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THE IMPACT OF JUDICIAL REVIEW ON THE DEPARTMENT OF VETERANS AFFAIRS' CLAIMS ADJUDICATION PROCESS: THE CHANGING ROLE OF THE BOARD OF VETERANS' APPEALS

Charles L. Cragin, Chairman, Board of Veterans' Appeals¹

In a March 1992 statement submitted to the Congress, the Deputy Secretary of Veterans Affairs described the impact of judicial review on the Department of Veterans Affairs (Department or VA) as "profound."² That description is still apt and applies with as much force to the Board of Veterans' Appeals (Board or BVA) as it does to the Department as a whole. Nothing has had as much impact on the Board as the Veterans' Judicial Review Act (VJRA).³ The VJRA established the United States Court of Veterans Appeals in 1988 and charged it with the review of decisions of the Board.⁴ Prior to the VJRA, decisions of the Board were not subject to judicial review, except in very limited circumstances. Judicial review has provided a convenient forum for testing the validity of departmental regulations and settling some long-disputed points of veterans law. It has also helped in establishing a more systematic approach to benefit claims adjudication and in providing a forum for dispute resolution outside the Department to veterans who may feel that VA has not treated them fairly. Nevertheless, these benefits have not been achieved without costs, particularly in increased formality and complexity of the adjudication process and a considerable expansion of the time necessary to render a final decision in a claim.

FUNDAMENTAL CHANGES IN THE DECISION MAKING PROCESS

The Board celebrates its sixtieth anniversary this year.⁵ The first

1. I wish to express my appreciation to Steven L. Keller, Esq., Counsel to the Chairman, Board of Veterans' Appeals, Connie Haskins, Esq., Staff Counsel in the Office of Counsel to the Chairman, Board of Veterans' Appeals, and Clay Witt, Esq., Director, Legal Policy and Planning, Board of Veterans' Appeals, for their invaluable assistance in the preparation of this article.

2. *Department of Veterans Affairs' Implementation of U.S. Court of Veterans Appeals Decisions: Hearing Before the Subcomm. on Compensation, Pension and Insurance of the Senate Comm. on Veterans' Affairs*, 102d Cong., 2d Sess. 34 (1992) (statement of Anthony J. Principi, Deputy Secretary of Veterans Affairs).

3. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

4. 38 U.S.C. §§ 7251-7252 (Supp. III 1991).

5. The Board was created by Executive Order during the early years of Franklin D. Roosevelt's administration. For a history of the development of appellate bodies in the field of veterans law in the United States, see U.S. DEPARTMENT OF VETERANS AFFAIRS, PAMPHLET NO. 1-3, BOARD OF VETERANS' APPEALS 50TH ANNIVERSARY PAM-

half-century of the Board's existence was a period of incremental, rather than revolutionary, changes. The Board was a part of a federal system for compensating former members of the United States armed forces for disabilities sustained in service, a system that was marked by what Justice Rehnquist has referred to as "rational paternalism."⁶ The hallmark of the system was its informal and nonadversarial nature.

A significant feature of that nonadversarial process was that, while a VA claimant was free to submit expert opinion evidence in support of his or her claim, he or she was not required to do so to establish entitlement to the benefit or benefits sought. Rather, the VA system relied on the expertise of its adjudicators for the proper assessment and evaluation of claims for veterans' benefits. For example, initial decisions on disability claims were made at the local level by a three-person "rating board." This board consisted of a medical specialist, a legal specialist, and an occupational specialist.⁷ These individuals utilized their expertise to evaluate claims, rather than rely exclusively on a detached evaluation of any expert opinion contained in the record. They were required to resolve all "reasonable doubt" in the claimant's favor.⁸ They were "to assist [the] claimant in developing the facts pertinent to the claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government."⁹

The Board of Veterans' Appeals used a similar approach. Then, as now, decisions by the Board were made by a three-member Board "section."¹⁰ Prior to judicial review, each section of the Board that considered disability matters consisted of two attorneys and a licensed physician. These Board members were charged to grant ben-

PHLET (1984). The Board is currently a statutory body. See 38 U.S.C. § 7101 (Supp. III 1991).

6. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 323 (1985). This opinion gives an excellent overview of the veterans' benefits system as it existed prior to the passage of the VJRA. This paternalistic concern for veterans goes back to the founding days of the country. "If 'paternalism' is an insignificant Government interest, then Congress first went astray in 1792 . . ." *Id.* The Court went on to conclude that the governmental interest was not insignificant. *Id.*

7. *Id.* at 309.

8. See 38 C.F.R. § 3.102 (1988).

9. 38 C.F.R. § 3.103(a) (1988). These regulatory principles of resolving doubt in a claimant's favor and assisting in the development of claims were made statutory by the VJRA. See 38 U.S.C. § 5107 (Supp. III 1991).

10. See 38 U.S.C. §§ 4002, 4003 (1988); 38 U.S.C. §§ 7102, 7103 (Supp. III 1991). Sections contained within title 38 of the United States Code, the title containing statutory provisions relating to veterans' benefits, were renumbered in 1991. See Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 402, 105 Stat. 187, 238 (1991); Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991). The same sections of the code appear with different numbers, depending on the year.

efits in each case in which it was legally and medically warranted. They were (and continue to be) required to consider all evidence of record,¹¹ but, in practice, they were expected to use the additional resources provided by their own training and their informed legal and medical judgment, gained through years of practical experience in the adjudication of such claims.¹²

