

January 1994

Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits

Frank Q. Nebeker

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Courts Commons](#), [Jurisprudence Commons](#), [Military, War, and Peace Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 Me. L. Rev. 5 (1994).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol46/iss1/3>

This Lecture is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

JURISDICTION OF THE UNITED STATES COURT OF VETERANS APPEALS: SEARCHING OUT THE LIMITS*

Frank Q. Nebeker**

I have been asked to talk to you about the United States Court of Veterans Appeals—specifically, challenges and trends in defining the scope of the court's jurisdiction. As a brand-new court, and one without any antecedent, the court began to establish precedent to deal with all aspects of its jurisdiction. In fact, it is still very much in the process of setting such precedent.

For the first time, the court brought the principle of *stare decisis* to the veterans' community. The principle required considerable re-adjustment within the Department of Veterans Affairs (Department or VA). The VA's regional offices and the Board of Veterans' Appeals (Board or BVA) were deciding benefits applications *ad hoc*. At the Board level there was little effort to achieve consistency among decisions by different panels. Moreover, veterans' benefits claimants were unprepared for the adversarial nature of an appellate court. The administrative adjudication, both at the agency of original jurisdiction and indeed at the Board level has been and remains a paternal system. The claimant need only present a "well-grounded" claim (much like a *prima facie* case) to bind the Secretary of Veterans Affairs to assist in the prosecution of the claim by guiding the evidentiary efforts on behalf of the claimant and by broaching issues not mentioned, but fairly embraced in the claim. The adversarial nature of judicial proceedings—particularly as relates to compiling a record for appellate review—has had far-reaching effects within the Department.

In addition, issues relating to the court's jurisdiction required new, and sometimes complex, analysis of the rule of finality as applied to actions by the Department. A claimant could relitigate the same claim again and again by reopening or alleging "clear and unmistakable error" in a prior decision. These exceptions to the rule of finality have raised significant issues relating to the court's jurisdiction.

Because the subject is complex, I am going to limit my remarks. First, I will give you a thumbnail sketch of the court's history. Then I will discuss the precedent that has developed relating to the three

* These remarks were prepared for delivery to the Veterans Law Symposium, sponsored by the Maine Law Review, University of Maine School of Law, Portland, Maine, on September 24, 1993.

** Chief Judge, United States Court of Veterans Appeals. I would like to express my appreciation to Sandra P. Montrose for her valuable assistance in preparing these materials.

major statutory limitations on the court's subject matter jurisdiction. Finally, I will talk briefly about developments relating to the court's jurisdiction in other selected areas.

One observation: as you read this in print, it will have notes to let you know what came from where. In general, however, the Court of Veterans Appeals does not use footnotes. The only other appellate court to eschew footnotes is your neighbor, the Supreme Court of New Hampshire. In our court's opinions you may see them—rarely—in a dissent or separate concurrence, but we aim to keep things as clear and simple as we can.

I. HISTORY OF THE COURT

On November 18, 1988, when President Bush signed the Veterans' Judicial Review Act (hereinafter VJRA),¹ the United States Court of Veterans Appeals came into being. The court provided judicial review of veterans' benefits claims for the first time.²

This court is one of the very few courts of national jurisdiction in this country's history, and one of even fewer created without any antecedent.³ It is an Article I court,⁴ headed by a chief judge sitting with two to six associate judges.⁵ All judges are appointed for a term of fifteen years.⁶ Cases are heard by judges sitting alone, in panels of three, or en banc.⁷

1. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. §§ 7251-7298 (Supp. III 1991)).

2. See Barton F. Stichman, *The Veterans' Judicial Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings*, 41 ADMIN. L. REV. 365, 366 (1989).

3. Six courts of national jurisdiction were created prior to the Court of Veterans Appeals. The United States Supreme Court was created with the ratification of the Constitution. In 1942, the United States Emergency Court of Appeals was created to adjudicate the wartime price control program of World War II. The United States Court of Military Appeals was created in 1950. In 1974, there was a Temporary Emergency Court of Appeals that heard disputes arising from wage and price stabilization legislation. A special court for the regional reorganization of the railroads was created in 1974.

The Foreign Intelligence Surveillance Court was created in 1978, without antecedent. Very few other federal courts, however, were created without any predecessor tribunal. For example, the Court of Customs and Patent Appeals was created from the Court of Customs Appeals in 1929; in 1982, it merged with the Court of Claims and became the United States Court of Appeals for the Federal Circuit.

The federal district courts and the circuit courts of appeals (other than the United States Court of Appeals for the Federal Circuit) have limited geographical jurisdiction. See generally Erwin C. Surrency, *HISTORY OF THE FEDERAL COURTS* (1987); Robert A. Carp & Ronald Stidham, *THE FEDERAL COURTS* (1985); Ogilvy, *The Social Security Court Proposal: A Critique*, 9 J. OF LEGIS. 229 (1982).

4. 38 U.S.C. § 7251 (Supp. III 1991).

5. *Id.* § 7253(a).

6. *Id.* § 7253(c).

7. *Id.* § 7254(b).

By statute, the court is independent for budget purposes. The court submits its budget request directly to Congress "without review within the executive branch."⁸ Thus, the court's budget is subject neither to control by the VA, nor to review by the Office of Management and Budget.

