CLARITY OF LETTERS TO CLAIMANTS NEEDS TO BE IMPROVED (2002), 3, available at <https://www.gao.gov/assets/gao-02-395.pdf>.

¹⁵ *Mattox v. McDonough*, 34 Vet. App. 61, 63 (2021).

pending VA appeals. Often, decisions sent by the VA did not “inform veterans and other claimants what element of the claim has been proven, what issues have not been decided, and what element(s) of the claim have been disproved.”¹⁶ These notification letters often contained “insufficient information to allow veterans and their representatives to fully understand the rating decision, to be certain what evidence was considered, or to know what reasons or bases were used to reach decisions,” which meant that more veterans were pursuing appeals to confirm that VA’s decision was correct.¹⁷

In 2012, in an effort to reduce the backlog of claims and provide more timely decisions, VA announced several new initiatives aimed at improving the delivery of benefits.¹⁸ One of these initiatives was focused on “Simplified Notification Letters,” which would provide shortened decisions.¹⁹ With the Simplified Notification Letter initiative, VA significantly restricted the amount of information provided in decision

¹⁶ *Legislative Hearing on H.R. 675, H.R. 677, H.R. 732, H.R. 800, H.R. 1067, H.R. 1331, H.R. 1379, H.R. 1414, H.R. 1569, and H.R. 1607 Before the Subcomm. On Disability Assistance & Mem’l Affs. of the H. Comm. on Veterans’ Affs.*, 113th Cong. 114-14 at 106 (Apr. 14, 2015) (statement of Ronald B. Abrams, Joint Executive Director for the National Veterans Legal Services Program).

¹⁷ *Metrics, Measurements and Mismanagement in the Board of Veterans’ Appeals*, 113th Cong. 113-86, at 60 (Sept. 10, 2014) (statement of Joseph A. Violante, DAV National Legislative Director).

¹⁸ U.S. Department of Veterans Affairs, *Transformation Initiative Rollout*, 2 VBA Today 2 (June 2012), available at https://www.vba.va.gov/vba/newsletter/issue/june_12.pdf

¹⁹ *Id.*

letters to claimants, “reduc[ing] most notice letters to pattern words and phrases instead of original claims specific content.”²⁰ Consequently, “few claimants receive[d] the information they need[ed] to understand fully decisions made by the VA.”²¹

By 2013, it became apparent that the veterans’ appeals process desperately needed reform. Perhaps the most concerning deficiency was the ever-increasing backlog of pending appeals that created significant delays in reviewing VA Regional Office decisions denying veteran claims. In a 2013 congressional hearing, law professor and later Veterans Court Judge Michael Allen explained that “[t]here is no question that veterans and other claimants face significant delays in the review of decisions denying their claims. Such delays have real world effects on people’s lives and also run the risk of undermining public confidence in the system as a whole.”²² Commenters explained, “[i]n January 2015, there were approximately 375,000 pending appeals at VA. This number increased to approximately 470,000 as of

²⁰ *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. On Disability Assistance & Mem’l Affs. of the H. Comm. On Veterans’ Affs.*, 114th Cong. 114-02, at 62 (2015) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States).

²¹ *Id.*

²² *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans’ Disability Claims: Hearing Before the Subcomm. On Disability Assistance & Mem’l Affs. of the H. Comm. On Veterans’ Affs.*, 113th Cong. 113-22, at 31 (2013) (statement of Professor Michael P. Allen, Stetson University College of Law).

March 31, 2017—a 20% increase in little more than 2 years.”²³ As a result of this escalating backlog, the VA appeals process was deemed broken.²⁴

Consequently, Congress deliberated about how to transform and reform the veterans’ appeals process, including by improving and enhancing the notice provided to veterans. Stakeholders viewed enhancing and improving notice to veterans as one of the most important actions the VA could take to improve the process and address the backlog of pending appeals.²⁵ Congress heard stakeholder testimony arguing that the “VBA must perfect a system based on the premise of getting each claim decision right the first time,”²⁶ and “to help a veteran make the most informed decision regarding the merits of an appeal, the VA should provide improved case-specific notice of the initial rating decision.”²⁷ Experts explained that for the veteran “to truly understand what the right road is to go down, they need to have case-specific notice.”²⁸ This is because “better decision letters ... not only help

²³ H.R. REP. NO. 115-135, at 5 (2017).