This approach does not lend itself to review in an adversarial judicial arena. In the adversarial context, judges decide cases solely on the record before them. In fact, the United States Court of Veterans Appeals is expressly required to do so.¹³ Prior to the enactment of the VJRA, Board decisions increasingly reflected an attempt to improve decisional quality by providing a more detailed articulation of the rationale for the decision. A typical BVA decision had grown from a one-page document tersely allowing or denying appeals to a five- or six-page document describing the contentions raised, the evidence of record, the applicable statutory and regulatory authorities, and the reasons why the claim was allowed or denied. Nevertheless, prior to the VJRA, the explanation usually was neither detailed nor highly technical. For example, in response to questions such as whether a current disability was etiologically related to another condition that was present in service, the Board would sometimes just cite "sound medical principles" for its conclusion. In part, this approach reflected the belief that detailed technical medical explanations were not of interest to the average lay person. Also in keeping with the non-adversarial nature of the adjudication process, the Board generally refrained from commenting on "sensitive" matters such as the credibility, or lack thereof, of some statements and testimony received in support of a claim. Perhaps the most significant motivation for providing a truncated explanation for the basis of a decision was the necessity of processing an enormous caseload in a timely manner with limited resources.¹⁴ As discussed below, improving decision quality, productivity, and timeliness, despite a heavy workload, remain paramount concerns for the Board.

The VJRA, for the first time, required the Board to include "the reasons or bases for [its] findings and conclusions . . ."¹⁵ Previously, the Board had been required to include only "findings of fact

11. See 38 U.S.C.A. § 4005(d)(5) (West 1979), *superseded by* 38 U.S.C. § 7104(a) (Supp. III 1991).

12. For a fuller treatment of this approach and its history, see Charles L. Cragin, *A Time of Transition at the Board of Veterans' Appeals: The Changing Role of the Physician*, 38 FED. BAR NEWS & J. 500 (1991).

13. 38 U.S.C. § 7252(b) (Supp. III 1991).

14. In fiscal year 1988, the last full fiscal year before the VJRA became law, the Board received 43,792 appeals and disposed of 41,607 cases. *Internal Records of the Board* (on file with author). These records are required by 38 U.S.C. § 7101(d) (Supp. III 1991).

15. 38 U.S.C. § 7104(d)(1) (Supp. III 1991).

and conclusions of law separately stated" in its decisions.¹⁶ The rationale for this change, as contained in the legislative history of the VJRA, was rearticulated by the court in one of its early landmark decisions:

One reason given for this change, which was adopted in the final version of the VJRA, was to provide "a decisional document from the Board that will enable a claimant to understand, not only the Board's decision but also the precise basis for that decision, and [will] also permit a claimant to understand the Board's response to the various arguments advanced by the claimant." S. Rep. No. 418, 100th Cong., 2d Sess. 38 (1988). Moreover, the Committee provided another explanation for the change: "[T]he decisional document should assist the reviewing court to understand and evaluate the VA adjudication action."¹⁷

This rationale was particularly applicable to the evaluation of medical issues. The court concluded in one of its early opinions that:

BVA decisions must include the "reasons or bases" for medical conclusions, even those opined by a BVA physician; a mere statement of an opinion, without more, does not provide an opportunity for the veteran to explore a basis for reconsideration or for this Court to review the BVA decision "on the record" as required by 38 U.S.C. § 4052(b).¹⁸

Then, in *Colvin v. Derwinski*,¹⁹ the court stated that "BVA panels may consider *only* independent medical evidence to support their findings."²⁰ This line of cases effectively ended the "panel of experts" approach that had characterized the VA adjudication system since its inception.²¹ After the terms of current physician members expire in July 1994, the Board will continue to utilize the services of its physicians as teachers and advisors, but not as adjudicators.

IMPACT ON THE NONADVERSARIAL PROCESS

The VJRA brought about numerous changes, but its two principal features are the establishment of judicial review of the Board's decisions and the elimination of a Civil War era \$10.00 fee limitation that had the effect of keeping involvement of attorneys in veterans' benefits cases to a minimum.²² VA long opposed both changes. VA's

16. 38 U.S.C.A. § 4004(d) (West 1979).

17. *Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990) (quoting S. Rep. No. 418, 100th Cong., 2d Sess. 38 (1988) (emphasis added)).

18. *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990).

19. 1 Vet. App. 171 (1991).

20. *Id.* at 175 (emphasis added).

21. BOARD OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFAIRS, ANN. REP. OF THE CHAIRMAN, 5 (1992) [hereinafter CHAIRMAN'S ANN. REP. (1992)]. In my 1992 *Annual Report*, I reiterated that I do not intend to make any further recommendations to the Secretary for the appointment of physicians as members of the Board.

22. The \$10.00 fee limitation, previously found at 38 U.S.C. § 3404(c), is the prin-

most frequently voiced concern was that these measures would impair its long-standing, supportive, nonadversarial role in its relationship with veterans. A remark by VA's General Counsel at a 1986 Congressional hearing is typical. "Enactment of judicial review would interject an adversary relationship into what has been a cooperative process. As a matter of principle, VA should never be placed in an adversary position, much less become an opposing litigant, with respect to claimants."²³ In the same statement,²⁴ the General Counsel quoted this excerpt from Justice Rehnquist's opinion in *Walters v. National Association of Radiation Survivors*:²⁵

Knowledgeable and thoughtful observers have made the same point in other language:

"To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy."²⁶

As the fifth anniversary of the passage of the VJRA nears, the specter of litigious, overzealous counsel has not yet materialized as a serious or systemic problem. Thus far, the private bar as a whole seems to have shown relatively little interest in the practice of veterans law. In fiscal year 1988, attorneys served as the representative in 669 cases disposed of by the Board. This constituted 1.6% of the

cial focus of *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985). That opinion includes an excellent discussion of the history of this provision and its governmental purposes. Although the \$10.00 limitation was removed by the VJRA, there are still restrictions on fees. See 38 U.S.C. § 5904 (Supp. III 1991); 38 C.F.R. § 20.609 (1992).