The court hears direct appeals, filed by claimants, from adverse final decisions of the BVA of the VA.⁹ The court has authority to affirm, modify, or reverse a BVA decision, or to remand the matter "as appropriate."¹⁰ Limited review of the court's decisions is available in the United States Court of Appeals for the Federal Circuit.¹¹ The Federal Circuit has viewed challenges to the application of a law or regulation to the facts of a veterans' benefits claim as outside the scope of its jurisdiction, and has dismissed those cases.¹²

The court has jurisdiction to promulgate Rules of Practice and Procedure.¹³ Initially, an informal Rules Advisory Committee proposed interim rules, which were adopted effective December 18, 1989. These rules were based on the relevant Federal Rules of Appellate Procedure. The court's present Rules of Practice and Procedure superseded the interim rules on May 1, 1991. The court now has a permanent and quite active Rules Advisory Committee, chaired by J. Michael Hannon, Esq., of Washington, D.C.¹⁴

When the court's first three judges had been confirmed and sworn in, with a small staff and in very small rented offices, the court began operations. The postal service delivered the first notices of appeal, the clerk docketed the cases, and the court was in business.¹⁵ Before reaching a determination on the merits of any appeal, however, the court began to tackle the task of defining its jurisdiction. The court is now at full strength and in its permanent facility,¹⁶ yet

8. *Id.* § 7282.

9. The Department of Veterans Affairs, formerly the "Veterans Administration," was upgraded to Cabinet-level status in March of 1989. Pub. L. No. 100-527, § 2, 102 Stat. 2635 (1988).

10. 38 U.S.C. § 7252(a) (Supp. III 1991). *See also id.* § 7261(a).

11. *Id.* § 7292 (1991). *See, e.g.,* *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992) (construing its jurisdiction as "limited").

12. The dismissal orders in these cases rely on *Livingston*, and are not themselves citable as precedent.

13. 38 U.S.C. § 7264(a) (Supp. III 1991).

14. The Rules Advisory Committee, appointed by the court, periodically meets with the clerk and proposes amendments to the rules when need arises.

15. The court's first judges were Chief Judge Frank Q. Nebeker, and Judges Kenneth B. Kramer and John J. Farley, III. The court began operations on October 16, 1989. *See* 54 Fed. Reg. 42,437 (1989) (announcement of court's commencement of operations). By mid-September 1990, the court had its full complement of associate judges. The other four judges are Hart T. Mankin, Ronald M. Holdaway, Donald L. Ivers, and Jonathan R. Steinberg.

16. The court moved to its present location at 625 Indiana Avenue, NW, Washington, DC 20004, in November 1990, and opened its doors there following the Veterans' Day Holiday.

it continues to address jurisdictional issues in their various permutations.

II. SCOPE OF THE COURT'S JURISDICTION

Three statutory requirements limit the court's subject matter jurisdiction: an appellant must (1) have a final BVA decision;¹⁷ (2) have filed, on or after November 18, 1988, a notice of disagreement (NOD) with the agency of original jurisdiction that initially adjudicated the claim or claims addressed by the BVA;¹⁸ and (3) have filed a notice of appeal (NOA) with the court within 120 days of the date on which the notice of a BVA decision is mailed.¹⁹

Case law relating to "finality" of a BVA decision and to timeliness of an NOA has developed to the point where precedential holdings should cover most of the jurisdictional circumstances of nearly all new appeals. As discussed below, however, because of the nature of proceedings within the VA, case law relating to the NOD as a jurisdictional factor will continue to develop in the future. I will acquaint you with a few of the variations the court has encountered.

A. Final BVA Decision

1. Finality Requirement

The court has exclusive jurisdiction to review final decisions of the BVA.²⁰ Very early in its existence, the court was required to address issues relating to the requirement that an appellant have a final decision of the BVA.

The court's first published opinion, *In re Quigley*,²¹ accompanied an order dismissing the appeal. The Chief of the Medical Administration Service had sent a letter to Mr. Quigley notifying him that his fee-basis card²² was to be revoked. The court held that the appeal was premature because there was no final decision from the BVA. The court concluded that it would have "appellate jurisdiction to review a BVA decision declining jurisdiction."²³ Finding that Mr. Quigley had failed to exhaust his administrative remedies, the court found it unnecessary to address whether it had jurisdiction under

17. 38 U.S.C. § 7252 (Supp. III 1991).

18. Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988).

19. 38 U.S.C. § 7266(a) (Supp. III 1991).

20. *Id.* §§ 7252(a), 7266(a). See *Harris v. Derwinski*, 1 Vet. App. 180, 182 (1991) (holding that, "[r]ead together, [§§ 7252(a) and 7266(a)] require that a claimant seeking to appeal to the Court must have a *final* BVA decision." (emphasis in original)); see also *Bond v. Derwinski*, 2 Vet. App. 376, 377 (1992).

21. 1 Vet. App. 1 (1990) (veteran sought emergency hearing and injunction preventing revocation and preserving his fee-basis card rights).

22. *Id.* at 1. With a fee-basis card, a veterans' benefits recipient can, under certain conditions, receive services from non-VA medical providers for whose services the VA pays.

23. *Id.* at 2.

the All Writs Act,²⁴ even if it liberally construed his communication to the court as a petition for extraordinary relief.²⁵

A little later, however, the court examined whether there was an exception to the “finality” rule—i.e., whether the court has the power to grant any petition for extraordinary relief when it lacks subject matter jurisdiction to entertain a direct appeal. In *Erspamer v. Derwinski*,²⁶ the court held that it has authority to act under the All Writs Act. Mr. Erspamer had filed a claim in the late 1970s, seeking service connection for his leukemia, which he claimed resulted from his exposure to ionizing radiation while in service. After Mr. Erspamer’s death in 1980, his widow continued to pursue a claim for service-connected death benefits and for accrued disability benefits. In 1989, she petitioned the court for a writ of mandamus to compel the VA to comply with two BVA decisions (issued over a period of ten years) remanding the matter to the VA regional office for adjudication.

