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## Five Years Under the Veterans Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process

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# FIVE YEARS UNDER THE VETERANS' JUDICIAL REVIEW ACT: THE VA IS BROUGHT KICKING AND SCREAMING INTO THE WORLD OF MEANINGFUL DUE PROCESS

*Lawrence B. Hagel and Michael P. Horan*<sup>1</sup>

## THE MANY PERSPECTIVES OF THE VETERAN

I have been asked to give you the "veterans' perspective" on whether the Court of Veterans Appeals has served the purpose for which it was created by Congress and also to describe what additional steps the court might take to further the ends desired by veterans. This is no easy task.

It is difficult not because I do not have a lot to say. It is difficult because it is a charge to speak, in a sense, for all veterans. In order to understand what I mean, I think it may be helpful to give you a little background on the view of the veterans community regarding judicial review.

There are forty veterans service organizations<sup>2</sup> recognized<sup>3</sup> by the Department of Veterans Affairs (VA).<sup>4</sup> These organizations range from the smallest, the Congressional Medal of Honor Society, to the largest, the American Legion, which boasts 3.2 million members. The Paralyzed Veterans of America, of which I am the General Counsel, fits somewhere in the middle. In addition, there are other small organizations of veterans which do not have official VA recognition. In all, these organizations speak for some twenty-seven million veterans of the United States Armed Forces.

The number of veterans organizations gives you an idea of the diversity of interests of veterans. There is complete unanimity of opinion on few issues affecting the veterans community. Judicial review

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This Article is based on the remarks of Robert L. Nelson, General Counsel of PVA, delivered at the University of Maine School of Law on September 24, 1993. Contributions to this article were made by Fredrick J. E. Mullen, Sr., Director of PVA Appellate Services and William Mailander, Esq., Associate Director, PVA Veterans Appeals Litigation Office.

2. DEPARTMENT OF VETERANS AFFAIRS, DIRECTORY OF VETERANS SERVICE ORGANIZATIONS (1993).

3. "Recognized" organizations are those approved by the VA to prosecute claims on behalf of veterans before the Department of Veterans Affairs. 38 U.S.C.A. § 5902 (West 1991).

4. For simplicity the Department of Veterans Affairs will be referred to by its more widely known acronym, the "VA."

is an example.

To give you some perspective on my remarks, let me tell you a little about the Paralyzed Veterans of America (PVA). PVA's membership is composed of 16,000 veterans, all of whom have either a spinal cord injury or disease. We have thirty-six chapters throughout the United States and in the Commonwealth of Puerto Rico. The national organization employs some 275 individuals. About 185 of those employees, located in 56 service offices, are dedicated to the direct delivery of services to veterans by assisting them in obtaining the benefits to which they are entitled. This number includes an office charged solely with representing veterans at the Board of Veterans' Appeals and one which represents veterans before the Court of Veterans Appeals. All of our representation is provided free of charge to veterans and without regard to PVA membership status. In total, PVA currently holds the power of attorney for approximately 82,000 veterans and over the past six years has had more than 10,000 of its cases decided by the Board of Veterans' Appeals. It has represented nearly 100 appellants before the United States Court of Veterans Appeals and United States Court of Appeals for the Federal Circuit.

#### PRE-JUDICIAL REVIEW VIEWS ON THE VA ADJUDICATION SYSTEM

For over 170 years prior to the passage of the Veterans' Judicial Review Act (VJRA)<sup>5</sup> in 1988, it was the view of Congress that there should be no judicial review of veterans' claims for benefits.<sup>6</sup> Additionally, the Administrative Procedure Act, passed in 1946, effectively exempted the VA from its reach, leading one commentator, and more recently the U.S. Court of Appeals for the Federal Circuit, to observe that "the Veterans' [sic] Administration stands in 'splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review.'"<sup>7</sup>

Veterans, perceiving injustice and arbitrariness, began to seek a means of independent review of VA decisions regarding claims for disability compensation and veterans' pensions. The first Congress-

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5. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989) (hereinafter VJRA).

6. H.R. REP. No. 963, 100th Cong., 2d Sess. (1988), reprinted in U.S.C.C.A.N. 5782 (hereinafter H.R. REP. No. 100-963).

7. Robert L. Rabin, *Preclusion of Judicial Review in Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975), cited in H.R. REP. No. 100-963; Gardner v. Brown, 5 F.3d 1456 (Fed. Cir. 1993). But see *Judicial Review of Veterans' Claims Hearings: Before the Subcomm. on Special Investigations for the Comm. on Veterans' Affairs*, 96th Cong., 2d Sess. 25-40 (1980) (testimony of Richard Berg, Executive Secretary, Administrative Conference of the United States, citing more than 50 current statutes which purport to preclude review of executive branch decisions).

sional hearings conducted with a view toward changing this practice were held in 1952. At those hearings, a pattern began that was to repeat itself for some thirty-five years. Several veterans organizations opposed various pending bills while other veterans organizations, as well as a number of other witnesses (including the American Bar Association), supported various alternatives providing for outside review of VA decision-making.<sup>8</sup> The VA, not surprisingly, opposed bills that would grant veterans judicial review, extolling the existing claims system as one that provided a fair and responsive means of adjudicating the hundreds of thousands of claims for benefits made each year. Indeed, the VA still clings to this view even today, after the passage of judicial review. Hearings considering various proposals for judicial review were also conducted in 1960, 1962, 1970, 1980, 1983, and 1986, with similar results.<sup>9</sup>

Despite the fact that Congress did not initially pass legislation lifting the ban on judicial review of VA decisions, it did recognize the complaints voiced by veterans that the process of claims adjudication was not as "fair and responsive" as the VA would have Congress believe. As a result of these hearings, Congress did pass laws which strengthened the due process rights of veterans. For example, Public Law No. 87-97<sup>10</sup> required the Board of Veterans' Appeals to take more care in the analysis and decision of each case that came before it and to make findings of fact and conclusions of law in each case. Public Law No. 87-866<sup>11</sup> required the VA to issue, when requested by a veteran, a written explanation (called a "statement of the case") of exactly why the veteran's benefit claim was denied. Public Law No. 85-857<sup>12</sup> established uniform rules for determining effective dates for allowances, reductions and termination of benefits.

In 1988 the situation changed somewhat. All veterans service organizations testifying before Congress favored some form of judicial review. The organizations, however, were far from unanimous regarding what form that review should take.<sup>13</sup>

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8. H.R. REP. No. 100-963, *supra* note 6, at 10.

9. *Id.* at 10-13.

10. Codified as amended at 38 U.S.C. § 7104 (Supp. III 1991).

11. Codified at 38 U.S.C. § 7105 (Supp. III 1991).

12. Codified at 38 U.S.C. § 5110 (Supp. III 1991).

13. *Judicial Review Legislation: Hearing on S. 11, The Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act Before the Comm. on Veterans' Affairs of the United States Senate, 100th Cong., 2d Sess. 28-41, 49-54, 177-270, 270-311, 383-430 (1988)* (statements of: Thomas J. Burch, National Vietnam Veterans Coalition; Philip Cushman, Veterans Due Process, Inc.; John F. Heilman, Disabled American Veterans; Dorothy Legarreta, National Ass'n of Radiation Survivors; Richard E. O'Dell, Vietnam Veterans of America; James N. Magill, Veterans of Foreign Wars of the United States; R. Jack Powell, Paralyzed Veterans of America; Philip E. Riggin, The American Legion; Frank E.G. Weil, American Veterans Committee); *Judicial Review of*

### DISTINGUISHING THE SCOPE OF JUDICIAL REVIEW

Veterans organizations made a distinction between two types of judicial review—review of the VA's administrative adjudications of the claims of veterans for individual benefits and review of the rule-making authority of the VA and of the VA's interpretation of its own regulations.

