

# THE IMPACT OF THE VETERANS' JUDICIAL REVIEW ACT ON THE FEDERAL CIRCUIT

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## INTRODUCTION

The jurisdiction of the United States Court of Appeals for the Federal Circuit was recently enlarged through the enactment of the Veterans' Judicial Review Act of 1988 (VJRA).<sup>1</sup> The VJRA authorizes the Federal Circuit to review the decisionmaking of the United States Department of Veterans Affairs (VA)<sup>2</sup> through two judicial paths. First, the VJRA created a new Article I court, the United States Court of Veterans Appeals (CVA),<sup>3</sup> to review denials by the

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1. Pub. L. No. 100-687, 102 Stat. 4105 (1988).

2. Approximately three weeks before it enacted the VJRA, Congress reorganized the former Veterans' Administration as a cabinet-level executive department. The Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

3. 38 U.S.C.A. § 7251 (West 1991). Article I courts are those created by Congress with the authority granted it by the "necessary and proper" clause of Article I of the Constitution. U.S. CONST. art. I, cl. 8. Article III courts include the United States Supreme Court and "such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, cl. 1.

VA of individual claims for federal veterans benefits. CVA decisions are subject to appeal to the Federal Circuit exclusively.<sup>4</sup> Second, the VJRA transferred jurisdiction from United States district courts to the Federal Circuit over direct challenges to VA regulations and other policies of general applicability.<sup>5</sup>

This Article provides an overview of these two additions to the jurisdiction of the Federal Circuit. Part I reviews historical aspects of judicial review as it has been applied to decisionmaking by the VA: specifically, past statutory limitations on judicial review and court holdings that have effectively narrowed those limitations. Part II discusses the first review path recently established by the VJRA, whereby departmental decisions are appealable to the Board of Veterans Appeals (BVA) and then to the CVA. CVA judgments are appealable to the Federal Circuit and ultimately may be reviewed by the Supreme Court on writ of certiorari. Part III addresses the second review path provided by the VJRA, a track which allows challenges of department rules and policies directly to the Federal Circuit and assigns exclusive jurisdiction over such challenges to that court. Part IV addresses the impact on the Federal Circuit's docket created or stimulated by the VJRA's two paths for judicial review of VA decisionmaking. The Article concludes that the impact on the Federal Circuit so far has been limited although previous restraints on attorneys fees have largely been lifted by the VJRA. Moreover, the docket impact is likely to remain limited until a greater proportion of the private bar develops a practice in this area of law.

## I. HISTORICAL OVERVIEW OF JUDICIAL REVIEW OF VA DECISIONMAKING

The U.S. system of government has a strong tradition that favors court review of administrative agency decisions.<sup>6</sup> Until the VJRA,

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4. 38 U.S.C.A. § 7292 (West 1991).

5. *Id.* § 502.

6. See STEVEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 28 (1985). Two essential elements of the traditional model of administrative law are (1) that judicial review be available to ensure accurate and impartial decisionmaking by agencies in compliance with legislative directives, and (2) that agency decisional processes facilitate the exercise of judicial review. *Id.* Under the traditional model, judicial review is an integral part of the regulatory process. Although legislative oversight, media scrutiny, and internal bureaucratic checks also serve to assure that an agency acts properly, heaviest reliance falls on the independent judiciary to police agency conformance to statutory authorization by reviewing both factual and legal bases for administrative decisions. *Id.* In this context, judicial review has two overarching functions: A court serves both as a "quality control" on the technical soundness of agency decisions, and as a "generalist forum" for reassessing administrative choices among competing social values. *Id.* at 371. Courts have historically been available as of right to persons adversely affected by administrative actions, according to Breyer

however, most decisions of the VA were exempt from court review. Congress created the VA in 1930.<sup>7</sup> Three years later, Congress added provisions prohibiting court review of individual benefits decisions made by the VA.<sup>8</sup>

Limited exceptions to the general ban on court review of VA decisionmaking evolved.<sup>9</sup> In *Johnson v. Robison*,<sup>10</sup> the Supreme Court held that 38 U.S.C. § 211(a), the judicial review preclusion statute, does not bar federal courts from entertaining constitutional challenges to veterans benefits legislation.<sup>11</sup> The Court's reasoning led to the development of a body of lower court case law allowing district courts to entertain challenges brought under the Administrative Procedure Act (APA)<sup>12</sup> to a variety of VA actions. For example, lower courts ruled that VA regulations, policies, and other actions affecting the adjudication of claims for benefits were reviewable in district courts to determine whether the actions were constitutional.<sup>13</sup> The lower courts also allowed challenges to VA regulations to determine whether the regulations were arbitrary and capricious or whether they violated statutory authority.<sup>14</sup> The only lawsuits

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and Stewart. In order to discharge that responsibility, since they have no special competence to weigh technical details, costs, and benefits, courts have instead attempted to improve the quality of agency decisions through controls on the decisionmaking process. *Id.* at 371.

