

WALKING POINT

A PATROL THROUGH THE VA CLAIMS JUNGLE

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When I returned from Vietnam for the final time in 1970, most of my fellow veterans saw the VA as a blundering, bumbling, inapproachable bureaucracy, consisting of people whose job it was to keep veterans from getting any benefits. The public was generally not enamored with the Vietnam War nor did they think much of the soldiers returning therefrom, and the VA was just another form of “the enemy.” After all, in 1862 Congress passed the first law limiting the fees attorneys and claims agents could charge for representing veterans.¹ Later, Congress substituted a maximum fee of ten dollars for representation of veterans and their survivors, where the fee cap remained for more than 120 years.² And what could a lawyer do? It isn’t as if there were a court that could hear a lawyer anyway. Claimants went to their regional offices, and initial decisions on their claims were made on a panel of three: one doctor, one lawyer, and one occupational specialist. Appeals were only available to the Board of Veterans Appeals (BVA) in Washington D.C., and what lawyer could afford to practice before the regional offices and the Board?³

Things started to get a little better.

In 1988, Congress passed and President Reagan signed into law the Veterans Judicial Review Act, which created the United States Court of Veterans Appeals (now the Court of Appeals for Veterans’ Claims or CAVC) as an Article I court.⁴ By the time

¹ 12 Stat. 568 (1863).

² Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases before VA: The “New Paternalism”*, 1 VETERANS L. REV. 2, 6–7 (2009).

³ John P. Cullen, *The Veterans Administration and the Practice of Lawyers Before It*, 6 J. MARSHALL L. Q. 405, 405–406 (1941).

⁴ Veterans’ Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113 (1988) (codified as amended in scattered sections of 38 U.S.C.). In 1999 the name of the court was changed to its present incarnation, the Court of Appeals for Veterans Claims (CAVC) by the Veterans’ Programs Enhancement Act of 1998. Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (1998) (codified at 38 U.S.C.A. § 7251).

my oldest son came back from commanding a company in Iraq (2006), the times they were a-changing.

As a legislatively created court, the CAVC has limited but exclusive jurisdiction to “affirm, modify, or reverse a decision of the [BVA] or to remand the matter, as appropriate.”⁵ The court’s decision-making powers are limited; the government may not appeal to the CAVC, and the CAVC cannot make initial factual determinations and can only reverse findings of material fact that are clearly erroneous, furthermore, the CAVC has no jurisdiction to review the VA’s schedule of ratings for disabilities.⁶

It was only after creation of the CAVC that appeals could be continued on to the Federal Circuit and eventually the Supreme Court. The review in these Article III courts is limited by statute, and in the absence of a constitutional issue review is limited to legal questions only; review of factual determinations and the application of the law to facts in particular cases is expressly precluded.⁷ While attorney involvement in these later stages of the decision making process was a must from the beginning, due to the complexity of both the claims process and medical questions involved, attorney involvement at the beginning stages of the claims process has increased as well. As of 2006, attorney representation in prosecuting claims for benefits was allowed at earlier stages in the process, beginning with the Notice of Disagreement, and legislative history shows that the prevailing views regarding attorney representation have changed and

⁵ 38 U.S.C. § 7252(a).

⁶ Rory E. Riley, *Preservation, Modification, or Transformation? The Current State of the Department of Veterans Affairs Disability Benefits Adjudication Process and Why Congress Should Modify, Rather than Maintain or Completely Redesign, the Current System*, 18 FED. CIR. B. J. 1, 7 (2009).

⁷ Allen, *supra* note 6, at 368; 38 U.S.C. § 7292(d)(2).

lawyers are now seen as capable of enhancing, rather than detracting from, the claims process.⁸

The Current Claims Process

Step One: Claims at the Regional Office

To begin a claim, claimants must submit a written application with one of the more than 50 Regional Offices (ROs) located throughout the country or now online.⁹ Once a claimant has filed a substantially complete claim, the VA must send the applicant a letter stating the evidence necessary to prove the claim, and explaining the burden of producing evidence for both the claimant and the government.¹⁰ The application also triggers the VA's duty to pull together all of the veteran's records up to the time the claim was filed, including service records, medical records, VA treatment records, and civilian treatment records.¹¹ Now that the claim has been submitted, the file moves through a series of teams to be assembled and adjudicated. First, the claim is run through a Triage Team whose responsibility is to weed out all of the completely unfounded and frivolous claims.¹² From there, claims pass to the Pre-Determination Team, responsible for assembling the claim and preparing administrative decisions such as eligibility requirements and the like.¹³ Since the Pre-Determination Team is not

⁸ Reiss & Tenner, *supra* note 4, at 16–17. *See also* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (2006). Further information about the Notice of Disagreement can be found in the discussion of the current claims process *infra*.