On the former type of judicial review, there was considerable disparity in the views of veterans service organizations. It is clear that there was concern that with it, judicial review would bring unnecessary formalism to the claims adjudication process. On the latter type of judicial review, however, there was virtual unanimity of opinion that it was required.

### COMMON GROUND FOR VETERANS

While there was diversity of opinion regarding the form of judicial review, there were a number of common themes that ran through the testimony of the various veterans groups during the 1988 hearings. They were:

A. The quality of the Board of Veterans' Appeals decisions needed improvement. Denials of benefits were often based on conclusory statements without relating those conclusions to facts. This gave the impression that decisions were arbitrary and capricious.

B. The VA was inflexible in its interpretation of its regulations and the laws it was charged to administer. There was a suspicion that these interpretations were often driven, not by legal analysis, but by fiscal concerns.

C. There was a need for a truly independent decision making authority, standing apart from the VA, with the power to review the adjudications of the VA.

D. Judicial review and the removal of the fee limitations for attorneys might unnecessarily formalize the relatively informal system for benefits adjudication.

### FIVE YEARS AFTER PASSAGE OF THE VJRA: HAVE THE CONCERNS BEEN MET?

#### QUALITY OF ADJUDICATION

Prior to the VJRA and the advent of judicial review, the VA styled itself as an *ex parte*, nonadversarial, paternalistic adjudica-

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*Veterans Affairs: Hearing on H.R. 639, H.R. 5039, S. 11, and S. 2292 Before the Comm. on Veterans' Affairs of the United States House of Representatives, 100th Cong., 2d Sess. 61-72, 513-28 (1988) (in addition to statements of the organizations listed before, statements of: Richard W. Johnson, Non-Commissioned Officers Association; Noel C. Woosley, American Veterans of World War II, Korea and Vietnam (AMVETS); Albert J. Bland, Ex-Prisoners of War; Raymond J. Williams, Catholic War Veterans).*

tion system. Perhaps it was. However, in characterizing itself in this manner, the VA adopted adjudication procedures that were completely alien to black letter law principles governing administrative law and that were largely incapable of withstanding judicial review of administrative agency decisions. Indeed, the very reasons why Congress finally granted veterans the right to judicial review in 1988 were arguments employed by the VA in opposition to judicial review.<sup>14</sup>

Testifying in opposition to proposed judicial review legislation, the VA lauded itself for operating an adjudication system that did not make credibility findings on the evidence filed by a claimant,<sup>15</sup> made its benefit determinations based on the off-the-record medical judgments of its adjudicators,<sup>16</sup> did not develop evidence to refute a claimant's contentions, and did not document in the record every factor upon which it based a denial of a claim for benefits.<sup>17</sup> There was little or no statutory or regulatory authority for these admitted VA practices.<sup>18</sup> Whether previously authorized or not, fortunately for the veteran, these practices and others are no longer permissible now that judicial review is a reality.<sup>19</sup>

Veterans believe that the adjudication practices now guaranteed the veteran by the Court of Veterans Appeals and imposed on the VA and Board of Veterans' Appeals (BVA or Board) by the court's decisions are neither novel nor judicially created obligations. They reflect nothing more than the court requiring, as it should, VA and

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14. See generally *Judicial Review Legislation: Hearing Before the Senate Comm. On Veterans' Affairs On S. 11, the Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act*, S. Hrg. No. 938, 100th Cong., 2d Sess. 54-55, 490-519 (1988) (statements of Donald L. Ivers, General Counsel, Veterans Administration).

15. *Id.* at 494.

16. *Id.*

17. *Id.* at 494-95.

18. See Charles L. Cragin, *A Time Of Transition At the Board Of Veterans' Appeals, The Changing Role Of The Physician*, 38 *FED. B. NEWS & J.* 500 (Nov./Dec. 1991). In this article, the Chairman of the Board of Veterans' Appeals acknowledges that much of the BVA's adjudication practices before the VJRA seemingly burgeoned into existence without any apparent statutory or regulatory authority.

19. The District of Columbia Circuit Court of Appeals summarized the judicial review process as follows:

In reviewing agency decisions we do examine at least four questions: First, was the action taken within the agency's powers under its basic statute? Second, was the procedure followed by the agency correct, that is, was there administrative due process? Third, was the result reached supported by substantial evidence? And, fourth, was the rationale by which the agency reached its result logical, that is, was there a demonstrated logical connection between the evidence adduced and the conclusion reached by the agency or was the agency action arbitrary or capricious? These four questions are at the core of judicial review of administrative agency actions.

*Communications Inv. Corp. v. FCC*, 641 F.2d 954, 972 (D.C. Cir. 1981).

BVA compliance with statutory law.

The Court of Veterans Appeals in numerous opinions has reversed the BVA for failing to hold the VA to its statutory duty to assist the veteran by considering and discussing all potentially applicable and pertinent statutes and regulations during the adjudication process.<sup>20</sup> The court did not create or impose any unconventional obligations upon the VA and BVA.<sup>21</sup> Indeed, at most, the court was merely forcing compliance by the VA and BVA with the governing statutory law found throughout Title 38 of the United States Code.<sup>22</sup>

The court, for example, has made it clear that, once notified of the existence of medical and other records which may assist the veteran in substantiating a claim for benefits, the VA must make reasonable efforts to obtain them. The first case to discuss this responsibility, *Jolley v. Derwinski*,<sup>23</sup> came to the court after the VA refused Mr. Jolley's request for assistance in obtaining certain military medical records he believed would help substantiate his claim. During oral argument, the VA counsel informed the court that the VA had actually located the records approximately two months before the hearing but had not informed the veteran of their location. The VA argued that it had no legal responsibility to obtain these records because the duty to assist the veteran, embodied in statute<sup>24</sup> and

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20. See *Franklin v. Brown*, 5 Vet. App. 190, 193 (1993) ("the BVA and the VA are not free to ignore the VA's duly promulgated regulations. . ."); *Horowitz v. Brown*, 5 Vet. App. 217, 223 (1993) (quoting *Browder v. Derwinski*, 1 Vet. App. 204, 205 (1991)) ("[T]he Board 'is required to apply all relevant statutes and regulations appropriate to the particular case before it.'"); *Howard v. Brown*, 5 Vet. App. 113, 116 (1993) ("[T]he Board is required to consider and discuss the applicability of all potentially applicable provisions of law."); see also *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991); *Akles v. Derwinski*, 1 Vet. App. 118, 120-21 (1991); *Fugere v. Derwinski*, 1 Vet. App. 103, 108 (1990); *Payne v. Derwinski*, 1 Vet. App. 85, 87 (1990); *Bentley v. Derwinski*, 1 Vet. App. 28, 31 (1990).

21. See *Nielson v. Sullivan*, 992 F.2d 1118, 1119-20 (10th Cir. 1993) ("[T]he 'failure to apply the correct legal standards or to provide this court with a sufficient basis to determine that appropriate legal principles have been followed is grounds for reversal.'"); *Davis v. Shalala*, 985 F.2d 528, 531 (11th Cir. 1993) (court of appeals reviews the record to determine whether the agency employed the correct legal standards in evaluating claims); see also *Horowitz v. Brown*, 5 Vet. App. 217, 223 (1993) (Before the Court of Veterans Appeals, the VA argued, inter alia, that because the VA rating board had explicitly invoked the provisions of one regulation that this excused VA noncompliance with another regulation. The court rejected this assertion.).