The court held that it had jurisdiction in appropriate circumstances to issue extraordinary writs to VA officials.²⁷ First, the court is a “court[] established by Act of Congress,”²⁸ the term used in the All Writs Act. Second, section 7265(b) of title 38 of the United States Code provides that the court would “have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.”²⁹ Third, section 7261(a)(2) of title 38 gives the court authority to “compel action of the Secretary unlawfully withheld or unreasonably delayed.”³⁰ Finally, to hold otherwise would “frustrate the Congressional desire for judicial review” where failure of the VA to act would “prevent[] a claimant from ever attaining a BVA decision which would be subject to review.”³¹

In *Erspamer*, the court declined to exercise its power to issue extraordinary relief, but retained jurisdiction. It noted that Mrs. Erspamer could seek appropriate relief if the VA regional office had not acted on the claim within six months after the decision.³² The

24. The All Writs Act provides that “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions” 28 U.S.C. § 1651(a) (1982).

25. *In re Quigley*, 1 Vet. App. at 1-2.

26. 1 Vet. App. 3 (1990).

27. *Id.* at 7.

28. 28 U.S.C. § 1651(a) (1982).

29. 38 U.S.C. § 7265(b) (Supp. III 1991). The *Erspamer* opinion also quotes statements of Senator Alan Cranston and Representative Don Edwards which support the view that Congress intended the court to have the power to issue writs. *Erspamer v. Derwinski*, 1 Vet. App. at 6-7.

30. 38 U.S.C. § 7261(a)(2) (Supp. III 1991).

31. *Erspamer v. Derwinski*, 1 Vet. App. at 7.

32. *Id.* at 12.

Secretary appealed to the Federal Circuit, but the appeal was dismissed by agreement of the parties when the benefits were granted.³³

Subsequently, the court addressed "the other side of the coin," considering whether it had jurisdiction to address an issue raised by a claimant but not addressed by the Board. In *Travelstead v. Derwinski*,³⁴ the court held, disagreeing with the Secretary, that it could address an issue raised by the claimant and decided by the regional office, but not addressed by the Board. The court reasoned that administrative inaction, under such circumstances, has precisely the same impact on a claimant as denial of relief.³⁵ The BVA could not preclude judicial review by casting its decision in the form of inaction, rather than express denial of relief as to the issue.³⁶

In other early decisions the court explored its jurisdiction to hear any matter that did not arise from direct appeal of a final adverse BVA decision. The court held that, although it is an Article I court, it would adopt a "case or controversy" limitation paralleling that in Article III courts.³⁷ Thus, like the Article III courts, the court lacks jurisdiction in any matter that is or has become moot. The court also has held that it does not have the power to enter a declaratory judgment.³⁸ It reasoned that the Declaratory Judgments Act³⁹ gives such authority to "any court of the United States."⁴⁰ That term, the court concluded, is confined to Article III courts as defined in section 451 of title 28 of the United States Code,⁴¹ and thus is not applicable to the Court of Veterans Appeals since it is not included in that section.

Moreover, the court ruled in *Darrow v. Derwinski*⁴² that it lacks jurisdiction to review the Secretary of Veterans Affairs' consideration of equitable relief. The court concluded that it had no jurisdiction to provide appellate review because the BVA had no authority to review such actions or refusals to act by the Secretary. With no final BVA decision on equitable relief, there was nothing for the court to review.⁴³

33. See *Ersbamer v. Derwinski*, No. 90-7001 (Fed. Cir. June 28, 1990) (dismissal order issued as mandate).

34. 1 Vet. App. 344 (1991).

35. *Id.* at 348 (citing *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)).

36. *Id.*

37. See, e.g., *Mokal v. Derwinski*, 1 Vet. App. 12 (1990); *Swan v. Derwinski*, 1 Vet. App. 20 (1990).

38. *Nagler v. Derwinski*, 1 Vet. App. 297, 306-07 (1991).

39. 28 U.S.C. § 2201 (1988).

40. *Id.*

41. *Nagler v. Derwinski*, 1 Vet. App. at 306-07.

42. 2 Vet. App. 303 (1992).

43. *Id.* at 306.

In *Harrison v. Derwinski*⁴⁴ and *Lefkowitz v. Derwinski*,⁴⁵ the court ruled that it lacked jurisdiction to promulgate a rule permitting class actions. The court reasoned that it could not, by rule, exercise jurisdiction over claimants who did not otherwise meet the jurisdictional requirements of the VJRA. In addition, the court found, such a rule is unnecessary because the court's precedential decisions would have binding effect upon the Department in adjudicating the same or similar claims. Therefore, potential members of a "class" would get the benefit of the precedent, whether it controls because of identity of facts and issues or due to a logical extension of the earlier decision.

