Veterans' Psychiatric Benefits: Enter Courts and Attorneys

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In 1988, the Veterans Judicial Review Act (VJRA) was signed into law, ending more than a century of Congressional measures that kept veterans' benefits claims completely out of the appellate court system. Before this new law, any decision made by the Department of Veterans' Affairs (VA) about a veteran's claim was final, and there was no recourse for independent judgment of an appeal. The legislation modified the existing Board of Veterans Appeals (BVA) to enhance its independence from the Veterans' Administration and established a new Court of Veterans Appeals (CVA) with jurisdiction to review BVA decisions. Veterans' benefits proceedings have not only been insulated from the courts, they also have been undesirable to private attorneys, because since 1864 Congress has prohibited attorneys from charging more than $10 to advocate a VA disability claim. The new law allows attorneys to represent veterans before the CVA and receive appropriate remuneration. In 1991, the number of veterans was estimated at 26,897,000, and VA disability compensation programs spent $9.6 billion. Currently, there are about 2,179,000 veterans receiving service-connected monetary compensation; approximately 13.5 percent (293,200) have a primary psychiatric disability. The CVA is a specialized Article I court that has seven justices and sits in Washington, D.C. In its formative years, the Court has reached decisions that have had an impact on the veterans' psychiatric benefits examination process. Now more than ever, non-VA psychiatrists may be asked to offer probative opinions in veterans' benefits proceedings. The authors review VA psychiatric disability procedures and, using case examples, discuss both precedent decisions involving VA psychiatric claimants and the evolving standards of judicial review.

In addition to providing medical care for veterans, the Department of Veterans Affairs (VA) administers a system that provides benefits including monetary compensation, treatment, and rehabilitation services for veterans with "service-connected disabilities." In VA parlance, service-connected disabilities are disorders that developed during military service including those directly related to combat.[1] In 1991 the Department of Veterans Affairs spent $9.6 billion on VA disability compensation programs. Currently, there are about 2,179,000 veterans receiving service-connected monetary compensation; ap-

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The views and recommendations expressed in this article are those of the authors and do not necessarily reflect official DVA policy.

proximately 13.5 percent (293,200) have a primary psychiatric disability.[2,3]

The Veterans Benefits Administration (VBA) is authorized by Congress to provide benefits to veterans for service-connected disabilities and to provide income supplement pensions to older veterans with nonservice-connected disabilities. The Veterans Health Administration (VHA) is charged with performing clinical evaluations for the VBA when available data are insufficient for disability adjudication purposes. Salaried and fee-for-service physicians throughout the VA health care system conduct disability examinations that yield information used to evaluate veterans' claims. These data complement claimants' military, legal, medical, and social service records.[4]

Veterans who are claiming or contesting service-connected disabilities usually are represented by veterans' service officers (e.g., Disabled American Veterans and Veterans of Foreign Wars officers) or VA benefits counselors.[5] Previously, attorneys were rarely involved, because since 1864 Congress prohibited them from charging more than $10 to advocate a VA benefits claim.[6-8] This limitation, backed by a maximum criminal penalty of two years in prison at "hard labor," had a supremely discouraging effect on members of the private bar.[9] On November 18, 1988, after more than a decade of hearings and vigorous debate before five separate Congresses, the 100th Congress enacted the Veterans Judicial Review Act (VJRA), ending this "splendid isolation."[10,11]

The Veterans Judicial Review Act[9] essentially retains intact the VA's existing two-tiered administrative process for adjudicating benefits. A local regional office: 1) renders an initial decision appealable by the claimant to the Board of Veterans Appeals (BVA)[11]; 2) allows attorneys and "agents" retained within one year of the first BVA decision to charge a reasonable fee to reopen a claim before the regional office or to move the BVA to reconsider its denial[12]; 3) authorizes review of BVA individual claim denials in a newly created Article I court,[13,14] the U.S. Court of Veterans Appeals (CVA), with further review in the U.S. Court of Appeals for the Federal Circuit[15]; 4) allows attorneys and others authorized to practice before the CVA to charge a reasonable fee for representation[12,16]; and 5) gives jurisdiction over challenges to VA rules and regulations and other applicable policies to the Court of Appeals for the Federal Circuit.[17]

Ex-servicemen and women file about 663,000 disability benefit claims each year, of which the VA grants roughly half.[18] Of those rejected, approximately 70,000 contest the denial to their local regional office.[19] In fiscal year 1992, 33,483 appeals were decided by the BVA, but 10,946 of these appeals were again denied.[19] Before the VJRA, these claimants, unlike Social Security Administration, Medicare, or welfare recipients, had no recourse for independent judgment of their appeals. The VJRA created an extra level of review outside the agency.[20]

Since its inception, the CVA has issued decisions that have had an impact

on the veterans' psychiatric benefits examination process. These decisions have affected not only psychiatrists but veterans' attorneys and forensic psychiatrists who may become involved in evaluating VA disability cases. The CVA's decisions have opened up an area that previously had a veil of administrative secrecy. Our purpose is to review the VA psychiatric disability adjudication process and, using case examples, discuss precedent decisions involving psychiatric patients.