22. 38 U.S.C. § 511 (Supp. III 1991) ("The Secretary [of VA] shall decide all questions of law . . ."); 38 U.S.C.A. § 7105(d)(1)(B) (West 1991) (VA's "statement of the case shall include . . . [a] citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision."); 38 U.S.C. § 7104(a) (Supp. III 1991) ("Decisions of the [BVA] shall be based on the entire record . . . and upon consideration of . . . applicable provisions of law and regulation."); 39 U.S.C. § 7104(d)(1) (Each decision of the [BVA] shall include a written statement . . . on all material issues of . . . law presented on the record . . .").

23. 1 Vet. App. 37 (1990).

24. "The Secretary shall assist such a claimant in developing the facts pertinent

regulation,<sup>25</sup> was a mere statement of policy and formed no basis for a claim that the VA failed to follow binding "procedural rules."<sup>26</sup> Subsequent cases have confirmed that the VA's duty to assist the veteran in developing his or her claim includes: (1) ensuring that the veteran receives an adequate medical examination when necessary to determine the existence or degree of a disability;<sup>27</sup> (2) making reasonable efforts to obtain civilian as well as government records;<sup>28</sup> and (3) on its own initiative, seeking obviously missing records that may substantiate or corroborate the veteran's claim.<sup>29</sup> Such decisions mean that the veteran's case will be decided on all of the available, relevant facts.

By enforcing the veteran's statutory right to have the denial of his claim fully explained,<sup>30</sup> the court has forced the BVA to focus on hard facts, to evaluate opinion evidence, and to explain why it did not choose to credit evidence that was favorable to the veteran.<sup>31</sup> Failure to provide the necessary explanation provides insufficient basis for judicial review and renders the decision arbitrary and capricious. This process makes the BVA decide cases based on the record rather than on impressions. The result is fairer treatment for the veteran.

The court has also searched the law and drawn on provisions which had gone stale from the VA's lack of usage, to the veteran's advantage. For example, the court has informed the Secretary of Veterans Affairs that there is no requirement that a veteran specify with precision the statutory provisions or the corresponding regulations under which the veteran seeks benefits.<sup>32</sup> In fact, the court has found that the combined effect of 38 U.S.C. § 7722(c), requiring the Secretary to "distribute full information to eligible veterans . . . regarding all benefits and services to which they may be entitled under laws administered by the Department [of Veterans Affairs]," and the VA's statutory duty to assist the veteran in the develop-

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to the claim. Such assistance shall include requesting information as described in section 5106 of this title." Section 5106 requires the heads of other executive agencies to provide information to the Secretary of Veterans Affairs. 38 U.S.C. § 5106(a) (Supp. III 1991).

25. "[I]t is the obligation of the VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (1993).

26. *Jolley v. Derwinski*, 1 Vet. App. at 39.

27. *Perez v. Derwinski*, 2 Vet. App. 562, 564 (1992).

28. *Collamore v. Derwinski*, 2 Vet. App. 541, 543 (1992).

29. *Gobber v. Derwinski*, 2 Vet. App. 470, 472 (1992).

30. 38 U.S.C. §§ 5104(b), 7105(d)(1) (Supp. III 1991).

31. *Gilbert v. Derwinski*, 1 Vet. App. 49, 51 (1990) (requiring the Board to make an analysis of the credibility and probative value of evidence submitted by and on behalf of the veteran).

32. *Green v. Derwinski*, 1 Vet. App. 121, 122-23 (1991).



ment of facts related to his or her claim<sup>33</sup> require the VA to infer that a veteran is claiming a benefit when the facts of the claim fairly present it.<sup>34</sup>

A veteran whose claim has been finally denied always has the right to reopen the claim if he or she can present "new and material" evidence to the VA.<sup>35</sup> The court has given this right new life. Prior VA practice, according to the facts of *Manio v. Derwinski*,<sup>36</sup> was to review only the new evidence submitted, in isolation, and to determine whether or not the new evidence warranted granting the benefit sought. The VA commonly denied a veteran the right to reopen with a simple statement that the evidence submitted by the veteran did not establish a new factual basis for the claim. In *Manio* the court found that once the VA determines that evidence submitted to reopen the claim is "new and material"<sup>37</sup> it must reevaluate the veteran's claim in light of all of the evidence of record, not merely the new evidence.<sup>38</sup> This decision means that veterans who are able to gather new evidence in support of their claim have an opportunity to have a de novo adjudication under the more favorable atmosphere of the post-judicial review environment.

The VJRA and the court have also given the veteran a means of forcing the sometimes intransigent VA to perform tasks it is required but refuses to perform. The law gives the court the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed."<sup>39</sup> The court has used this authority, for example, to order the VA to produce, and to include in an appellant's claims file, documents which the veteran requested on numerous occasions prior to the BVA decision.<sup>40</sup>

There are four volumes of the Veterans Appeals Reporter filled with other examples. In short, as a result of judicial review, veterans generally are now receiving more thorough and fairer treatment when they appeal their claims to the BVA. With some difficulty, the Board is altering its procedures and its general attitude to accommodate the fact that it is no longer the ultimate authority on the

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33. 38 U.S.C. § 5107(a) (Supp. III 1991).

34. *Green v. Derwinski*, 1 Vet. App. at 122-23.

35. 38 U.S.C. § 5108 (Supp. 1991) ("If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.").

36. 1 Vet. App. 140 (1991).

37. The phrase "new and material evidence" has been defined by the Secretary of Veterans Affairs as "evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim." 38 C.F.R. § 3.156(a) (Supp. III 1991).

38. *Manio v. Derwinski*, 1 Vet. App. at 145.

39. 38 U.S.C. § 7261(a)(2) (Supp. III 1991).

40. *Koulizos v. Derwinski*, 2 Vet. App. 350, 351 (1992).

application of facts and law to a veteran's claim. Most importantly, if the BVA denies a claim, it must thoroughly explain its reasons to the veteran, and this explanation must be supported by evidence of record and by reasoning that will withstand the scrutiny of review by a non-VA, judicial body.

THE REGIONAL OFFICE: THE HEART OF THE SYSTEM, THE ROOT OF  
THE PROBLEM

While it is true that the court has improved the quality of the decisions issued by the BVA, that new quality has not as readily been translated into better decisions at the lower levels of the agency's administrative claims review process. It is inviting to justify this failure by reasoning that because the VA is such a large agency, it is very difficult to change its way of doing business and, for the first time in the agency's history, respond to the direction of an outside reviewing authority. But facts would indicate that a major factor in the VA's slowness to react to the case law of the court is a continued resistance to the concept of judicial review, be it conscious or unconscious. For example, as many as three years after the court was created, the VA Director of Compensation and Pension Service, the official who controls the regional offices (the initial level of claim adjudication often called "VAROs"), issued a memorandum to the VAROs which appeared to downplay the compulsory nature of court pronouncements.

