SUPREME COURT OF THE UNITED STATES

No. 07–1209

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, PETITIONER *v.* WOODROW F. SANDERS

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, PETITIONER *v.* PATRICIA D. SIMMONS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[April 21, 2009]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

Federal law requires the Court of Appeals for Veterans Claims to "take due account of the rule of prejudicial error." 38 U. S. C. §7261(b)(2). Under this provision, when the Department of Veterans Affairs (VA) fails to notify a veteran of the information needed to support his benefit claim, as required by 38 U. S. C. §5103(a), must the veteran prove the error harmful, or must the VA prove its error harmless? The Federal Circuit held that the VA should bear the burden. *Sanders* v. *Nicholson*, 487 F. 3d 881 (2007). The Court reverses because the Federal Circuit's approach is "complex, rigid, and mandatory," *ante*, at 9, "imposes an unreasonable evidentiary burden upon the VA," *ante*, at 10–11, and contradicts the rule in other civil and administrative cases by "requir[ing] the VA, not the claimant, to explain why the error is harmless," *ante*, at 11. I respectfully disagree.

Taking the last point first, the Court assumes that there is a standard allocation of the burden of proving harmlessness that Congress meant to adopt in directing the Veterans Court to "take due account of the rule of prejudi-

cial error." 38 U. S. C. §7261(b)(2). But as both the majority and the Government concede, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation," *Keyes* v. *School Dist. No. 1, Denver*, 413 U. S. 189, 209 (1973), and courts impose the burden of dealing with harmlessness differently in different circumstances. As the Court says, the burden is on the Government in criminal cases, *ante*, at 13, and even in civil and administrative appeals courts sometimes require the party getting the benefit of the error to show its harmlessness, depending on the statutory setting or specific sort of mistake made, see, *e.g.*, *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F. 2d 1317, 1324 (CADC 1988) (declaring that imposing the burden of proving harm "on the challenger is normally inappropriate where the agency has completely failed to comply with" notice and comment procedures).

Thus, the question is whether placing the burden of persuasion on the veteran is in order under the statutory scheme governing the VA. I believe it is not. The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim, see, *e.g.*, 38 U. S. C. §5103A, and a number of other provisions and practices of the VA's administrative and judicial review process reflect a congressional policy to favor the veteran, see, *e.g.*, §5107(b) ("[T]he Secretary shall give the benefit of the doubt to the claimant" whenever "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter"); §7252(a) (allowing the veteran, but not the Secretary, to appeal an adverse decision to the Veterans Court). Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions, I would not remove a comparable benefit in the Veteran's Court based on the ambiguous directive of §7261(b)(2).

And even if there were a question in my mind, I would come out the same way under our longstanding "rule that interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994).

The majority's other arguments are open to judgment, but I do not see that placing the burden of showing harm on the VA goes so far as to create a "complex, rigid, and mandatory" scheme, *ante*, at 9, or to impose "an unreasonable evidentiary burden upon the VA," *ante*, at 10–11. Under the Federal Circuit's rule, the VA simply "must persuade the reviewing court that the purpose of the notice was not frustrated, e.g., by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." *Sanders*, *supra*, at 889. This gives the VA several ways to show that an error was harmless, and the VA has been able to shoulder the burden in a number of cases. See, *e.g.*, *Holmes* v. *Peake*, No. 06–0852, 2008 WL 974728, *2 (Vet. App., Apr. 3, 2008) (Table) (finding notice error harmless because the claimant had "actual knowledge of what was required to substantiate" his claim); *Clark* v. *Peake*, No. 05–2422, 2008 WL 852588, *4 (Vet. App., Mar. 24, 2008) (Table) (same).

The Federal Circuit's rule thus strikes me as workable and in keeping with the statutory scheme governing veterans' benefits. It has the added virtue of giving the VA a strong incentive to comply with its notice obligations, obligations "that g[o] to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." *Mayfield* v. *Nicholson*, 19 Vet. App. 103, 120–121 (2005).

I would affirm the Federal Circuit and respectfully dissent.