Adjudication Process

Briefly, the adjudication process begins with receipt of the veteran's disability claim (see figure).[21] The gatekeepers in this system are the VA regional offices, which are staffed by a small army of claims examiners that includes supervisors, clerks, rating specialists, adjudicators, quality assurance reviewers, and hearing officers. Initially, the authorization section reviews the claim for basic eligibility criteria such as character of discharge and dates of service. If the claim survives authorization review, it will be referred to one of the local regional office rating boards. The boards currently consist of three members (called rating specialists), one of whom is a medical specialist. The board weighs the evidence and makes a rating decision, and the adjudication section notifies the applicant.[22] If the applicant disagrees with the decision, an appeal may be initiated at the local regional office by filing a notice of disagreement within one year of the VA letter of denial.[23, 24] There is no particular form that must be used to prepare this notice. It can be a simple statement that refers to the VA action, or it can be a short brief that carefully itemizes the basis for disagreement.[25]

Upon receipt of the notice of disagreement, the regional office then reviews the claim file and either grants the claim or prepares a statement of the case that explains the facts and pertinent laws and regulations involved in the decision to deny the claim.[26, 27] If the latter occurs and the veteran wants to contest the decision, an appeal must be filed to the BVA within 60 days of the date on the statement of the case or the remainder of the one-year period that began with the date of the original VA denial, whichever is longer.[28]

In considering whether to initiate or continue an appeal, the veteran has the opportunity to appear before a regional office hearing officer. Hearings may be held before or after filing the notice of disagreement. A hearing officer has the authority either to amend or reverse the decision on new and material evidence or to affirm the decision.[29] Deadlines for filing a notice of disagreement and subsequent appeals may be extended in connection with a request for or conduct of a hearing.

The BVA is the final administrative appellate process arbiter. The board comprises up to 65 members, with a chairman appointed by the President of the United States for a six-year term and members appointed for nine-year terms.[30] The Board hears cases in 3-member panels where majority vote is generally determinative.[31, 32] The Board

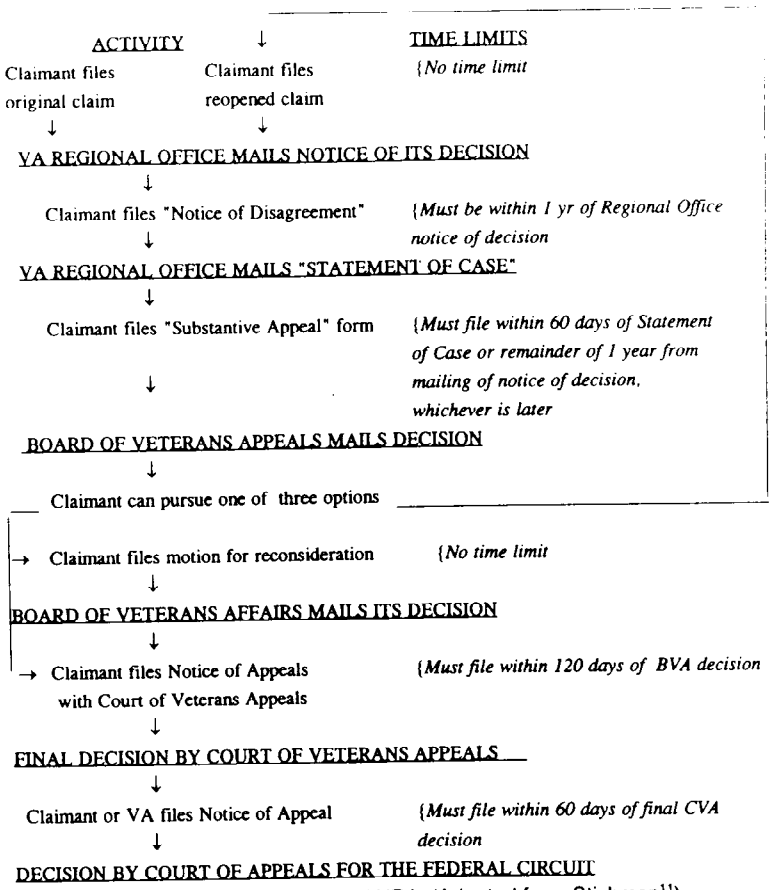

Figure 1. The Veterans' Benefits Process after the VJRA. (Adapted from Stichman[11])

has jurisdiction over all questions on claims involving benefits under the laws administered by the VA. A BVA appeal may be filed by the claimant personally; by the claimant through an attorney, agent, or accredited representative of a recognized organization; or by a fiduciary appointed to manage the claimant's affairs.[33] Presenting cases before the BVA is similar in many respects to presenting Social Security Administration cases before an administrative law judge.