A COVA [Court of Veterans Appeals] decision which remands a case to BVA [Board of Veterans' Appeals] does not require revision of regulations or procedures. A COVA decision which does not establish a new legal principle or void an existing regulation does not require nationwide attention. *COVA decisions are based on facts presented in an individual case and not on legal theory.*<sup>41</sup>

The emergence of such a memorandum, coupled with knowledge of other cases where the VA did not appear to respond to orders of the court, led the court to comment that:

The decision to initiate a change . . . does not come from the engine room or the radio room, from the ship's purser, engineer or doctor. On the contrary, the order to change course comes from the top, the captain on the bridge. We find nothing presented in this case up to and during oral argument . . . which would indicate that there was, in fact, a decision made at the top—at the Secretarial level—to change the course of the Department of Veterans Affairs with respect to judicial review and decisions of this Court.<sup>42</sup>

While the VA now has recognized the need to change its attitude

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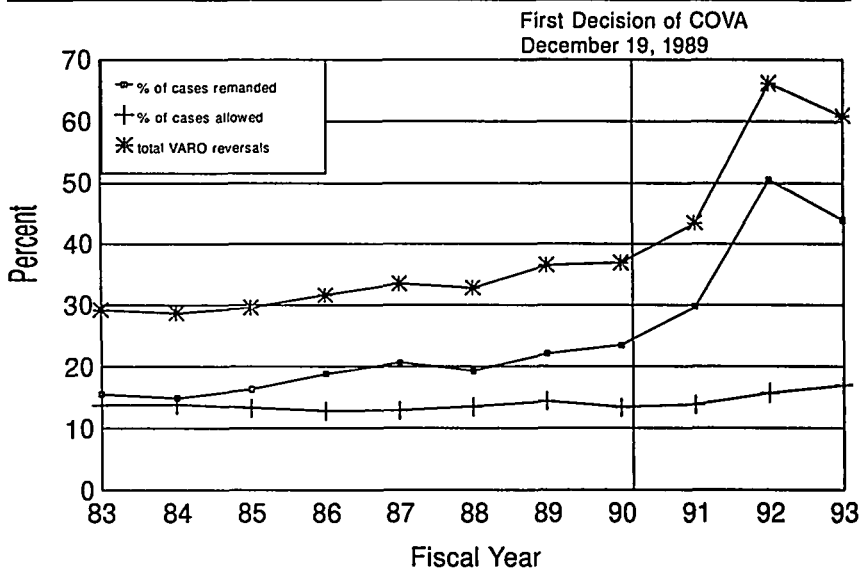
41. DEPARTMENT OF VETERANS AFFAIRS, MEMORANDUM FROM DIRECTOR OF COMPENSATION AND PENSION SERVICE (1991).

42. Jones v. Derwinski, 1 Vet. App. 596, 601 (1991).

with respect to the authority and general applicability of court decisions, the change is still slow in coming. Some evidence of the change can be seen in the statistics regarding actions taken on appeals by the BVA. For the fiscal years 1977 to 1989, the Board, on average, overturned decisions of the VA regional offices 29.5% of the time due to improper adjudication at that level.<sup>43</sup> In 1990 the reversal rate was 36.9%, in 1991 it was 43.5%, in 1992 it was 66.2%, and in 1993 60.9%.<sup>44</sup> This means that currently, the BVA is finding that in over half of the cases decided by the regional offices and appealed to the Board, the veteran has been denied some, non-harmless due process right. These cases are then sent back to the regional office with instructions to comply with the applicable statute, regulation or court decision.

## BVA Review of VARO Decisions

Remands, Allowances & Total Reversals



43. BOARD OF VETERANS' APPEALS, APPEALS STATISTICAL DATA—BOARD OF VETERANS' APPEALS (1993). Thirty-one percent represents the combined total of the average percentage of cases remanded (17.5%) and the average percentage of cases actually granting a benefit (13.25%). This figure represents the Board's "reversal rate" of decisions of the VA's administrative benefit decisions.

44. *Id.* Individual fiscal year figures were: percent of cases remanded: 1990-23.5%; 1991-13.8%; 1992-50.5%; 1993-44.0%; percent of cases allowing benefits: 1990-13.4%; 1991-13.8%; 1992-15.7%; 1993-16.9%.

The accompanying chart depicts the percent of BVA decisions remanding cases to the VARO and those granting benefits. The sum of those two percentages equals the total percentage of cases in which error was found (BVA "reversal rate").

It follows, then, that even more than change at the top, change at the bottom is crucial to the veteran receiving the true value of the VJRA. There are two reasons for this. First, only about fifteen percent of the claims filed at the various VAROs are appealed to the BVA.<sup>45</sup> Consequently, for the vast majority of veterans, there will only be one look at their case. If the VARO is not properly equipped to thoroughly and properly adjudicate claims, the veteran suffers. Second, for those veterans who appeal the initial decision, sloppy adjudication at the VARO only means that the case will come back to the regional office to be done over, adding unnecessary time to the adjudication of that claim and detracting from attention given to new claims. My grandfather would have put it this way: "If there is not time to do it right, when will there be time to do it over?"

#### THE COST OF DUE PROCESS: WHO IS RESPONSIBLE?

There is, of course, no free lunch. The veteran is paying for his or her full measure of due process, not in dollars but in time. There is no doubt that it takes more time to adjudicate a case if the VA is required to obtain all existing medical records applicable to a particular claim; to actually support its conclusions with evidence that appears in the record; to make credibility findings based upon record evidence; and to explain the rejection of medical evidence in the record with more than a statement such as "the veteran's contentions are not supported by accepted medical knowledge." VA officials are quick to lay the blame of increased claim processing time on the shoulders of the court.<sup>46</sup>

There is, however, some belief among veterans advocates that the Board's delays in processing cases remanded to it by the court have been less than genuine and in some cases self-inflicted. The basis for this belief is partially anecdotal. For example, in a case that required only the Board's clarification of its treatment of evidence currently in the record, the Board returned the case to the regional office with an order to hospitalize the veteran for observation and evaluation, despite the fact that the veteran had been hospitalized several times at VA facilities and had numerous evaluations of the disability in question.<sup>47</sup> In another case, the court found that the VA must attempt to obtain civilian medical records crucial to the vet-

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45. BOARD OF VETERANS' APPEALS, APPEAL STATISTICAL DATA—BOARD OF VETERANS' APPEALS (1993).

46. *Hearing Before Subcomm. on Compensation, Pension and Insurance of the House Comm. on Veterans Affairs*, 102d Cong., 2d Sess. 3-64 (1992) (statement of Deputy Secretary Anthony J. Principi); *Hearing Before the Senate Comm. on Veterans Affairs*, 102d Cong., 2d Sess. 5-11, 33-41 (1992) (statement of Deputy Secretary Anthony J. Principi).

47. *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991).

eran's case, a task routinely performed by the regional office.<sup>48</sup> Despite the clear necessity to send the case back to the VARO, the case still resides at the Board, some seven months after the court's decision. In the face of such facts, the Chairman of the Board's frequent laments of increased processing time<sup>49</sup> seem much like the physician who orders unnecessary medical tests, all the while complaining that the increased cost of health care is due to the litigation explosion.

VA statistics regarding lengthy processing time undoubtedly include claims in which the VA has voluntarily delayed adjudication pending its own appeal of similar cases. For example, the VA halted adjudication of some 6,000 claims pending its appeal of the court's decision in *Gardner v. Derwinski*.<sup>50</sup>

Finally, the problem of the VA's inability to adjudicate claims in a timely fashion is not a phenomenon that has suddenly arisen since passage of the VJRA. In March of 1988, eight months before the passage of the VJRA, the Chief Benefits Director of the VA testified before Congress on the subject of the timeliness of VA claims adjudication. He said:

There are twenty-eight standards in our timeliness measurement system. As of January 31, 1988, we were meeting an acceptable level in only five of them. One year ago it was eleven categories, and two years ago it was eighteen. We were meeting acceptable levels in twelve of sixteen categories two years ago, and seven of sixteen last year; today we are doing so only in three.

