Judicial Review

From its creation in 1930, decisions of the Veterans Administration, now the Department of Veterans Affairs, could not be appealed outside VA except on rare Constitutional grounds. This was thought to be in the best interests of veterans, in that their claims for benefits would be decided solely by an agency established to administer veteran-friendly laws in a paternalistic and compassionate manner. At the time, Congress also recognized that litigation could be very costly and sought to protect veterans from such expense.

For the most part, VA worked well. Over the course of the next 50 years, VA made decisions in millions of claims for benefits. This resulted in VA providing millions of sick and disabled veterans the compensation and medical care to which they were entitled.

Over time, however, complaints from veterans grew in both number and volume. The VA regulatory process and the application of laws to claims were not always accurate or even uniform. While most veterans received benefits the law provided, veterans who were denied benefits felt that because only VA employees decided their claims and appeals, they could not be assured that the decisions in their cases were correct.

In 1988, Congress enacted legislation to authorize judicial review and created the United States Court of Appeals for Veterans Claims (Court) to hear appeals from the VA Board of Veterans' Appeals (BVA). In enacting this legislation, Congress recognized that, without judicial review, the only remedy available to correct VA's misinterpretation of laws, or the misapplication of laws to veterans' claims, was through subsequent legislation.

Today VA decisions on claims are subject to judicial review in much the same way as a trial court's decisions are subject to review on appeal. This review process allows an individual not only to challenge the application of law and regulations to an individual claim, but, more important, to contest whether VA regulations accurately reflect the meaning and intent of the law. When Congress established the Court, it added another beneficial element to appellate review by creating oversight of VA decision making by an independent, impartial tribunal from a different branch of government. As a result, veterans are no longer without a remedy for erroneous BVA decisions.

Judicial review of VA decisions has, in large part, lived up to the positive expectations of its proponents. Nevertheless, based on past recommendations in *The Independent Budget*, Congress has made some important adjustments to the judicial review process based on lessons learned over time. However, more precise adjustments are still needed so judicial review conforms to Congressional intent. Accordingly, *The Independent Budget* veterans service organizations make a series of recommendations to improve the processes of judicial review in veterans' benefits matters.

Enforce the Benefit-of-the-Doubt Rule:

To achieve the law's intent that the Court of Appeals for Veterans Claims enforce the benefit-of-the-doubt rule on appellate review, Congress must enact more precise and effective amendments to the statute setting forth the Court's scope of review.

Title 38, United States Code, section 5107(b) grants VA claimants a statutory right to the benefit of the doubt with respect to any benefit under laws administered by the Secretary of Veterans Affairs when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter. Yet the Court of Appeals for Veterans Claims (Court) has affirmed many Board of Veterans' Appeals (BVA) findings of fact when the record contains only minimal evidence necessary to show a plausible basis for such finding. The Court upholds VA findings of material fact unless they are clearly erroneous, and it has repeatedly held that when there is a "plausible basis" for the BVA's factual finding, it is not clearly erroneous. This makes a claimant's statutory right to the "benefit of the doubt" vacuous because claims can be denied and the denial upheld when supported by far less than a preponderance of evidence. These actions render Congressional intent under section 5107(b) meaningless.

To correct this situation, Congress amended the law with the enactment of the "Veterans Benefits Improvement Act of 2002" to expressly require the Court to consider whether a finding of fact is consistent with the benefit-of-the-doubt rule.[1] However, this intended effect of section 401 of the "Veterans Benefits Act of 2002" has not been used in subsequent Court decisions.[2]

Prior to the Veterans Benefits Act, the Court's case law provided (1) that the Court was authorized to reverse a BVA finding of fact when the only permissible view of the evidence of record was contrary to that found by the BVA and (2) that a BVA finding of fact must be affirmed where there was a plausible basis in the record for the Board's determination.

As a result of Veterans Benefits Act section 401 amendments to section 7261(a)(4), the Court is now directed to "hold unlawful and set aside or reverse" any "finding of material fact adverse to the claimant…if the finding is clearly erroneous."[3] Furthermore, Congress added entirely new language to section 7261(b)(1) that mandates the Court to review the record of proceedings before the Secretary and the BVA pursuant to section 7252(b) of Title 38 and "take due account of the Secretary's application of section 5107(b) of this title…."[4] The Secretary's obligation under section 5107(b), as referred to in section 7261(b)(1), is as follows:

> (b) BENEFIT OF THE DOUBT—The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.[5]

Congress wanted the Court to take a more proactive and less deferential role in its BVA fact-finding review, as detailed in a joint explanatory statement of the compromise agreement contained in the legislation:

> [T]he Committees expect the Court to reverse clearly erroneous findings when appropriate, rather than remand the case. The new subsection (b) [of section 7261] would maintain language from the Senate bill that would require the Court to examine the record of proceedings before the Secretary and BVA and the special emphasis during the judicial process on the benefit-of-doubt provisions of section 5107(b) as it makes findings of fact in reviewing BVA decisions…The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit-of-doubt" provision.[6]

With the foregoing statutory requirements, the Court should no longer uphold a factual finding by the BVA solely because it has a plausible basis, inasmuch as that would clearly contradict the requirement that the Court's decision must take due account of whether the factual finding adheres to the benefit-of-the-doubt

rule. Yet such Court decisions upholding BVA denials because of the "plausible basis" standard continue as if Congress never acted.

