

Judicial Review in Veterans' Benefits

In 1988, Congress recognized the need to change the situation that had existed throughout the modern history of veterans' programs, in which claims decisions of the Department of Veterans Affairs (VA) 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).

Now the Department'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.

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 some of these changes, the CAVC has not given them 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, either in connection with a case before the CAVC or upon direct challenge to the United States Court of Appeals for the Federal Circuit. 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 the 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 court's scope of review.

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 a Board of Veterans’ Appeals (BVA) 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 (Secretary) 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 2002⁶ 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. The intended effect of section 401⁷ 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 af-

firmed 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.”⁸ 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....”⁹

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.¹⁰

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.”¹¹ Nonetheless, such characterizations have

historically proven to be nothing more than meaningless 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 plain meaning of the amended subsections (a)(4) and (b)(1) requires 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, to 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.

Furthermore, consistent with the proclaimant nature of the VA adjudication system and the availability of appeal to the CAVC only by the appellant, Congress provided in Veterans Benefits Act section 401 the authority to reverse or set aside only those findings that are adverse to the claimant. Moreover, 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 Sen. Rockefeller on April 9, 2002.¹² Sen. 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.¹³

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)," known as 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:¹⁴

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.¹⁵

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,¹⁶ 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."¹⁷ Chairman Rockefeller concluded that the court should "reverse clearly erroneous findings when appropriate, rather than remand the case."¹⁸ 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.¹⁹ Rep. 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.'"²⁰

With the foregoing statutory requirements, the Court of Appeals for Veterans Claims should no longer uphold a Board of Veterans' Appeals finding of material fact 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 are justified because of plausible bases 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 thumb its nose at its legislative power, particularly one charged with the protection of rights afforded to our nation’s disabled veterans and their families. 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 title 38, United States Code, section 7261, to provide that the Court of Appeals for Veterans Claims will hold unlawful and reverse any finding of material fact that is not reasonably supported by a preponderance of the evidence.

⁶ Pub. L. No. 107-330, 401, 116 Stat. 2820, 2832.

⁷ Section 401 of the Veterans Benefits Act, effective December 6, 2002, amended title 38, United States Code, sections 7261(a)(4) and (b)(1).

⁸ 38 U.S.C. § 7261(a)(4) (emphasis indicates amendments by Veterans Benefits Act section 401(a)). See also 38 U.S.C. § 7261(b)(1).

⁹ See 38 U.S.C. § 7261(b)(1).

¹⁰ 38 U.S.C. § 5107(b)(emphasis added).

¹¹ *Gilbert v. Derwinski*, 1 Vet.App. 49, 54–55 (1990).

¹² See S. 2079, 107th Cong., 2d Sess., § 2.

¹³ 148 CONG. REC. S11334 (remarks of Sen. Rockefeller) (emphasis added).

¹⁴ 148 CONG. REC. S11337, H9007.

¹⁵ 148 CONG. REC. S11337, H9003 (daily ed. Nov. 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).

¹⁶ 148 CONG. REC. S11337, H9007.

¹⁷ 148 CONG. REC. S11334 (emphasis added).

¹⁸ *Id.*

¹⁹ 147 CONG. REC. S11337, H9003.

²⁰ 148 CONG. REC. H9003 (emphasis added).



CLAIMS BACKLOG AT THE COURT:

The Court of Appeals for Veterans Claims (CAVC) must overcome the ongoing problems of the disability claims backlog and resulting delays in delivery of crucial disability benefits to veterans and their families.

The Board of Veterans’ Appeals (BVA) and the CAVC needlessly remand countless cases on appeal time after time. In many of these appeals, the evidence of record fully supports a favorable decision on the appellant’s behalf, yet the appeal is remanded nonetheless. These unjustified remands not only perpetuate the hamster-wheel reputation of veterans law, but also risk depriving the appellant of the benefits to which he or she is entitled based on facts already of record. In these cases, appellants are denied rightful benefits, usually for many additional years, without any remedy for such delays.

As it is for VA, the greatest challenge facing the CAVC is the backlog of appeals. As a result of long delays in claims processing at VA, it can take years for appeals to reach the CAVC. A significant number of disabled vet-

erans are elderly and in poor health, and many do not live to witness resolution to their claims.

