

Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants

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I. INTRODUCTION

Congress began providing veterans pensions in early 1789, and after every conflict in which the nation has been involved Congress has, in the words of Abraham Lincoln, "provided for him who has borne the battle, and his widow and his orphan." The VA was created by Congress in 1930, and since that time has been responsible for administering the congressional program for veterans' benefits.¹

Historically, Congress has endeavored to create a non-adversarial system for awarding benefits to veterans, thus creating a unique character and structure to the Veterans Benefits System.² In 1988, Congress enacted the Veterans Judicial Review Act and Veterans Benefits Improvement Act of 1988 establishing, for the first time, judicial review of decisions of the Department of Veterans Affairs ("VA").³

On November 18, 1988, President Reagan signed into law the Veterans Judicial Review Act (VJRA).⁴ This statute constituted a sea change in the history of veterans claims.⁵ Prior to this statute, attorney fees were capped at 10 dollars, total compensation; after the enactment, no attorneys fees lawfully can be charged or paid for work at the administrative level, prior to a first final decision of the Board of Veterans' Appeals.⁶ Attorneys may charge a fee for representing VA claimants, only *after* a first final decision of the Board of Veterans' Appeals.⁷ The result of such paternalism is to realistically prevent attorneys from representing VA claimants until after the record of the administrative proceedings has been *closed*.

The passage of this act created judicial review in the Veterans Benefits context establishing a clear intent to preserve the historic, pro-claimant system.⁸

Implicit in such a beneficial system has been an evolution of a completely *ex parte* system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to the optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.⁹

Congress expressly noted that, "In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion or strict adherence to the burden of proof."¹⁰ Thus, Congress preserved the unique character and structure of the veterans benefits system but at a detrimental cost to VA claimants seeking appellate review of the denial of benefits by the Secretary.

While paternalism in the development and initial adjudication process inures to the benefit of claimants, paternalism in the review of the denial of benefits works a detriment to those individuals challenging the decisions of the Secretary.¹¹ In 1990, the Secretary of the Department of Veterans Affairs promulgated 38 C.F.R. § 3.103(a) as a statement of policy. The regulation states in pertinent part:

Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing facts pertinent to the claim and to render a decision which grants every benefit which can be support in law while protecting the interest of the government.

This statement of policy guarantees and acknowledges the Agency's obligation to assist claimants in developing facts pertinent to the claim and to render a decision which grants every benefit to which a claimant may be entitled under law.

However, fundamental problems exist when extending paternalism to the appellate review process of the decisions of the Secretary. The maintenance of paternalism in the appellate process undermines and often prevents claimants from obtaining the benefits to which they are entitled to under law because of the obstacles created by paternalism that interfere with the process of review of the denial of benefits by the Secretary.

II. OVERVIEW OF THE ADMINISTRATIVE AND JUDICIAL REVIEW OF THE DENIAL OF VETERANS' BENEFITS

A. Administrative Review

In fiscal year 2002, the VA paid over 22 billion dollars in disability compensation to an average of about 2.4 million veterans and over 300,000 survivors.¹² VA also paid over three billion in pensions to an average of about 580,000 veterans and survivors.¹³ The amount of disability compensation largely depends upon the degree to which a veteran is disabled.¹⁴ VA determines the degree to which veterans are disabled in 10 percent increments on a scale of zero to 100 percent.¹⁵ Basic monthly payments range from \$104 per month for 10 percent disability to \$2,193 per month for 100 percent disability.¹⁶ About 65 percent of veterans receiving disability compensation have disabilities rated at 30 percent and lower.¹⁷ Only approximately eight percent of disabilities are rated at 100 percent.¹⁸

VA operates through 57 regional offices¹⁹ that accept claims and render initial decisions.²⁰ Administrative appellate review of the decisions of the Secretary requires claimants to indicate a desire to appeal, not once, but twice.²¹ A claimant must first file a Notice of Disagreement, expressing a desire for appellate review of the decision of the Secretary.²² In response thereto, the Agency is required to prepare a Statement of the Case, providing a summary of the evidence, citation to pertinent laws and regulation, the decision made on each issue, and a summary of the reasons for such decisions.²³ However, an appeal is not perfected until a claimant has completed a substantive appeal by filing a VA Form 9 after a Statement of the Case has been furnished by the Agency.²⁴