7. Pub. L. No. 71-536, ch. 863, § 1, 46 Stat. 1016 (1930).

8. Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9 (1933) ("All decisions rendered by the Administrator . . . [or] regulations issued shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review . . .").

9. See generally Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veterans Benefits*, 17 OHIO N.U. L. REV. 99 (1990).

10. 415 U.S. 361 (1974).

11. *Johnson v. Robison*, 415 U.S. 361, 367 (1974).

12. 5 U.S.C. §§ 701-706 (1988).

13. See, e.g., *Marozsan v. United States*, 852 F.2d 1469, 1473 (7th Cir. 1988) (en banc) ("A veteran may obtain review, not of his individual claim determination, but of unconstitutional methods employed by the V.A. in arriving at that benefits decision."); *Devine v. Cleland*, 616 F.2d 1080, 1083-85 (9th Cir. 1980) (finding that questioning procedural safeguards in advance of benefits rulings amounts to constitutional challenge of congressional act, not challenge to agency determination of law or fact); *Zayas v. Veterans Admin.*, 666 F. Supp. 361, 364-65 (D.P.R. 1987) (stating that judicial review is limited to constitutional assessment of VA regulation and its correct application); *Plato v. Roudeshush*, 397 F. Supp. 1295, 1300-04 (D. Md. 1975) (stating that review of VA's policy of not according hearing prior to benefits reduction does not intrude on agency's authority to decide individual claims or develop substantive policies and is thus outside congressional intent behind "no review" clause). See generally Jean F. Rydstrom, Annotation, *Validity, Construction, and Application of 38 U.S.C. § 211(a) Precluding Judicial and Other Review of Administrative Decisions on Veterans Benefits*, 18 A.L.R. Fed. 915 (1974 & Supp. 1991).

14. See, e.g., *Evergreen State College v. Cleland*, 621 F.2d 1002, 1007-08 (9th Cir. 1980) (holding review of challenges to Administrator's authority to promulgate regulations is not precluded by 38 U.S.C. § 211(a)); *University of Md. v. Cleland*, 621 F.2d 98, 100-01 (4th Cir. 1980) (finding that challenges of Administrator's interpretation of statutory authority is judicially reviewable, as neither statutory text nor scant legislative history provide clear and convincing evidence of congressional intent to limit such review by courts); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075, 1078 (8th Cir. 1979) (maintaining that challenge of

that the courts consistently dismissed as barred by statute were non-constitutional challenges to the VA's decisions on individuals' claims for benefits.<sup>15</sup>

The Veterans' Judicial Review Act expanded the scope of section 211(a), recodified in 1991 as section 511(a),<sup>16</sup> overruling some of the case law allowing district courts to entertain actions brought under the APA challenging VA actions. Section 511(a) now prohibits any court from reviewing a decision of the Secretary of Veterans Affairs on "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans" except as provided in the VJRA.<sup>17</sup> In some circumstances, the VJRA authorizes judicial review of decisions of the Secretary under a law that affects the provision of veterans benefits in the CVA (with further appeal to the Federal Circuit).<sup>18</sup> In other circumstances, the VJRA authorizes direct review by the Federal Circuit.<sup>19</sup> Because section 511(a) addresses only judicial review of certain decisions by the Secretary of Veterans Affairs, the Supreme Court's decision in *Johnson v. Robison*,<sup>20</sup> construing section 511(a) as it existed prior to the VJRA, should remain good law. District courts should still be able to retain jurisdiction over lawsuits challenging the constitutionality of title 38 statutes because the challenge is to a decision of Congress, not to a decision of the Secretary.<sup>21</sup>

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Administrator's authority to promulgate regulations is judicially reviewable, as it does not overload courts with duty of second-guessing specialized agency on complex and technical issues); *Wayne State Univ. v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978) (holding that 38 U.S.C. § 211(a) does not preclude review of challenge to Administrator's authority to promulgate regulations). *Contra Roberts v. Walters*, 792 F.2d 1109, 1110 (Fed. Cir. 1986) (declining to entertain veteran's request for favorable statutory interpretation, as directed to administrator's decision rather than decision of Congress and making negative reference to *Evergreen State*, *University of Md.*, and *Wayne State*).

15. See, e.g., *Wickline v. Brooks*, 446 F.2d 1391, 1391 (4th Cir. 1971) (refusing to review VA's denial of claim for disability compensation), *cert. denied*, 404 U.S. 1061 (1972); *Fritz v. Director of Veterans Admin.*, 427 F.2d 154, 155 (9th Cir. 1970) (dismissing veteran's claim for lack of jurisdiction); *Redfield v. Driver*, 364 F.2d 812, 813 (9th Cir. 1966) (declining to review Administrator's final decision on whether veteran's death was caused by service-related condition, as beyond jurisdiction of court); *Barefield v. Byrd*, 320 F.2d 455, 457-58 (5th Cir. 1963) (holding that VA decisions need not conform to APA, as Administrator is statutorily authorized to make own rules and regulations in carrying out VA responsibilities), *cert. denied*, 376 U.S. 928 (1964).

