

# Judicial Review



## Require Enforcement of the Benefit-of-the-Doubt Rule

### RECOMMENDATION:

Congress should amend 38 U.S.C. § 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 § 7261(b)(1), when applicable.

### BACKGROUND AND JUSTIFICATION:

To achieve the law’s intent that the Court of Appeals for Veterans Claims (CAVC) enforces the benefit-of-the-doubt rule on appellate review, Congress must enact more precise and effective amendments to the statute setting forth the CAVC’s scope of review. Congress should reaffirm its intent concerning changes made to the Veterans Benefits Act of 2002 38 U.S.C. § 7261, by indicating that it was and still is intended for the CAVC to provide a more searching review of the Board of Veteran’s Appeals (BVA) findings of fact and in doing so ensure that the CAVC enforces a VA claimant’s statutory right to a benefit of the doubt.

Congress amended the law with the enactment of the Veterans Benefits Improvement Act to expressly require the CAVC to consider whether a finding of fact is consistent with the benefit-of-the-doubt rule. However, this intended effect of § 401 of the act has not been used in subsequent CAVC decisions. Prior to the Veterans Benefits Improvement Act, CAVC case law provided that it 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 that a BVA finding of fact must be affirmed where there was a plausible basis in the record for the BVA’s determination.

As a result of Veterans Benefits Improvement Act (§ 401 amendments to § 7261(a)(4)), the CAVC 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.” Furthermore, Congress added entirely new language to § 7261(b)(1) that mandates the CAVC review the record of proceedings before the Secretary and the BVA pursuant to § 7252(b) of title 38 and to “take due account of the Secretary’s application of § 5107(b) of this title....”

The Committees expected CAVC to reverse clearly erroneous findings when appropriate rather than remand the case. Subsection (b) (of § 7261) maintained language from the Senate bill that would require the Court to examine the record of proceedings before the Secretary and the BVA and the special emphasis during the judicial process on the benefit-of-the-doubt provisions of § 5107(b) as it makes findings of fact in reviewing BVA decisions. The combination of those changes was intended to provide for more searching appellate review of BVA decisions, and thus gave full force to the benefit-of-the-doubt provision.

Therefore, to clarify the less deferential level of review that the Court should employ, *The Independent Budget* veterans service organizations believe Congress should amend § 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 CAVC to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under title 38 U.S.C. § 7261(b)(1) when applicable.

## Enhancements Needed for the Court of Appeals for Veterans Claims

### RECOMMENDATIONS:

Congress should provide all necessary funding to construct a courthouse and justice center in a location of honor and dignity--a location befitting the authority and prestige of the Court of Appeals for Veterans Claims (CAVC).

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

Congress should enact legislation that would permanently increase the number of judge appointments to the CAVC from seven to nine.

### BACKGROUND AND JUSTIFICATION:

#### The Court's Backlog

Congress is aware that the number of cases appealed to the CAVC has increased significantly over the past several years. Nearly half of those cases are consistently remanded to the BVA. The CAVC 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 a court briefing is required. Despite this change to CAVC 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 practice. In this instance, VA 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, general counsel often changes its position, admits to error, and agrees to or requests a remand. Likewise, the Department of Veterans Affairs agrees to settle many cases in which the CAVC requests oral argument, suggesting acknowledgment of an indefensible VA error through the Court's proceedings. VA 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 CAVC or the veteran.

This failure merely adds to the Court's backlog; therefore, Congress should enact legislation to help preserve CAVC resources. Such an act would be codified in a note to § 7264; for example, the new section could state that under 38 U.S.C. § 7264(a), the Court shall prescribe amendments to Rule 33 of the Court's Rules of Practice and Procedure. These amendments would also contain language stipulating that 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. If VA later determined that a remand was necessary, it may only seek remand by joint agreement with the appellant. No time would 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.