23. *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the House Comm. on Veterans' Affairs*, 99th Cong., 2d Sess. 221 (vol.II) (1986) (statement of Donald L. Ivers, General Counsel, Veterans Administration).

24. *Id.* at 223-24.

25. 473 U.S. 305 (1985).

26. *Id.* at 325-26 (quoting Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1287-90 (1975)). Similar objections were raised to the bills that eventually evolved into the VJRA. See *Judicial Review Legislation: Hearing Before the Senate Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 490 (1988) (statement of Donald L. Ivers, General Counsel, Veterans Administration); *Judicial Review of Veterans' Affairs: Hearing Before the House Comm. on Veterans' Affairs*, 100th Cong., 2d Sess. 446 (1988) (statement of Donald L. Ivers, General Counsel, Veterans Administration).

cases decided by the Board during that period. These figures were typical until fiscal year 1992, when attorneys served as the representative in 763 cases, or 2.3% of the cases disposed of by the Board. The figures for the first three quarters of fiscal year 1993 are 541 cases and 2.7%, respectively. Thus the impact of attorney representation before the Department has been relatively slight.²⁷

Financial disincentives probably remain the most significant factor contributing to the relatively low level of attorney involvement. First, fees may not be charged for work performed at the early stages of representation before the Department. With certain very limited exceptions, attorneys may not charge fees "with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case."²⁸ Thus, although attorneys may become involved early on in a claim to "build the record," they must work without charge until there has been an initial denial by the Board, and the time has arrived for filing a motion for administrative reconsideration, a reopened administrative claim, or a judicial appeal.

Second, increases in disability compensation awards in VA benefit cases are often small and therefore yield only modest attorney fees, especially in the typical situation where the attorney charges a contingency fee based on a percentage of the amount of an award of accrued, past-due benefits. Unlike Social Security disability cases, most VA disability compensation claims do not involve awards based on total disability. Rather, VA disability compensation is awarded on a graduated scale, based on the degree of impairment shown. The degree of disability is calculated in 10% increments.²⁹ The largest group of current disability awards is in the 10% category.³⁰

27. These figures do not include cases in which the representative was Vietnam Veterans of America, a veterans' service organization that often uses the services of attorneys and law students in appellate representation before the Board. This organization usually serves as the representative in less than one-half of one percent of the cases before the Board. *Internal Records of the Board* (on file with author). The statistics for fiscal year 1992 can be found in the CHAIRMAN'S ANN. REP. (1992), *supra* note 21. The figures for fiscal year 1993 have not yet been published but will be available in the CHAIRMAN'S ANN. REP. (1993).

28. 38 U.S.C. § 5904(c)(1) (Supp. III 1991). The same limitations apply to fees charged by "agents," i.e., non-attorney claims agents who have met the VA's accreditation standards. See 38 C.F.R. §§ 14.629(b), 20.3(b) (1992). There are very few of these agents. Fees may not be charged by service organization employees who act as representatives or by individuals recognized as representatives with respect to a particular claim, typically a family member or friend who represents an individual appellant. See 38 U.S.C. §§ 5902, 5903 (Supp. III 1991).

29. See 38 C.F.R. pt. 4 (1992).

30. At the end of fiscal year 1992, the number of veterans assigned disability ratings totalled 2,180,936. Of these, 871,467 were at the 10% level. Only 132,078 were at the 100% level. U.S. DEP'T OF VETERANS AFFAIRS, ANN. REP. OF THE SECRETARY OF

Another significant factor minimizing private attorney participation is that national and state veterans' service organizations represent veterans and their dependents without charge. These organizations historically have provided most of the representational services for claimants in the VA adjudication system and, given their depth of experience, often have a degree of subject matter expertise that exceeds that of many private attorneys who are still unfamiliar with this area of practice. The service organizations continue to provide representation for most appellants before the Board.³¹

Recent changes in the law may promote greater attorney involvement in administrative adjudication. In the Federal Courts Administration Act of 1992,³² Congress amended 28 U.S.C. § 2412(d)(2)(F) to include the United States Court of Veterans Appeals within the definition of courts authorized to make fee awards under the Equal Access to Justice Act (EAJA).³³ Although EAJA fees are awarded for representation before the court, the fact that such fees are based on factors independent of the amount recovered by the client provides some incentive for attorney involvement earlier in the development of the case at the administrative level. In one case recently argued before the court, an issue was raised as to whether an EAJA award is recoverable for attorney services rendered in a case after the court has remanded that case to the Board.³⁴ If the court decides that issue in the affirmative, an additional incentive for attorney representation would result.

Another incentive for involvement of the private bar was highlighted by a recent decision of the United States Court of Appeals for the Federal Circuit. In *Gardner v. Brown*,³⁵ the court held that a VA regulation impermissibly imposed a fault or accident requirement for benefits awarded under 38 U.S.C. § 1151 (formerly section

VETERANS AFFAIRS, 79, 81 (1992) [hereinafter SECRETARY'S ANN. REP. (1992)]. Monetary amounts for each rate are set by statute. See 38 U.S.C. § 1114 (Supp. III 1991). Since these rates are usually adjusted annually, the rates in published versions of the code are frequently somewhat less than the current actual rate. As an example, the 10% and 100% rates were respectively \$83 and \$1,680 monthly, effective December 1, 1991. Veterans' Compensation Rate Amendments of 1991, Pub. L. No. 102-152, 105 Stat. 985 (1991). These rates were raised by the same percentage and at the same time as the December 1, 1992, increase in Social Security benefits. Veterans' Compensation Cost-of-Living Adjustment Act of 1992, Pub. L. No. 102-510, § 2, 106 Stat. 3318 (1992).