16. DVA Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 378, 388 (1991) (to be codified at 38 U.S.C. § 511).

17. 38 U.S.C.A. § 511(a) (West 1991).

18. See *infra* notes 31-59 and accompanying text (discussing CVA's jurisdiction, standards, and scope of review, and Federal Circuit's authority to review CVA decisions).

19. See *infra* notes 60-66 and accompanying text (discussing Federal Circuit's exclusive jurisdiction to review direct challenges to VA rules, using APA scope-of-review provisions).

20. 415 U.S. 361 (1974).

21. For example, in 1991, a class action lawsuit was filed in the United States District Court for the Southern District of New York to challenge the constitutionality of the provision

Similarly, district courts retain jurisdiction to adjudicate lawsuits challenging VA actions that are not connected to a decision by the Secretary that directly affects the provision of veterans benefits. For example, after passage of the VJRA, two veterans organizations and several individual veterans challenged the failure of the Secretary of the VA to comply with the Veterans' Health Programs and Improvement Act of 1979,<sup>22</sup> also called the 1979 Agent Orange Act. The Act requires the Secretary to conduct an epidemiological study of any long-term adverse health effects in Vietnam veterans that may result from exposure to the herbicide "Agent Orange."<sup>23</sup>

Although implementation of the 1979 Agent Orange Act could ultimately have an impact on the provision of veterans benefits, the lawsuit does not challenge a "decision by the Secretary [of Veterans Affairs] under a law that affects the provision on benefits" within the meaning of section 511(a). The primary focus of the 1979 Agent Orange Act is to require that a study be conducted. Although the results of the study could potentially induce the Secretary to change the VA's regulations for the provision of benefits, this result would be secondary to the primary statutory requirement, which does not itself affect the provision of veterans benefits. Accordingly, section 511(a) does not bar district courts from entertaining these types of challenges.

## II. DIRECT REVIEW IN THE UNITED STATES COURT OF VETERANS APPEALS, WITH FURTHER REVIEW IN THE FEDERAL CIRCUIT

Title III of the Veterans' Judicial Review Act establishes a new United States Court of Veterans Appeals under Article I of the U.S. Constitution.<sup>24</sup> Most disputes between a veteran or veteran's dependent and the VA must now be litigated initially in the CVA. The

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of the Omnibus Budget Reconciliation Act of 1990, tit. 8, § 8001(a)(1), Pub. L. No. 101-508, 104 Stat. 1388, 1388-341 to -342 (1990) (codified at 38 U.S.C. § 5505(a)) requiring the VA to withhold service-connected disability compensation to veterans rated mentally incompetent by the VA if the value of the veteran's estate exceeds \$25,000, exclusive of the veteran's home. *Disabled American Veterans v. United States Dep't of Veterans Affairs*, Civ. No. 91-1413 (S.D.N.Y. filed Feb. 27, 1991).

22. Act of Dec. 20, 1979, Pub. L. No. 96-151, tit. 3, § 307, 93 Stat. 1092, 1097, *reprinted in* 38 U.S.C.A. § 527 note (West 1991) (Agent Orange Study).

23. *American Legion v. Derwinski*, Civ. Nos. 90-1808, 90-1809 (D.D.C. filed Aug. 2, 1990) (referred Jan. 16, 1992 to U.S. magistrate for scheduling, non-dispositive motions, and discovery).

24. VJRA, tit. 3, §§ 4051-4092, Pub. L. No. 100-687, 102 Stat. 4105, 4113-22 (1988) (to be codified at 38 U.S.C. §§ 7251-7298). The major difference between federal courts created pursuant to Article I of the United States Constitution, including the CVA, the United States Tax Court, and the United States Court of Military Appeals, and those created pursuant to Article III is that the judges of an Article III court are appointed for life and their salaries cannot be decreased.

VJRA provides that the CVA must consist of a chief judge and at least two, but not more than six, associate judges appointed by the President.<sup>25</sup> The term of office for all CVA judges is fifteen years.<sup>26</sup> The President may, however, remove a judge from office prematurely for various specified reasons preventing the proper execution of the judge's duties.<sup>27</sup> The CVA commenced operation on October 16, 1989, with a minimum complement of three judges. By the summer of 1990, it had a full complement of seven judges. Principal offices of the court are located in Washington, D.C., near most of the other federal and local courts.<sup>28</sup> Instead of mandating specific rules of practice and procedure, Congress delegated broad powers to the CVA to prescribe its own rules.<sup>29</sup> Based on the court's experience with its interim rules, comments of interested persons, and views of the court's advisory committee, the CVA published Rules of Practice and Procedure<sup>30</sup> in April 1991, modeled on the Federal Rules of Appellate Procedure.

