Judicial Review

In 1988, Congress recognized the need to change the situation that existed throughout the modern history of veterans' programs, in which claims decisions of the Department of Veterans Affairs were immune to judicial review. Congress enacted legislation to authorize judicial review and created what is now the United States Court of Appeals for Veterans Claims (CAVC) to hear appeals from VA's Board of Veterans' Appeals (BVA). Until Congress acted, the BVA enjoyed, and took advantage of, its decision making—what the Supreme Court once referred to as "splendid isolation" from the law.

Now the VA's administrative 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 provides a course for an individual to seek a remedy for an erroneous decision and a means by which to settle questions of law for application in other similar cases. When Congress established the CAVC, it added another beneficial element to appellate review: It created oversight of VA decision making by an independent, impartial tribunal from a different branch of government. 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 through experience over time. More precise adjustments are still needed to conform judicial review to Congressional intent. Accordingly, *The Independent Budget* veterans service organizations make the following recommendations to improve the processes of judicial review in veterans' benefits matters.

THE COURT OF APPEALS FOR VETERANS CLAIMS

Scope of Review: Enforce Fairness in the Appeals Process

ENFORCE THE BENEFIT-OF-THE-DOUBT RULE:

To achieve the law's intent that the Court of Appeals for Veterans Claims (CAVC/Court) 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.

The conclusion regarding this recommendation is explained by the story of James Halvatgis. Mr. Halvatgis served approximately 25 years of honorable service. He was diagnosed with a right lumbar strain following a lifting injury during service in February 1963. Mr. Halvatgis also hurt his back when he fell approximately 20 feet while rappelling and then again in a jeep accident when he was thrown from the vehicle while swerving to avoid a landmine in Vietnam. He reported low back pain during service in July 1966, December 1968, September through November 1973, September through October 1974, and again in 1976. Many of these symptoms spanned months at a time and were accompanied by neurological symptoms indicating nerve involvement. X-rays of the veteran's low back taken *prior* to military discharge clearly revealed early signs of spinal deterioration.

Numerous private treatment records following discharge continued to document a definite back disability. A board-certified orthopedic surgeon, who was also an associate professor of orthopedic surgery, diagnosed degenerative joint disease of the lumbar spine with spinal stenosis. VA subsequently received a medical opinion from this same orthopedic surgeon wherein he stated that he felt that the veteran had had symptoms since the 1960s with respect to his low back and opined that in all likelihood, the Vietnam War injuries contributed to his early onset of arthritis and spinal stenosis.

Mr. Halvatgis filed a claim of service connection for his low back condition in January 2002. Further, he submitted a statement to VA that all doctors who provided statements regarding his claims were afforded one complete copy of his service medical records. In April 2002, VA received another opinion from a second board-certified orthopedic surgeon, who, again, was an associate professor of orthopedic surgery. This was the veteran's treating physician, who stated that he had reviewed the veteran's service medical records and then opined that the veteran's "condition is a continuation of the difficulties he developed in the service."

The veteran submitted a second medical opinion (totaling three) from one of the surgeons that stated the low back pain complained of while in the military "gradually progressed to the point where he now has post-traumatic arthritis of the lumbar spine." A second opinion from the other surgeon (totaling four) was submitted that stated, "[h]e had problems dating back to 1974 when...he was noted to have collapse, narrowing, and degeneration at the L5-S1 level. I have reviewed his medical service record which indicates this difficulty to that point in time."

In developing the claim, VA examined Mr. Halvatgis and asked for another medical opinion. The opinion was rendered by a noncertified physician assistant. Without referring to all of the treatment records in service, and without acknowledging the evidence that included four opinions presented by the two orthopedic surgeons, the physician assistant opined that Mr. Halvatgis's condition was congenital *and* otherwise age related, and therefore not related to his service. Based on the physician assistant's opinion, VA denied the claim.

Mr. Halvatgis appealed to the Board of Veterans' Appeals (BVA/Board). The Board found that there was "no competent evidence linking the veteran's low back disorder with his service...." The Board arbitrarily provided that the physician assistant's opinion was of more probative value despite that fact that all opinions were based on the same information.

Mr. Halvatgis appealed to the Court. *See Halvatgis v. Mansfield*, No. 06-0149, 2007 WL 4981384 (U.S. Vet.App., November 02, 2007). Because of the Board's nearly unreviewable authority to assign probative value (a factual finding) as arbitrarily as it sees fit, regardless of how abusive, and because of the Court's refusal to

reverse such ludicrous decisions if they contain the slightest scintilla of plausibility, the Court denied Mr. Halvatgis's claim.