Since November 2000, the statutory scheme has imposed upon the Secretary

certain paternalistic duties which are required to be performed prior to adjudicating a claim on the merits. Specifically, upon receipt of an application for benefits, the Secretary is required to notify the claimant and his representative, if one has been obtained, of the "evidence necessary to substantiate the claim."²⁵ Additionally, the Secretary has an affirmative duty to assist claimants in obtaining evidence necessary to substantiate their claims.²⁶ VA must obtain the veteran's service medical records,²⁷ as well as information from other governmental or non-governmental sources that have been adequately identified and authorized by the claimant.²⁸ Moreover, other federal agencies have an affirmative duty to provide information to the VA.²⁹ Congress reaffirmed and clarified the obligations of the Secretary by enacting the Veterans Claims Assistance Act of 2000.³⁰

Following the receipt of the substantive appeal (VA Form 9), the Agency of Original Jurisdiction will certify the case to the Board of Veterans' Appeals.³¹ When an appeal is certified to the Board of Veterans' Appeals for administrative appellate review, the appellate record is transferred to the Board and the appellant and his or her representative are notified in writing of the certification and the transfer.³² Decisions of the Board are required to be based upon the entire record in the proceeding, consideration of all evidence, material of record, and the applicable provisions of law and regulation.³³

Since the enactment of the Veterans Judicial Review Act of 1988, the Board of Veterans' Appeals has issued annually the following total numbers of decisions:

1989	38,673	1997	43,347
1990	46,556	1998	38,886
1991	45,308	1999	37,373
1992	33,483	2000	34,028
1993	26,400	2001	31,557
1994	22,045	2002	17,231
1995	28,195	2003	24,630*
1996	33,944		*estimated ³⁴

B. Judicial Review of BVA Decisions

In order to obtain review of a final decision of the Board of Veterans' Appeals, by the U.S. Court of Appeals for Veterans Claims, a person adversely affected by such decision must file a notice of appeal with the court within 120 days after the date on which notice of the decision is mailed pursuant to 38 U.S.C. § 7104(e).³⁵

The scope of judicial review of decisions of the Board of Veterans' Appeals includes determining whether the Board's actions were unconstitutional or in violation of the relevant statutes or regulations; whether the Board's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; whether the Board's actions were "in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right"; or whether the Board's actions were "without observance of procedure required by law."³⁶

A claimant filing an appeal of a BVA decision to the U.S. Court of Appeals for Veterans Claims, receives a Designation of Record (DOR) from counsel for the

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Secretary of the Department of Veterans Affairs.³⁷ The DOR is generated by the General Counsel for the Secretary based upon the contents of the veteran's claims file.³⁸ A claimant is allowed, by rule, to counter designate any portions of the record not included by the General Counsel in the DOR.³⁹ Judicial review is limited, by statute, to the content of the record of proceedings before the Secretary and the Board, the contents of the veteran's claims file.⁴⁰

III. A NON-ADVERSARIAL PROCESS WITHOUT PATERNALISM

The non-adversarial nature of the veterans' benefits system can be maintained without extending paternalism to the appellate review of the Agency's denial of benefits. In particular, the continuation of paternalism after the initial denial of benefits, as part of the administrative appellate review process, is detrimental to the interest of veterans and other eligible claimants seeking an objective and independent review of the Secretary's denial of benefits.

Black's Law Dictionary defines paternalism as "[a] government's policy or practice of taking responsibility for the individual affairs of its citizens, [especially] by supplying their needs or regulating their conduct in a heavy-handed manner."⁴¹ As applied to the review of the denial of VA benefits, paternalism denies VA claimants fundamental rights enjoyed by other citizens seeking review of the denial of disability benefits.

The continuation of the paternalism of the Agency, in the context of the review of veterans' benefits denials is a detriment, not a benefit to claimants. Veterans and their survivors are deprived of fundamental rights afforded every citizen of this country, but denied to veterans and their families because of a misguided public policy, which extends paternalism to the appellate review of the denial of benefits. This article will compare the rights available to Social Security disability claimants with the constraints imposed by a paternalistic process of reviewing the denial of veterans' benefits.

Many agency systems of adjudication are based to a significant extent on the judicial model of decision making.⁴² The Social Security Administration (SSA) is perhaps the best example of an agency that is not based upon the judicial model.⁴³ The most important modification of the judicial model by the Social Security statutory and regulatory scheme is the replacement of the normal adversary procedure with the "investigatory model."⁴⁴ Social Security proceedings are therefore inquisitorial, rather than adversarial.⁴⁵ Such a model is consistent with the non-adversarial nature of the veterans benefits system, but without the burdens imposed by the continuation of unnecessary paternalism.