31. For the first three quarters of fiscal year 1993, these organizations provided representation in approximately 87% of the cases decided by the Board. *Internal Records of the Board* (on file with author).

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

33. *Id.* § 506, 106 Stat. at 4513.

34. *Moore v. Brown*, U.S. Vet. App. No. 89-79. This case is currently pending before the U.S. Court of Veterans Appeals.

35. 5 F.3d 1456 (Fed. Cir. 1993).

351).³⁶ That statute provides for compensation for additional disability incurred or aggravated as the result of VA medical treatment.³⁷ The invalidation of this regulation, which had been in effect for nearly sixty years, essentially converted a fault-based compensation scheme into a no-fault system. Clearly, *Gardner* will have substantial prospective financial impact on both the VA compensation and health care systems. In addition, the decision calls into question nearly sixty years of VA administrative adjudications of entitlement to benefits under 38 U.S.C. § 1151. If the court determines that many of these prior decisions contain "clear and unmistakable" error under section 3.105 of title 38 of the Code of Federal Regulations because they were based on an invalid regulation, the possibility of a contingency fee based on a percentage of a large award of past-due accrued benefits may spur increased attorney involvement.

In contrast to the approach the Board has historically taken, the adversarial system is the standard operating procedure for the United States Court of Veterans Appeals, which, in this sense, operates similarly to any other federal appellate court. The VA claimant, usually appearing *pro se*,³⁸ but sometimes represented by a private attorney, or by a service organization attorney or non-attorney practitioner, is on one side and the Secretary of Veterans Affairs, represented by the Department's General Counsel,³⁹ is on the other.

Tension inevitably arises between VA's nonadversarial adjudication system and the adversarial arena in which the decisions of that system are reviewed. The Board renders the final decision for the Secretary on nearly all benefits entitlement issues.⁴⁰ The court reviews decisions of the Board. As a direct result, the Board literally is the area of interface between the adversarial judicial system and the nonadversarial VA benefits system. VA was created in response to the great moral debt the nation owes to its veterans. The Board is charged with providing veterans and their dependents with a fair, high-quality decision in a timely manner.⁴¹ At the same time, Board decisions must comport with all the requirements of the law, as articulated by the court. While relatively few decisions of the Board actually come before the court, all BVA decisions must be prepared to withstand the scrutiny of judicial review. Preparation of cases according to these standards, which include all notice and due process procedures, has increased the length and complexity of BVA deci-

36. *Id.* at 1463-64.

37. 38 U.S.C. § 1151 (Supp. III 1991).

38. Recent statistics from the court reflect that, as of July 31, 1993, 82.8% of appellants in 1993 appeared before the court *pro se*. UNITED STATES COURT OF VETERANS APPEALS, CASEFLOW REPORT (July 31, 1993).

39. 38 U.S.C. § 7263(a) (Supp. III 1991).

40. *Id.* § 7104(a).

41. By statute, the Board is charged "to conduct hearings and consider and dispose of appeals properly before [it] in a timely manner." *Id.* § 7101(a).

sions, added a legalistic and adversarial tone to the decision making process, and dramatically increased the time it takes the Board to issue a decision.

One of the clearest examples of the kind of conflict that can now arise between the adversarial and nonadversarial processes is in the duty to weigh the credibility and probative value of lay statements and testimony. The nonadversarial approach, as it was historically applied at the Board, would favor a deferential or indirect approach to unreliable evidence, especially when it appears to be a product of fading memory or a well-meaning effort by a friend or relative to be supportive.⁴² The Board would include little or nothing about such evidence in the decision, assign it little or no weight, and support the decision by citing evidence with greater probative value—particularly documents prepared proximate in time to the actual occurrence of the significant events. The credibility of an affiant or witness was directly attacked only in the most egregious circumstances.

This “deferential” approach is inconsistent with the adversarial nature of judicial review. In order to determine whether the Board has decided a matter correctly, the court must be informed, on the record, of the “reasons or bases” for the decision. The court has made it clear that the Board must candidly discuss the weight given to lay statements and testimony in its decisions. For example, *Jones v. Derwinski*⁴³ included this language:

However, the majority here is of the view that the assessment of the credibility of the veteran's sworn testimony is a function for the BVA in the first instance and that it is not for this Court to find . . . that sworn testimony, under the circumstances of this case, is credible. That issue will thus be remanded to the Board with a direction to make a specific determination as to the credibility of the veteran's testimony and to provide a statement of the reasons or bases for that determination.⁴⁴

The Board must be candid in its decisions in order to withstand judicial review. Such candor, especially on matters of credibility, appears inconsistent with the nonadversarial atmosphere that had historically characterized proceedings before VA.

Another source of tension arises from the juxtaposition of the more formal and legalistic approach required in the post-judicial review era with the traditional nonadversarial approach to entitle-

42. Certainly, the majority of veterans present their cases as honestly as they can. In some cases, it may become apparent to the finder of fact that recitations of events have been embroidered and expanded, that accurate memory of the events described has faded in time, or that descriptions of the events are not based on first-hand information. In a few instances, statements and testimony are simply not truthful.

43. 1 Vet. App. 210 (1991).

44. *Id.* at 217.

ments adjudication. An example will illustrate the point. A generally accepted principle of law is that there is a point at which there is an end to litigation and that the same questions may not be endlessly contested. The doctrine of *res judicata* is an example. Although the standards are much less strict in VA claims adjudication than in many other areas of the law, this principle is recognized in statutes and regulations that raise obstacles to gaining VA benefits once a claim has been finally denied.⁴⁵ As part of the traditional paternalistic outlook, some Board members of the old school were reluctant to deny an appeal based on the finality of an earlier adverse decision. They might simply ignore the prior final denial, or give it cursory treatment, and then go on to deny the appeal by giving a full explanation of why the appeal could not be allowed, namely, because the case could not stand on its merits. This way, Board members felt that it would not be seen as denying VA benefits on a technicality. For a time, the court tended to tolerate such approaches.