Over the years, the CAVC has shown a reluctance to reverse errors committed by the BVA. Rather than addressing an allegation of error raised by an appellant, the CAVC has a propensity to vacate and remand cases to the board based on an allegation of error made by the VA Secretary for the first time on appeal, such as an inadequate statement of reasons or bases in the board decision. Another example occurs when the Secretary argues, again for the first time on appeal, for remand by the CAVC because VA failed in its duty to assist the claimant in developing the claim notwithstanding the Board’s express finding of fact that all development is complete. Such actions are particularly noteworthy because the Secretary has no legal authority to appeal a board decision to the CAVC.²¹

Consequently, the CAVC will generally decline to review alleged errors raised by an appellant that actually serve as the basis of the appeal. Instead, the court remands the remaining alleged errors on the basis that an appellant is free to present those errors to the board even though an appellant may have already done so, leading to the possibility of the board repeating the same mistakes on remand that it had previously. Such remands leave errors by the board, and properly raised to the court, unresolved; reopen the appeal to unnecessary development and further delay; overburden a backlogged system already past its breaking point; exemplify far too restrictive and out-of-control judicial restraint; and inevitably require an appellant to invest many more months and perhaps years of his or her life in order to receive a decision that the court should have rendered on initial appeal. As a result, an unnecessarily high number of cases are appealed to the CAVC for the second, third, or fourth time.

In addition to postponing decisions and prolonging the appeal process, the CAVC's reluctance to reverse BVA decisions provides an incentive for VA to avoid admitting error and settling appeals before they reach the court. By merely ignoring arguments concerning legal errors rather than resolving them at the earliest stage in the process, VA contributes to the backlog by allowing a greater number of cases to go before the court. If the CAVC would reverse decisions more frequently, *The Independent Budget* veterans service organizations believe VA would be discouraged from standing firm on decisions that are likely to be overturned or settled late in the process.

Recommendations:

Congress should introduce legislation to amend title 38, United States Code § 7261 to require the CAVC, to the extent necessary to its decision and when presented, on a de novo basis: (1) to decide all relevant questions of law; (2) to interpret constitutional, statutory, and regulatory provisions; and (3) to determine the meaning or applicability of the terms of an action of the Secretary. The CAVC's jurisdiction should also be amended to require it to decide all assignments of error properly presented by an appellant.

Additionally, so that it has an accurate measure of the CAVC's performance, Congress should require the Court to submit an annual report that includes:

- the number of appeals filed;
- the number of petitions filed;
- the number of applications filed under title 28, United States Code, section 2412;
- the number and type of dispositions, including:
 - ◆ settlements,
 - ◆ joint motion for remand,
 - ◆ voluntary dismissal,
 - ◆ the number of BVA decisions affirmed,
 - ◆ the number of dispositions both reversed and remanded by a single-judge decision, and
 - ◆ the number of single-judge decisions by "each" judge.
- the median time from filing to disposition;
- the number of oral arguments;
- the number and status of pending appeals and petitions and of applications described in paragraph (3);
- a summary of any service performed by recalled retired judges during the fiscal year;
- the number of decisions or dispositions rendered by a single judge, multijudge panels, and the full court;
- the number of cases pending longer than 18 months;
- the number of cases appealed to the court more than once; and
- the number of appellants who die while awaiting a decision from the court.

These additional data will allow Congress to more accurately assess the CAVC's workload and its need for additional resources. Presenting the information in this suggested format would give Congress a clearer picture of the CAVC's accomplishments and its failures.

²¹ 38 U.S.C.A. § 7252(a) (West 2002) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision.")



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 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 title 38, United States Code, section 502, the Court of Appeals for the Federal Circuit (CAFC) may review direct challenges to VA’s rulemaking. However, section 502 exempts from judicial review actions relating to the adoption or revision of the VA *Schedule for Rating Disabilities*.

Formulation of criteria for evaluating reductions in earning capacity from various injuries and diseases re-

quires 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 percent disabled. VA should not be empowered to issue rules that are clearly arbitrary and capricious. Therefore, the 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 title 38, United States Code, section 502 to authorize the CAFC to review and set aside changes to the *VA Schedule for Rating Disabilities* found to be arbitrary and capricious or clearly in violation of statutory provisions.