The VJRA gives the CVA "exclusive jurisdiction to review decisions of the Board of Veterans Appeals," the highest adjudicative body on claims for veterans benefits within the VA.<sup>31</sup> One who files a notice of appeal in the CVA is called the appellant<sup>32</sup> and the individual who is sued, normally the Secretary of Veterans Affairs, is called the appellee.

Only a person "adversely affected" by a Board of Veterans Appeals (BVA) decision may seek review in the CVA.<sup>33</sup> To be "adversely affected" by a BVA decision, and thus have standing to file suit against the Secretary in the CVA, the claimant must receive less than the full benefits to which the claimant is, or may be, entitled.<sup>34</sup> If, for example, a veteran is receiving service-connected disability compensation and the BVA rules that the veteran's disability rating should be increased from 30% to 70%, but not to 100%, the vet-

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25. 38 U.S.C.A. § 7253(a) (West 1991).

26. *Id.* § 7253(c).

27. *Id.* § 7253(f).

28. The Act requires the CVA's principal office to be located in Washington, D.C., although the court may sit anywhere in the United States. *Id.* § 7255.

29. *Id.* § 7264(a).

30. U.S. VET. APP. R. (1991), reprinted in 38 U.S.C.A. app. at 760 (West 1991).

31. 38 U.S.C.A. § 7252(a) (West 1991).

32. *Id.* § 7266.

33. *Id.* § 7266(a). The court has held that an appeal can validly be filed by a custodian of a claimant, on behalf of the claimant, if the custodian has a recognized fiduciary relationship created by virtue of state law or the Secretary of Veterans Affairs. *Mokal v. Derwinski*, 1 Vet. App. 12, 14-15 (Ct. Vet. App. 1990). It appears that a veterans organization or a governmental entity does not have standing to challenge a BVA decision on behalf of an adversely affected individual.

34. *Corchado v. Derwinski*, 1 Vet. App. 160, 162-63 (Ct. Vet. App. 1991).

eran can appeal that part of the BVA's decision denying an increase to 100%. Thus, a claimant who receives some relief from the BVA may nevertheless appeal the BVA's decision to deny complete relief to the CVA.

By contrast, neither the Secretary of Veterans Affairs nor any other VA official may appeal a BVA decision to the CVA.<sup>35</sup> What logically follows from this is that the CVA has no authority to reduce benefits to which the BVA has already decided the claimant is entitled. Thus, a claimant cannot end up in a worse position by appealing to the CVA. If, for example, the BVA rules that the veteran's service-connected disability rating should be increased from 10% to 30%, but not to 100%, the CVA has authority to reverse that part of the BVA's decision denying an increase to 100%, but cannot reverse the grant of a 30% rating.

With respect to standing, the CVA has adopted the "case or controversy" limitation familiar to both Article III and Article I courts.<sup>36</sup> Thus, the CVA by its own restraint will not issue advisory opinions. Moreover, the VJRA adopts the traditional rule in American jurisprudence that judicial review of agency action is based on a review of the record created before the agency.<sup>37</sup> The scope of the review that the court must apply in assessing decisions of the BVA<sup>38</sup> is similar in most respects to the scope-of-review provisions of the APA.<sup>39</sup>

Although the VJRA provides that "[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the court,"<sup>40</sup> the Act makes clear that the CVA may review almost any issue of law that affects the outcome of a case over which the CVA has jurisdiction.<sup>41</sup> Even though the BVA is bound by VA regulations, instructions of the Secretary of Veterans Affairs, and precedent opinions of the General Counsel of the VA,<sup>42</sup> the CVA is not bound by these authorities. Thus, the CVA may overturn a BVA decision and order the grant of benefits based on a construction of the law that was beyond the authority of the BVA to adopt. The CVA can set aside a BVA conclusion of law if the CVA finds that conclusion to be arbitrary, capricious, an abuse of discre-

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35. 38 U.S.C.A. § 7252(a) (West 1991).

36. *Mokal v. Derwinski*, 1 Vet. App. 12, 13-15 (Ct. Vet. App. 1990).

37. 38 U.S.C.A. § 7252(b) (West 1991).

38. *Id.* § 7261.

39. 5 U.S.C. § 706 (1988).

40. 38 U.S.C.A. § 7261(c). In particular, the CVA may not review the schedule of ratings for disabilities as adopted by the Secretary. *Id.* § 7252(b).

41. *Id.* § 7261(a).