Today, one of the ways to overcome the effect of a prior final denial is to present "new and material evidence" in order to reopen the claim.⁴⁶ In *Manio v. Derwinski*,⁴⁷ the court mandated a two-step analysis when an attempt to reopen the claim with additional evidence was made subsequent to a final denial. First, the Board must determine whether the additional evidence is "new and material." Second, if the Board determines that the claimant has produced new and material evidence, then the claim is reopened and the case evaluated on the basis of all the evidence, both old and new.⁴⁸ In its initial application of this two-step analysis, the court sustained Board decisions that, in its opinion, could stand on their own merits even though analysis contained in those decisions had not gone through the proper procedural steps.⁴⁹ This changed with *McGinnis v. Brown*.⁵⁰

Upon further reflection, however, it becomes apparent that our past analyses may have been incomplete; jurisdiction does indeed matter and it is not "harmless" when the VA during the claims adjudication process fails to address threshold jurisdictional issues. This is particularly true when the Secretary ignores the mandates

45. Administrative denials of VA benefits to a claimant become final in one of two ways: either an appeal is not filed within the time permitted by law, or there is a prior Board decision on the same issue and a motion for reconsideration has not been received or granted. See 38 U.S.C. §§ 7103(a), 7104(b), 7105, 7105A (Supp. III 1991); 38 C.F.R. §§ 20.302, 20.501, 20.1100 (1992).

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

47. 1 Vet. App. 140 (1991).

48. *Id.* at 145.

49. For an exposition and history of this harmless error approach, see Judge Steinberg's separate opinion concurring in part and dissenting in part in *McGinnis v. Brown*, 4 Vet. App. 239, 245 (1993).

50. *Id.* at 239.

of 38 U.S.C.A. §§ 7104(b) and 7105(c) (West 1991) which provide that finally denied claims cannot be reopened without the submission of "new and material evidence" under 38 U.S.C.A. § 5108 in the case of final BVA decisions or without compliance with regulations in the case of unappealed final RO [Regional Office] denials. When we affirm a BVA decision which purports to deny a reopened claim on the merits after we have concluded that there was, in fact and in law, no reopened claim to deny, we give at best equivocal direction to adjudicators and members of the Board, deprive the previous denial of finality, and effectively establish a date for a new final denial which has no basis in fact or in law. We conclude that the appropriate remedy in such circumstances is not to affirm the BVA decision denying the claim on the merits but to vacate the decision and thereby reestablish the finality of the previous denial.⁵¹

Although it is hard to quarrel with the court's position on purely legal grounds, the point is clear that the Board now must give full credence to the technical requirements of the law—especially in matters affecting its own jurisdiction.

JUSTICE DELAYED

The court has been creating a body of "veterans' common law" through its precedent decisions.⁵² The applicable law, as articulated by the decisions of the court, is changing on almost a daily basis. Because of the increasing complexity and rapidly evolving state of the law, BVA decisions are lengthier, more complex, and require more time to prepare than ever before. As a consequence, speedy justice in VA claims adjudication has become an elusive target. No decision of the court has yet resulted in an improvement in decision productivity or timeliness anywhere in the entire VA adjudication system.⁵³ Many decisions have had the exact opposite result. Furthermore, another layer of appellate review adds to processing time as lower level adjudicatory bodies struggle to meet new requirements. The remainder of this section looks at some of the complications that have served to lengthen VA's claims adjudication process.

Providing benefits to this country's veterans is an enormous undertaking. The fiscal year 1992 VA entitlement appropriations totaled more than seventeen *billion* dollars.⁵⁴ VA pays out more than

51. *Id.* at 244.

52. *En banc* and panel decisions of the court are precedential. Single judge decisions are essentially only "law of the case." See *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992).

53. CHAIRMAN'S ANN. REP. (1992), *supra* note 21, at 15. It is possible that some subsequent decisions by the court placing greater emphasis on terminating review at earlier stages in appropriate cases, such as *McGinnis*, will eventually have an impact on expediting some cases.

54. SECRETARY'S ANN. REP. (1992), *supra* note 30, at 63.

eight hundred million dollars in disability benefit payments every month.⁵⁵ VA regional offices around the country accomplished 3.2 million "completed actions" in fiscal year 1992.⁵⁶ Notices of disagreement, the first procedural step in appealing an adverse field determination,⁵⁷ filed in the field during fiscal year 1992 totaled 69,928. During the same period, 38,229 appeals were pursued to completion and transferred to the Board. The Board disposed of 33,483 cases. About half of those dispositions were final decisions by the Board appealable to the court. The court received 1,742 notices of appeal during the fiscal year. Only a tiny fraction of the adjudicative decisions made in the field and only about 10% of the Board's final decisions wind up before the court.⁵⁸ Nevertheless, the impact of the court's decisions is enormous because they often dramatically change procedures throughout the system.

The court has held that its decisions must be given full force and effect immediately, even when VA may have appealed a decision.⁵⁹ The precedent panel or *en banc* decisions of the court, announcing important changes in interpretation of the law, affect each of the thousands of cases pending at any given time and may require returning to "square one" with all affected cases. Occasionally, the process must be repeated twice in the same case when the court reverses itself on further review.⁶⁰ This offshoot of judicial review often adds to claim processing time.⁶¹

55. *Id.* at 81.