Furthermore, if the Department sought a remand after the end of seven days after the Rule 33 conference, the Department would waive 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. § 2412. The Court would have the authority to impose appropriate sanctions, including financial sanctions, against the Department for failure to comply with these prescribed rules.

## Permanently Increase the Number of Judges to Nine

The CAVC's caseload averages roughly 4,600 cases per year. As a result, the CAVC has had one of the highest, if not the highest, caseloads per active judge of any federal appellate court in the country. In response, the CAVC was authorized in 2008, as part of the Veterans Benefits Improvement Act to expand, at least temporarily, to nine judges, as of January 2010.

The authorization to increase the number of CAVC judges was set to expire at the end of 2012 if the positions were not filled within that time frame, fortunately for the CAVC, the two available vacancies were filled prior to the expiration date. The CAVC now stands at nine judges, due to this temporary authorization, an increase justified due the growing number of appeals handled by the CAVC.

Congress must enact legislation to permit an increase in judge appointments to keep pace with an increasing caseload. If these two temporarily authorized appointments become vacant, the CAVC is not authorized to replace them. The statute mandates no more than seven judges, which would adversely impact the CAVC's ability to make timely decisions because the remaining judges would be left to absorb the current and incoming workload.

## A Dedicated CAVC Building

Finally, the United States Court of Appeals for Veterans Claims (CAVC) 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 26 years since the CAVC 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 reside in its own courthouse.

The CAVC should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress allocated \$7 million in FY 2008 for preliminary work on site acquisition, site evaluation, preplanning for construction, architectural work, and associated other studies and evaluations; no further funding has been provided. The issue of providing a fitting and proper court facility must move forward.

## Repeal the Tax Imposed on Military Retirees Rated Less Than 50 Percent Disabled

### RECOMMENDATION:

Congress should enact legislation to repeal the inequitable practice requiring military longevity retirees pay be offset/taxed by an amount equal to the disability compensation awarded to veterans rated less than 50 percent.

### BACKGROUND AND JUSTIFICATION:

All military retirees should be permitted to receive military longevity retired pay and VA disability compensation concurrently, also known as Concurrent Retirement Disability Pay. *The Independent Budget* veterans' s believe the time has come to finally remove the current prohibition imposed upon those longevity retirees rated less than 50 percent disabled.

Many veterans retired from the armed forces based on length of service must forfeit a portion of their retired pay, earned through faithful performance of military duties, as a condition of receiving VA compensation for service-connected disabilities when they are rated less than 50 percent disabled. This policy is inequitable—military retired pay is earned by virtue of a veteran's career of service, usually more than 20 years of honorable and faithful service performed on behalf of our nation.

VA compensation is paid solely because of disability resulting from military service, regardless of the length of service. Most nondisabled military retirees pursue second careers after serving in order to supplement their income, thereby justly enjoying a full reward for completion of a military career with the added reward of full civilian income. In contrast, military retirees with service-connected disabilities do not enjoy the same full earning potential. Their earning potential is reduced commensurate with the degree of service-connected disability. A longevity-retired disabled veteran should not suffer a financial penalty for choosing a military career over a civilian career, especially when, in all likelihood, a civilian career would have involved fewer sacrifices and quite likely greater financial rewards. In order to place all disabled longevity military retirees on equal footing with nondisabled military retirees, no offset should occur between full military retired pay and VA disability compensation. To the extent that military retired pay is offset by VA disability compensation, the disabled military retiree is treated less fairly than a nondisabled military retiree.

Moreover, a disabled veteran who does not retire from military service but elects instead to pursue a civilian career after completing a service obligation can receive full VA disability compensation and full civilian retired pay—including retirement from any federal civil service position. A veteran who honorably served and retired after 20 or more years who suffers from service-connected disabilities should not be penalized for becoming disabled in service to America.

While Congress has made progress in recent years in correcting this injustice, current law still provides that service-connected veterans rated less than 50 percent disabled who retire from the armed forces on length of service may not receive disability compensation from VA in addition to full military retired pay.