⁹ Allen, *supra* note 6, at 366.

¹⁰ 38 U.S.C. 5103(a).

¹¹ Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57, 83 (2009). The VA is under a duty to acquire private medical records if the applicant provides a signed consent to release records form. *Id.* *See also* 38 U.S.C. § 5103A(b), (c); 38 C.F.R. § 3.159(c)(1).

¹² Reed, *supra* note 14, at 85. *See also* VETERANS BENEFITS MANUAL § 12.6.2.2.1, at 945 (Barton F. Stichman & Ronald B. Abrams eds., 2009).

¹³ VETERANS BENEFITS MANUAL, *supra* note 15, § 12.6.2.2.2, at 946.

generally made up of specialists, claimants are best served by carefully scrutinizing decisions and developments in their claims at this stage to ensure these tasks are properly done to avoid delays and remands from the later stages of the process.¹⁴

Once the Pre-Determination Team's tasks are finished, the claim is forwarded to the Rating Team, composed of rating specialists trained to evaluate medical and service records and interpret medical diagnoses and opinions. Rating Teams make the decisions at the heart of the process: whether an injury or disease is related to military service; whether the claimant is actually suffering from the disease, disability, or injury; whether any disability is total and permanent; and entitlement to additional compensation.¹⁵ In addition, the Rating team might also determine that the claimant's record is not adequate to render a decision and can send the case back to the Pre-Determination Team for further development.¹⁶

After the rating specialist makes a decision, the RO must notify the applicant through a notification letter, which includes the decision that was made, the effective date if applicable, why the decision was made, the right to a hearing, and the necessary steps to initiate an appeal.¹⁷ Notice to the claimant and some further development of claims is handled by a Post-Determination Team, which also handles claims not requiring a rating decision, such as accrued benefits decisions and dependency issues.¹⁸ In the case of a favorable decision to the applicant, the process will be at an end and benefits will be provided. If the claimant is unsatisfied with the decision for

¹⁴ *Id.* at 947.

¹⁵ *Id.* § 12.6.2.2.3, at 948.

¹⁶ *Id.*

¹⁷ 38 U.S.C. § 5104; 38 C.F.R. § 3.103(b). *See also* Riley, *supra* note 9, at 6.

¹⁸ *Id.* § 12.6.2.2.4, at 948.

whatever reason, he or she has one year to file a notice of disagreement (NOD) with the RO. At a minimum, the NOD must be in writing, dated and signed by the claimant and referring to the adverse decision by date; additionally, the NOD should express disagreement with the decision and a desire for appellate review.¹⁹

Filing a NOD prompts the RO where the decision was rendered to prepare a statement of the case (SOC) explaining the steps taken to determine the claim and the regulations relied on by the RO that affect the award of benefits. In addition to starting the appeal process, filing a NOD allows a claimant to request an informal hearing with a Decision Review Officer (DRO), who is a senior RO officer. The DRO is empowered to review the case de novo, but cannot overturn any part of a decision favorable to the claimant unless the decision contains clear and unmistakable error.²⁰ During this timeframe, the RO itself might continue to accept evidence and reverse itself before the SOC is sent to the claimant, so that there are several ways for a decision to be reversed before an appeal is actually taken.

If all of the above-mentioned “outs” still do not produce a decision favorable to the claimant, the SOC will be sent out and a 60-day period is triggered for a claimant to perfect his or her appeal by filing an appeal to the BVA within this timeframe.²¹ Once the appeal is perfected and the file has been sent to the Board of Veterans Appeals

¹⁹ *Id.* § 12.7.1, at 959; Reed, *supra* note 14, at 87.

²⁰ VETERANS BENEFITS MANUAL, *supra* note 15, §12.8.1, at 965–67.