2. *Variations on the Finality Theme: Motions For Reconsideration by the BVA*

The finality of a BVA decision is abated when the adversely affected claimant files a motion for reconsideration by the BVA before filing an NOA to the court.⁴⁶ Notice from the Chairman of the BVA that reconsideration has been denied or notice by the claimant that the request for reconsideration is withdrawn makes the BVA decision final. The date of either of these actions begins the running of a new 120-day appeal period to the court—but only if the motion for reconsideration by the BVA was filed within the initial 120-day appeal period.⁴⁷ When a motion for reconsideration is pending before the Board, and the claimant files a "protective" NOA with the court, the court lacks jurisdiction and must dismiss the appeal. The dismissal is without prejudice to any appeal filed after the BVA denies reconsideration or issues an adverse decision upon reconsideration.⁴⁸

A corollary also holds. When a claimant has filed a timely NOA to the court (assuming there is also an NOD that gives the court jurisdiction), and then requests reconsideration by the Board, the court has jurisdiction of the appeal. If the Chairman is inclined to grant reconsideration, the Secretary must notify the court and move for leave to entertain the matter.⁴⁹ Under these circumstances, the Chairman lacks jurisdiction to act without leave of the court; the "grant" of reconsideration without leave is a nullity and does not strip the court of jurisdiction by abating the finality of the decision appealed to the court.⁵⁰

44. 1 Vet. App. 438 (1991).

45. 1 Vet. App. 439 (1991).

46. *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991); *Breslow v. Derwinski*, 1 Vet. App. 359, 362 (1991).

47. *Rosler v. Derwinski*, 1 Vet. App. at 249.

48. *Breslow v. Derwinski*, 1 Vet. App. at 364-65.

49. *Cerullo v. Derwinski*, 1 Vet. App. 195, 198-201 (1991).

50. *Id.* at 200-01.

Recently, in *Patterson v. Brown*,⁵¹ the court considered its jurisdiction to review a denial of reconsideration by the Chairman of the BVA. Mr. Patterson had filed a timely NOA from a BVA decision denying a waiver of loan guarantee indebtedness. The court stayed proceedings to permit him to pursue reconsideration by the Board. When the Chairman denied reconsideration, Mr. Patterson sought review of the denial. The court held that it has jurisdiction to review decisions of the Chairman to deny an appellant's motion for reconsideration. This jurisdiction is limited, however, to cases where the motion for reconsideration is based on new evidence or changed circumstances. Based on limitations set by United States Supreme Court decisions, the court found that it could not review a denial of reconsideration where the BVA would merely take another look at the same record.⁵²

3. "Finality" Summed Up

The court, then, has jurisdiction over appeals from final decisions of the BVA. While it has All-Writs jurisdiction,⁵³ such jurisdiction will be exercised only in extraordinary circumstances and in aid of the court's potential jurisdiction. An examination of the "finality" of a BVA decision raises issues that relate to my next topics: What constitutes a timely NOA? and what is required for an NOD that confers jurisdiction on the court?

B. Timely Filed Appeal

The VJRA requires the filing of an NOA within 120 days of the date on which the notice of a Board decision is mailed.⁵⁴ The court has construed this requirement strictly, deeming "the timely filing of a notice of appeal . . . mandatory and jurisdictional."⁵⁵ Both this court and the Federal Circuit have held that section 7266(a) of title 38 of the United States Code "defines the jurisdiction of the Court and 'does not authorize the court to extend that time,' " even under the doctrine of equitable tolling.⁵⁶

51. 5 Vet. App. 362 (1993).

52. *Id.* at 365 (citing *Interstate Commerce Comm'n v. Locomotive Engineers*, 482 U.S. 270, 280 (1987)).

53. *See supra* note 24.

54. 38 U.S.C. § 7266(a) (Supp. III 1991).

55. *Elsevier v. Derwinski*, 1 Vet. App. 150, 152 (1991) (quoting *Torres v. Derwinski*, 1 Vet. App. 15, 17 (1990) (quoting *United States v. Robinson*, 361 U.S. 220, 224, 229 (1960))).

56. *Jones v. Derwinski*, 2 Vet. App. 362, 363 (1992) (citing *Butler v. Derwinski*, 960 F.2d 139, 141 (Fed. Cir. 1992) (quoting *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991))). In *Jones* the court concluded that "to the extent this Court's decision in *Elsevier v. Derwinski* suggests that the doctrine of equitable tolling is 'potentially applicable' to the 120-day statutory period for noting an appeal to this Court, we deem the *Butler* decision to have overruled it." *Jones v. Derwinski*, 2 Vet. App. at

As discussed above in relation to issues of finality of BVA decisions, a claimant's filing of a motion for reconsideration within the 120-day judicial appeal period postpones the start of the appeal period until the BVA mails notice to the claimant that it has denied the motion for reconsideration.⁵⁷ Additionally, the court has held that the 120-day period does not begin to run until the BVA sends a copy of its decision to the appellant and the appellant's representative at the last known address of each.⁵⁸ As for flawed mailing (e.g., to the incorrect representative), the period begins to run from the time the claimant and representative actually receive notice of the BVA decision.⁵⁹

Finally, the court has not applied a "mailbox rule." Rather, to be timely, an NOA must have been received by the clerk by the end of the 120th day.⁶⁰ Rule 4 of the court's Rules of Practice and Procedure permits filing by facsimile or other printed electronic transmission. However, when filing is by electronic transmission, a confirmatory written NOA must be received by the court within ten days after the date of facsimile filing.⁶¹ Failure to submit a confirmatory writing, however, has not been deemed to defeat jurisdiction, because the confirmatory written NOA is merely a procedural step subsequent to the actual vesting of jurisdiction upon timely receipt of the facsimile.

C. *Timing of Notice of Disagreement*

1. *The Issue That Has Outlasted Predictions*

The VJRA provides that the court may review only those final BVA decisions that were preceded by an NOD filed with the agency of original jurisdiction (e.g., the claimant's VA regional office) on or after November 18, 1988, when the VJRA became law.⁶² When the court began operations, I predicted confidently that the jurisdictional issues relating to the timing of the NOD would "go away" with the passage of time. My reasoning was that as November 18, 1988 receded further into the past, all BVA decisions from which a timely NOA could be filed would of necessity deal with claims that arose on, after, or shortly before that crucial date and would have been adjudicated by the regional office on, after, or shortly before that date so that the claimant's NOD would certainly have been

363 (quoting *Elsevier v. Derwinski*, 1 Vet. App. at 154) (citations omitted).