Unfortunately, because the Board has such authority, cases such as this are not at all uncommon. The Board is fully aware that its power to assign such value to evidence is practically untouchable; therefore, rather than using that power to ensure fairness and objectivity when reviewing evidence, it consistently yields it as a proverbial double-edged sword to marginalize and minimize evidence to fit its own subjective view. A combination of reasons explains the inherent unfairness displayed in Mr. Halvatgis's case. Part of the problem is that a claimant's statutory right to the benefit of the doubt in cases like this has been interpreted as a "finding of fact" and subsequently converted by the Court's jurisprudence to nothing more than meaningless window dressing.

The CAVC upholds VA findings of "material fact" unless they are clearly erroneous and has repeatedly held that when there is a "plausible basis" for the Board's factual finding, it is not clearly erroneous.

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 CAVC has been affirming many BVA findings of fact when the record contains only minimal evidence necessary to show a "plausible basis" for such finding. This renders a claimant's statutory right to the benefit of the doubt meaningless 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[17] to expressly require the CAVC to consider whether a finding of fact is consistent with the benefit-of-the doubt rule. The intended effect of section 401[18] of the Veterans Benefits Act of 2002 has not been upheld by the court.

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 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."[19] Furthermore, Congress added entirely new language to section 7261(b)(1) that mandates the CAVC 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...."[20]

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.[21]

Prior to enactment of Veterans Benefits Act section 401, the CAVC characterized the benefit-of-the-doubt rule as mandating that "when...the evidence is in relative equipoise, the law dictates that [the] veteran prevails" and that, conversely, a VA claimant loses only when "a fair preponderance of the evidence is against the claim."[22] Nonetheless, such characterizations have historically proven to be nothing more than lip service.

Reading amended sections 7261(a)(4) and 7261(b)(1) together, which must be done in order to determine the effect of the Veterans Benefits Act section 401 amendments, reveals that the CAVC is now directed, as part of its scope-of-review responsibility under section 7261(a)(4), to undertake three actions in deciding whether BVA fact-finding that is adverse to a claimant is clearly erroneous and, if so, what the court should hold as to that fact-finding.

Specifically, the three actions to be taken as noted in the plain meaning of the amended subsections (a)(4) and (b)(1) require the Court: (1) to review all evidence

before the Secretary and the BVA; (2) to consider the Secretary's application of the benefit-of-the-doubt rule in view of that evidence; and (3) if the Court, after carrying out actions (1) and (2), concludes that an adverse BVA finding of fact is clearly erroneous and therefore unlawful, the Court must set it aside or reverse it.

Therefore, as the foregoing discussion illustrates, Congress intended the Veterans Benefits Act section 401 amendments to section 7261(a)(4) and (b) to fundamentally alter the Court's review of BVA fact-finding. This is evident by both the plain meaning of the amended language of these subsections as well as the unequivocal legislative history of the amendments.

Further, the legislative history bolsters the plain meaning of the statute by making clear that Congress intended for the Court to take a more proactive and less deferential role in its BVA fact-finding review. For example, amendments to section 7261, dealing with the same elements as did Veterans Benefits Act section 401, were included in S. 2079, introduced by Senator Rockefeller on April 9, 2002.[23] Senator Rockefeller stated in full regarding section 401:

> Section 401 of the Compromise Agreement would maintain the current "clearly erroneous" standard of review, but modify the requirements of the review the court must perform when making determinations under section 7261(a) of title 38. CAVC would be specifically required to examine the record of proceedings—that is, the record on appeal-before the Secretary and BVA. Section 401 would also provide special emphasis during the judicial process to the "benefit of the doubt" provisions of section 5107(b) as CAVC 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. The addition of the words "or reverse" after "and set aside" in section 7261(a)(4) is intended to emphasize that CAVC should reverse clearly erroneous findings when appropriate, rather than remand the case. This new language in section 7261 would overrule the U.S. Court of Appeals for the Federal Circuit decision of *Hensley v. West,* 212 F.3d 1255 (Fed. Cir. 2000), which emphasized that CAVC should perform only limited, deferential review of BVA decisions, and stated that BVA fact-finding "is entitled on review to substantial deference." However, nothing in this new language is inconsistent with the existing section 7261(c), which precludes the court from conducting trial de novo when reviewing BVA decisions, that is, receiving evidence that is not part of the record before BVA.[24]

Perhaps the most dramatic of the three CAVC actions directed by section 401 was the mandate that the court "take due account of the Secretary's application of section 5107(b)," the "benefit-of-the-doubt rule." It is against this more relaxed standard of review that, through Veterans Benefits Act section 401, Congress has now required the Court to review the entire record on appeal and to examine the Secretary's determination as to whether the evidence presented was in equipoise on a particular material fact. The foregoing notwithstanding, the Court's equipoise review is no better after Veterans Benefits Act section 401 than it was before section 401. Congress's intent has been ignored.