²¹ Reed, *supra* note 14, at 87. In cases where the SOC is completed and mailed shortly after the NOD is filed, the claimant would still have one year from the filing of the NOD to perfect the appeal. 38 C.F.R. § 20.302(b)(1). In either case, the required form is VA Form 9, Appeal to Board of Veterans Appeals. 38 U.S.C. § 7105(d) (3)–(5); 38 C.F.R. § 20.202 (2009). The Substantive Appeal form can be found in the Forms Appendix, or on the web site of the Veterans Benefits Administration, at <http://www.va.gov/vaforms/va/pdf/va9.pdf>

(BVA), the RO can take no further action on the claim unless and until the claim is remanded to the RO by the BVA.²²

Step Two: The Board of Veterans Appeals

The BVA is the first level of what can loosely be termed appellate review of decisions of the various ROs, but unlike the ROs, the BVA is independent of the Veterans Benefits Administration.²³ The BVA reviews the benefits sought on appeal, and hears the cases in the order in which they were received and docketed. The BVA might allow the appeal, deny the appeal, or remand the case to the RO for further development of the claim, basing its decision on “the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.”²⁴ Statutory law requires the BVA to assign appeals to a single Veterans Law Judge or “to a panel of not less than three” judges for review.²⁵ The BVA is organized in four “Decision Teams” that hear cases arising from ROs organized geographically in groups of states.²⁶

Proceedings before the BVA are by one of four options: an in-person hearing at the RO via a “BVA Travel Board Hearing”, an in-person hearing at the BVA’s headquarters in Washington D.C., waiving the hearing and proceeding directly to adjudication of the claim, and most recently a videoconference from the local RO to the central headquarters via remote connection.²⁷ While each option has its advantages

²² VETERANS BENEFITS MANUAL, *supra* note 15, § 12.11.1, at 979. *See also* Reed, *supra* note 14, at 88–89.

²³ VETERANS BENEFITS MANUAL, *supra* note 15, § 13.1, at 1013.

²⁴ 38 U.S.C. § 7104 (a).

²⁵ 38 U.S.C. § 7102(a).

²⁶ VETERANS BENEFITS MANUAL, *supra* note 15, § 13.1.2, at 1017–18.

²⁷ VETERANS BENEFITS MANUAL, *supra* note 15, § 13.2, at 1023. *See also* Reed, *supra* note 14, at 89–90. If the videoconference hearing is held, it is considered in lieu of other BVA hearings. VETERANS BENEFITS MANUAL, *supra* note 15, § 13.2, at 1023.

and drawbacks in terms of time, cost, and effort, the case is prepared for transfer to the BVA unless the BVA Travel Board hearing is held. In that case, the claim remains at the RO where it was filed and it is easier for local advocates to submit additional evidence or pursue additional claims prior to the hearing.²⁸ Generally, Travel Board hearings are the slowest to proceed to adjudication because the Travel Board visits most ROs only once or twice a year, and hearings at the main office are scheduled somewhat faster, with the videoconference hearing being the most expeditious option if the claimant desires a hearing.²⁹

Following the informal hearing, which is most often conducted by a single judge, the case proceeds to the BVA's teams of staff attorneys assigned to each of the Decision Teams who review the transcript and prepare a bench memo to the judge outlining the case's merits; eventually the case is brought before the judge, who reviews the file, transcript, and memo, decides the case and prepares the formal decision.³⁰ The judge's decision could result in affirming the RO, remanding the case to the RO for further evidentiary development, granting service connection, increase evaluations, as well as decisions on specialized claims.³¹

From this point, the claimant has 120 days from the date stamped on the BVA decision to appeal the claim, though the claimant may also ask for reconsideration during the same period of time. If a motion to reconsider is made and denied, the claimant has 120 days from the denial of the motion to file a notice of appeal.³²

²⁸ VETERANS BENEFITS MANUAL, *supra* note 15, § 13.3, at 1025.

²⁹ Reed, *supra* note 14, at 90.

³⁰ *Id.* at 91.

³¹ *Id.* at 91–92.

³² CT. VET. APP. R. 4(a)(1). Denial of a motion to reconsider renews the 120 day period for filing a notice of appeal by court decision, since filing the motion for reconsideration keeps the BVA decision from becoming final. Rosler

Step 3: Appeal to the Court of Appeals for Veterans Claims

The U.S. Court of Appeals for Veterans Claims (CAVC) has “exclusive jurisdiction to review decisions of the Board of Veterans Appeals.”³³ Only those persons “adversely affected” by a BVA decision can seek review in the CAVC, but this also includes instances where the claimant receives less than the full benefits to which he or she might be entitled, allowing appeal of a decision that was favorable but not favorable enough to satisfy the claimant.³⁴ In order for the CAVC to have jurisdiction, the BVA decision must be final, and the notice of appeal must have been filed within 120 days after the BVA decision has been rendered.³⁵ Although not strictly required since the CAVC is an Article I court, the CAVC adheres to the “case or controversy” requirement familiar in Article III courts.³⁶

Filing the NOA starts the appeals process, and from the time of filing the secretary has 60 days to submit a designation of record to the appellant or attorney from that time, though the secretary often asks for an extension of time due to workload pressures.³⁷ From there, the appellant has 14 days to agree or disagree with the secretary’s designation, and the appellant can propose adding documents from the claim file to the record. Once the designation has been worked out, and the record has been filed with the CAVC, the appellant has 60 days to file a principle brief and the secretary has 60 days from that point to file the secretary’s brief. Once the secretary’s

v. Derwinski, 1 Vet. App. 241, 249 (Ct. Vet. App. 1991).