. . . .  
. . . [T]he Committee noted that internal VA statistics show an increase in the number of cases remanded from the BVA back to the [Department of Veterans Affairs] for further development. The number of remands has increased [before judicial review] from approximately 15 percent of all appeals in 1978 to 21 percent by the end of fiscal year 1987 (or 8,564 cases out of 41,296 appeals).

Such remands may be an indication of several systemwide problems—for example, poor original claims development within the DVA regional offices, inadequate medical examinations conducted by private or VA physicians, overworked adjudications within both DVB [Department of Veterans Benefits of the Veterans Administration] and BVA, uncertainties regarding the resolution of highly complex cases like post-traumatic stress disorder or

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48. *Crader v. Brown*, 5 Vet. App. 169 (1993).

49. *Hearing Before the Subcomm. on Compensation, Pension and Insurance of the House Committee on Veterans Affairs*, 103d Cong., 1st Sess. (statement of Charles L. Cragin, Chairman, BVA) (May 6, 1993); Charles L. Cragin, Remarks at meeting of major veterans service organizations held at the Department of Veterans Affairs, Omar Bradley Conference Room, Washington, D.C. (February 1993).

50. Bill McAllister, *VA Held Liable in Benefit Case*, WASH. POST, Sept. 16, 1993, at A27; Greg Pierce, *VA's Handling of Benefits Ruled Wrong Since 1934*, WASH. TIMES, Sept. 16, 1993, at A12.

radiation exposure.<sup>51</sup>

Veterans continually hear from the VA and the BVA's Chairman about problems caused by judicial review legislation and how hard it is to implement the changes wrought by its passage.<sup>52</sup> Except under the duress of pending court sanctions,<sup>53</sup> the veteran has seen little, if any, "can do" spirit of implementation. Consequently, veterans continue to be skeptical of the genuineness of the VA's efforts to make the fundamental changes necessary to give them the full benefit of this historic statute.

Another reason for the veterans' belief that the VA continues to resist judicial review comes from various pieces of proposed legislation, sponsored (officially or unofficially) by officials within the VA, which would subvert the key result of judicial review, the requirement that the VA must, for the first time in its history, obey its own rules. For example, legislation has been introduced which would eliminate three-person rating boards at the regional offices and replace them with individual "rating officials;"<sup>54</sup> eliminate three-person decisions in most cases decided by the Board of Veterans' Appeals and replace them with single-member decisions;<sup>55</sup> change the definition of a well-grounded claim from the judicially established standard of "plausible"<sup>56</sup> to one of "reasonable probability;"<sup>57</sup> and lower the threshold requirements for imposing on the VA a duty to assist the veteran in obtaining non-federal records in support of his claim.<sup>58</sup> However, in reaction to court decisions confirming its authority to review certain pre-judicial review claims upon an allegation of clear and unmistakable error,<sup>59</sup> legislation has been introduced that would restrict the effective date of the award of benefits in such cases to ten years prior to an allegation of clear and unmistakable error.<sup>60</sup> At present, the effective date is the date benefits would have been awarded had the VA not made the error.<sup>61</sup> Legislation has also been proposed that seeks to insulate the Chairman's

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51. S. REP. No. 342, 100th Cong., 2nd Sess. 30-31 (1988).

52. Charles L. Cragin, *The Impact of Judicial Review on the VA Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 *ME. L. REV.* (forthcoming Mar. 1994); Charles L. Cragin, Address to the Second Annual Judicial Conference of the United States Court of Veterans Appeals (October 18, 1993).

53. *Jones v. Derwinski*, 1 *Vet. App.* 596, 605-08 (1991).

54. H.R. 3269, 103d Cong., 1st Sess. § 4(a) (1993).

55. *Id.* § 5; H.R. 2574, 103d Cong., 1st Sess. §§ 202, 203 (1993); S. 1445, 103d Cong., 1st Sess. §§ 3, 4 (1993).

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

57. H.R. 2574, 103d Cong., 1st Sess. § 103 (1993).

58. *Id.* § 103(b).

59. *See, e.g., Russell v. Principi*, 3 *Vet. App.* 310 (1992).

60. H.R. 2574, 103d Cong., 1st Sess. § 105 (1993).

61. 38 C.F.R. § 3.105(a) (1992).

denial of a request for reconsideration from judicial review<sup>62</sup> and, in an effort to foreclose judicial review, reduce the time limits for certain filings in the administrative process from the current one year<sup>63</sup> to 120 days.<sup>64</sup> Finally, in light of the court's insistence that hearing testimony be considered evidence, not merely contentions,<sup>65</sup> proposed legislation aims to limit the number of BVA travel board hearings to 1000 per year.<sup>66</sup>

From the veteran's perspective, it can be put this way: now that the VA is forced to play by the rules, it wants to change them. Consequently, it appears that the veteran's battle for effective judicial review of VA decisions is not over; it has just moved to a new phase: consolidation and preparation for a VA counterattack in both the legislative and regulatory theaters.

#### REQUIRING THE VA TO FOLLOW THE RULES WHEN MAKING THE RULES

Veterans organizations have recognized a need for judicial supervision of the VA's formulation and interpretation of its own rules. The court has also recognized this need. In *Fugere v. Derwinski*<sup>67</sup> the court gave teeth to the portion of the VJRA which subjects the VA rule-making process to the requirements of the Administrative Procedure Act.<sup>68</sup> In *Fugere* the court held that certain sections of the VA Adjudication Procedure Manual,<sup>69</sup> a manual commonly treated by the VA as an internal, interpretive set of procedures, were VA policies that affected individual rights which could not be rescinded without compliance with the notice and comment provisions of the Administrative Procedure Act.

The facts of *Fugere* provide a good basis for understanding the importance veterans place on judicial review of rule-making decisions. In 1987, the VA published new, more restrictive rating criteria for, among other things, hearing disabilities. Despite these new criteria, however, veterans were protected against a decrease in benefits if there had not been any change in the veteran's condition or

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62. H.R. 2574, 103d Cong., 1st Sess. § 203 (1993).

63. 38 U.S.C.A. § 7105(b)(1) (West 1991).

64. H.R. 2574, 103d Cong., 1st Sess. §§ 205, 206 (1993).

65. *Hatlestad v. Derwinski*, 1 Vet. App. 164, 169-70 (1991).

66. H.R. 2574, 103d Cong., 1st Sess. § 207 (1993). The current statute (38 U.S.C.A. § 7110 (West 1991)) gives the veteran an absolute right to a hearing by a traveling section of the Board, placing no restriction on the number of such hearings that may be conducted in one year. Recent statistics show that the Board conducted 3,533 hearings at VAROs during fiscal year 1993. Charles L. Cragin, *The Impact of Judicial Review on the VA Claims Adjudication Process: The Changing Role of the Board of Veterans Appeals*, 46 ME. L. REV. (forthcoming Mar. 1994).

67. 1 Vet. App. 103 (1990), *aff'd* 972 F.2d 331 (Fed. Cir. 1992).

68. 38 U.S.C. §§ 501(d), 502 (Supp. III 1991).