42. *Id.* § 7104(c).

tion, or otherwise not in accordance with law, or if the conclusion fails to meet statutory, procedural, or constitutional requirements.<sup>43</sup> The decisions subject to CVA review are not just those of the BVA; decisions of the Secretary of Veterans Affairs or the Chairman of the BVA are subject to review as well.<sup>44</sup> For example, the CVA has effectively ruled that it may properly review the validity of the Secretary's actions in adopting regulations, rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability, including opinions and interpretations of the VA General Counsel that fit this description.<sup>45</sup>

The CVA has made clear that the BVA is not entitled to judicial deference on conclusions of law.<sup>46</sup> The CVA may review the BVA's legal interpretations under a *de novo* standard.<sup>47</sup>

In most BVA decisions that deny a claimant the full benefits sought, the disagreement between the claimant and the BVA centers on the facts. For example, in a claim for service-connected disability compensation, the BVA may find that the veteran's current ulcer condition did not have its inception in service, although the veteran asserts that it did. Alternatively, the BVA may find that the veteran's mental disability was a personality disorder, which is not a compensable disability, while the veteran contends that it was schizophrenia, which is compensable. Because of the central role necessarily played by the BVA's findings of fact, the degree to which the court is authorized to scrutinize BVA findings of fact greatly affects a claimant's chance of success in appealing most BVA decisions to the CVA. Although the CVA may not try facts *de novo*, the VJRA does give the court authority to review BVA findings of fact and to set them aside. The Act provides that the CVA should set aside a finding of material fact "if the finding is clearly erroneous,"<sup>48</sup> a standard Congress has rarely used for court review of federal agency action. In a landmark decision, *Gilbert v. Derwinski*,<sup>49</sup> the CVA interpreted this standard of review to coincide with the standard that Rule 52(a) of the Federal Rules of Civil Procedure requires United States courts of appeals to apply to findings of fact made by district court judges.<sup>50</sup>

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43. *Id.* § 7261(a)(3).

44. *Id.*

45. *See Fugere v. Derwinski*, 1 Vet. App. 103, 109-10 (Ct. Vet. App. 1990) (holding that VA official's rescission of benefits rule by internal unilateral memorandum violates notice and comment principles of APA), *argued*, No. 91-7058 (Fed. Cir. Nov. 4, 1991).

46. *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (Ct. Vet. App. 1991).

47. 38 U.S.C.A. § 7261(a)(1) (West 1991).

48. *Id.* § 7261(a)(4).

49. 1 Vet. App. 49 (Ct. Vet. App. 1990).

50. *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (Ct. Vet. App. 1990).



Once the CVA makes a final decision, the Federal Circuit has exclusive jurisdiction to hear appeals of CVA decisions.<sup>51</sup> Unlike the one-sided appeals process from the BVA to the CVA, in which the claimant can appeal, but not the VA, a CVA decision can be appealed to the Federal Circuit by either the individual who appealed to the CVA or by the VA.<sup>52</sup> Appeals to the Federal Circuit must be filed within sixty days of the final CVA decision.<sup>53</sup> Once the Federal Circuit renders a final decision, either the VA or the claimant may petition the United States Supreme Court for certiorari within ninety days of the final action.<sup>54</sup>

The authority of the Federal Circuit to overturn a CVA decision is much more limited than the authority of the CVA to reverse a BVA decision. The most significant restriction on the Federal Circuit is that it cannot overturn factual determinations made by the BVA and reviewed by the CVA, except to the extent the appeal presents a constitutional issue.<sup>55</sup> On nonconstitutional issues, the Federal Circuit must thus accept the BVA's findings of fact, except to the extent that the CVA reverses the findings, in which case the Federal Circuit must accept the CVA's view of the facts.

If the BVA finds, for example, that a claimant does not suffer from post-traumatic stress disorder in a claim for service-connected disability compensation, and the CVA rejects the claimant's argument that this BVA determination is "clearly erroneous," the claimant cannot appeal this decision to the Federal Circuit on the ground that the BVA's determination that the claimant did not suffer from

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51. 38 U.S.C.A. § 7292(c) (West 1991).

52. *Id.* § 7292(a).

53. The VJRA states that an appeal to the Federal Circuit "shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." 38 U.S.C.A. § 7292(a) (West 1991). 28 U.S.C. § 2107 (1988) provides "[i]n any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties [for appeal to a court of appeals] shall be sixty days from such an entry [of judgment, order or decree]." Accordingly, both claimants and the VA will have 60 days from entry of judgment within which to appeal a CVA decision.

54. 38 U.S.C.A. § 7292(c) (West 1991) ("The judgment of [the Federal Circuit] shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of Title 28."); *see* 28 U.S.C. § 1254 (1988) ("[C]ases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any part to any civil or criminal cases, before or after rendition of judgment or decree."); 28 U.S.C. § 2101(c) (1988) ("Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.").