²⁴ *Id.*

²⁵ *See Metrics, Measurements and Mismanagement in the Board of Veterans’ Appeals: Hearing Before the Subcomm. on Oversight and Investigation of the H. Comm. on Veterans’ Affs.*, 113th Cong. 113-86, at 59-60 (Sept. 10, 2014) (statement of Joseph A. Violante, DAV National Legislative Director).

²⁶ *Id.* at 59.

²⁷ *Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcomm. On Disability Assistance & Mem’l Affs. of the H. Comm. On Veterans’ Affs.*, 114th Cong. 114-02, at 62 (2015) (statement of Gerald T. Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States).

²⁸ *Id.* at 35.

veterans better prepare if they need to appeal, but ... help prevent appeals from being introduced because the veterans were not properly informed about the basis for denial.”²⁹

Congress recognized that enhanced and heightened notice provisions both serve veterans and foster a more streamlined, effective, and efficient claims process, and drafted the Appeals Modernization Act accordingly.³⁰ Under the AMA, when VA decides a claim for benefits, it must provide notice of its decision.³¹ This notice must include all of the following: (1) identification of the issues adjudicated; (2) a summary of the evidence considered by the VA; (3) a summary of the applicable laws and regulations; (4) identification of findings favorable to the claimant; (5) if applicable, identification of elements not satisfied leading to the denial; (6) an

²⁹ *Legislative Hearing on the Veterans Appeals Improvement and Modernization Act of 2017: Hearing Before the H. Comm. on Veterans' Affs.*, 115th Cong. 115-12 at 35 (May 2, 2017) (statement of Louis J. Celli, American Legion).

³⁰ H.R. Rep. No. 115-135, at 3 (2017) (“To help veterans better understand VA's decision on their claims, the bill includes a statutory requirement that VA issue detailed decision notification letters. Under the bill, a decision letter would include a summary of the evidence, a summary of applicable laws and regulations, an explanation of how the veteran may obtain a copy of the evidence used in making the decision, and VA's favorable findings, if any. If the veteran's claim is denied, the letter would also explain why the claim was denied, and describe the evidence VA would need to grant service connection or the next higher-level of compensation. The intent of this provision is to help better inform the veteran's decision regarding whether to appeal VA's rating decision.”

³¹ 38 U.S.C. § 5104(a).

explanation of how to obtain or access evidence used in making the decision; and (7) if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.³²

In other words, the AMA requires that VA tell claimants with specificity why issues were not adjudicated in their favor, and what would be needed to get to a grant. This requirement, which aligns with Congress's efforts to continually improve the efficiency of a pro-claimant adjudicative system,³³ is incompatible with application of the implicit denial doctrine as developed in the legacy system.

II. The Implicit Denial Doctrine Needs an AMA Update.

The Veterans Court has not yet taken due account of the impact of the Appeals Modernization Act's specific notice provisions on its implicit denial doctrine, which is commonly articulated through its *Cogburn* factors.³⁴ The Veterans Court developed the implicit denial doctrine in the context of the legacy system, in which Congress required only notice of the decision and "a statement of the reasons for the decision."³⁵ The Veterans Court accordingly held that a claim may be adjudicated where there is "a recognition of the *substance* of the claim in a [Regional Office]

³² 38 U.S.C. § 5104(b)(1)-(7); *see also* 38 C.F.R. § 3.103(f).

³³ *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (examining Congress's intent to "maintain a beneficial and non-adversarial system of veterans benefits" through the passage of the Veterans' Judicial Review Act) (quoting H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95).

³⁴ *Cogburn*, 24 Vet. App. at 212.

³⁵ *See Ingram*, 21 Vet. App. at 251 (citing 38 U.S.C. § 5104(b) (2016)).

decision from which a claimant could deduce that the claim was adjudicated[.]”³⁶ Yet in order to provide “timely, fair, and high-quality decisions,”³⁷ Congress has since required more than mere notice that a claim has been denied and some explanation as to why. This Court need not reject the implicit denial doctrine entirely to find that it must be reshaped in light of the specific notice requirements of the AMA.