69. DEPARTMENT OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL.

disability. The VA Adjudication Manual (the Department's instructions to its claims adjudicators) specifically provided that if a veteran's claim had been previously adjudicated and a change in rating criteria or the adoption of new testing procedures (rather than an actual change in the veteran's condition) would result in a reduced benefit for the veteran, the adjudicator should apply the old, more favorable criteria in conducting a new rating. In 1988, without notice, the VA rescinded this protective manual provision. Mr. Fugere, who had an adjudicated hearing disability, asked that his disability be reevaluated. When the readjudication occurred, in the absence of the recently rescinded manual provision, the new rating criteria were applied, and the VA reduced Mr. Fugere's disability benefit.<sup>70</sup>

The court held that the VA must follow the notice and comment procedure required by the Administrative Procedure Act before rescinding this rule. Since the VA failed to do so, the court struck down the VA's attempted revision of the protective provision of the Adjudication Procedure Manual and restored the benefit lost by Mr. Fugere.<sup>71</sup>

In another case, the court discussed the degree of deference VA rules should be given when the interpretation of a veterans' benefits statute is at issue. In *Gardner v. Brown*,<sup>72</sup> a panel of the United States Court of Appeals for the Federal Circuit unanimously upheld the decision of the Court of Veterans Appeals which had found that the sixty-year-old VA regulation governing the payment of claims for persons who suffer an additional disability as a result of VA medical treatment was invalid. The court found that the VA had, by its regulation, imposed eligibility requirements not contained in the legislation authorizing this benefit and was therefore invalid.<sup>73</sup>

In defense of its regulation, the VA argued to the court that invalidation of the regulation would have dire financial consequences for the VA—an argument that must have caused veterans who had long sought judicial review to nod knowingly at the admission of a practice they had long suspected.<sup>74</sup> Needless to say, the court dismissed this argument by stating that the expense of providing the benefit

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70. *Fugere v. Derwinski*, 1 Vet. App. at 104-05.

71. *Id.*

72. 5 F.3d 1456 (Fed. Cir. 1993).

73. *Id.* at 1463-64.

74. [D]uring periods of fiscal restraint, regulations can be shaped more through the influence of the Office of Management and Budget and blatant political pressure than the intent of Congress. Most often it is these decisions which deny benefits to veterans otherwise eligible under the law, either by direct constriction of the regulation, or by the outright denial of adequate funding levels for authorized programs.

H. REP. No. 60, 100th Cong., 2d Sess. 319 (1988) (statement of Gordon H. Mansfield, Associate Executive Director for Government Relations, Paralyzed Veterans of America, testifying in support of judicial review legislation).



authorized by legislation is Congress' concern.<sup>75</sup>

Perhaps the most significant aspect of the Federal Circuit's opinion was its treatment of the VA's argument that the court should give special deference to the VA's interpretation of the statute because the VA regulation or its equivalent was long-standing. While recognizing that the VA's regulation had been in existence in some form for nearly sixty years, the court found this fact of little significance. The court indicated that deference was inappropriate in light of the fact that until the passage of the Veterans' Judicial Review Act in 1988, the regulation was not subject to judicial review. The court dismissed the VA's argument noting that until the VJRA, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review."<sup>76</sup>

The VA has estimated that the *Gardner* decision, when implemented, will have immediate affect on some 6,000 veterans.<sup>77</sup> Again, this is clear testimony to the value of judicial review to veterans.

#### INDEPENDENCE PRESUMES ETERNAL VIGILANCE

In considering whether or not to institute additional appeal rights for veterans, Congress considered two models. One would have caused a review of veterans' claims by currently existing Article III courts.<sup>78</sup> Congress opted, however, to establish a specialized court under Article I of the Constitution with jurisdiction limited to the review of decisions of the BVA.<sup>79</sup> A primary reason to have judicial review is to have a body apart from and independent of the VA review its decisions on claims for veterans benefits. This independence is important both in practice and in perception.

The value of the court to veterans and, indeed, the court's ability to fulfill the function for which it was created, depends upon the ability to maintain its independence. This may not be easy to do for a court of such limited jurisdiction. Without vigilance, it may be easy for the court to treat cases as one of a particular type, rather than reviewing with searching inquiry whether the claims presented by the veteran merit consideration, if not redress.

To maintain its independent status both in fact and in the eyes of the public, the court should avoid continued use of VA euphemisms such as "buddy statements"<sup>80</sup> for statements, often sworn, of wit-

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75. *Gardner v. Brown*, 5 F.3d at 1464.

76. *Id.* at 1462.

77. Bill McAllister, *VA Held Liable in Benefit Case*, WASH. POST, Sept. 16, 1993, at A27; Greg Pierce, *VA's Handling of Benefits Ruled Wrong Since 1934*, WASH. TIMES, Sept. 16, 1993, at A12.

78. See, e.g., H.R. 639, 100th Cong., 2d Sess. (1988); S. 11, 100th Cong., 2d Sess. (1988).

79. 38 U.S.C. § 7251 (1991).

80. *Burger v. Brown*, 5 Vet. App. 340, 342 (1993); *Thibault v. Brown*, No. 92-885 (Vet. App. Sept. 15, 1993).

nesses provided by persons who knew the veteran. Use of such language suggests a lack of sufficient independent inquiry. The court itself has cautioned the VA to consider such statements as evidence and accord them appropriate weight in light of other information in the record.

#### EX PARTE AND ADVERSARY ADJUDICATION

##### A CALL FOR PEACEFUL COEXISTENCE

The VA claims adjudication system has always been built upon a philosophy of benign paternalism. When practiced fairly, this philosophy has served the veteran well over the years. When reviewing the testimony of various veterans groups, one is struck with the concern, almost a fear, that judicial review would supplant this philosophy with unnecessary formalization of the claims process. Indeed, the VA seemed to play on this fear when in June of 1988, the VA responded to a number of specific questions posed by the Senate Veterans Affairs Committee then considering judicial review legislation.<sup>81</sup> The Senate Committee asked the VA to respond to these questions:

For each of the following procedures, please state the reasons why the VA does not currently practice the particular procedure in question, and believes the procedure would have a negative effect on the process of reaching an equitable, fair decision for the claimant:

- A. Developing evidence to refute a claimant's contentions in order to ensure that the record supports denial of an unmeritorious claim. . . .<sup>82</sup>

The VA responded:

It is wise to recall that the VA adjudication process is *ex parte* in nature. Evidence is secured on behalf of a claimant, not in spite of or in contradiction to a claimant. It is the practice of the Agency not to refute contentions which will not support an allowance of the benefit sought. Very often a veteran makes a variety of contentions which may or may not be wholly supported by the record. However, acceptance of these arguments may not provide a basis for favorable action. Because of the non-adversarial philosophy of the Agency, we will not refute these assertions. In other instances, the documentary evidence is at variance with the allegations. This evidence is in the form of hospital reports, medical examinations and other contemporaneous evidence filed in the claims folder. The adjudicators may conclude it is sufficient to answer the contentions

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81. *Judicial Review Legislation: Hearing Before the Committee on Veterans Affairs of the U.S. Senate on S. 11, The Proposed Veterans Administration Adjudication and Judicial Review Act and S. 2292, Veterans' Judicial Review Act*, 100th Cong., 2d Sess. 640-55 (1988) (written response of the Veterans Administration).