The BVA will have the full record created at the regional office.[34] Board panels may include physicians, but they are not necessarily experts on the disabilities in question.[35] BVA appellants have a right to a personal hearing either in Washington, D.C., or before a BVA traveling panel at a regional office.[36] In fiscal year 1992, the BVA allowed 15.7 percent of claims, remanded (sent the case back to the regional office for reconsideration) 50.5 percent, and denied or otherwise disposed of the remaining 33.8 percent.[19]

Before the VJRA, there were essentially two options for a claimant denied relief by the BVA. The claimant could

either file a motion for reconsideration or accept the BVA decision as final and start the entire adjudication process over again by submitting new and material evidence to the VA regional office in support of the original claim.[37, 38]

Currently, there is no limit on when or on the number of times a claim can be reopened.[38] Thus, each time a claimant submits new and material evidence in support of a previously denied claim, no matter how much time has expired since the previous denial, the claimant is entitled to all of the procedural rights available to one filing an original claim, including the right of appeal to the BVA.[11] Determination of new and material evidence is discussed in a later section.

The Court of Veterans Appeals The CVA was created under Article I of the Constitution by the enactment of the Judicial Review Act.[13] The Court is based in Washington, D.C., and comprises seven judges who are appointed by the President with the advice and consent of the Senate.[39] The term of office for all CVA judges is 15 years.[40]

The CVA has exclusive jurisdiction to review BVA decisions and to consider all questions concerning benefit laws administered by the VA including factual, legal, and constitutional questions.[14, 41] An exception is the VA Schedule for Rating Disabilities[42] (a federal evaluation guide), which is not subject to Court review or modification.[43, 44] The CVA, however, may review the propriety of disability ratings according to the VA ratings schedule.

The appellant must file a notice of appeal with the CVA within 120 days of the date the BVA mailed its final decision.[45] Only appellants who do not prevail at the BVA can appeal to the Court; the VA cannot appeal a BVA decision. Most appeals deal with entitlement to or amount of disability benefits. A determination by the Court as to any *factual matter* (finding of fact) is final and may not be reviewed in any other court. Decisions on *legal matters* (interpretation of regulations and statutes), however, may be reviewed by the Court of Appeals for the Federal Circuit.[46]

A decision on a Court proceeding is by majority vote if more than one judge is assigned to a case.[47] The decision must include a statement of the Court's finding of fact and conclusions of law. After 30 days a decision becomes final unless the chief judge decides to have the case reconsidered and/or reviewed by an enlarged section of the Court.[48]

At the conclusion of Court proceedings, records pertaining to the appellant's claim are returned to the local regional office for use in the ordinary handling of additional and/or subsequent benefits claims. The Court may appoint three-judge panels in cases that have precedential value and provide for publication of the decisions for public information and use.[49]

Because only a person adversely affected by a final decision of the Board can appeal to the CVA and the VA cannot appeal a BVA decision, it appears that the intent of the VJRA is to protect a veteran's existing compensation, even if the compensation is partial.[50] In other words, no claimant may

end up worse off by appealing to the CVA.[11] To limit potential CVA cases, the VJRA generally precludes Court review of final BVA decisions resulting from notices of disagreement filed before November 18, 1988.[10]

The Court can overturn BVA findings of material fact "if the finding is clearly erroneous."[51] Neither the VJRA nor the U.S. Code defines "clearly erroneous" with precision; nonetheless, reviewing BVA findings of fact under the clearly erroneous standard has proved helpful to veterans. The clearly erroneous standard permits the CVA to carry out a more complete analysis of factual matters than would be appropriate under a stricter "arbitrary- and -capricious" standard. Congress also intended the clearly erroneous standard to be less deferential to the BVA than "unsupported by substantial evidence" that is used in Social Security Administration cases.[11]

The Court does not hold new trials or receive new evidence but reviews the record that was considered by the BVA. Consequently, appellants are not entitled to discovery or to a trial. The VA, however, has a statutory obligation to assist the veteran in developing the facts pertinent to a claim.[52] If a veteran appeals his/her case and there has been a failure of the duty to assist, the case must be remanded to a lower adjudication level for further development and reconsideration.

CVA Appeal Process Decisions of the CVA can be appealed to the Federal Circuit, but the scope of review is quite limited. Either party can seek a ruling on the validity or interpretation of a statute or regulation. The Federal Circuit, however, may not review factual determinations or the application of statutes and regulations to a particular case except where the appeal presents a constitutional issue.[53] The extent of this review is somewhat ambiguous in the VJRA. The VA or the claimant has 60 days from the date of final CVA judgment to appeal a decision to the Federal Circuit.[54]

Federal Circuit decisions are appealable by writ of certiorari to the U.S. Supreme Court.[55] If either the Supreme Court or the Federal Circuit orders the case remanded to the CVA, the rehearing decision then will become final.[48]

Attorney Fees The Secretary of the Department of Veterans Affairs may recognize attorneys and "agents" to practice before the VA.[12, 56] An accredited agent must establish good character and reputation and pass a VA-administered written examination on VA benefits law.[57] Some law firms have hired former officers of veterans service organizations to handle the early stages of a client's claim. Ex-service organization officers have ready familiarity with VA regulations and can provide veterans with preliminary representation at a modest fee. Before the VJRA, a fee paid to advocates could not exceed $10 on any claim. As a result, in fiscal year 1987 for example only 705 of the approximately 40,000 claimants who appeared before the BVA were represented by attorneys.[58]

Exactly what constitutes reasonable attorneys fees as authorized by the VJRA is currently the subject of litiga-

tion before the CVA, and as a result the details have not been resolved. It is sufficient to note that considerably more than the pre-1989 ($10) level of attorney compensation has been authorized by law and that fees that do not exceed 20 percent of any past due benefits awarded are presumed to be reasonable.[8, 59, 60]

Appellant Representation Although appellants may represent themselves before the CVA, they are advised to seek legal representation. Under Court rules, appellants may be represented by nonlawyers. Many veterans organizations are staffed by service officers who regularly represent claimants during the VA administrative process, and some represent appellants before the Court, but they must meet standards of proficiency described in the CVA rules of practice.[61] A few of these organizations and some public-interest law firms offer free representation, and bar associations may offer free or reduced-fee representation.