55. 38 U.S.C.A. § 7292(d)(2) (West 1991); *see* *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991) (stating that while CVA has plenary jurisdiction to assess issues of law appealed from BVA and to review factual determinations under a "clearly erroneous" standard, court of appeals is limited to reviewing "non-factual" decisions).

post-traumatic stress disorder was, contrary to the conclusion of the CVA, "clearly erroneous." On this issue, the CVA decision is final and unappealable. Conversely, if the CVA does reverse the BVA's decision on the ground that it was "clearly erroneous" for the BVA to find that the claimant is not suffering from post-traumatic stress disorder, the VA cannot challenge the CVA's judgment by appealing to the Federal Circuit on the ground that the CVA erred in concluding that the BVA finding of fact was "clearly erroneous." In this scenario, the CVA's decision on this issue is also final and unappealable.

The primary focus of Federal Circuit review of an appeal from the CVA concerns the validity and proper interpretation of statutes and regulations that the CVA relied upon in making its decision.<sup>56</sup> The Federal Circuit is authorized to review the CVA's legal determinations under a *de novo* standard and can overturn a statute or regulation, or an interpretation thereof, if it concludes that the CVA's determination is arbitrary, capricious, an abuse of discretion, unconstitutional, contrary to a statute, in excess of statutory authority, without observance of procedure required by law, or otherwise not in accordance with law.<sup>57</sup>

The gray area regarding the scope of review that the Federal Circuit has over CVA decisions concerns CVA or BVA interpretations or applications of statutes and VA regulations. On one hand, the VJRA states that the Federal Circuit can review any interpretation of a statute or VA regulation, other than factual determinations, that the CVA relied on in making the decision.<sup>58</sup> On the other hand, the VJRA states that "[e]xcept to the extent that an appeal . . . presents a constitutional issue," the Federal Circuit "may not review . . . a challenge to a law or regulation as applied to the facts of a particular case."<sup>59</sup> The Federal Circuit has not as yet addressed this conflict but it may soon be obliged to consider it. In some recent appellate briefs before the Federal Circuit, both the VA and claimants have

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56. 38 U.S.C.A. § 7292(a) (West 1991).

57. *Id.* § 7292(d)(1); see *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991) (citing first sentence of 38 U.S.C. § 7292(d)(1), providing that "this court may review the Veterans Court's legal determinations under a *de novo* standard.").

58. 38 U.S.C.A. § 7292(a) (West 1991) ("[A]ny party . . . may obtain a review of the [CVA's] decision with respect to the validity of any statute or regulation (other than refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) . . ."); *id.* § 7292(d)(1) ("[The Federal Circuit] shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the [CVA] . . .").

59. *Id.* § 7292(d)(2) ("Except to the extent that an appeal . . . presents a constitutional issue, [the Federal Circuit] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.").

asked the Federal Circuit to review interpretations of statutes and regulations as applied to the individual facts of a case.

### III. DIRECT REVIEW IN THE FEDERAL CIRCUIT

In addition to creating a new court with exclusive jurisdiction to review BVA decisions, the VJRA also provides the Federal Circuit with exclusive jurisdiction to review direct challenges to VA regulations, rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability, including opinions and interpretations of the VA General Counsel that fit this description.<sup>60</sup> The Federal Circuit is to review these direct challenges under the scope-of-review provisions of the Administrative Procedure Act.<sup>61</sup>

Thus, the VJRA effectively transfers jurisdiction over such lawsuits from the district courts to the Federal Circuit. The only regulations affecting the provision of benefits that are beyond review by the Federal Circuit are regulations that adopt or revise the VA's disability rating schedule. The VJRA expressly proscribes Federal Circuit review of the disability rating schedule.<sup>62</sup>

The transfer of jurisdiction from district courts to the Federal Circuit applies to cases filed on or after September 1, 1989.<sup>63</sup> The legislative history of the VJRA makes clear that pending actions filed in district courts before that date are not intended to be transferred to the Federal Circuit.<sup>64</sup>

In summary, the VJRA contemplates that claimants can challenge VA regulations and general policies that affect their cases through either of two judicial paths.<sup>65</sup> First, they may file a direct challenge before the Federal Circuit. Alternatively, they can appeal their individual cases to the BVA, which is bound by VA regulations, "instructions" of the Secretary, and VA General Counsel "precedent

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60. *Id.* § 502; *see also* *Pena v. Secretary, Dep't of Veterans Affairs*, 944 F.2d 867, 869-70 (Fed. Cir. 1991) (denying direct review by Federal Circuit because claimant clearly sought review of particular benefits decision rather than review of VA's making or interpreting rules and policies); *Hilario v. Secretary, Dep't of Veterans Affairs*, 937 F.2d 586, 588-89 (Fed. Cir. 1991) (holding that, aside from CVA appeals, Federal Circuit's authority to review VA action under APA is limited by 38 U.S.C. § 502 to rulemaking, policy, and FOIA publication requirements, and may not be extended to agency's application of benefits statutes to facts of particular case).

