

Judicial Review in Veterans' Benefits

Although the Department of Veterans Affairs (VA) has the sole authority to adjudicate claims for veterans' benefits, 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 what is now the United States Court of Appeals for Veterans Claims (CAVC or the court) to review appeals from VA's Board of Veterans' Appeals (BVA), 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.

For the most part, judicial review of the claims decisions of VA has lived up to positive expectations of its proponents. To some extent it has also brought about some of the adverse consequences foreseen by its opponents. Based on past recommendations in *The Independent Budget*, Congress made some important adjustments to correct some of the unintended effects of the judicial review process. In its initial decisions construing these changes, the CAVC has not given the effect intended by Congress to ensure that veterans have meaningful judicial review in all aspects of their appeals. More precise adjustments are still needed to conform CAVC review to Congressional intent.

In addition, most of VA's rulemaking is subject to judicial review. Here again, changes are needed to bring the positive effects of judicial review to all of VA's rulemaking.

Accordingly, *The Independent Budget* veterans service organizations make the following recommendations to improve the processes of judicial review in veterans' benefits matters.

Judicial Review Issues

THE COURT OF APPEALS FOR VETERANS CLAIMS

Scope of Review

Standard for Reversal of Erroneous Findings of Fact:

To achieve its intent that the 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 Court upholds VA's factual findings unless they are clearly erroneous. Clearly erroneous is the standard for appellate Court reversal of a district court's findings. When there is a "plausible basis" for a factual finding, it is not clearly erroneous under the case law from other courts, which the CAVC has applied to BVA findings.

Under the statutory "benefit-of-the-doubt" standard, the BVA is required to find in the veteran's favor when the veteran's evidence is at least of equal weight as that against him or her, or stated differently, when there is not a preponderance of the evidence against the veteran. Yet, the court has been affirming any BVA finding of fact when the record contains the minimal evidence necessary to show a plausible basis for such finding. This rendered the statutory benefit-of-the-doubt rule meaningless because veterans' claims can be denied and the denial upheld when supported by far less than a preponderance of evidence against the veteran.

To correct this situation, Congress amended the law to expressly require the CAVC to consider, in its clearly erroneous analysis, whether a finding of fact is consistent with the benefit-of-the-doubt rule. With this statutory requirement, the CAVC can no longer properly uphold a BVA finding of fact solely because it has a plausible basis inasmuch as that would clearly contradict the requirement that the CAVC's decision must take into account whether the factual finding adheres to the benefit-of-the-doubt rule. The court can no longer end its inquiry after merely searching for and finding a plausible basis for a factual determination. Congress intended for the CAVC to afford a meaningful review of both factual and legal determinations presented in an appeal before the court. Congress also

amended the law to specify that the CAVC should, as a general rule, reverse erroneous factual findings rather than set them aside and allow the BVA to decide the question anew on remand.

While Congress chose not to replace the clearly erroneous standard of review, it did foreclose the application of this standard in ways inconsistent with the benefit-of-the-doubt rule. Also, Congress made it clear that the CAVC is not to routinely remand cases for new BVA fact-finding when the findings of fact before the court did not have sufficient support in the record and the current record supports a conclusion opposite of that reached by the BVA. However, the CAVC has 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 as long as the court's scope of review retains the clearly erroneous standard. To ensure the CAVC enforces the benefit-of-the-doubt rule, Congress should replace the clearly erroneous standard with a requirement that the court will reverse a factual finding adverse to a claimant when it determines such finding is not reasonably supported by a preponderance of the evidence.

Recommendation:

Congress should amend section 7261 of title 38 United States Code to provide that the court will hold unlawful and set aside any finding of material fact that is not reasonably supported by a preponderance of the evidence.

Preservation of Informalities of VA Claims Process

"Exhaustion" Requirement Has No Place in Veterans Benefits Claims:

By refusing to consider points not specifically argued to BVA, the CAVC has, contrary to Congressional intent and the law, imposed formal pleading requirements upon VA's informal administrative claims process.

When Congress authorized judicial review of veterans' claims, one of its foremost concerns and intents was preservation of the informality of VA's administrative claims process under conditions in which the BVA's decisions would be subject to review by a court. Congress was very much aware of the dangers that the courts might attempt to impose their own formal rules of adversarial proceedings upon VA's informal claims process and therefore sought to prevent this adverse consequence. By imposing an exhaustion requirement upon veterans, the CAVC has, for its own expedience, largely ignored Congressional intent, the law, and the unique nature and purposes of veterans' programs by doing the very thing Congress so carefully and clearly acted to forestall.