56. Telephone interview by a member of my staff with Michael Bratz, Field Operations Staff Chief, Field Operations Division, Veterans Benefits Administration, Department of Veterans Affairs (July 15, 1993). Mr. Bratz indicated that this figure includes adjudications of all types of compensation and pension claims processed by VA's various regional offices. It does not include all potentially appealable field decisions. For example, it does not include decisions made in education benefit claims. The figure does, however, illustrate the scope of VA's adjudicative activity and the very small number of determinations appealed.

57. See 38 U.S.C. § 7105 (Supp. III 1991).

58. See UNITED STATES COURT OF VETERANS APPEALS, CASEFLOW REPORT (Mar. 31, 1993).

59. *Tobler v. Derwinski*, 2 Vet. App. 8, 14 (1991). The court did provide VA with some latitude in terms of staying cases pending the outcome of an appeal from one of its decisions. *Id.* at 12 (citing *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980), *cert. denied*, 449 U.S. 975 (1980)). 38 U.S.C. § 7267 (formerly § 4067) originally permitted some reaction time by providing, in effect, that the court's decisions did not become final for 30 days. That provision was later deleted. Pub. L. No. 102-82, § 1, 105 Stat. 375 (1991).

60. For example, in "*Abernathy I*," published at 2 Vet. App. 391 (1992), but later withdrawn from publication, the court held that the Board should apply the *Manio* two-step analysis to pension claims. Several months later, in "*Abernathy II*," the court retreated from this position on reconsideration. *Abernathy v. Principi*, 3 Vet. App. 461, 464 (1992).

61. While there has been appellate review of VA claims adjudication in the field for 60 years by the Board itself, the Board's decisions are not precedential. See 38 C.F.R. § 20.1303 (1992). Accordingly, they did not have the same impact within the

Another factor that significantly increases the time it takes for final resolution of a claim is that the Board is finding that it must remand more cases for additional development than it has in the past. Most cases remanded to the originating agency are returned to the Board for final adjudication. For the decade prior to the passage of the VJRA, the Board's fiscal year remand rates ran from a low of 13.4% to a high of 20.7%. With the full impact of judicial review, the remand rate hit 50.5% in fiscal year 1992. The rate for the first three quarters of fiscal year 1993 is only slightly improved, at 47.3%.⁶²

Several factors contribute to this increase, but the most significant has been the court's expansive interpretation of the Department's duty to assist claimants in the development of their claims.⁶³ Various decisions of the court require VA to seek out potentially relevant additional service records,⁶⁴ private and VA medical records,⁶⁵ Social Security Administration records,⁶⁶ new physical examinations,⁶⁷ and more complete examinations.⁶⁸ Other decisions have expanded the scope of appeals, under the duty to assist rubric, to include "inferred" claims for ancillary benefits⁶⁹ and "issues raised in all documents or oral testimony submitted prior to the BVA decision," even though those issues may not have been mentioned at all in an appellant's formal appeal.⁷⁰

"Due process" remands by the Board have also increased and are likely to continue to increase. The court's tendency to expand the scope of issues on appeal, making it more likely that an issue will have been missed and therefore not adjudicated below, has already been noted. The court has also been extremely expansive about what statutory and regulatory authorities must be addressed. For example, in *Schafrath v. Derwinski*,⁷¹ the court stated, "Where a VA regulation is made *potentially* applicable through the assertions

Department.

62. *Internal Records of the Board* (on file with author).

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

64. See, e.g., *Jolley v. Derwinski*, 1 Vet. App. 37 (1990).

65. See, e.g., *Case v. Derwinski*, 2 Vet. App. 592, 595 (1992); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); *Ferraro v. Derwinski*, 1 Vet. App. 326, 334 (1991); *Little v. Derwinski*, 1 Vet. App. 90, 92 (1990).

66. See, e.g., *Murincsak v. Derwinski*, 2 Vet. App. 363, 372 (1992).

67. See, e.g., *Proscelle v. Derwinski*, 2 Vet. App. 629, 632 (1992).

68. See, e.g., *Wilson v. Derwinski*, 2 Vet. App. 16, 21 (1991); *Schafrath v. Derwinski*, 1 Vet. App. 589, 595 (1991); *Moore v. Derwinski*, 1 Vet. App. 401, 405-06 (1991); *Little v. Derwinski*, 1 Vet. App. 90, 92-93 (1990).

69. *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991).

70. *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991). Interestingly, opinions such as this one neither note nor discuss statutory provisions that suggest that an appellant has at least some obligation to be clear about what he or she is seeking on appeal. See, e.g., 38 U.S.C. §§ 7105(d)(3), 7105(d)(5) (Supp. III 1991).

71. 1 Vet. App. 589 (1991).

and issues raised in the record, the Board's refusal to acknowledge and consider that regulation is 'arbitrary, capricious, an abuse of discretion,' and 'not in accordance with the law,' and must be set aside as such."⁷² Thus, the Board will need to identify and discuss all potentially applicable statutes and regulations even if they have not been raised or specifically considered below. In *Bernard v. Brown*,⁷³ the court stated:

[W]hen, as here, the Board addresses in its decision a question that had not been addressed by the RO [Regional Office], it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby.⁷⁴

A Board section's decision to remand a case to the field is not necessarily a reflection on the work product of various VA field offices. There may be a substantial interval between the time that a decision is made in the field and the time that decision is reviewed by the Board—an interval that is unfortunately growing longer in the current climate. As the recent past has proved, the state of veterans law can change rapidly. What was accepted practice when a field decision was made may no longer be legal when the Board reviews the decision.