The duty of the Administrative Law Judge (ALJ) in an administrative review of the denial of benefits to a Social Security claim is to investigate the facts and to develop arguments both for and against granting benefits.⁴⁶ The Commissioner of the SSA has no representative before the ALJ to oppose the claim for benefits.⁴⁷ Neither VA statutes nor regulations provide for a comparable requirement upon the initial level of appellate review or upon the final administrative appellate review at the Board of Veterans' Appeals. An express statutory direction to the Agency is needed to require that after an appeal is necessary, an independent investigation of facts and development

of arguments for and against the granting of benefits should be imposed on the Agency's administrative appellate process.

Just because VA claimants have the benefit of paternalism in the development of the claim does not mean that paternalism is beneficial in the appeal of the denial of a claim. The result is a de facto and sub silento adversarial development and definition of the issues by the formerly paternalistic VA system, which does not exist in the administrative review process of the SSA.⁴⁸ The non-paternalistic process in the Social Security scheme develops issues in a non-adversarial administrative appellate review process undertaken by an independent ALJ and includes certain rights not currently available to VA claimants.

Once the paternalistic VA system denies benefits, that same paternalism works to the substantial detriment of claimants who have received an adverse decision from the Secretary of the Department of Veterans Affairs (Secretary). Social Security claimants denied benefits are afforded a non-adversarial, but independent review of the Agency's decision to deny benefits. There is no reason that claimants denied VA benefits should not be entitled to the same non-adversarial, but independent review of the Secretary's decision to deny benefits.

IV. AN OVERVIEW OF THE ADMINISTRATIVE AND JUDICIAL REVIEW OF THE DENIAL OF SOCIAL SECURITY BENEFITS

A. Social Security Claimant's Rights to Discovery

A full review of all applicable Social Security regulations does not indicate an incorporation of the Federal Rules of Civil Procedure regarding discovery,⁴⁹ such as the use of depositions, notices to produce, and requests for admissions.⁵⁰ Nevertheless, in many administrative hearings the judges permit pre-hearing discovery pursuant to the Federal Rules of Evidence.⁵¹ Therefore, the representative can properly dispatch interrogatories to the consulting doctor, vocational expert, and other persons indicated in the review of the claimant's file.⁵² Further, the representative in these jurisdictions can enjoy full use of pre-hearing deposition tactics and requests for admissions as well.⁵³ However, the representative must be aware that the regulations do not provide for such use of civil procedure discovery and in fact only prescribe a very limited scope of pre-hearing discovery.⁵⁴

The Social Security regulations explicitly provide only for subpoenas for the attendance of witnesses and for the production of documents.⁵⁵ A request for a subpoena must be made directly to the ALJ or at an SSA office not less than five days prior to the time fixed for the hearing.⁵⁶ Thereafter, the ALJ will determine if the witness' testimony and documents are material to an issue at the hearing.⁵⁷ The SSA will pay the cost of issuance of the subpoena and the appropriate fees and mileage of any witness.⁵⁸

In the event that the person to whom the subpoena is directed fails to appear at the hearing or fails to produce a document, the ALJ is without individual power to make a citation for contempt.⁵⁹ The ALJ must apply to the U.S. district court via the designated U.S. attorney for permission to proceed with the contempt citation against the contemner.⁶⁰

B. Right to Counsel

The Constitution does not provide any right to counsel in the disability determination process.⁶¹ However, the claimant does have a statutory right to counsel at the hearing.⁶²

The ALJ has the duty to advise the claimant of his right to counsel.⁶³ The ALJ is required to explain how and why legal representation would be valuable or to set out the burden of proof the claimant must uphold with or without representation.⁶⁴ Further, the ALJ must inform the claimant that he has an opportunity to have free representation.⁶⁵ If a claimant appears at the hearing without an attorney, the ALJ has a duty to "scrupulously and conscientiously probe into all the facts."⁶⁶ The ALJ has to fully develop the proof and carefully weigh it.⁶⁷

This duty is even more complex once it becomes apparent to the ALJ during the course of the hearing that the claimant is having difficulty answering simple questions and that there exists a possibility that the claimant may have a mental problem.⁶⁸ Even where the claimant is represented by an attorney, the duty of the ALJ to fully develop the record still exists.⁶⁹

C. The Duties of an Administrative Law Judge

The ALJ must fully and fairly develop the record so that a just and accurate determination may be made.⁷⁰ Although the ALJ has this duty when a claimant is represented by counsel,⁷¹ the ALJ's obligation is enhanced when a claimant has no representation.⁷²