In its broader sense, the purpose of the doctrine of exhaustion of administrative remedies is to prevent parties from bypassing the available administrative processes to take their claims directly to the courts. It has been recognized that the exhaustion doctrine has four primary goals:

- (1) discourage flouting of the administrative processes created by Congress;
- (2) allow the administrative agency to apply its expertise, to exercise its discretion, and to correct its own errors;
- (3) aid judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding; and
- (4) promote judicial economy by avoiding needless duplication of actions and perhaps by avoiding the necessity for any judicial involvement.

Clearly, the law does not allow a veteran to bypass the BVA and appeal an agency of original jurisdiction decision directly to the CAVC. As provided in 38 U.S.C. § 7261, under an appeal properly before it, the court "shall," "to the extent necessary to its decision and when presented," "decide all relevant questions of law, interpret constitutional, statutory, and regulatory

provisions, and determine the meaning or applicability of the terms of an action by the Secretary"; "hold unlawful and set aside decisions, findings...conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board." Contrary to this statutory provision, the CAVC refuses to address "all" relevant questions of law, etc., "presented" to it unless the veteran expressly raised and argued these points to the BVA. In requiring that the veteran have first raised a precise legal point or argument to the BVA, the court is not only violating § 7261, it is ignoring Congressional intent and improperly shifting VA's obligations under the law to veterans.

Unlike judicial or more formal administrative proceedings where it is the responsibility of the parties to raise and plead all legal arguments and discover and present all material evidence, veterans are not expected to know and plead the legal technicalities of veterans' benefits. Veterans file simple claims forms with basic information, not detailed legal pleadings. Congress repeatedly stated its intent to preserve and maintain this informal process throughout the legislative history of its legislation to authorize judicial review. It is VA's legal obligation to assist the veteran in filing the claim and developing the evidence and to consider all relevant legal authorities and potential bases of entitlement regardless of whether they are expressly raised by the veteran. When a veteran appeals to the BVA and receives an unfavorable decision, the veteran has exhausted his or her administrative remedies. Any failure to fully develop the record, to fully explore all avenues of entitlement, or to apply all pertinent law is an error of omission by the BVA that the CAVC should address in its appellate review, irrespective of whether the veteran knew of or raised the specific point before the BVA. Yet, for its own purposes, the CAVC refuses to consider points of argument that were not specifically raised before the BVA. By requiring veterans to know and expressly raise and argue all the complex legal points relevant to a claim, the CAVC shifts the Government's obligations to veterans, imposes unnecessary formalities upon VA's administra-

tive claims process, and fundamentally alters the nonadversarial, pro-veteran nature of VA proceedings. The court seems unable or unwilling to grasp the simple fact that in considering veterans' appeals it reviews a claims record, not a litigation record.

Congressional intervention is necessary to restore veterans' basic rights under the VA claims process. Congress should amend 38 U.S.C. § 7261. The phrase "without regard to any theory of issue preclusion or exhaustion" should be added between the words "presented," and "shall" at the end of section

(a). This change would not disfavor VA because the CAVC provides the agency an opportunity to respond to any legal argument presented by a claimant before it rules.

Recommendation:

Congress should amend 38 U.S.C. § 7261 to preclude judicial imposition of formal pleading requirements upon the VA claims process.



Court Facilities

Courthouse and Adjunct Offices:

The court 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 15 years since the 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. This court for veterans 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 court

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 CAVC.



COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Review of Challenges to VA Rulemaking

Authority to Review Changes to VA Schedule for Rating Disabilities:

The exemption of VA changes to the rating schedule from judicial review leaves no remedy for arbitrary and capricious rating criteria.

Under 38 U.S.C. § 502, the Federal Circuit may directly review challenges to VA's rulemaking. Section 502 exempts from judicial review actions relating to the adoption or revision of the *VA Schedule for Rating Disabilities*, however.

Formulation of criteria for evaluating reductions in earning capacity from various injuries and diseases requires expertise not generally available in Congress. Similarly, unlike other matters of law, this is an area outside the expertise of the courts. Unfortunately, without any constraints or oversight whatsoever, VA is free to promulgate rules for rating disabilities that do not have as their basis reduction in earning capacity. The coauthors of *The Independent Budget* have become alarmed by the arbitrary nature of recent proposals to adopt or revise criteria for evaluating disabilities. If it so

desired, VA could issue a rule that a totally paralyzed veteran, for example, would only be compensated as 10% disabled. VA should not be empowered to issue rules that are clearly arbitrary and capricious. Therefore, the Court of Appeals for the Federal Circuit (CAFC) should have jurisdiction to review and set aside VA changes or additions to the rating schedule when they are shown to be arbitrary and capricious or clearly violate basic statutory provisions.

Recommendation:

Congress should amend 38 U.S.C. § 502 to authorize the CAFC to review and set aside changes to the *Schedule for Rating Disabilities* found to be arbitrary and capricious or clearly in violation of statutory provisions.