When a veteran retains an attorney or agent after the first BVA decision, the best course of action may be to reopen the claim before a VA regional office or move for reconsideration before the BVA, rather than seek CVA review. If the record previously created before the BVA is not that favorable to the claimant but new evidence can be obtained that will significantly strengthen the case, reopening a claim is the most sensible course.[11]

Service-Connected Disability Compensation Veterans are entitled to monetary compensation for certain psychiatric disabilities (e.g., psychotic and affective disorders) incurred in or aggravated during military service.[1, 62] There are five ways to establish service-connected disability:

1) Demonstrate that a chronic psychiatric condition was incurred during military service.

2) Demonstrate that a preexisting condition became worse during military service.

3) Demonstrate that a statutory presumption (i.e., the manifestation of certain chronic psychiatric disorders) occurred within one year postdischarge.

4) Demonstrate that a new psychiatric condition is proximately linked to a service-connected condition.

5) Demonstrate that a new condition was the result of a disabling injury that occurred in a VA medical facility (these disabilities are compensated as if service-connected).[63]

Relevant VA records may include past and present disability applications and determinations; a current medical file containing VA medical center treatment records; and military records including a personnel file that describes length of service, details of the nature of service, and circumstances surrounding discharge. Other information may include military medical treatment such as hospital, outpatient, and sick call records and a description of unit activities such as combat records or accident investigation reports.

To supplement these records and gain more current information, a veteran applicant is scheduled for a medical disability examination(s). When mental disorders are claimed, psychiatric and in some cases social work examinations are

done. In some facilities, VA mental health clinicians who work in direct patient care also serve as VA disability examiners. In other facilities, outside (non-VA) clinicians perform the examinations on a fee-for-service basis.

The local rating board gathers the information and determines a prevailing diagnosis. General descriptions of psychiatric disability level are found in the mental-disorders section of the VA Schedule for Rating Disabilities.[64] Personality-disorder diagnoses (DSM-III-R, Axis II) cannot be service-connected.[65] Once a diagnosis has been established and symptoms described, the board sets a disability percentage by determining where the veteran's disability falls on the rating schedule. The schedule assigns percentages of disability that reflect average impairment of earnings capacity based on general rating formulas.[64, 66] Disability severity is based on actual symptomatology as it affects social and industrial adaptability. Two of the most important disability determinants are time lost from work and decreased work efficiency.[66] In the case of multiple disabilities, percentages are not added arithmetically but are determined via the Table of Combined Disabilities.[67, 68]

Disability percentages are set in increments of 10 but also may be 0 (0 percent disability confers eligibility for treatment only).[45] As of December 1992, for example, 10 percent disability conferred $1,020 per year and 100 percent disability $20,760 per year. Once a veteran's service-connected disability is established, the rating is periodically reevaluated by examiners who review the veteran's recent medical records and conduct face-to-face interviews. Disability levels may be adjusted by the veteran's local rating board in accordance with the examiner's findings. Disability that is nonstatic (i.e., may improve with treatment) is reviewed at approximately two-year intervals. Disability that has been present for more than 20 years is protected and not subject to periodic review.[69] Disability monetary compensation is not taxable. Social Security Administration disability insurance or retirement benefits are not reduced upon receipt of VA service-connected disability; however, Social Security Supplemental Income (SSI) is reduced.

Despite the large amounts of information potentially contained in the veteran's claim file, records are sometimes sketchy. This puts more pressure on the adequacy and accuracy of face-to-face disability examinations. Traditionally, these examinations have been short psychiatric interviews of about 30 minutes with another 30 minutes or less for chart review and dictation. Some stations now have expanded the time frames for PTSD examinations because of the complexity of traumatic stressor determination.[70]

Case Examples

At times, the result of the above expectations has been a gap between information desired by local rating boards and the clinician's capacity to elicit the data. Understandably, these and other problems have come to the CVA's attention, resulting in decisions adverse to the VA for failing to either develop an ade-

quate record or assist the veteran in doing so; for failing to consider probative non-VA medical opinions; for failing to provide reasons and bases for making claim denials; and for some seemingly peculiar or inconsistent interpretations of the rating schedule. The central administrative appellate issues can be summarized as follows:

1) The "benefit-of-the doubt" doctrine;

2) The "reasons-and-bases-for-findings-and-conclusions" requirement;

3) The "clearly erroneous" standard of review;

4) The "duty-to-assist" requirement;

5) The "new-and-material-evidence" requirement;

6) Interpretation of the disability rating schedule.