In *Cogburn*, the Veterans Court delineated four factors to be considered when determining whether a claim was implicitly denied in the legacy system:

- (1) the specificity or the relatedness of the claims;
- (2) the specificity of the adjudication—whether the adjudication alludes “to the pending claim in such a way that it can reasonably be inferred that the prior claim was denied”;
- (3) the timing of the claims—whether, multiple claims were filed together but only one claim was adjudicated; and
- (4) whether the claimant was represented. The presence of the appellant's attorney throughout the appeals process before the Agency is a significant factor, but “representation by a lawyer alone would not permit a finding of waiver.”³⁸

³⁶ *Ingram*, 21 Vet. App. at 243 (citing 38 U.S.C. § 5104(b) (2016)).

³⁷ VA Claims and Appeals Modernization, 84 Fed. Reg. 39818, 39819 (proposed Aug. 10, 2018).

³⁸ *Cogburn*, 24 Vet. App. at 212 (citations omitted).

The *Cogburn* factors essentially ask whether a reasonable person reading a decision would understand that their claim for benefits had been denied. A “claim,” in VA parlance, refers to entitlement to a given benefit, and to entitlement to compensation for a given medical condition in the disability context.³⁹ However, the AMA requires notice not just of whether a claim has been denied, but “identification of the issues adjudicated” *within* that claim.⁴⁰ The *Cogburn* factors do not demand the AMA’s level of specificity.

Indeed, the AMA introduces a distinct emphasis on detailed and transparent communication, starkly contrasting with the amorphousness of the *Cogburn* factors. Under the *Cogburn* factors, decisions or considerations that might not be explicitly stated are often inferred from the context or content of adjudications. The AMA mandates that each decision clearly identifies and explains the decision-making process, disfavoring the type of inferences that the *Cogburn* factors allow. The AMA’s approach, requiring explicit statements as to each issue in decision notices, minimizes the scope for such inference, thereby addressing what the decision encompasses directly. The AMA insists on detailed explanations of the evidence and

³⁹ *Boggs v. Peake*, 520 F.3d 1330, 1337 (Fed. Cir. 2008) (“[C]laims based upon distinctly diagnosed diseases or injuries must be considered separate and distinct claims.”); *Murphy v. Wilkie*, 983 F.3d 1313, 1318 (Fed. Cir. 2020) (clarifying that lenity may counsel that the agency expand the scope of a veteran’s claim).

⁴⁰ 38 U.S.C. § 5104(b)(1).

legal bases used in decisions, aiming to provide veterans with sufficient information to understand and potentially challenge each issue within a VA decision.

This level of detail seeks to eliminate ambiguities that would traditionally require the application of the *Cogburn* factors to deduce implicit denials. Additionally, while the *Cogburn* factors highlight the role of a representative in interpreting implicit denials, the AMA's comprehensive communication requirements ensure that all veterans, whether represented or not, receive the same level of detailed information, effectively reducing disparities based on representation.

Consequently, the structural intentions of the AMA, with its focus on explicitness and comprehensive communication, are at odds with current implicit denial doctrine. It is unclear whether there is a way to harmonize the AMA with some aspects of the current regime, as the comprehensive requirements of the AMA largely mitigate the need for applying the *Cogburn* factors, aiming to provide all necessary information in a clear and transparent manner.

CONCLUSION

Regardless of whether the veterans benefits' implicit denial doctrine survives the AMA, application of the doctrine in the context giving rise to the Veterans Court's *Hamill* decision on appeal here does not. The VA failed to give reasonable notice that it had made a determination either way as to the Character of Discharge

issue, in direct contravention of statute, and the Veterans Court's *Hamill* opinion neglects to consider that VA's failure to provide notice of decision on this issue prejudices veterans. When VA fails to tell claimants that it has refused to reconsider their veteran status or that it has made an unfavorable character of discharge determination, it prevents claimants from presenting the very evidence that would clear their path to benefits access. In this way, application of the implicit denial doctrine in this case contravenes Congress's purpose for enhanced notice in the AMA as well.

For these reasons, the Federal Circuit should reverse the Veterans Court's decision.

Dated: February 20, 2024

Respectfully Submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 24-1543

Short Case Caption: Hamill v. Collins

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Signature: /s/Morgan MacIsaac-Bykowski

Name: Morgan MacIsaac-Bykowski