Another case that significantly extends the time involved in reaching a final decision is *Thurber v. Brown*.⁷⁵ The evolution of the court's reasoning began earlier with its decision in *Colvin v. Derwinski*.⁷⁶ The *Colvin* court concluded that the Board could only consider independent medical evidence and could not rely on the medical judgment of its members.⁷⁷ Often the medical evidence received by the Board does not include a reasoned, well-supported opinion about the main medical question at issue although the raw data upon which to base such an opinion is present. The court seemed to realize this difficulty in *Colvin* where it stated:

If the medical evidence of record is insufficient, or, in the opinion of the BVA, of doubtful weight or credibility, the BVA is always free to supplement the record by seeking an advisory opinion, or-

72. *Id.* at 593 (emphasis added).

73. 4 Vet. App. 384 (1993).

74. *Id.* at 394.

75. 5 Vet. App. 119 (1993).

76. 1 Vet. App. 171 (1991). As to advisory medical opinions, see 38 U.S.C. § 7109 (Supp. III 1991). In a later case, the court required that, prospectively, the Board "include in its decisions quotations from medical treatises (rather than bare citations), and such quotations should be of sufficient length so that their context (both within the treatise in question and within the body of relevant medical literature) is able to be determined." *Hatlestad v. Derwinski*, 3 Vet. App. 213, 217 (1992).

77. *Colvin v. Derwinski*, 1 Vet. App. at 172.

dering a medical examination or citing recognized medical treatises in its decisions that clearly support its ultimate conclusions.⁷⁸

Reliance on medical treatises is an attractive alternative in routine cases, although it can sometimes be extremely difficult to find an authority for very basic principles. The Board implemented this method in a number of cases, including *Thurber v. Brown*.

In *Thurber*, the court addressed for the first time the due process implications of using evidence, in this case medical texts, that had not been part of the record below and that the appellant had not had an opportunity to rebut. The court held:

[B]efore the BVA relies, in rendering a decision on a claim, on any evidence developed or obtained by it subsequent to the issuance of the most recent SOC or SSOC with respect to such claim, the BVA must provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it. If, in the course of developing or obtaining or attempting to so develop or obtain such evidence, the BVA becomes aware of any evidence favorable to the claimant, it shall provide the claimant with reasonable notice of and a reasonable opportunity to respond to the favorable evidence, and shall in its decision provide reasons or bases for its findings with respect to that evidence.⁷⁹

Compliance with *Thurber* will add at least sixty to ninety additional days to the processing of cases affected by that decision.⁸⁰

Board decisions now simply take a great deal more time to prepare and review because of their increased complexity.⁸¹ The relatively simple, result-oriented decisions of the past are not adequate to meet the court's requirements. The old standard used by the Board for planning purposes in estimating resource requirements was that an average Board decision was 240 typed lines, or about six

78. *Id.* at 175.

79. *Thurber v. Brown*, 5 Vet. App. 119, 126 (1993). "SOC" and "SSOC" refer to "statement of the case" and "supplemental statement of the case." See 38 U.S.C. § 7105(d)(1) (Supp. III 1991); 38 C.F.R. §§ 19.29-19.31 (1992).

80. I have exercised my authority under 38 C.F.R. § 20.2 (1992) to prescribe a procedure to meet the court's *Thurber* requirements. This procedure will provide notice and comment opportunities similar to those provided by 38 C.F.R. § 20.903 (1992) when the Board intends to rely on medical treatises or other evidence gathered following the most recent statement of the case or supplemental statement of the case. BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS, MEMORANDUM NO. 01-93-12, PROCESSING OF APPEALS AFFECTED BY THURBER V. BROWN, NO. 92-172 (U.S. VET. APP. MAY 14, 1993).

81. The trend toward increased complexity may be illustrated by the growth of the chapter of the BVA manual that outlines the basics of preparation of Board decisions. VA, Board of Veterans' Appeals, MBVA-1, pt. II, ch. 9. When the chapter was formally revised and reprinted in 1986, it was 28 pages in length, including the exhibits. The first draft of a new revision currently under review is 139 pages in length, including exhibits.

pages, in length. Average decision length in fiscal year 1993 has been 300 lines. Even this 25% increase does not tell the full story. About half of the Board's decisions are now remands. These are not final decisions and the remand documents are typically much shorter than decisions on the merits. The average cost per decision has increased dramatically, more than doubling from fiscal year 1988 to date. This increase reflects the time it takes to perform the detailed research and prepare the lengthy explanations that are now required in even relatively simple cases. The Board's heavy work load has been subject to judicial notice by the court in a recent decision which noted: "The Court judicially notes that the Board has an extremely heavy work load and is striving very hard to meet new requirements that are, in part, due to cases from this Court."⁸²

Compliance with the requirements of the evolving "veterans' common law" has caused the Board to fall further behind as it attempts to do more with limited resources, including the current statutory limitation on the number of Board members.⁸³ The new complexity has had a similar effect throughout the VA claims adjudication system. Appeal processing time in the field averaged 168 days in fiscal year 1988. For the first three quarters of fiscal year 1993, it was 213 days. The time it took to process an average appeal to completion at the Board was 136 days in fiscal year 1988. It is now 238 days. In fiscal year 1988, the Board received 43,792 appeals and disposed of 41,607 appeals. In fiscal year 1992, the figures were 38,229 and 33,483, respectively. The Board received 27,610 appeals during the first three quarters of fiscal year 1993, but was only able to dispose of 20,088. Another way of looking at the situation is to measure "response time," the projected number of days it would take the Board to decide all currently pending appeals based on the average number of decisions rendered per day over the preceding year. Response time increased from 139 days in fiscal year 1991 to 240 days in fiscal year 1992. In August 1993, that figure reached an all-time high of 405 days and is projected to go as high as 441 days by the end of this fiscal year.⁸⁴

In a memorandum of June 8, 1993, the Secretary of Veterans Affairs instructed the Board to include in or attach to each of its final decisions entered on or after October 1, 1993, a list of the specific evidence that the Board relied on in arriving at its decision. This "Certified List" will include all items of substantive evidence, as well as evidence covering all procedural and "duty to assist" issues, which were considered by the Board. The list will be presented by VA General Counsel to the court for consideration as the "designated record" in each case on appeal. At this point, the Board is

82. *Delisio v. Brown*, No. 93-639 (U.S. Vet. Ct. App. July 15, 1993).

