DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

March 26, 2013

Director (00/21) In Reply Refer To: 211
All VA Regional Offices and Centers Fast Letter 13-06

SUBJ: Implementation of Sections 504 and 505 of Public Law 112-154

Purpose

This Fast Letter (FL) explains the changes resulting from sections 504 and 505 of Public Law (PL) 112-154, which became effective on February 2, 2013. The PL amends 38 U.S.C. §§ 5103 and 5103A to streamline the Department of Veterans Affairs' (VA) duty-to-notify and duty-to-assist responsibilities. This new law applies to VA's notification and assistance obligations on or after February 2, 2013. No rework of claims handled prior to the date of this letter will be required as a result of this amended law.

Compensation Service is in the process of amending 38 C.F.R. § 3.159 to comply with this statutory change and the revisions will not be final until a later time. However, Regional Office (RO) and Pension Management Center (PMC) employees must implement key provisions of this PL immediately per instructions contained in this letter. Compensation Service and Pension and Fiduciary (P&F) Service will make necessary changes to M21-1MR, training materials, electronic systems, etc. subsequent to the final regulation change.

Background

On November 9, 2000, Congress enacted the Veterans Claims Assistance Act (VCAA), which provided that VA has a duty to assist a claimant who files a substantially complete application in obtaining evidence to substantiate his or her claim before making a decision on the claim. The law eliminated the concept of a well-grounded claim, redefined VA's duty to assist, and mandated specific notice requirements.

The well-intentioned requirements of the VCAA have presented VA with significant challenges. Many claimants receive multiple notices addressing the same condition, or addressing different conditions or claims at various stages of development. Although sent in an effort to help the claimant, the practice of issuing multiple notices does not necessarily enhance the claimant's understanding of the claims process. The enactment of PL 112-154 represents a valuable step to streamline VA's duty-to-notify/assist responsibilities and address claims processing delays that occur due to the VCAA.

It is important to note that PL 112-154 does not change the content of VA's VCAA notice (referred hereafter as "§ 5103 notice"). Instead, it affords VA flexibility under the law to deliver § 5103 notices in a more efficient manner to include the transmission of the notice through electronic communication. It also provides VA the authority to engage claimants in taking a more active role in claims development.

Note: Compensation Service has previously referred to the required § 5103 notice as a VCAA notice. Effective immediately, the term "Section (§) 5103 notice" will replace "VCAA notice" when discussing the notice required under 38 U.S.C. § 5103. Compensation Service will revise the language in all applicable materials in the future.

The following sections of the Fast Letter outline key provisions of Sections 504 and 505, which went into effect on February 2, 2013, and apply to any case handled on or after that date.

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Regional Offices (ROs) and Pension Management Centers (PMCs) will implement the changes immediately. However, as mentioned above, no rework of claims handled prior to the date of this letter is required.

Section 1: Flexibility in how and when VA delivers the § 5103 notice

Current Practice: ROs and PMCs provide § 5103 notices to a claimant *after* he or she submits a substantially complete application to VA. This long-standing practice requires claims personnel to establish control of the claim and then initiate a *paper-based* letter to the claimant after receipt of the claim.

New Practice: **Including § 5103 notices in VA Forms**

The amended 38 U.S.C. § 5103 no longer requires § 5103 notices to be sent *after* receipt of a claim. Instead, VA is authorized to place such notices on claims application forms, thereby making the § 5103 notice information available to the claimant *prior* to claim submission. This is currently accomplished through the use of VA Forms 21-526EZ, 21-527EZ, and 21-534EZ. Although these forms are currently designated for the Fully Developed Claim (FDC) program, it is important to remember that the § 5103 notice

requirements are satisfied for a claim filed on the appropriate claimant-signed EZ form, regardless of whether or not the claim is ultimately found to meet FDC criteria.

Stations should make every effort to promote the use of the EZ forms for ALL types of claims that are specific to these forms. See *Fast Letter (FL) 12-25, The Fully Developed Claim Program (Processing Claims Received on VA Forms 21-526EZ, 21-527EZ, and 21-534EZ),* for more details regarding the FDC program, use of the EZ forms, and § 5103 notices.