Perhaps the seminal case in the brief history of the Court of Veterans Appeals has been *Gilbert v Derwinski*,[71] decided on October 12, 1990. This was not a psychiatric case, but it has had considerable precedent value. The appellant, Norman Gilbert, claimed disability benefits allegedly resulting from a back injury sustained while in military service. The claim was denied by the BVA. The case presented the CVA with its first occasion to consider three statutory provisions of US Code Title 38. Section 7261(a)[41] provides that the Court may set aside a finding of material fact by the BVA only if such finding is "clearly erroneous." Section 5107(b)[72] gives a veteran the "benefit of the doubt" when there is an approximate balance of positive and negative evidence on a material issue. Section 7104(d)[73] requires that there be a written statement of the BVA's "reasons or bases" for its findings and conclusions.

The appellant, Gilbert, sought benefits for disability that he claimed resulted from back injuries sustained when he fell with a machine gun in his arms while serving in Korea in 1956. The BVA upheld the claim denial, finding that Gilbert had not demonstrated that his back problems were the result of injury incurred during military service, or if injury did occur it was "apparently acute and transitory in nature and resolved without leaving any residual disability." Because the evidence did not appear to be in approximate balance, Gilbert was not entitled to the benefit of the doubt.

"The Benefit-of-the-Doubt" Doctrine A unique standard of proof applies in decisions on claims for veterans' benefits. A veteran is entitled to the benefit of the doubt when there is an "approximate balance of positive and negative evidence."[72] This differs from standards of proof that cover other types of claimants and litigants. At one extreme is the requirement that guilt be proven "beyond reasonable doubt" in criminal cases. The second most stringent standard is "clear and convincing evidence" that applies when individual interests at stake are both "particularly important" and "more substantial than mere loss of money."[74]

In civil litigation between private litigants, the "fair preponderance" standard is used. "While private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence'

standard indicates both that society has 'minimal concern with the outcome,' and that the litigants should 'share the risk of error in roughly equal fashion.'"[74]

The statutory benefit-of-the-doubt standard dealing with veterans' benefits is at the opposite end of the spectrum, beyond even the fair preponderance standard. A veteran therefore need only demonstrate that there is an approximate balance of positive and negative evidence to prevail; entitlement need not be established beyond reasonable doubt, by clear and convincing evidence, or by a fair preponderance of evidence. The preponderance of evidence must be against the claim for benefits to be denied because by tradition and by statute, the benefit of the doubt belongs to the veteran.

There are some limits to the benefit-of-the-doubt rule. It does not apply during the process of submitting or gathering evidence, and it only applies to the "merits of an issue material to the determination of the matter." Finally, the rule does not diminish the veteran's initial burden of proof.[72]

The "Reasons and Bases for . . . Findings and Conclusions" Requirement

Before enactment of the VJRA, decisions of the BVA were required only to be "in writing and contain the findings of fact and conclusion of law separately stated."[75] Congress amended the U.S. Code to mandate that a "decision of the Board shall include a . . . written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions on all material issues of fact and law presented on the record."[76] The BVA must articulate with reasonable clarity its reasons or bases for decisions and in order to facilitate effective judicial review, it must identify those findings crucial to its decision and account for both persuasive and/or non-persuasive evidence. These decisions must contain clear analysis and succinct but complete explanations. A bare conclusory statement that is not "clear enough to permit effective judicial review," is not helpful to the veteran, or in compliance with statutory requirements.[71]

In the *Gilbert* case, the Secretary argued that the Court should not reverse a factual determination by the BVA if there is 1) a plausible basis for the Board's decision or 2) two permissible views of the evidence, and the fact finder simply chose between them. The CVA agreed that the BVA's factual finding was supported by the evidence of record or more accurately the lack of such evidence, but there also was evidence that supported Gilbert's claim. The BVA decision contained neither an analysis of the credibility or probative value of evidence submitted on Gilbert's behalf nor a statement of the reasons or bases for the implicit rejection of that evidence.

Moreover, declared the Court, the BVA addressed the benefit-of-the-doubt issue "only in the barest of conclusory terms." The statute itself was not cited, and the decision merely stated that the "Board does not find that the doctrine [of benefit of the doubt] would warrant allowance of the benefits sought on appeal." If, as the Secretary seems to have argued, there are indeed two permissible

views of the evidence, there must be a determination of whether there is an approximate balance of the positive and negative evidence and a statement of the reasons or bases for the determination.

It may well be that there are reasons or bases for denying the claim and for concluding that the evidence is not in equipoise; however, the BVA decision did not contain an evaluation of positive evidence, a weighing of the positive and negative evidence, or a statement of the reasons or bases for the bare conclusion that the benefit-of-the-doubt doctrine does not apply. If the veteran is to understand the reason for the claim denial, strict adherence to the reasons or bases requirement is necessary. Therefore, the *Gilbert* case was remanded to the BVA for reconsideration.