57. *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991).

58. *Chadwick v. Derwinski*, 1 Vet. App. 74, 76 (1990); *see also* 38 U.S.C. §§ 7104(e), 7266(a) (Supp. III 1991).

59. *Ashley v. Derwinski*, 2 Vet. App. 307, 311 (1992).

60. *Torres v. Derwinski*, 1 Vet. App. 15, 17 (1990); U.S. Vet. App. R. 4; *see also* *Chadwick v. Derwinski*, 1 Vet. App. at 76.

61. U.S. Vet. App. R. 3(a).

62. Pub. L. No. 100-687, § 402, 102 Stat. 4105 (1988).

filed so as to give the court jurisdiction.

I have been wrong. The court has now been in operation nearly four years, yet the NOD continues to be probably the most widely contested and vexing jurisdictional issue before the court. The issue will eventually become moot, but we may be well into the 21st century before that happens. An understanding of the definition and function of an NOD, as well as a little background about the way the VA operates, will help explain why the NOD remains problematic.

2. *Definition and Function of the NOD*

An NOD is defined by statute and VA regulation. The statutory requirements for an NOD are set forth in section 7105(b) of title 38 of the United States Code.⁶³ It is, by VA regulation, "[a] written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction (AOJ or regional office) and a desire to contest the result."⁶⁴ Section 7105(b) provides in pertinent part that an NOD must be filed with the AOJ, that is, the agency which entered the initial review or determination concerning a claim;⁶⁵ that an NOD must be filed within one year from the date of mailing of notice of the determination;⁶⁶ and that an NOD "must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian."⁶⁷ For purposes of simplification, from now on I will refer to the AOJ as the "regional office," because in most cases, that's what it is.

The VA's governing regulation requires that an NOD be a "written communication,"⁶⁸ while the statute requires that it "must be in writing."⁶⁹ However, in *Tomlin v. Brown*,⁷⁰ the court recently construed the regulation to impose no technical formal requirements for an NOD beyond the requirements set by the statute.⁷¹

The purpose of an NOD, within the meaning of the court's jurisdictional statute, is to initiate appellate review by letting the VA know that a claimant intends to appeal to the BVA.⁷² When a claimant files an NOD, the regional office must respond by preparing a

63. 38 U.S.C. § 7105(b) (Supp. III 1991).

64. 38 C.F.R. § 20.201 (1993).

65. 38 U.S.C. § 7105(b)(1) (Supp. III 1991).

66. *Id.*

67. *Id.* § 7105(b)(2).

68. 38 C.F.R. § 20.201 (1993).

69. 38 U.S.C. § 7105(b)(2) (Supp. III 1991).

70. 5 Vet. App. 355 (1993).

71. *Id.* at 357.

72. See 38 U.S.C. § 7105(a),(b) (Supp. III 1991).

“statement of the case.”⁷³ This must be sent to the claimant, who is then required to perfect the appeal by completing and filling out a VA Form 1-9, specifying the relief the claimant seeks from the BVA.⁷⁴ The VA Form 1-9 has, at times, been used by claimants to express disagreement with a regional office action. One of the jurisdictional issues that the court had to consider is whether a VA Form 1-9 could serve as an NOD that would give the court jurisdiction of an appeal.

For the court to have jurisdiction of an appeal from a BVA decision, the NOD leading to the BVA’s review of a particular claim must have been filed on or after November 18, 1988. Congress included the NOD requirement to keep the new court from being inundated with appeals at the outset.⁷⁵ The reasoning was that because it took the Department close to a year to move from NOD to final BVA decision, the new court would be capable of full operation before the first NOA was filed.⁷⁶ In addition, making the NOD a jurisdictional “event” had the effect of permitting the Board to adjust to the new requirement that it must articulate “reasons or bases,” which the VJRA also required.⁷⁷

3. *Whether There Can Be More Than One NOD*

In reviewing the records of some of the early appeals to the court, we noted that the regional office would sometimes make several decisions on the same claim over a period of months, or even years. The claimant would file an NOD after the first time the claim was adjudicated. Sometimes he would ask the regional office to reevaluate his claim, and sometimes it would do so, and would issue another—still adverse—decision. Sometimes he would send new evidence to the regional office, and it would take another look at the claim and would issue another decision. Sometimes the BVA would review the record and the action of the regional office, and send the matter back to the regional office for further development (perhaps, for example, another medical examination of the claimant), and the regional office would issue a new decision.

After each action by the regional office, the claimant or his representative would write to that office, expressing disagreement with the regional office decision. Some of these statements of disagree-

73. *Id.* § 7105(d)(1); 38 C.F.R. § 20.200 (1993).

74. In January 1992, the Department replaced the VA Form 1-9 with VA Form 9. See 38 U.S.C. § 7105(d)(3) (Supp. III 1991); 38 C.F.R. §§ 20.200, 20.202 (1993) (statutory and regulatory provisions relating to perfecting a “substantive appeal” by submitting a VA Form 9).