61. 38 U.S.C.A. § 502 (West 1991); *Hilario*, 937 F.2d at 588-89.

62. 38 U.S.C.A. § 502(c) (West 1991).

63. VJRA, Pub. L. No. 100-687, tit. 4, § 401, 102 Stat. 4105, 4122 (1988).

64. *See* 134 CONG. REC. 31,459 (1988) (remarks of Sen. Mitchell); *id.* at 37,472-73 (remarks of Sen. Cranston); *id.* at 31,787-90 (remarks of Rep. Edwards).

65. *See* 134 CONG. REC. 31,470-71 (1988) (remarks of Sen. Cranston); *id.* at 31,787-90 (remarks of Rep. Edwards).

opinions."<sup>66</sup> If they lose at the BVA, claimants may challenge the VA regulation or policy in the CVA as part of an appeal of a BVA denial, with subsequent review available in the Federal Circuit.

#### IV. THE CURRENT EFFECT OF THE VJRA ON THE FEDERAL CIRCUIT'S DOCKET

So far, the VJRA has had a more limited impact on the docket of the Federal Circuit than many observers expected. The reason why relatively few appeals have been filed with the Federal Circuit pursuant to provisions of the VJRA is apparently that relatively few attorneys are willing to represent veterans and their dependents. In almost all of the appeals filed with the Federal Circuit pursuant to the VJRA, the claimant veteran has appeared before the court pro se. This closely reflects the situation at the Court of Veterans Appeals. As of August 1, 1991, of the 3096 appeals filed with the CVA, 2001 (64.6%) of the appellants prosecuted their appeals without a representative.<sup>67</sup>

Veterans appearing pro se are clearly at a severe disadvantage, as demonstrated by the fact that they experience a poor success rate at the CVA. A 1991 survey showed that only 21.9% of all pro se appellants were able to get their appeals decided on the merits, with most of the remainder being dismissed for lack of jurisdiction.<sup>68</sup> By comparison, 42.7% of veterans with representation obtained CVA decisions on the merits.<sup>69</sup> Of those pro se appellants who were able to obtain decisions on the merits, only 13% were successful in securing a reversal or remand of the appealed BVA decision, whereas veterans with a representative were able to obtain a reversal or remand in 46% of their cases.<sup>70</sup> Of the claimants surveyed, only 2.8% of all pro se appellants obtained a reversal or remand, compared to 19.6% for all veterans with a representative.<sup>71</sup> Most pro se veterans would prefer to have legal representation. Indeed, a survey conducted in 1991 by the Advisory Committee on Representation of CVA revealed that only 8% of the pro se appellants responding

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66. 38 U.S.C.A. § 7104(c) (West 1991); see *supra* note 42 and accompanying text (explaining that BVA is bound by regulations and precedent opinions).

67. 2 MICHAEL E. WILDHABER, RONALD B. ABRAMS, BARTON F. STICHMAN & DAVID F. ADLESTONE, *VETERANS BENEFITS MANUAL: AN ADVOCATE'S GUIDE TO REPRESENTING VETERANS AND THEIR DEPENDENTS* 7-31 (1991) (citing COMMITTEE ON VETERANS AFFAIRS, ADMINISTRATIVE LAW SECTION, AMERICAN BAR ASSOCIATION, *THE PRO SE PROBLEM IN THE UNITED STATES COURT OF VETERANS APPEALS: POSSIBLE SOLUTIONS* 3 (Aug. 14, 1991) (draft report)).

68. *Id.* at 7-32.

69. *Id.*

70. *Id.*

71. *Id.*

stated they had desired to proceed before the court without a representative.<sup>72</sup>

The problem, therefore, appears to be the lack of advocates willing to represent veterans before the Court of Veterans Appeals and the Federal Circuit. The scarcity of advocates is undoubtedly a legacy of the stringent attorney-fee limitations that existed prior to the VJRA; limitations which have discouraged generations of attorneys from learning and practicing veterans law. Since 1862, Congress has closely regulated the fee that can be charged by those who act as a claimant's representative in prosecuting a claim for benefits.<sup>73</sup> Prior to the VJRA, any fee paid to attorneys had to be determined by the Secretary and could not exceed \$10 on any one claim. An attorney who violated this fee limitation was subject to a maximum fine of \$500 and imprisonment "at hard labor" for a maximum of two years.<sup>74</sup> In practice, these provisions operated as an economic barrier preventing members of the private bar from serving as veterans' representatives. In fiscal year 1987, for example, only 705 of the approximately 40,000 claimants who appeared before the BVA were represented by attorneys.<sup>75</sup>

The VJRA substantially revises attorney fee limitations. The Act sets no limitation on attorneys fees for litigation in the Federal Circuit. For services rendered in cases on direct appeal to the CVA, the appellant and his or her representative are free to negotiate any fee agreement they desire, subject to two restrictions. First, the advocate must file a copy of the fee agreement with the CVA, which may order a reduction if it finds that the agreed-on fee is "excessive or unreasonable."<sup>76</sup> The CVA need not take affirmative action to ap-