New Practice: **Providing § 5103 notices electronically through eBenefits**

PL 112-154 amends 38 U.S.C. § 5103 to allow VA to deliver the § 5103 notice by the most effective means available, to include electronic communication. By providing the § 5103 notices electronically, rather than exclusively through paper-based correspondence, VA will improve performance and customer service to our claimants. As noted *in FL12-26, Procedures for Processing VONAPP Direct Connect Disability Claims*, this is currently accomplished through the VONAPP Direct Connect (VDC) portal in eBenefits. The VDC portal allows claimants to file claims in a paperless environment using the VA Form 21-526EZ and receive the legally required § 5103 notice electronically. Although VDC utilizes the 526EZ, not all claims submitted through VDC are FDCs. The electronic notification provided to claimants through VDC is sufficient, regardless of whether or not the claim is ultimately found to meet FDC criteria.

Note 1: Although the new law authorizes VA to utilize e-mail as a way to transmit the § 5103 notice, this is currently not a viable option due to privacy and security concerns.

Note 2: There are unique § 5103 requirements for claims that were previously denied service connection and for which the appeal period has expired. Therefore, regardless of whether the claim is received on an EZ form or through VDC, ROs and PMCs must send the claimant a subsequent notice containing, "What the evidence must show"(WTEMS) specific to new and material (N&M) evidence, including the date of and reasons for that prior denial. *See Kent v. Nicholson*, 20 Vet.App.1, 10 (2006).

Section 2: § 5103 notices are not required in certain instances

Current Practice: A separate § 5103 notice is required when ROs and PMCs receive a subsequent claim while the same type of issue from a previous claim is pending. This routinely occurs when a Veteran files a claim and then submits a new claim while the open claim is still pending.

New Practice: **Removing § 5103 notice requirements when the same claim type is already pending**

In accordance with amended 38 U.S.C. § 5103(b)(4), ROs are no longer required to send a § 5103 notice for a subsequent claim(s) that is filed while a previous claim is pending if the previous notice provided sufficient notice of the information and evidence necessary to substantiate such subsequent claim(s). However, ROs must still send a § 5103 notice if over one year has passed since any notice was sent *and a subsequent claim(s) is received*. Issuing § 5103 notices unnecessarily diverts valuable resources from more productive efforts within Veterans Service Centers.

The following scenarios are provided to ensure an understanding of when a § 5103 notice is not required pursuant to 38 U.S.C. § 5103(b)(4):

If	***And***	**Then**
The claim is submitted on an EZ form	A subsequent claim is submitted for *any* claim type covered on that EZ form	No subsequent § 5103 notice is required (unless N&M evidence letter is needed)
	A subsequent claim is submitted for a claim type ***NOT*** covered by that EZ form	Send § 5103 notice for the subsequent claim type
The claim is ***NOT*** submitted on an EZ form ***AND*** a § 5103 notice was sent for the claim	A subsequent claim is submitted for the same claim type, (e.g., claim for service connection; subsequent claim for service connection)	No subsequent § 5103 notice is required (unless N&M evidence letter is needed for a claimed issue).
	A subsequent claim is submitted for a different claim type	Send § 5103 notice for the subsequent claim type, unless WTEMS adequately covers the issue (see section 2(a) below)
	A subsequent claim is submitted for both the same claim type and a different claim type not covered by previously provided WTEMS, (e.g., claim for increase; subsequent claim for 1151)	• Send § 5103 notice for the different type of subsequent claim • In the § 5103 notice, acknowledge receipt of the claimed issues for which notice is not required. See note below.