75. See, e.g., 134 Cong. Rec. S16,650 (daily ed. Oct. 18, 1988) (statement of Sen. Cranston).

76. *Id.*

77. 38 U.S.C. § 7104(d)(1) (Supp. III 1991).

ment may have been filed with the regional office before November 18, 1988, but another one or more may have been filed on or after that date. The court had to decide whether any statement of disagreement after such a readjudication could be an NOD that would give the court jurisdiction. Initially, the court decided that such a statement, even if it was submitted on a VA Form 1-9, could indeed be a jurisdiction-conferring NOD. In *Whitt v. Derwinski*,⁷⁸ the court consolidated four cases varying this procedural fact pattern, and so held.

In *Whitt*, the court held that where the regional office adjudicated a claim more than once, for whatever reason, the first expression of disagreement filed after any such adjudication was an NOD. If it was filed on or after November 18, 1988, the court had jurisdiction of the appeal.⁷⁹

When the Court of Appeals for the Federal Circuit subsequently addressed this issue in *Strott v. Derwinski*,⁸⁰ however, it found that an expression of disagreement with an adjudication by the regional office when it "is acting in an appellate role . . . cannot function as the statutory basis for Veterans Court jurisdiction."⁸¹ In *Strott*, the Federal Circuit ruled that, "[t]o the extent that *Whitt v. Derwinski* suggests otherwise, it is overruled."⁸²

On April 15, 1993, the court issued its en banc decision in *Hamilton v. Brown*,⁸³ holding that: (1) there can be only one valid NOD as to a particular claim, extending to all subsequent regional office and Board adjudications on the same claim until a final decision has been rendered in that matter, or the appeal has been withdrawn by the claimant, and (2) a VA Form 1-9⁸⁴ appeal as to a particular claim cannot itself be an NOD that would give the court jurisdiction where an earlier NOD had been filed.⁸⁵

4. Variations on the NOD Theme

The legal principles relating to an NOD that will give the court jurisdiction have now been set out. However, there appear to be countless possible permutations of the NOD issues. For example, a panel of judges recently decided that an oral expression of disagreement with a regional office's initial action on a claim, made during a regional office hearing, had all the statutory attributes of an NOD

78. 1 Vet. App. 40 (1990).

79. *Id.* at 43, 45-46.

80. 964 F.2d 1124 (Fed. Cir. 1992).

81. *Id.* at 1128.

82. *Id.* (citation omitted).

83. 4 Vet. App. 528 (1993) (en banc).

84. The VA Form 1-9 (or VA Form 9) is filed by a claimant to "perfect" an appeal that has been initiated by an NOD. See 38 U.S.C. § 7105(a) (Supp. III 1991); 38 C.F.R. §§ 20.200, 20.202 (1993).

85. *Hamilton v. Brown*, 4 Vet. App. at 538.

once the hearing was transcribed and the oral statement became "written."⁸⁶ The date of filing of that NOD was the date of the transcription by the VA.⁸⁷

Other, even more recent decisions, have held that the claim of a widow is separate from, even though derived from, that of her deceased veteran husband. In such a case, even where the veteran's NOD as to his claim was filed prior to November 18, 1988, the widow may have a new NOD that would give the court jurisdiction of her appeal. This NOD would be the first statement of disagreement filed by the widow or her representative in response to the initial adjudication of her claim by the regional office.⁸⁸ The court has also held that a widow's letter to a regional office expressing disagreement with action on her husband's claim is not an NOD as to her claim, where the regional office had not yet addressed her separate, derivative claim.⁸⁹

Another noteworthy NOD variation occurs when the BVA addresses, in a single decision, a number of claims that have been filed separately and adjudicated at different times. When the claimant then appeals to the court, he can have "good" NODs as to some of the claims, but not others. The court will go forward to reach the merits on the claims over which it has jurisdiction, but must dismiss the appeal as to the claims for which the NOD was filed before November 18, 1988.⁹⁰

III. OTHER JURISDICTIONAL ISSUES

Very briefly, I will now highlight a few other significant jurisdictional issues for you. These relate to (1) the reopening of a claim on "new and material evidence"; (2) the requirement that a claim be "well grounded"; (3) review of "old" BVA decisions for "clear and unmistakable error"; (4) the "collateral order" exception to the rule that BVA decisions must be final to be reviewed; and (5) concurrent jurisdiction over National Service Life Insurance matters. Finally, the new statute applying the provisions of the Equal Access to Justice Act (EAJA) to the court requires the court to examine the scope of its jurisdiction in still another area.⁹¹

86. *Tomlin v. Brown*, No. 91-2165 (Vet. Ct. App. July 16, 1993).

87. *Id.*, slip op. at 4.

88. *Zevalkink v. Brown*, No. 91-1683 (Vet. Ct. App. Aug. 17, 1993).

89. *Cates v. Brown*, 5 Vet. App. 399 (1993).

90. See *Hamilton v. Brown*, 4 Vet. App. at 537; cf. *Tucker v. Derwinski*, 2 Vet. App. 201, 202 (1992).

91. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506(a), 106 Stat. 4506, 4513 signed by the President on October 29, 1992, applied the provisions of section 2412(d) of title 28 of the United States Code (the Equal Access to Justice Act, or EAJA), to the court.

A. *Claims Reopened With New and Material Evidence*

Years ago, a veteran may have filed a claim, for example, for service connection for a particular disability. When that claim was denied, the claimant may have failed to pursue any appeal from the regional office's decision or he may have received a final, adverse BVA decision. Let us assume that all of this happened so long ago that it was impossible for the claimant to file a timely appeal because the court was not in existence. Needless to say, such a claimant would have to have filed an NOD long before November 18, 1988.