³³ 38 U.S.C. § 7252(a).

³⁴ VETERANS BENEFITS MANUAL, *supra* note 15, § 15.2.2, at 1148. See also *Holland v. Brown*, 9 Vet. App. 324, 329 (Ct. Vet. App. 1996).

³⁵ VETERANS BENEFITS MANUAL, *supra* note 15, § 15.2.3, at 1149.

³⁶ *Padgett v. Peake*, 22 Vet. App. 159, 162 (Ct. Vet. App. 2008) (citing *Mokal v. Derwinski*, 1 Vet. App. 12, 15 (Ct. Vet. App. 1990)); VETERANS BENEFITS MANUAL, *supra* note 15, § 15.2.3.4, at 1157.

³⁷ *Reed*, *supra* note 14, at 94. See also CT. VET. APP. R. 25(d), 45(j), 10(a)(5).

brief has been filed, the appellant has 14 days to respond in a brief no longer than 15 pages and at this point, the case is considered submitted to the court.³⁸

Once the case is submitted to the court, a single screening judge makes a preliminary evaluation of the case, and decides how the case will be set. Cases can be set for summary disposition by a single judge if the case involves well-settled principals of law, or might be set for disposition by a panel of three judges.³⁹ Although more rare, a screening judge can also recommend that the case be heard en banc at this time.⁴⁰ Since more than half of all appeals brought to the CAVC are filed without a lawyer, if the screening judge directs the case to be set in front of anything other than a single judge, the clerk automatically stays the case for 30 days so that a *pro se* appellant can obtain counsel.⁴¹

From this point, oral arguments may be ordered, though most often the judges meet and decide the case without oral argument. If a panel decision, the judges vote and assign a member to write the opinion, and because of the time invested by the screening judge, most of the time the senior panel member assigns the decision writing responsibility to this judge. The opinion is then circulated among the panel members, and when approved the decision is circulated to the other judges of the court for their information.⁴² Once the decision is deemed acceptable, it is published and the court's order is issued affirming the BVA, reversing the BVA, or most frequently reversing the BVA and remanding with instructions.⁴³

³⁸ Reed, *supra* note 14, at 95; VETERANS BENEFITS MANUAL, *supra* note 15, § 15.4.4, at 1222.

³⁹ VETERANS BENEFITS MANUAL, *supra* note 15, § 15.4.4, at 1222.

⁴⁰ *Id.*

⁴¹ *Id.*; Reed, *supra* note 14, at 94.

⁴² VETERANS BENEFITS MANUAL, *supra* note 15, § 15.4.4, at 1222.

⁴³ Reed, *supra* note 14, at 96.

Claimants still unsatisfied with the decision of the CAVC may either appeal further to the Court of Appeals for the Federal Circuit and eventually petition the U.S. Supreme Court, or move for reconsideration or rehearing before the CAVC. Claimants have 21 days to move for rehearing or reconsideration, and once this time has passed or the motion is denied, the court issues its mandate. Claimants have 60 days from that point to file their appeal with the Federal Circuit.⁴⁴

The Need for Attorney Representation

As the previous discussion may have pointed out, there are several points in the VA claims process where attorneys can be most helpful to some of the most deserving clients in our country. It is not simply a matter of advocacy in this system, and in fact advocacy may be one of the lesser concerns of practitioners in this field due to the lesser standards of proof and systematic sympathetic treatment by the VA itself. Rather, the concern is providing services to claimants in a unique and procedurally dense environment. At several points in the process, there are true opportunities for a proverbial second bite at the apple, for instance in the DRO process or while the claimant is waiting for a Travel Board hearing. *Pro se* claimants will often not be equipped to deal with these strategic decisions in the most rational fashion, and may not be aware of all the implications any given decision might entail. Consultation with an experienced attorney can help claimants decide if the best way to proceed is to seek a new decision through the RO or begin the appeal process to the BVA and CAVC.