Note: Compensation Service will update MAP-D and VBMS with acknowledgement language in the future. In the meantime, ROs should provide a simple statement in the notice letter that "*we are continuing to work on your previous claim(s) and have received your additional claim(s). Our previous letter(s) provided you with sufficient information regarding the evidence needed to support your claim, as well as what VA will do..*"

The following examples are provided to highlight changes described above:

> *Example 1*: Veteran submits a *claim for increased evaluation for left knee condition on a VA Form 21-4138. VA sends initial § 5103 notice to claimant. After three months and while the claim for left knee is pending, the claimant sends in a claim for increase for right hip. A second § 5103 notice for the right hip claim <u>is not</u> required.*
>
> *Example 2: Veteran submits a claim for increased evaluation for low back condition on a VA Form 21-526EZ. Nine months later, while the previous claim is still pending, the Veteran submits a new claim for service connection for migraine headaches on a VA Form 21-526b. In this case, no § 5103 notice is required for the claim for migraine headaches because the previous notice (i.e., attachment on the VA Form 21-526EZ) contains sufficient notice of the information necessary to substantiate a claim for service connection.*

Note: The amended law indicates that VA's duty-to-notify and duty-to-assist responsibilities no longer apply when VA can award the "maximum benefit" based on the evidence of record. Because of the complexity of this issue and to ensure VA implements this provision appropriately, Compensation Service will provide a separate fast letter in the future.

<u>Section 2(a)</u>: Including three specific WTEMS in every § 5103 notice

<u>Current Practice</u>: When a Veteran submits a claim for service connection, the current practice is to include language in the body of § 5103 notice that addresses the elements of a successful claim for service connection, as well as in the WTEMS attachments to the end of the notice. In many claims, as the Veteran presents new evidence and arguments in support of his/her claim, and as VA obtains new evidence on his/her behalf, a different legal basis for the benefit emerges, such as service connection on a secondary basis, or on the basis of aggravation. Further, as described in Section 2 above, the Veteran may add new issues to an exisiting claim. When these scenarios occur, a new § 5103 notice is generally required.

<u>New Practice</u>: Effective immediately, for every claim in which VA has not yet sent a § 5103 notice and the claimant seeks service connection on any basis, or seeks a higher disability evaluation, always include the *original service connection* (also referred to as the "continuity" WTEMS), *secondary service connection* (which includes information regarding aggravation), and the *increased rating* WTEMS attachments. It is NOT

necessary to make selections in the MAP-D letter that will include the text for those three items in the body of the § 5103 notice letter.

- By ensuring claimants receive the *original service connection*, *secondary service connection,* and *increased rating* WTEMS in every § 5103 notice, VA reduces the number of duplicate notices sent to a claimant when new conditions are claimed, or when new legal bases for entitlement are presented.

- It is not necessary to send new § 5103 notices when a sufficient notice was sent before this guidance was issued. Continue to include other relevant WTEMS (1151, new and material, etc.), as well as the VCAA Notice Response and other relevant text for the body of the § 5103 notice as appropriate for each particular claim.

Section 2(b): Terminating the practice of specifying contentions in § 5103 notice letters

Current Practice: When Veterans Service Representatives (VSRs) produce a § 5103 notice letter, the standard practice is to specify the contentions in the letter. This requires VSRs to spend time searching through the claims file and/or electronic record to determine if all claimed issues are covered. In certain cases, VSRs are sending duplicate § 5103 notices when it is discovered that a claimed issue(s) was omitted from the letter. This adds further delays to the development process.

New Practice: Effective immediately, VSRs shall terminate the practice of specifying contentions in § 5103 notice letters for service connection claims (except in attempts to reopen previously denied claims). Because Congress, in PL 110-389, has provided VA the authority to provide generalized, rather than specialized, notices, it is not necessary to list contentions in the § 5103 notice.

Note: Rating VSRs should review MAP-D /VBMS to ensure all contentions are covered in the rating decision document.

Section 2(c): Terminating the practice of sending initial development letters in certain cases

Current Practice: When claims on EZ forms or through eBenefits are received, VSRs are routinely sending development letters that contain additional information such as a listing of claimed conditions, future scheduliing of a VA examination, VA toll-free number, etc. This information is normally contained in the traditional "VCAA letters" along with the required § 5103 notice information.