Nevertheless, such a claimant could attempt to reopen his claim by submitting to the VA regional office evidence that he believes is "new and material."⁹² Such an effort would cause the VA to revisit the claim. The claimant could then obtain court review of any subsequent adverse BVA decision. An adverse BVA decision is "final,"⁹³ but not in the same sense that a civil judgment becomes final under Rule 60(b) of the Federal Rules of Civil Procedure. The VA has statutory authority to consider once again, at any time, a claim reopened with new and material evidence.⁹⁴ Such a claim, both conceptually and legally, is a "different" claim from the initial one which has been denied, even if it has the identical objective as the earlier claim, for example, to obtain service-connected benefits for a disabled right shoulder.⁹⁵ If the regional office action is adverse to the claimant on this "different" claim, he can file an NOD. Where that NOD has been filed on or after November 18, 1988, the court has jurisdiction of a timely appeal from a final BVA decision on the "reopened" issue.

The question of whether evidence is "new and material" is a question of law that the court reviews *de novo*.⁹⁶ If the BVA denies reopening because it finds that evidence submitted by the claimant in the effort to reopen is not new and material, the court will affirm that decision when it finds that the BVA committed no error in that determination. In such a case, both the BVA and the court have exercised their jurisdiction to determine jurisdiction.

Where the BVA erroneously concludes that the claim has been "reopened," or, without addressing that threshold issue, erroneously reaches the merits, however, the result is different. The court concluded in *McGinnis v. Brown*⁹⁷ that where the court determined that the evidence submitted in the attempt to reopen was not new

92. 38 U.S.C. § 5108 (Supp. III 1991).

93. *Id.* § 7103(a).

94. *Id.* § 5108.

95. *Suttman v. Brown*, 5 Vet. App. 127, 136 (1993).

96. See *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (1991); *Thompson v. Derwinski*, 1 Vet. App. 251, 252-53 (1991).

97. 4 Vet. App. 239 (1993).

and material, the BVA lacked jurisdiction to reach the claim; its decision must be vacated, and it is directed to vacate any regional office decision that reached the merits.⁹⁸ In such a case, the court reasoned, the “claim [is] a finally denied claim which has not been reopened and there was no claim to adjudicate on the merits or appeal to the BVA.”⁹⁹ Because the BVA had no jurisdiction to reach the merits, neither does the court; the court’s action “reestablish[es] the finality of the previous denial.”¹⁰⁰

B. Requirement That a Claim Be “Well Grounded”

Similarly, neither the regional office nor the BVA has jurisdiction to adjudicate a claim that is not well grounded.¹⁰¹ That is, the claim must be put forward with “evidence that must justify a belief by a fair and impartial individual that the claim is plausible.”¹⁰² The determination whether a claim is well grounded is a matter of law.¹⁰³ Where the regional office and BVA have adjudicated a claim that is not, as a matter of law, well grounded, “there was no claim to adjudicate on the merits. . . .”¹⁰⁴

C. Claim Based on Allegation of “Clear and Unmistakable Error”

The en banc court consolidated two cases, *Russell v. Principi* and *Collins v. Principi*,¹⁰⁵ to address the issue of whether it had jurisdiction to review otherwise unreviewable past decisions of the BVA where a claimant raised the issue of “clear and unmistakable error” in a previous decision. The court held that it has jurisdiction, but that review is strictly limited.

The court concluded, initially, that title 38 of the Code of Federal Regulations, section 3.105(a), which authorizes the Board or regional office to revise previous decisions where there was “clear and unmistakable error” is a valid regulation. The Secretary derives this authority from section 7103(c) of title 38 of the United States Code,¹⁰⁶ which permits correction of “an obvious error in the record.”¹⁰⁷ In making its review as to clear and unmistakable error, the BVA must base its decision on the record and the law that existed at the time

98. *Id.* at 244.

99. *Id.*

100. *Id.*

101. 38 U.S.C. § 5107(a) (Supp. III 1991).

102. *Grottveit v. Brown*, 5 Vet. App. 91, 92 (1993) (citing *Tirpak v. Derwinski*, 2 Vet. App. 609, 611 (1992)).

103. *King v. Brown*, 5 Vet. App. 19, 21 (1993).

104. *Grottveit v. Brown*, 5 Vet. App. at 93.

105. 3 Vet. App. 310 (1992).

106. 38 U.S.C. § 7103(c) (Supp. III 1991).

107. *Russell v. Principi*, 3 Vet. App. at 314.

of the prior regional office or BVA decision.¹⁰⁸ When it finds error in such a decision, the error must be “undebatable, or, [one] about which reasonable minds cannot differ.”¹⁰⁹

When a regional office and, ultimately, the BVA adjudicate the issue, and when there is an NOD that gives the court jurisdiction, and a timely NOA from the BVA decision, the court can then review the claim of clear and unmistakable error. This is true even though there is no NOD or NOA that would give the court jurisdiction of the earlier BVA decision, which the claimant alleges was tainted by such error.¹¹⁰

Review by the court of such a “collateral attack” on an earlier decision, however, is strictly limited. First, the BVA must have addressed the precise issue; the claimant cannot raise it for the first time before the court.¹¹¹ Second, the court’s review is limited to determining whether the BVA decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹² In addition, as in any other case, the court will review “to determine whether adequate ‘reasons or bases’ were given for the instant BVA decision” addressing the issue of clear and unmistakable error in a prior decision.¹¹³ Finally, once the court has reviewed a decision of the BVA on the issue of clear and unmistakable error, that issue may not be raised again.¹¹⁴ The same finality applies if the regional office addresses the issue and that regional office decision is not appealed to the BVA, or if a claimant fails to file a timely appeal to the court from a BVA decision finding no clear and unmistakable error.¹¹⁵

D. “Collateral Order” Jurisdiction

The court has recognized the “collateral order” exception to its general rule that appeal lies only from final BVA decisions. In *Coleman v. Brown*,¹¹⁶ the court took jurisdiction of an appeal from a BVA decision affirming an adjudication of incompetency by the regional office. A VA regulation gives the Veterans Service Officer jurisdiction and authority to modify a regional office’s determination of a benefits claimant’s incompetency.¹¹⁷ In Mr. Coleman’s case, the

108. *Id.*

109. *Id.*

110. *Id.* at 314-15.