D. Judicial Review of ALJ Decisions

The review of denial of benefits by Social Security following the decision of an ALJ is undertaken by federal district courts.⁷³ Review is limited in scope, since the evidence cannot be reweighed, nor can a judgment be substituted for the decision rendered.⁷⁴ The district court will have the power to enter a judgment affirming, modifying, or reversing the decision, with or without remanding the case to the appeals council for a hearing. The findings of the Commissioner as to any fact, if supported by substantial evidence, are conclusive.⁷⁵ Therefore, the court will decide the issues of law and determine whether there is substantial evidence to support the findings of fact based upon the pleadings and the transcript of the record.⁷⁶

The Social Security Act is to be broadly construed and liberally applied.⁷⁷ Where the Commissioner applies the incorrect rule of law, the matter is remanded for correction by the Commissioner instead of the court awarding benefits.⁷⁸

The decision of the district court granting summary judgment is reviewable de novo.⁷⁹ The court of appeals must consider the record as a whole, weighing both the evidence that supports and detracts from the Commissioner's conclusion.⁸⁰ The court may not affirm simply by isolating a specific quantum of supporting evidence.⁸¹

V. HOW VA CLAIMANTS ARE ADVERSELY AFFECTED BY PATERNALISM AT THE ADMINISTRATIVE APPELLATE LEVEL

The paternalism contemplated by Congress, prior to the denial of benefits by the Secretary, is unquestionably beneficial to claimants. However, when that paternalism is extended to the administrative appellate review process, paternalism effectively denies claimants' rights enjoyed by other citizens seeking administrative appellate review of their denial of disability benefits. By comparing the rights afforded Social Security claimants to the constraints imposed by paternalism to claimants seeking VA benefits, the adverse effects upon claimants will become evident.

In order to initiate and perfect an appeal, VA claimants must comply with the requirements of 38 U.S.C. § 7105. These requirements are cumbersome and unnecessarily burdensome to claimants seeking administrative appellate review of the denial of VA benefits. A Social Security claimant is provided a standardized form to request reconsideration of an initial denial of benefits. The Department of Veterans Affairs does not provide a standardized form to initiate an appeal of the Secretary's denial of benefits. While there are advantages to VA claimants not being required to file a standardized form to initiate an appeal, VA regulations presently create distinct disadvantages.

38 U.S.C. § 7105 mandates that a claimant not merely express disagreement in order to initiate an appeal but that he subsequently reaffirm and perfect an appeal with the filing of what amounts to a second notice of appeal in the form of a substantive appeal. The failure of a claimant to file a substantive appeal prevents consideration of the appeal initiated by the filing of his Notice of Disagreement.⁸² A Social Security claimant seeking administrative appellate review following the denial of reconsideration files a standardized form requesting a hearing before an ALJ who conducts a de novo and independent review of the Agency's denial. Curiously, the VA does provide a standardized form for perfecting an appeal but does not provide a standardized form with the required "magic words" for a notice of disagreement.

Furthermore, by regulation, the Agency has imposed an additional burden upon claimants seeking to obtain administrative appellate review by filing a Notice of Disagreement and requiring that the Notice of Disagreement include special language that indicates a "desire to appeal."⁸³ These "magic words" could easily be incorporated into a standardized form created by the Agency. Prior to this regulatory imposition in February 1992, the U.S. Court of Appeals for Veterans Claims (CAVC) interpreted the statute as not requiring any special wording other than the expression of disagreement with the Agency's decision.⁸⁴ This regulatory requirement evidences a shift from a non-adversarial process to the implications of the beginnings of adversarialism in the administrative appellate review process. A Social Security claimant must merely complete and execute two standardized forms in order to obtain review by an ALJ.

The government's heavy-handed regulation of the process to initiate and perfect an administrative appeal is evident when compared to the non-adversarial process employed by the Social Security Administration for the review of the denial of benefits. It is unreasonably paternalistic to require VA claimants to affirm twice their intent to appeal the denial of benefits by the Secretary. The additional burden of perfecting an appeal with a substantive appeal is heavy-handed and works to the

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benefit of the administrators and not to the claimants seeking review of the denial of benefits. Such paternalism undermines the rights of claimants seeking both administrative and judicial appellate review of the decisions of the Secretary. The extent of the imposition is demonstrated when compared to the non-adversarial but equally effective process utilized by the Social Security Administration.