82. *Id.* at 646.

and deny the claim or appeal. It is not a practice to obtain the actual office records or complete hospital records folder or investigate the situation in order to refute all contentions. On the other hand, when the adjudicators are of the opinion that the evidence is insufficient to allow the claim or to refute the contentions, they will develop the evidence in order to afford the veteran every opportunity for allowance.<sup>83</sup>

The Committee further asked the VA why it did not “[d]evelop[] and produc[e] evidence, such as consultative opinions and scientific treatises or journal articles to support the medical judgment of the VA’s medical adjudicators. . . .”<sup>84</sup> The VA responded:

The rating boards and Board of Veterans Appeals rely upon accepted and sound medical principles in reviewing factual issues. Moreover, they access established and well-known medical reference works, and the adjudicative panels in medical cases include a member who is trained in general medicine or a specialty particularly relevant to veterans’ disabilities. In addition, the veteran is free to submit consultative opinions, scientific treatises, or journal articles for review. If the content of these opinions presents a medical issue or controversy, the evidence of record along with the opinions submitted by the veteran will be submitted to an independent medical expert for review and an opinion. That individual will be familiar with the professional literature relating to the particular medical issue and present an opinion as it relates to the evidence of record. Moreover, the veteran is permitted to review and comment on that opinion before a decision is rendered. The current system works well and provides a full review of a point of medical controversy to ensure a fair decision. To expand this to require development of medical literature to refute opinions beyond those situations described above would encumber the system without any resulting tangible benefit to claimants. There are many medical contentions presented in claims and appeals that are not supported by accepted medical principles and are not supported or verified by clinical findings. To require intensive documentation with literature to refute these contentions would serve no useful purpose.<sup>85</sup>

The Committee also asked the VA why it did not, during personal hearings, “[ask] direct, probing questions of witnesses to ascertain and evaluate the credibility of the evidence they present so as to articulate why their testimony is found to be ‘less than persuasive.’”<sup>86</sup> The VA responded by stating:

The type of conduct in examining witnesses acceptable in courtrooms would be inappropriate at a VA hearing. Hearings before the VA are not formal, judicial proceedings. The hearing is held for the

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83. *Id.* at 647.

84. *Id.* at 646.

85. *Id.* at 648-49.

86. *Id.* at 649.

benefit of the claimant, and is but one aspect of the VA's mandate to assist the claimant in developing his or her claim. Efforts must be made to ensure that the claimant does not receive the impression that a final decision on the claim or appeal has been reached prior to holding the hearing, or that the Agency is his or her adversary. For example, under present regulations cross-examination is to be avoided.<sup>87</sup>

Consequently, there is a fine line drawn at VA hearings between questioning a witness to ensure the substance or veracity of evidence and maintaining the nonadversarial atmosphere of the proceeding. We are concerned that judicial second-guessing of VA decisions and increased participation of attorneys as veterans' representatives would insinuate a more adversarial influence into VA proceedings that may confuse and threaten witnesses, discourage personal hearings, and deprive our adjudicators of valuable information that could aid the veteran's claim.<sup>88</sup>

These responses indicated that the VA believes that the requirements to gather and weigh evidence, to make evaluations of credibility, and to explain to veterans the reasons for its decisions make the whole adjudication system adversarial. Not only is this not necessary, it was clearly not intended by Congress when it passed the VJRA.

As the Chairman of the House Committee on Veterans Affairs stated in his comments on the House floor regarding the VJRA:

[W]e have crafted a compromise bill which will allow an independent review by a court of the VA's decision on a veteran's claim, will allow judicial review of VA regulations and legal interpretations, and will allow veterans to pay attorneys to represent them before the court. At the same time, we think we have preserved as much of the informal and generous nature of the existing system as possible. . . .<sup>89</sup>

In providing for judicial review of veterans claims, it is not our intent to encourage litigation between veterans and the VA. . . .<sup>90</sup>

All that the VJRA has done is ensure that the VA obtain *all* of the necessary facts upon which to make a decision, to allow testimonial evidence, given under oath, the weight normally accorded such evidence, to apply the favorable statutory presumptions and stan-

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87. See 38 C.F.R. § 19.157(c) (1992).

88. *Judicial Review Legislation: Hearing Before the Committee on Veterans Affairs of the U.S. Senate on S. 11, The Proposed Veterans Administration Adjudication and Judicial Review Act and S. 2292, Veterans' Judicial Review Act*, 100th Cong., 2d Sess. 649 (1988) (written response of the Veterans Administration). This testimony is another example of the VA's pre-judicial review adjudication practices, discussed earlier, which the court later found to be unacceptable violations of the law and agency regulation.

89. 134 CONG. REC. H10,342 (daily ed. Oct. 19, 1988) (statement of Rep. Montgomery).

90. *Id.* at H10,343.

dards of proof when weighing evidence and, most importantly, to explain the decision upon a request from the veteran. Nothing in this process requires the VA to treat the veteran as an adversary during the administrative adjudication of the claim.

In an adversary proceeding, the two sides start the process with opposing views of the facts to be decided, then each side presents proof to support its position, thus permitting a neutral fact finder to decide which position is correct. Consequently, if the VA's view, that judicial review makes claims adjudication adversarial, was adopted, when a veteran filed a claim, the VA would assume that the claim was invalid and begin to gather evidence to refute it. But this is not what the law commands. As discussed above, if the facts presented are plausible, the VA must assume that the claim is valid and proceed to assist the veteran in gathering the necessary evidentiary support to permit payment of the claim. If, after all attempts to locate potentially available evidence have been exhausted, the VA believes there is insufficient evidence to warrant granting the benefit sought, then it must deny the claim and be prepared, if asked by the veteran, to explain why it was denied and what additional evidence, if available, would substantiate the claim. There is nothing adversarial in this process. The situation changes, however, when the veteran appeals to the Court of Veterans Appeals. There, the VA properly defends the agency's decision as a partisan advocate. The VA must understand precisely when this change in roles occurs.

From the veteran's viewpoint, the post-VJRA administrative adjudication system can still be "paternalistic." The VA, however, can no longer be the parent who justifies his decisions with the equivalent of the simple statement, "Because I'm your father, and I say so." The parent who supports his or her decisions with the force of fact and logic, is no less the parent, has no less authority, and is not somehow transformed into an opponent of the child.

Instead of decrying the "fundamental changes" in the VA system supposedly wrought by the VJRA, VA officials should emphasize that judicial review merely means that the VA must do what it has long been charged with doing, only it must do it better. Past abuses in the system, both real and perceived, necessitate improvement in the quality of adjudication. However, it does a great disservice to the veteran, and truly subverts the purposes of the judicial review legislation, to imply that the adjudication of veterans claims is to be done on an adversarial basis.

#### WHAT NEEDS TO BE DONE

By and large, veterans should be happy with the direction things have taken since the inception of judicial review. There is, however, more that needs to be done. First, the door to judicial review must be opened wider. Judicial review must not be limited only to veter-

ans who have filed a Notice of Disagreement<sup>91</sup> on or after November 18, 1988.<sup>92</sup> The effect of various court decisions has left only two means for a veteran with a “finally” denied claim to have it reviewed under the new adjudication system. A new review can be obtained either by presenting “new and material evidence” or by establishing that the VA committed “clear and unmistakable error” in its prior adjudication.<sup>93</sup> This is unfair to many veterans.

For example, prior to the VJRA, the VA and BVA denied the claims of many veterans based on nothing more than their own unsubstantiated medical conclusions. The court, however, considers the VA’s pre-judicial review act adjudications as “final adjudications” and requires a veteran to file new and material evidence to reopen previously denied claims. This is especially unfair when the record shows that the veteran *has* filed medical evidence throughout the years which, because of the absence of judicial review, the VA and BVA could (and did) simply ignore. It is even more unfair when the VA and BVA denied the claim without any independent medical evidence on the record to support their denial decisions.