111. *Id.* at 315.

112. *Id.* (citing 38 U.S.C. § 7261(a)(3)(A) (Supp. III 1991)).

113. *Id.* (citing 38 U.S.C. § 7104(d)(1) (Supp. III 1991)); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

114. *Russell v. Principi*, 3 Vet. App. at 315.

115. *Id.*

116. 5 Vet. App. 371 (1993).

117. 38 C.F.R. § 3.353 (1992); see C.F.R. pt. 13 (1993) for a discussion of the role and duties of a “Veterans Service officer.”

BVA affirmed the regional office's finding, even though no Veterans Service Officer had been involved.

Upon the court's request, the Secretary and amici submitted memoranda agreeing that the BVA decision was final for purposes of court review. Noting that "agreement by the parties alone cannot confer jurisdiction,"¹¹⁸ the court observed that its inquiry into finality stemmed from the fact that a Veterans Service Officer "might recommend that a veteran not be determined incompetent and that recommendation followed."¹¹⁹ The Board, however, had undertaken to make a final decision, rather than awaiting action by a Veterans Service Officer. Under the circumstances, the court reasoned, each day that Mr. Coleman continued under an unlawful determination of incompetency constituted an irreparable loss, which could not "be undone for those days."¹²⁰

Citing *Stack v. Boyle*¹²¹ and *Cohen v. Beneficial Industrial Loan Corp.*,¹²² the court vacated the determination of incompetency on merits not relevant here.¹²³ Where, however, appeal can lie from an interlocutory action of the BVA, questions of claim and issue preclusion (*res judicata*) still lurk. In deciding *Coleman*, it was unnecessary to address such issues exhaustively; they remain for another case, another day.

E. Concurrent Jurisdiction Over Claims Related to National Service Life Insurance

In *Young v. Derwinski*,¹²⁴ the court held that, notwithstanding statutory language¹²⁵ providing United States district courts with jurisdiction over National Service Life Insurance claims, the court also had jurisdiction over these claims. This is true where the claimant appeals to the BVA and, if dissatisfied with that decision, appeals to the court.¹²⁶

F. Applications for Attorneys Fees Under EAJA

In *Jones v. Derwinski*,¹²⁷ the court considered whether it had jurisdiction to entertain applications for attorneys fees under the

118. *Coleman v. Brown*, 5 Vet. App. at 374.

119. *Id.*

120. *Id.*

121. 342 U.S. 1, 6-7 (1951).

122. 337 U.S. 541, 546 (1949).

123. *Coleman v. Brown*, 5 Vet. App. at 375.

124. 1 Vet. App. 70 (1990).

125. 38 U.S.C. § 1984(a) (Supp. III 1991).

126. *Young v. Derwinski*, 1 Vet. App. at 72-73.

127. 2 Vet. App. 231 (1992). The appeals on the merits in *Jones v. Derwinski*, 1 Vet. App. 210 (1991), and *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), were consolidated on the EAJA issue.

Equal Access to Justice Act (EAJA).¹²⁸ Finding no waiver of sovereign immunity that would permit the court, not then expressly included under EAJA, to entertain such applications, the court denied the pending applications.¹²⁹ *Jones* was appealed to the Court of Appeals for the Federal Circuit.

On October 29, 1992, while *Jones* was pending before the Federal Circuit, the President signed the Federal Courts Administration Act of 1992.¹³⁰ This Act makes the provisions of EAJA applicable to proceedings in the Court of Veterans Appeals. On that basis, the Federal Circuit vacated this court's decision in *Jones* and remanded the case.¹³¹

The Federal Courts Administration Act provides that EAJA applies to any case pending in the court on the date of enactment, as well as any appeal filed after that date.¹³² The court is currently considering applications for attorneys fees under EAJA where the issue is the meaning of the term "pending" as used in the Act. In deciding whether it has jurisdiction over these applications, the court must address the issue of whether the term "pending" refers to the merits of the underlying appeal, or whether it is sufficient that an EAJA application was "pending" on that date. The court is presently considering this matter en banc.

IV. CONCLUSION

The Court of Veterans Appeals is the "new kid on the block" among judicial appellate tribunals. As a new court, without any antecedent, its first task has been to examine and articulate the scope of its jurisdiction. The court may someday reach the point where, barring new legislation, it will have precedent to apply to all conceivable jurisdictional issues. Jurisdictional questions in veterans benefits claims, however, appear to be infinite in their variety. Such questions will continue to engage the court well into the future.

128. 28 U.S.C.A. § 2412(d) (West Supp. 1993).

129. *Jones v. Derwinski*, 2 Vet. App. at 231-32.

130. Pub. L. No. 102-572, 106 Stat. 4506 (1992).

131. *Jones v. Principi*, No. 92-7047. 1992 U.S. App. LEXIS 31416, at *2 (Fed. Cir. Nov. 19, 1992) (opinion not citable as precedent).

132. Pub. L. No. 102-572, § 506(b), 106 Stat. 4506, 4513 (1992).