The Clearly Erroneous Standard of Review Congress has provided that the CVA may set aside findings of fact that are clearly erroneous.[51] In *U.S. v U.S. Gypsum Co.*,[77] the Supreme Court has defined the clearly erroneous standard as follows:

> "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The standard plainly does not entitle a reviewing court to reverse the fact finder simply because it is convinced that it would have decided the case differently. Where there are two permissible views, the fact finders' choice between them does not make the other clearly erroneous. "In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."[77]

In *Willis v Derwinski*,[78] the veteran sought to establish service-connection for psychosis (schizophrenia), arguing that his condition was misdiagnosed as a personality disorder. The BVA denied the claim, and an appeal was taken. The veteran claimed that although he had experienced symptoms of schizophrenia in the service, his condition was misdiagnosed as personality disorder (for which the VA cannot pay compensation benefits).[63] Subsequent nonmilitary psychiatric examinations diagnosed the veteran's condition as chronic paranoid schizophrenia.

In 1988, the VA admitted that the veteran's entire claim file including his service medical records had been lost. Nevertheless, the veteran's claim was denied by the local regional office in March and again in June. In January 1989, a VA psychiatrist who found the veteran "uncommonly reliable" noted that the veteran gave a credible description of symptoms of schizophrenia that he claimed to have experienced while in military service. The examiner was convinced that the initial personality disorder diagnosis was erroneous because the veteran's past history revealed no prodromal traits or behaviors. Yet, on September 20, 1989, the BVA affirmed the claim denial. The BVA admitted that the veteran's records had been lost but upheld the denial because there was no "objective evidence" that the personality disorder diagnosis was in error and be-

cause the veteran's discharge based on "unsuitability" supported the VA's finding.

The Court disagreed, concluding that the BVA failed in its 1989 decision to articulate reasons and bases for the apparent dismissal of evidence favorable to the veteran. Moreover, the BVA failed to explain its conclusion that the veteran was not entitled to the benefit of the doubt. Instead, it appeared that the rating board reached the conclusion that the veteran's psychosis was *not* misdiagnosed in the service, based on evidence that was not in the record (rather than on the only evidence that *was* in the file: the VA psychiatrist's and other statements supporting the veteran's claim). The case was remanded to the BVA.

In *Caldwell v Derwinski*,[79] the BVA denied the veteran's claim for service-connected schizophrenia, and an appeal was taken. The veteran served in the U.S. Navy from 1973 to 1975. During his last year he was assigned to Bethesda Naval Hospital as a medical corpsman. The veteran testified at a BVA hearing that while on active duty he began experiencing hallucinations and had related difficulties that resulted in poor job performance. Nevertheless, the first recorded hospitalization or medical treatment for a mental condition appeared in 1976 (when the veteran was committed to a private hospital by a state court order), nearly two years after military separation. The psychiatric diagnosis was paranoid schizophrenia.

Private medical records contained statements from family members concerning the veteran's unusual behavior and about his mother's efforts to have him seek treatment shortly after discharge. The Court found that the BVA proffered nothing more than its own speculation to counter this evidence. The Court previously had held that the BVA cannot substitute its own unsubstantiated medical conclusions in lieu of medical evidence of record.[80] The Court concluded that because there was no evidence to support the BVA determination, a mistake had been made and the BVA finding was clearly erroneous. Consequently, the decision was reversed.

The Duty-to-Assist Requirement The VA must assist claimants in developing facts pertinent to their claims. The veteran in turn has the burden of submitting evidence sufficient to demonstrate that the claim is well grounded. Exactly what constitutes a duty to assist or a well-grounded claim is not precisely defined in VA regulations. In lieu of precise definitions, these concepts are being developed through CVA case law. In *Murphy v Derwinski*,[81] a well-grounded claim is defined as "a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible . . . "

If a claim is not well grounded, the VA has no duty to assist; however, once there is a legitimate claim, the duty to assist is neither optional nor discretionary.[82] The VA must obtain all service records,[83] develop all relevant facts,[81] and consider all applicable regulations even if not claimed.[84] Finally, the law does not require the veteran to specify

with precision the statutory provisions or corresponding regulations under which he or she seeks benefits.[85] The nonadversarial nature of the initial proceedings requires the VA to consider benefits that may be inferred from the medical record even though not identified by the claimant and to conduct appropriate examinations to decide the claim.[85]

In *Littke v Derwinski*,[82] the Court characterized the VA's obligation to assist in claims development as the "cornerstone of the veterans' claim process," and an "integral part" of the VA's "system of processing and adjudicating claims for benefits that is both informal and nonadversarial." The Court noted the VA's statutory and regulatory obligation as follows:

> "Historically, the assistance given to the veteran in a claim for disability benefits has involved, for the most part, obtaining and assembling the claimant's service medical records. However, the duty to assist goes beyond this. By assisting the claimant in developing pertinent facts, from whatever source, and by conducting a thorough medical examination when, as in this case, there is, in the record, evidence of a significant change in the claimant's condition, the VA will more adequately fulfill its statutory and regulatory duty to assist the veteran. A well developed record will ensure that a fair, equitable and procedurally correct decision on the veteran's claim for benefits can be made."