Aside from the complaint that they have been denied benefits, claimants most often complain of the lengthy processing times and delays that have become

⁴⁴ *Id.*

entrenched in the system of adjudication and review, and delays have been noted at every stage of the adjudication process, from the ROs up to the CAVC and beyond.⁴⁵ By 2007, the aggregate delays and decision-making timeframes in the veteran's claims process took from five to seven years, on average, for claimants who appealed up to the CAVC.⁴⁶ When coupled with the comparatively higher rate of remand than more familiar Article III appellate courts,⁴⁷ one can see the importance of an attorney to both ensure the process is as quick as possible and that decisions are properly rendered the first time around.

Beyond providing strategic planning and familiarity with the system of decision, attorneys in the VA claims process can greatly help claimants develop the evidence necessary to support their claim. Even though the standard of proof is favorable to the veteran, in many cases technical medical evidence is needed to prove service connection. In fact, this phenomenon is likely to get worse before it gets better. On the modern battlefield, soldiers are more likely to be exposed to chemical and biological agents, and the mental stressors of war are at least as potent as they have historically been. The complexity of these cases justifies attorney involvement at all stages of the decision process, to ensure that facts supporting a claim are developed to their fullest extent at the earliest time possible.⁴⁸

In fact, it has been noted that presenting adequate medical opinion evidence, whether from private physicians or those obtained through the VA's duty to assist, is a

⁴⁵ Allen, *supra* note 6, at 377.

⁴⁶ *Id.*

⁴⁷ James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 157, 159 (2009).

⁴⁸ See David R. DiMatteo, *Walters Revisited: Of Fairness, Due Process, and the Future of Veterans' Fight for the Right to Hire an Attorney*, 80 TUL. L. REV. 975, 996 (2006).

major hurdle in deciding claims in a timely manner. Inadequate medical evidence is the leading cause of remands, at about one-third of remands from the BVA.⁴⁹ Aside from increasing the number of remands, inadequate evidence significantly contributes to the backlog of cases throughout the VA, and evidentiary problems can have a cascading effect throughout the process, further contributing to delay.⁵⁰ Again, attorneys can have a positive effect on this problem simply by understanding and explaining the hurdles clients might face in any given claim.

Attorney involvement is also justified earlier in the process because of the changed character of VA adjudication and appeals. Before the creation of the CAVC, the process remained, at least nominally, non-adversarial throughout. With the advent of the CAVC and eventual appeal to the Federal Circuit and beyond, the decisions made at the ROs and BVA are now more akin to trial decisions. Since the appellate decisions are by nature on a cold record, an attorney's presence at earlier stages helps to ensure that the CAVC and Federal Circuit have an adequate record to decide the case, and this can further help to decrease the amount of remands and the backlog at the VA.

Evidentiary problems are compounded by the prevalence of newer and more subtle injuries that returning veterans increasingly face. Conditions such as Gulf War Syndrome, Traumatic Brain Injury, and Post-Traumatic Stress Disorder complicate the process of providing benefits simply because the VA has not been able to flesh out how to deal with these injuries. Just as amputation was the "signature injury" of the Civil War

⁴⁹ James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 416 & n.93 (2009).

⁵⁰ *Id.* at 417.

Veteran, veterans of the Afghanistan and Iraq conflicts are likely to suffer from PTSD, TBI, multiple chemical sensitivity, and other serious ailments which are difficult to prove. TBI in particular can be difficult to treat, and has been mistaken for PTSD in some cases. If VA medical providers are having difficulty treating these conditions, it is little surprise that claims for compensation in this area are difficult to prove.⁵¹

In other areas, veterans can take advantage of presumptions of service connection for some conditions, either provided by statute or created by the VA itself through medical research. The use of presumptions is not new, and has been used to service-connect a variety of ailments due to radiation exposure during World War II and Agent Orange during Vietnam.⁵² Without an advocate to keep abreast of such changes, the individual claimant might be at a disadvantage even in a pro-claimant system. In such complex matters, aside from providing advice to claimants, attorneys can assist the VA to become more responsive to changing needs of our veterans and the unique problems that each cohort of veterans will face.

As an old soldier, and the father of officers who have served in the Army, Navy, and Air Force, I hope I may be forgiven for concluding on a personal note: The country is, as a whole, a more grateful and appreciative country regarding our veterans than we were 40 years ago, when I served. The court has evolved as has the awareness of returning veterans that the VA was originally intended as a friend and ally. And as has

⁵¹ See Chol Daniel Kim, *Traumatic Brain Injury Screening for the Armed Forces*, 40 McGEORGE L. REV. 449, 451 (2009).

⁵² Comment, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 133 (2009).

happened so often in this country, which boasts Jefferson and Lincoln, it took some real lawyering to get it done.