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72. *Id.*

73. In 1862, Congress set a \$5 cap on the fee an agent or attorney could charge certain military personnel in applying for a pension, bounty, or other allowance. Act to Grant Pensions, §§ 6-7, 12 Stat. 566, 568 (1862). Two years later, this limitation was raised to \$10. Act of July 4, 1864, §§ 12-13, 13 Stat. 387, 389. Until Congress passed the VJRA in 1988, the fee cap remained at \$10. 38 U.S.C. § 3404(c)(2) (1982) (stating that agent's fee shall not exceed \$10 for any one claim), *repealed by* Pub. L. No. 100-687, § 104, 102 Stat. 4108 (1988). *See generally* HOUSE COMM. ON VETERANS AFFAIRS, 100TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE TEN DOLLAR ATTORNEY FEE LIMITATION IN CLAIMS OF VETERANS' BENEFITS (Comm. Print No. 8, 1987) (reviewing fee limitations enacted between 1862 and 1936 and concluding that Congress has consistently wanted to protect claimants from rapacious attorneys).

74. 38 U.S.C. § 3405 (1988).

75. S. REP. NO. 418, 100th Cong., 2d Sess. 63 (1988); *see also* *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 312 n.4 (1985) (noting VA statistics showing that 2% of claimants have lawyers, 86% have "service representatives," and 12% proceed pro se by choice).

76. 38 U.S.C.A. § 7263(c)-(d) (West 1991). In defining the ceiling on fees as "excessive or unreasonable," Congress adopted the language of H.R. 5288. *See* 134 CONG. REC. 31,472-79 (1988) (remarks of Rep. Montgomery); *id.* at 31,472-81 (1988) (remarks of Sen. Cranston). In reporting out H.R. 5288, the House Committee on Veterans Affairs construed this language to bar "a fee at an hourly rate in excess of rates charged by a person of comparable skill

prove a fee agreement. CVA review of the reasonableness of a particular fee agreement can be initiated by motion of the CVA itself or by one of the parties, apparently including the VA.<sup>77</sup> A decision by the CVA on the reasonableness of a fee is final and cannot be appealed to any other court.<sup>78</sup>

A second restriction in CVA representation involves contingency fee agreements in which the advocate's fee is to be paid by the VA by subtracting the fee from the amount of benefits due to the claimant if the advocate is successful in the case. The VJRA requires the VA to cooperate by splitting the benefit check between representative and client. The advocate may not receive, however, more than 20% of the past-due benefits awarded.<sup>79</sup> The VA cannot give the advocate any share of future benefit checks issued by the VA as a result of the court victory.<sup>80</sup> The 20% ceiling does not apply to contingency-fee agreements that do not involve payment of the fee to the advocate directly by the VA. The only restriction on a contingency fee paid to the advocate by the client is "reasonableness" as determined by the BVA, or the CVA on appeal.<sup>81</sup>

Although attorneys have been able to charge reasonable fees for representing veterans before either the CVA or the Federal Circuit since passage of the VJRA, few attorneys have chosen to represent veterans in these courts. The impact of the VJRA on the docket of the Federal Circuit will probably not be significant until a larger segment of the private bar is willing to learn and practice this area of law.

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in the community in which the representative is normally employed." H.R. REP. NO. 963, 100 CONG., 2d Sess. 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5794, 5813-14.

On the Senate floor, Senator Cranston explained why he had dropped the strict dollar caps set out in S. 11 and agreed in conference with the approach adopted in H.R. 5288, allowing attorneys to earn "reasonable fees" for representing VA claimants:

In my view, the change to reasonable fees is a positive move. In our meetings to resolve the differences between the Senate-passed and House-passed versions of S. 11, the House committee expressed concern that the cap as articulated in the Senate bill could result in veterans [not] being able to retain effective counsel. To quote an old cliché: "You get what you pay for." Certainly, if we are going to give veterans real access to judicial review, we must give them access to good, qualified attorneys. I believe that allowing attorneys to charge reasonable fees will accomplish that goal and was convinced by the position of the House that its provisions on this point are preferable to the highly restrictive provisions of the Senate-passed measure.

134 CONG. REC. 31,469 (1988).

77. 38 U.S.C.A. § 7263(c) (West 1991).

78. *Id.*

79. VJRA, Pub. L. No. 100-687, tit. 1, § 104(a), 102 Stat. 4105, 4108 (1988) (to be codified at 38 U.S.C. § 5904(d)(1)).

80. *Id.* (to be codified at 38 U.S.C. § 5904(d)(2)(A)).

81. *Id.* (to be codified at 38 U.S.C. § 5904(c)(2)).