In *Wood v Derwinski*,[86] the appellant appealed a 1989 decision by the BVA denying service connection for PTSD. The BVA rendered its decision on two grounds: 1) that the evidence of record did not objectively support the PTSD diagnosis; and 2) that no independent evidence was shown to corroborate the veteran's claim that he had been exposed to psychologically traumatic events while in the service.

The appellant alleged that during his tour of duty in Vietnam, he had witnessed emotionally traumatic incidents that eventually resulted in PTSD. Wood's claim had been sent to the U.S. Army and the Joint Services Environmental Support Group (ESG), which conducts records research to assist VA officials and veterans' advocates in verifying veterans' claimed stressful experiences. The ESG was not successful in corroborating the veteran's claims because of lack of specific dates, places, and types of incidents. The Court, therefore, concluded there was insufficient evidence stemming from the veteran's military service to support a PTSD diagnosis. Contrary to the veteran's contentions, the BVA was not required to accept his uncorroborated account of his Vietnam experiences, nor was the VA required to accept the social worker's and psychiatrist's unsubstantiated (and somewhat ambiguous) opinions that the alleged PTSD had its origin in the veteran's Vietnam service.

The Court said the appellant twice failed to be sufficiently specific about the alleged stressful events. The Court allowed that, although the VA's assistance in this case was not a model to be followed, the veteran was on adequate notice that he was required to provide more information. The Court therefore declared that the VA seems to have done the minimum to fulfill its statutory duty

to assist, and the BVA decision was upheld.

New and Material Evidence If new and material evidence is presented regarding a claim that has been disallowed, the VA must reopen the claim and review the former disposition.[37] This review requires a two-step analysis: 1) the BVA must determine whether the evidence is new and material; and 2) if so, the case is reopened, and the BVA must evaluate the merits of the claim in light of both old and new evidence (*de novo* record review).[87]

In *Colvin v Derwinski*[80] the terms *new* and *material* were defined. Evidence is new if it is not merely cumulative of other evidence in the record and material if relevant and probative to the issue at hand. Furthermore, there must be a reasonable possibility that applying the doctrine of benefit of the doubt to the new evidence, reviewed in the context of the entire record, would change the outcome.

In the *Colvin* case, the Court found that the medical opinion expressed by one of Colvin's personal physicians was new and material evidence and as such must be considered by the BVA. Further, the BVA panel must not rely on the medical credentials of its physician member to support a medical conclusion or to refute the medical evidence in support of the veteran's claim. In other words, the medical opinions of the Rating Board and/or the BVA have no evidentiary value. This does not mean that the BVA is required to accept probative opinions that contradict its own conclusions. The Court merely stated that, having reached a contrary conclusion, it is necessary that the BVA state its reasons for doing so and more importantly point to a medical basis other than the panel's own opinion to support its decision.

The Disability Rating Schedule Determining the appropriate impairment level under the disability rating schedule[42] has been the most contested claim issue and, at least in psychiatric conditions, the most ambiguous. The rating schedule classifies psychiatric disabilities into three categories (psychoneurotic, organic mental, and psychotic disorders) and divides each category into five social/industrial impairment levels. The five levels begin with 10 percent disability, which is classified as mild social/industrial (e.g., vocational) impairment, 30 percent disability (definite impairment), 50 percent disability (considerable impairment), 70 percent disability (severe impairment), and 100 percent disability (total impairment). Differences between the five levels are not well defined, particularly the distinctions that separate considerable, severe, and definite impairment. Additionally, clinicians often do not use these terms but use generic descriptors like "moderate" impairment. The guidelines exist to promote consistency and objectivity from one rating specialist to the next, but the criteria are too vague and probably too broad. These issues have been addressed many times in Court decisions.

In *Fletcher v Derwinski*,[88] the BVA upheld a regional office determination that Fletcher, a veteran service connected for PTSD, manifested "consid-

erable" impairment and was thus entitled to a 50 percent rating. In previous examinations, Fletcher's mental condition had been rated at 70 percent impairment. An appeal was taken and the Court held that because the BVA had neglected to provide reasons for changing Fletcher's impairment level, the decision was reversed and the case remanded for reconsideration.

In *Ohland v Derwinski*,[89] the BVA also failed to provide reasons for assigning a PTSD disability rating. In this case, the VA examining physician used the term "moderate impairment" to describe the veteran's social/industrial status. Although generally descriptive, a term such as moderate does not directly correspond to VA rating schedule terminology.[66] In such instances, the Board is permitted to assign an alternative rating but must explain its reasoning. This was not done; therefore, the Court remanded the case to the BVA for further development.

In *Karnas v Derwinski*,[90] the BVA denied the appellant's claim for restoration of his prior 100 percent service-connected disability rating for schizophrenia, and Karnas appealed to the CVA. The CVA held that the Board not only determined without evidentiary support that there was improvement in the veteran's mental condition and reduced his rating to 70 percent, but also failed to consider a VA regulation compelling a 100 percent rating for a claimant who is 70 percent or more service-connected and whose disability prevents engagement in gainful employment.[79,91] This provision requires the VA to assign a 100 percent evaluation under the relevant diagnostic code "where the only compensable service-connected disability is a mental disorder assigned a 70 percent evaluation and such mental disorder precludes a veteran from securing or following a substantially gainful occupation . . . " The Court held that, as specified in the Code of Federal Regulations, if the VA cannot find material improvement in the interval between the previous examination and the most recent evaluation, the veteran's rating cannot be reduced.[92] Lack of recent treatment or hospitalization is not, in itself, sufficient to justify material improvement. The BVA decision was reversed and a 100 percent disability rating restored.