In light of this background, the post–Veterans Benefits Act section 401 mandate supercedes the previous CAVC practice of upholding a BVA finding of fact unless the only permissible view of the evidence of record is contrary to that found by the Board and that a Board finding of fact must be affirmed where there is a plausible basis in the record for the determination. Yet the nearly impenetrable "plausible basis" standard continues to prevail as if Congress never amended section 7261.

The legislative history supports the plain meaning of these provisions discussed herein by strongly evidencing the intent of Congress to bring about decisive change in the scope of the Court's review of Board fact-finding. The House and Senate Committees on Veterans' Affairs described the new provisions enacted by section 401 as follows in an explanatory statement they prepared regarding their compromise agreement: [25]

Senate bill
Section 501 of S. 2237 would amend section 7261(a)(4)...to change the [Court's] standard of review as it applies to BVA findings of fact from "clearly erroneous" to "unsupported by substantial evidence." Section 502 would also cross-reference section 5107(b) in order to emphasize that the Secretary's application of the "benefit of the doubt" to an appellant's claim would be considered by CAVC on appeal.

House bill
The House bill contains no comparable provision.

Compromise agreement
Section 401 of the Compromise Agreement followed the Senate language with the following amendments:

> The Compromise Agreement would modify the standard of review in the Senate bill in subsection (a) by deleting the change to a "substantial evidence" standard. It would modify the requirements of the review the Court must perform when it is making determinations under section 7261(a) ...since the Secretary is precluded from seeking judicial review of decisions of the Board, the addition of the words "adverse to the claimant" in subsection (a) is intended to clarify that findings of fact favorable to the claimant may not be reviewed by the Court. Further, the addition of the words "or reverse" after "and set aside" is intended to emphasize that the Committees expect the Court to reverse clearly erroneous findings when appropriate, rather than remand the case. [The Committees' expectations are being ignored by the Court.] 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. This would not alter the formula of the standard of review on the Court, with the uncertainty of interpretation of its application that would accompany such a change. 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.[26]

At the time of the Senate's final action on S. 2237, VBA section 401 was quite extensively explained by Senator Rockefeller, who was the chairman of the Senate Committee, the floor manager of the bill in the Senate, and the principal author of VBA section 401. In explaining section 401, he emphasized, as did the two committees in their explanatory statement,[27] that the combination of the new requirements that the CAVC "examine the...record on appeal," consider the benefit-of-the doubt rule, and "make...findings of fact in reviewing BVA decisions" is "intended to provide for more searching appellate review of BVA decisions and thus give full force to the 'benefit of the doubt' provision."[28] Chairman Rockefeller concluded that the court should "reverse clearly erroneous findings when appropriate, rather than remand the case."[29] His statement is particularly significant (1) because only the Senate had passed provisions to amend the Court's section 7261 scope-of-review provisions (in S. 2237), and the Committees on Veterans' Affairs explained that section 401 generally "follows the Senate language," and (2) because there is no legislative history that is inconsistent with his statement.[30] Representative Evans, the ranking minority member of the House Committee, spoke in strong support of S. 2237 and explained that "the bill...clarifies the authority of the Court of Appeals for Veterans Claims to reverse decisions of the [BVA] in appropriate cases and requires the decisions be based upon the record as a whole, taking into account the pro-veteran rule known as the 'benefit of the doubt.' "[31]

With the foregoing statutory requirements, the Court should no longer uphold a factual finding by the Board solely because it has a plausible basis, inasmuch as that would clearly contradict the requirement that the CAVC's decision must take due account whether the factual finding adheres to the benefit-of-the-doubt rule. Yet such CAVC decisions upholding BVA denials because of the "plausible bases" standard continue as if Congress never acted.

The CAVC has essentially construed these amendments—intended to require a more searching appellate review of BVA fact-finding and to enforce the benefit of-the-doubt rule—as making no substantive change. The Court's precedent decisions now make it clear that it will continue to defer to and uphold BVA fact-finding without regard to whether it is consistent with the statutory benefit-of-the-doubt rule. Congress should not allow any federal court to scoff at its legislative power, particularly one charged with the protection of rights afforded to our nation's disabled veterans and their families.

Congress clearly intended a less deferential standard of review of the Board's application of the benefit-of-the-doubt rule when it amended 38 U.S.C. 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, Congress should amend 38 U.S.C. section 7261(a) by adding a new section, (a)(5), that states: "(5) In conducting review of adverse findings under (a)(4), the Court must agree with adverse factual findings in order to affirm a decision."