New Practice: It is no longer required that ROs produce a duplicate letter including information (as listed above) when the claim was received on an EZ form and through eBenefits. VSRs shall terminate the practice of sending initial "development" letters when claims are received on an EZ form or through eBenefits. Because the § 5103 notice information has already been transmitted to the claimant, it is not necessary to send letters that are redundant and unnecessarily slow down the claims process. In these instances, VSRs shall only send development letters to the claimant or 3rd party if information is needed to support the claim.

Section 3: Defining reasonable efforts under VA's duty to assist

38 U.S.C. § 5103A outlines VA's duty to assist claimants in obtaining evidence needed to substantiate a claim. The law requires VA to make "reasonable efforts" to obtain private medical records on behalf of the claimant who adequately identifies and authorizes VA to obtain them. Because the law has not historically defined "reasonable efforts," Congress amended 38 U.S.C. § 5103A (b)(2)(B) to specify that VA "shall make not less than two requests to a custodian of a private record in order for an effort to obtain relevant private records to be treated as reasonable under this section, unless it is made evident by the first request that a second request would be futile in obtaining such records."

Current VA procedures already align with the amended law. As stated in M21-1MR, Part III, 1.A.1.c, "reasonable efforts" to obtain non-Federal agency records include making an initial request and then at least one follow-up request. Because VA's procedure aligns with the amended law, no change is warranted to current procedures.

Note: There are also no changes in the procedures to procure Federal records, as reflected in 38 CFR § 3.159(c)(2).

Section 4: Revised STAR Checklist to include "timeliness" error

Past Practice: VBA has historically tracked the timeliness of claims through the Director's Performance Standard Dashboard with the Average Days Pending (ADP) and Average Days to Complete (ADC) measures. These measures indicate the overall age of claims and are highly dependent upon the efficiency of workload management at each RO and PMC. As such, these measures alone do not provide readily usable details to identify areas of improvement in claims processing timeliness. In addition, these measures, by definition, cannot account for delays in individual cases, but rather highlight trends in overall claims processing.

New Practice: Implementation of new quality element for timeliness in the Systematic Technical Accuracy Review (STAR) checklist. As VBA strives to meet the national strategic goal of 125 days for processing rating-related claims, it is critical that timeliness be assessed at the individual claim level. Compensation Service has therefore

implemented a separate quality element on the STAR checklist that will address obvious deficiencies in the timeliness of the claim selected for quality review. The measure will be based exclusively on the extent to which the claim was unnecessarily developed or the decision was delayed.

As of November 19, 2012, the STAR checklist was modified to include two new questions under the Administrative portion of the checklist. The items added were:

- G3 (Was the end product selected for review over-developed?); and
- G4 (Did unnecessary development delay a decision on any claim associated with the EP under review?).

These questions were added to record any issues related to obvious overdevelopment. Notations in the G-series are not classified as benefit entitlement errors, and therefore are not reflected in the national or individual station accuracy. Comments identified in the G3 and G4 categories should be viewed as an additional tool, to be used in conjunction with the ADP and ADC measures to target training needs and identify deficiencies in the workflow process.

Compensation Service understands the potential subjective nature of commenting on whether a case was overdeveloped after the claim has been completed. Details provided in these categories will only focus on scenarios where development was obviously improper or unnecessary to complete the claim. As comments in the G3 or G4 sections are not benefit entitlement errors and will not require corrective action, requests for reconsideration of these comments will not be accepted. Below are a few examples of issues specific to this Fast Letter that may be noted under the G-series category (please note this list is not all-inclusive):

- A § 5103 notice was unnecessarily provided after a sufficient § 5103 notice was previously provided to the claimant through either a notice attached to a VA form (e.g., VA Form 21-526EZ) or electronic § 5103 notice through eBenefits. *See* Section 1 above.
- A § 5103 notice was unnecessarily provided to the claimant based on a subsequent claim that was filed while a previous claim was pending (38 U.S.C. § 5103(b)(4)). *See* Section 2 above.

Note: A 3-month grace period will be in effect from the date of this fast letter. This will allow employees to be appropriately trained before overdevelopment errors (G3 and G4) specific to the new law are noted by the STAR staff.

Questions

If you have questions concerning this fast letter, please submit to:
VAVBAWAS/CO/21Q&A

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