Conclusion

The CVA is beginning to have a profound effect on VA compensation and pension claims. There are 58 VA regional offices that adjudicate claims for veterans and authorize monthly benefits based on service-connected disability. As of December 1, 1992, veterans with 100 percent service-connected disability received a tax-free annual allowance of $20,760. If this amount or even a fraction of it is multiplied by the millions of veterans who receive disability benefits, the entitlement sum is enormous.

Among regional offices, there has been considerable variability in adjudicating claims. For example from 1986 to 1990, the PTSD claim approval rate in 58 VA regional offices varied from 36.2 percent to 73.5 percent.[93] In part, the creation of the CVA was an effort to

bring more uniformity and consistency to adjudication procedures. It has not been easy, however, because compliance with Court mandates was initially slow. The VA is large but not monolithic. There are many organizational divisions and subdivisions. As a result, the VBA found it difficult at first to disseminate information, implement Court decisions, and monitor results, particularly at the regional office level where the majority of VA decisions are made. If the VA is unable to effect CVA judgments in a timely way, the VJRA will have a reduced impact, and many veterans will continue to experience case processing delays.

The VA, in turn, cites impressive appellate statistics. Between the time it began operation in October 1989 and November 1, 1992, the CVA docketed 5,277 cases; of that total, the Court disposed of 3,110 cases while 2,167 remained under active consideration. The closed cases broke down as follows: 742 BVA decisions were affirmed, 1,340 cases were dismissed, 72 were reversed, and 955 were remanded to the BVA. Although outright reversals remained low, there was a considerable number of remands that identified errors in the way claims were processed and regulations were interpreted. These cases in turn create thousands of remands from the BVA to regional offices because there are cases awaiting consideration that may contain the same processing errors that were identified by the Court. Court decisions began to impact the BVA by mid-1991, which is graphically illustrated in the table 1.[19] Until then, relative rates of BVA appeal reversals, remands, and denials had been stable. After the CVA became operative, BVA remands more than doubled, and outright appeal denials correspondingly decreased. Currently, the BVA remand rate has leveled off at about 50 percent. In response, the VBA has created a judicial review staff to distribute new procedural information to regional offices in a timely fashion.

CVA remands usually address the way the VA follows its own administrative policies and regulations. Currently, the Court has insisted that the VA provide logical, coherent reasons and bases for its claim decisions. It is very difficult for a veteran's advocate working at the regional office level to prepare an effective appeal if there is not a reasonably clear explanation of regulations and statutes relied upon for a conclusion.

Also, the VA must develop well-grounded claims by acknowledging positive medical evidence (evidence favorable to the veteran), obtaining additional medical opinions, and otherwise assisting the veteran in obtaining evidence pertinent to his or her claim.

CVA decisions will have the effect of lengthening the adjudication process because the VA is required to gather more claim information and provide more complete claim denial explanations. Some current projections estimate that by the end of 1993 there will be 600,000 to 700,000 cases waiting to be adjudicated. In response, the VA has mandated quicker disability examination turnaround times, which will help reduce claim backlogs but may exacerbate ad-

ministrative errors as examinations become more cursory and decisions less defensible.

In fact, the procedural problems identified by the CVA seem to be both systemic and endemic. The VA can hardly fulfill its statutory duty to assist, articulate reasons and bases for decisions, or evaluate new and material evidence in the short time now allocated for claim review and claimant examination.

When private attorneys solicit their own examiners to evaluate veterans' claims, they may provide 4 to 8 times more time than is allocated by local jurisdictions for VA examiners (Wiles DB, personal communication October 1992). By submitting well-documented and thorough examinations, private attorneys have been successful in helping veteran appellants reverse VA adjudications. Prior to 1989 when the adjudication process effectively discouraged private attorneys, procedures were less likely to be challenged. With the advent of judicial review, system-wide procedures are under increasing scrutiny and final adjudications may be more time consuming, but it does not appear that there is a significant increase in *total* claims because, as in civil cases, both frivolous claims and appeals are limited by contingency fee agreements and Court sanctions (fines).[94, 95] Also, frivolous actions are discouraged by the fact that any government reimbursement to attorneys of fees and expenses under the Equal Access to Justice Act is limited to situations that result in favorable outcome for claimants.[96]

It seems that the solution to the proffered problems must involve allocating more resources to the current underfunded and understaffed administrative adjudication process. Considering current fiscal constraints, this is not a realistic prospect; however, the dual specter of claim backlogs and more claim awards based on cursory claim investigation is daunting. As the CVA continues to find repetitive appellate errors, pressure for reform mounts. Funding to upgrade the process in the short term may save money in the long term by emphasizing well-documented disability awards. The VA is making some tentative steps in this direction, but the final chapter has not been written.

The authors thank Ms. Mary Moffitt for her valuable assistance in manuscript preparation.

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