Congress clearly intended a less deferential standard of review of the Board's application of the benefit-of-the doubt rule when it amended Title 38, United States Code, section 7261 in 2002, yet there has been no substantive change in the Court's practices. Therefore, to clarify the less deferential level of review that the Court should employ, *The Independent Budget* veterans service organizations believe Congress should amend Title 38, section 7261(a) by adding a new section, (a)(5), that states "In conducting review of adverse findings under (a)(4), the Court must agree with adverse factual findings in order to affirm a decision."

Congress should also require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under Title 38, United States Code, section 7261(b)(1) when applicable.

Recommendation:

Congress should reaffirm its intentions concerning changes made to Title 38, United States Code, section 7261, by the "Veterans Benefits Act of 2002," indicating that it was and still is its intent for the Court of Appeals for Veterans Claims to provide a more searching review of the Board of Veterans' Appeals findings of fact, and in doing so, ensure that it enforces a VA claimant's statutory right to the benefit of the doubt. Congress should amend 38 U.S.C. section 7261(a) by adding a new section, (a)(5), that states: "In conducting a review of adverse findings under (a)(4), the Court must agree with adverse factual findings in order to affirm a decision." Congress should require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under section 7261(b)(1), when applicable.

[1] P.L. 107-330, § 401, 116 stat. 2820, 2832.
[2] Section 401 of the "Veterans Benefits Act", effective December 6, 2002; 38 U.S.C. §§ 7261(a)(4) and (b)(1).
[3] 38 U.S.C. § 7261(a)(4). See also 38 U.S.C. § 7261(b)(1).
[4] 38 U.S.C. § 7261(b)(1).
[5] 38 U.S.C. § 5107(b).
[6] 148 Congressional Record S11337, H9007; 148 Congressional Record S11337, H9003 (daily ed. November 18, 2002) (emphasis added). (Explanatory statement printed in Congressional Record as part of debate in each body immediately prior to final passage of compromise agreement.)

The Court's Backlog:

Congress should require the Court of Appeals for Veterans Claims to amend its Rules of Practice and Procedure so as to preserve its limited resources.

Congress is aware that the number of cases appealed to the U.S. Court of Appeals for Veterans Claims (Court) has increased significantly over the past several years. Nearly half of those cases are consistently remanded to the Board of Veterans' Appeals (BVA).

The Court has attempted to increase its efficiency and preserve judicial resources through a mediation process, under Rule 33 of the Court's Rules of Practice and Procedure, to encourage parties to resolve issues before briefing is required. Despite this change to the Court's rules, VA general counsel routinely fails to admit error or agree to remand at this early stage, yet later seeks remand, thus utilizing more of the Court's resources and defeating the purpose of the program.

In this practice, the Department of Veterans Affairs usually commits to defend the BVA's decision at the early stage in the process. Subsequently, when VA General Counsel reviews the appellant's brief, the Department often changes its position, admits to error, and agrees to or requests a remand. Likewise, VA agrees to settle many cases in which the Court requests oral argument, suggesting acknowledgment of an indefensible VA error through the Court proceedings. VA's failure to admit error, to agree to remand, or to settle cases at an earlier stage of the Court's proceedings does not assist the Court or the

veteran. This failure merely adds to the Court's backlog; therefore, Congress should enact legislation to help preserve the Court's resources. Such an act could be codified in a note to section 7264. For example, the new section could state,

(1) Under Title 38, United States Code, section 7264(a), the Court shall prescribe amendments to Rule 33 of the Court's Rules of Practice and Procedure. These amendments shall require the following:

(a) If no agreement to remand has been reached before or during the Rule 33 conference, the Department, within seven days after the Rule 33 conference, shall file a pleading with the Court and the appellant describing the bases upon which the Department remains opposed to remand.

(b) If the Department of Veterans Affairs later determines a remand is necessary, it may only seek remand by joint agreement with the appellant.

(c) No time shall be counted against the appellant where stays or extensions are necessary when the Department seeks a remand after the end of seven days after the Rule 33 conference.

(d) Where the Department seeks a remand after the end of seven days after the Rule 33 conference, the Department waives any objection to and may not oppose any subsequent filing by appellant for "Equal Access to Justice Act" fees and costs under 28 U.S.C. section 2412.

(2) The Court may impose appropriate sanctions, including monetary sanctions, against the Department for failure to comply with these rules.

Recommendation:

Congress should enact legislation as described herein to preserve the limited resources of the Court of Appeals for Veterans Claims and reduce the Court's backlog.

Courthouse and Adjunct Offices:

The United States Court of Appeals for Veterans Claims should be housed in its own dedicated building, designed and constructed to its specific needs, and in a location befitting its authority, status, and function as an appellate court of the United States.

During the 21 years since the Court of Appeals for Veterans Claims (Veterans Court) was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court that does not have its own courthouse.

The Veterans Court should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress responded in fiscal year 2008 by allocating $7 million for preliminary work on site acquisition, site evaluation, preplanning for construction, architectural work, and associated other studies and evaluations. The issue of providing the proper court facility is now moving forward.

Recommendation:

Congress should provide all funding as necessary to construct a courthouse and justice center in a location of honor and dignity to the men and women who served and sacrificed so much to this great nation and befitting the authority and prestige of the United States Court of Appeals for Veterans Claims.