An example of this injustice is presented by the facts of *Spencer v. Brown*.<sup>94</sup> In *Spencer*, the record before the court showed that the veteran, prior to the removal of the statutory bar to judicial review, received no less than four BVA decisions. After the removal of the bar he received yet another BVA decision, which the court affirmed on appeal. The record also showed that the veteran had filed private medical opinions with the VA as proof that he developed multiple sclerosis while serving on active duty and, as a result, was entitled to receive compensation and medical treatment for his disability. The VA and BVA never substantively addressed Mr. Spencer’s medical evidence, nor did the VA or BVA obtain a medical opinion contrary to the medical opinions filed by Mr. Spencer. Even though the VA and BVA relied upon no independent medical evidence of record to support their decisions denying Mr. Spencer’s claim, the court affirmed the BVA decision. In so doing, the court found that the VA had finally disposed of Mr. Spencer’s claim prior to the advent of judicial review, and that if the veteran wanted full judicial review of the manner in which his claim was adjudicated, he had to reopen his claim by filing new and material evidence. This is so even though, today, under the court’s opinions, the VA’s failure to rely on independent medical evidence would constitute reversible legal error re-

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91. A Notice of Disagreement is “[a] written communication . . . expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction . . . .” 38 C.F.R. § 20.201 (1992).

92. 38 U.S.C. § 7251 (Supp. III 1991) (Chapter Applicable to Cases Filed on or After November 18, 1988).

93. *Id.* §§ 5108, 7104(b) (Supp. III 1991); 38 C.F.R. § 3.105(a) (1992).

94. 4 Vet. App. 283 (1993).

quiring de novo adjudication of the claim. Having submitted substantial independent medical evidence in the past, it is impossible for Mr. Spencer to submit any further evidence that would meet the court's definition of "new and material."

Second, there is a need for more trained advocates, knowledgeable in the law of veterans' benefits. Many of the court's precedential opinions have been issued with the veteran appearing pro se.<sup>95</sup> Current statistics show that more than eighty percent of veterans filing appeals to the court have no representative. Without trained advocates, knowledgeable in the legal issues, the court has had little help developing a unified body of law.

The adversary model of dispute resolution depends for success on two relatively equally matched parties arguing their points with full force. The VA is fully represented in every case. It has the opportunity to ensure that the court hears its side of the case articulated by trained advocates. However, veterans are represented in only twenty percent of the cases. This puts a strain on the proper functioning of this judicial model.

The court, to its credit, has attempted to deal with this problem. Its Central Legal Staff and the judges' law clerks review cases filed by pro se veterans and attempt to spot key issues for the judges. In appropriate cases, outside counsel are sought to argue particularly important or complex legal issues before the court.<sup>96</sup> The court also invites the filing of amicus curiae briefs by persons and organizations regularly practicing before the court.<sup>97</sup> The court has also made nearly a million dollars in grants available for demonstration projects to establish a system for volunteer attorneys to handle cases pro bono for financially qualifying, pro se veterans.<sup>98</sup> That program placed over 230 cases with attorney representatives during its first year of operation.<sup>99</sup> But despite these efforts, the danger of operating an adversarial system with one of the parties fighting with at least one arm tied behind his or her back has dangerous implications

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95. *Reonal v. Brown*, 1993 U.S. Vet. App. LEXIS 458, No. 91-2014 (Sept. 8, 1993) (a physician's opinion is not new and material where it is based on a medical history previously rejected by VA); *King v. Brown*, 5 Vet. App. 19, 21 (1993) (statutory requirement that the veteran submit well-grounded claim performs the functions of requirement of showing entitlement to relief under the federal rules of civil procedure); *Ross v. Derwinski*, 3 Vet. App. 141, 144-45 (1992) (a claim based on improper VA medical treatment is not well-grounded where not accompanied by supporting evidence); *Espiritu v. Derwinski*, 2 Vet. App. 492, 494-95 (1992) (a lay person's opinion on a medical question does not constitute new and material evidence sufficient to reopen a claim because the lay person is not competent to express a medical opinion).

96. *See, e.g., Gardner v. Derwinski*, 1 Vet. App. 584 (1991).

97. *See, e.g., Jones v. Derwinski*, 2 Vet. App. 231 (1992), *Gardner v. Derwinski*, 1 Vet. App. 584 (1991); *Erspamer v. Derwinski*, 1 Vet. App. 3 (1990).

98. Minutes of the Advisory Committee of the Veterans Consortium (Nov. 16, 1993).

99. *Id.*

for the jurisprudence of the law of veterans' benefits.

Another question that may receive consideration in the future is whether the court should hear class action suits as a possible mechanism to compel correction of a systemic error. Without class actions, changes in the law that affect large groups of veterans will have to be made on a case-by-case basis. For example, in cases of veterans who had their disability ratings reduced under facts similar to those recounted in *Fugere*, the VA is under no duty to identify those veterans and make them whole. It is, rather, up to the individual veteran to discover the court's precedent and ask for a readjudication of his or her case based upon that decision and a claim of clear and unmistakable error. If, however, the law permitted class actions, a mechanism would exist to identify potential members of the class and, if the suit were successful, the VA could be required to give all class members relief.

In the consolidated cases of *Harrison v. Derwinski*<sup>100</sup> and *Lefkowitz v. Derwinski*,<sup>101</sup> the court found it did not have the authority to hear class actions. To be sure, there are downsides to class actions. But, if the VA does not seek on its own to correct systemic errors identified in certain court decisions, it could find itself faced with legislative efforts to permit the court to hear complaints of classes of veterans.

#### AFTERWORD

In summary, I would like to say that I believe the creation of the Court of Veterans Appeals has begun the restoration of integrity to the adjudication of claims for veterans' benefits. It is true that the court is forcing the VA to change, but the changes have, in the main, been beneficial to veterans. If the VA accepts the fact that the court is here to stay and works assiduously to align its adjudication machinery with the dictates of the law, case processing time will be reduced and the quality of claims adjudication will be vastly improved. To accomplish this, the VA must have sufficient resources to properly develop and adjudicate cases focusing first on the place where the most important adjudication activities occur, the regional offices.

The subject of judicial review naturally focuses attention on the cases that went wrong. Judicial review is working to improve the quality of review that every veteran receives when he or she files a claim for benefits. To this end, a focus on what can go wrong is important and valuable. But no veteran should lose sight of the fact that a lot goes right in VA adjudication. This past year there were over 440,000 new claims filed with the VA for disability compensa-

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100. 1 Vet. App. 438 (1991).

101. 1 Vet. App. 439 (1991).



tion or pension benefits.<sup>102</sup> Veterans expressed their dissatisfaction with these adjudications by filing a Notice of Disagreement in only about fifteen percent of these cases.

Both veterans and the VA must strive to make the system the best it can be. Judicial review gives the veteran a meaningful voice in that process. To the extent the veteran's side is taken by the court, the VA should view this as a positive step toward ensuring its decisions are both fair and thorough. When the veteran loses, he can be sure that the decision is one that comports with the law and has a basis in fact. In the larger sense, both sides win.

The biggest challenge to both sides is to keep the adversary process where it belongs—in the court. If the VA persists in transforming its claims processing at the BVA and the regional offices into an adversary proceeding, its prophecy of intolerable processing delays and antagonism will be self-fulfilling. The Department of Veterans Affairs must never forget its charge to care for those who have borne the battle, their widows, and their orphans.

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102. BOARD OF VETERANS' APPEALS, APPEAL STATISTICAL DATA—BOARD OF VETERANS' APPEALS (1993).