The Department of Veterans Affairs is a unique, non-adversarial forum for the adjudication of veterans' benefits claims. Proper and consistent application of the

benefit-of-the-doubt rule is critical to maintaining the unique characteristics of the Department. The above discussion proves that such application is absent more often than not; in fact, Court decisions are usually void of any meaningful discussion of the benefit-of-the-doubt rule. Whereas, when applying the companion to subsection 7261(b)(1), which is 38 U.S.C. section 7261(b)(2), requiring the Court to take due account of the rule of prejudicial error, the Court expressly states its determinations of such rule. Therefore, 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 38 U.S.C. section 7261(b)(1), when applicable.

Recommendations:

Congress should enact a joint resolution 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 the intent of Congress that the Court of Appeals for Veterans Claims provide a more searching review of the Board of Veterans' Appeals findings of fact, and that in doing so, ensure that it enforce 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: "(5) 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 require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under 38 U.S.C., section 7261(b)(1), when applicable.

[17]P.L. 107-330, § 401, 116 stat. 2820, 2832.
[18]Section 401 of the *Veterans Benefits Act*, effective December 6, 2002; 38 U.S.C. §§ 7261(a)(4) and (b)(1).
[19]38 U.S.C. § 7261(a)(4). See also 38 U.S.C. § 7261(b)(1).
[20]38 U.S.C. § 7261(b)(1).
[21]38 U.S.C. § 5107(b).
[22]*Gilbert v. Derwinski* 1 Vet. App. 49, 54–55 (1990).
[23]See S. 2079, 107th Cong., 2d sess. § 2.
[24]148 *Congressional Record* S11334 (remarks of Sen. Rockefeller).
[25]148 *Congressional Record* S11337, H9007.
[26]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.)
[27]148 *Congressional Record* S11337, H9007.
[28]148 *Congressional Record* S11334.
[29]Ibid.
[30]147 *Congressional Record* S11337, H9003.
[31]148 *Congressional Record* H9003.

THE COURT'S BACKLOG:

Congress should require the Court 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 (CAVC/Court) has increased significantly over the past several years. Nearly half of those cases are consistently remanded back to the Board of Veterans' Appeals (BVA/Board).

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 a 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 Board's decision at the early stage in the process. Subsequently, when VA general counsel reviews the appellant's brief, VA then 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 do not assist the Court or the vet-

eran; it merely adds to the Court's backlog. Therefore, Congress should enact a Judicial Resources Preservation Act. Such an act could be codified in a note to section 7264. For example, the new section could state:

(1) Under 38 U.S.C. 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 opposed.

(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 a Judicial Resources Preservation Act as described herein to preserve the Court's limited resources and reduce the Court's backlog.

APPOINTMENT OF JUDGES

Congress should ensure that any new judges appointed to the Court of Appeals for Veterans Claims are themselves a veteran's advocate and skilled in the practice of veterans law.

The United States Court of Appeals for Veterans Claims received well over 4,000 cases during FY 2008. According to the Court's annual report, the average number of days it took to dispose of cases was nearly 450. This period has steadily increased each year over the past four years, despite the Court having recalled retired judges numerous times over the past two years specifically because of the backlog.

Veterans law is an extremely specialized area of the law that currently has fewer than 500 attorneys nationwide whose practices are primarily in veterans law. Significant knowledge and experience in this practice area would reduce the amount of time necessary to acclimate a new judge to the Court's practice, procedures, and body of law. A reduction in the time to acclimate would allow a new judge to begin a full caseload in a shorter period, thereby benefiting the veteran population. Congress should therefore consider appointing new judges to the Court from the selection pool of current veterans law practitioners.

Recommendation:

Congress should enact a joint resolution indicating that it is the sense of Congress that any new judges appointed to the Court of Appeals for Veterans Claims be selected from the knowledgeable pool of current veterans law practitioners.

Court Facilities

COURTHOUSE AND ADJUNCT OFFICES:

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

During the nearly 16 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 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. Rather than being a tenant in a commercial office building, the court should have its own dedicated building that meets its specific functional and security needs, projects the proper image, and concurrently allows the consolidation of VA general counsel staff, court practicing attorneys, and veterans service organization representatives to the court in one place. The CAVC should have its own home, located in a dignified setting with distinctive architecture that communicates its judicial authority and stature as a judicial institution of the United States. Construction of a courthouse and justice center requires an appropriate site, authorizing legislation, and funding.

Recommendation:

Congress should enact legislation and provide the funding necessary to construct a courthouse and justice center for the Court of Appeals for Veterans Claims.