83. 38 U.S.C. § 7101(a) (Supp. III 1991).

84. *Internal Records of the Board* (on file with author).

unable to quantify the effect of the preparation of the "Certified List" on the productivity and timeliness of decisions. Clearly, it will not have a salutary effect on either.

MEETING THE CHALLENGE

Simpler times are unlikely to return. In the meantime, the Board is doing its best to meet the challenges. Board decision formats have been completely redesigned to meet the court's requirements. We are promptly distributing the court's decisions to Board members and staff counsel. Revised procedures are devised as rapidly as possible to meet changing needs when new interpretations of the law are received. VA has allocated funds to increase our staff of attorneys to assist with decision preparation, as well as to implement computer automation plans. The Board should be fully automated, using state-of-the-art computer technology, in the coming fiscal year. In July of this year, we used new technology to archive one year's BVA decisions on a single CD-ROM disc, permitting exhaustive data searches with sophisticated software. A formal, comprehensive training program for staff counsel has been initiated. Board employees, who were previously in several locations within the District of Columbia, have been consolidated into one building to improve communications and case movement logistics. Effective in January 1992, I exercised my authority to direct that Board hearings be conducted by single members of the Board, rather than panels of members, in order to provide hearings more rapidly and to free members for other duties.⁸⁵ The Board held 1,394 hearings in Washington, D.C., and 1,258 hearings at VA's regional offices in fiscal year 1992, a significant increase from the 1,108 hearings held in Washington, D.C., and the 880 hearings held in VA regional offices in fiscal year 1991.⁸⁶ In fiscal year 1993, the Board held 3,533 hearings at VA regional offices and 1,172 hearings in Washington, D.C.⁸⁷ I have introduced "trailing docket" procedures to maximize the effective use of Board members' time in conducting hearings. Measures such as these are especially important in view of the increased work load in general and the increase in the number of field hearing requests since the right to a hearing in the field became statutory with the passage of the VJRA.⁸⁸ Nevertheless, it is unlikely that improvements in administrative efficiency alone will be able to restore appeal resolution to the previous levels of response time.

The United States Senate is currently considering the Department's legislative proposal in the form of a bill known as the "Veter-

85. See 38 U.S.C. § 7102(b) (Supp. III 1991).

86. CHAIRMAN'S ANN. REP. (1992), *supra* note 21, at 9.

87. *Internal Records of the Board* (on file with author).

88. See 38 U.S.C. § 7110 (Supp. III 1991). As of April 1993, there were 2,611 pending requests for field hearings before Board members.

ans' Appeals Improvement Act of 1993,"⁸⁹ to improve and clarify certain adjudication and appeal procedures relating to claims for benefits. This legislative proposal would help to alleviate the case backlog. One of the changes contained in this bill is a provision that would permit individual Board members to decide cases, as opposed to the current system of review by three-member Board sections.⁹⁰ It is projected that this would permit an approximate 25% overall increase in decision productivity. Decision making by individual administrative law judges has worked well in the Social Security Administration and other administrative appeals systems. Using those systems as a model, review by individual Board members could be effective here as well.

In addition, the bill would permit the Board to conduct at least some hearings with the presiding Board member or members remaining in Washington and taking testimony of appellants and witnesses in the field through the use of modern communications technology. This should cut down on productive time lost during travel and permit the Board to offer hearings more promptly.

Under the bill, the Chairman, or another single Board member, would also be able to rule on procedural motions and other matters not requiring extensive familiarity with all of the evidence in a case. This could permit streamlined motion disposition procedures that would free other members to review and decide cases on the merits. The bill would permit more flexibility to meet case load needs by removing the current statutory ceiling on the total number of Board members. Another feature would be a provision specifically authorizing the Board to utilize medical experts employed by VA and other government agencies to help meet the demand for medical opinions generated by the *Colvin* decision—authority already implied by 38 U.S.C. § 7109.

SUMMARY

Judicial review is achieving some of its intended results. It has provided a convenient forum for testing the validity of VA regulations, settling some long-disputed points of veterans law. It has helped in establishing a more systematic approach to benefit claims adjudication. By providing a forum for dispute resolution outside the Department, it has enhanced the perception of fairness and objectivity in the adjudication process. It is noteworthy that the Board's allowance rate (reversal of decisions of VA regional offices) has increased from a range of 12.8% to 14.4% between fiscal year 1982 and fiscal year 1991, to 15.8% in fiscal year 1992 and 16.2% for fiscal year 1993 through July 30, 1993. Some of the feared results,

89. S. 1445, 103d Cong., 1st Sess. (1993).

90. See 38 U.S.C. §§ 7102(a)(1), 7103(a) (Supp. III 1991).

such as a nonadversarial system being overwhelmed by attorney-induced contentiousness and complexity, have not come to pass.

Nevertheless, there have been offsets in the form of requirements for extensive, costly, and time-consuming record building; more bluntness, formality, and an ensuing adversarial tone in decisional documents; and new legal and procedural complexity that considerably lengthens claims resolution at the administrative level. In fact, average response time now has increased to more than threefold from what historically had been considered "timely." Only partial relief can be attained by improvements in administrative efficiency at the Board. Some legislative initiatives, particularly permitting appellate decisions by individual Board members rather than panels of members, may provide additional relief.