In Social Security, after the denial of reconsideration, the Agency provides claimants a standardized form requesting a hearing before an independent ALJ. The VA provides the claimant with a Statement of the Case and then requires the filing of a VA Form 9 to perfect the initial appeal for administrative appellate review by the Board of Veterans' Appeals (BVA or Board). This redundancy severely limits the number of appeals perfected resulting in substantially fewer denials being subjected to administrative appellate review.

According to the Report of the Chairman of the BVA for fiscal year 2002, the following numbers of Notices of Disagreements were filed from 1999 to 2002:

1999	60,318
2000	60,042
2001	43,840
2002	78,140

During the same time period, the Agency received the following number of substantive appeals:

1999	35,728
2000	32,555
2001	17,720
2002	21,047

During the same period, the Board of Veterans' Appeals rendered the following number of decisions:

1999	37,373
2000	34,028
2001	31,557
2002	17,231

During the period from 1999 through fiscal year 2003, the CAVC made the following number of merit decisions:

1999	2,256
2000	1,619
2001	2,853
2002	972
2003	2,152

Of the decisions of the BVA in which the Court rendered merit decisions, the

following numbers and percentages resulted:

1999

666 affirmances or 29.5 percent of the total merit decisions;
363 affirmed or dismissed in part, reversed/vacated & remanded in part, or 16 percent of the total merit decisions;
1,017 reversed/vacated & remanded or 45 percent of the total merit decisions. (In 1999, the Court did not segregate from their statistics cases which were remanded only.)

2000

526 affirmances or 32.5 percent of the total merit decisions;
325 affirmed or dismissed in part, reversed/vacated & remanded in part, or 20 percent of the total merit decisions;
705 reversed/vacated & remanded or 43.5 percent of the total merit decisions. (In 2000, the Court did not segregate from their statistics cases which were remanded only.)

2001

27 affirmances or .01 percent of the total merit decisions;
65 affirmed or dismissed in part, reversed/vacated & remanded in part, or .02 percent of the total merit decisions;
962 reversed/vacated & remanded or 33.7 percent of the total merit decisions;
1,724 remanded or 60 percent of the total merit decisions.

2002

109 affirmances or 11 percent of the total merit decisions;
24 affirmed or dismissed in part, reversed/vacated & remanded in part, or .025 percent of the total merit decisions;
209 reversed/vacated & remanded or 21.5 percent of the total merit decisions;
476 remanded or 49 percent of the total merit decisions.

2003

129 affirmances or .06 percent of the total merit decisions;
22 affirmed or dismissed in part, reversed/vacated & remanded in part, or .01 percent of the total merit decisions;
412 reversed/vacated & remanded or 19 percent of the total merit decisions;
1,527 remanded or 71 percent of the total merit decisions.

The statistics from the CAVC confirm that in fiscal years 2001 through 2003 the Court in merit decisions reviewing the decisions made by the BVA have returned

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to the Board more than 90 percent in 2001 and 2003 and 70 percent in the year 2002. These statistics demonstrate that when decisions of the BVA on the merits are reviewed by the Court, claimants are consistently returned to the Agency for the readjudication of their claims in accordance with law.

Although Board members are now referred to and identified as Veterans Law Judges (VLJ), the decisions of the BVA are rendered without any prehearing discovery, the right to compensate counsel, and without an expressed statutory obligation imposed upon VLJs of independence. Hearings before Social Security ALJs include a bound, paginated record of the relevant pleadings and evidence considered which contains a table of contents identified with specificity, which are the records relied upon by the ALJ in rendering his decision. Additionally, the written decisions of Social Security ALJs contain citations to the record identifying the document relied upon. While VA claimants are entitled to a "hearing" before the BVA, VLJs do not have an independent duty to fully develop the record and to fully identify all potentially favorable issues.

First, the majority of BVA hearings are held in Washington, D.C.,⁸⁵ and to most VA claimants, such hearings are inherently problematic because of the expense of traveling there. In order for VA claimants to fully develop the record and identify all potentially favorable issues, assistance of competent counsel is required, yet, by statute, compensation to such counsel is prohibited until after the Board's first final decision.

Second, Board hearings are not the inquisitorial hearings conducted by ALJs in Social Security. ALJs are required to fully develop the record and identify all potentially favorable issues. Because VA claimants and their representatives are without any rights to pre-hearing discovery, Board hearings and decisions are made without the ability of VA claimants to challenge the Secretary's failure to fully develop the record and/or to have identified all potentially favorable issues.

Furthermore, claimants and their representatives preparing for hearings before the BVA have no rights to discovery and only limited rights to subpoena witnesses. Such rights are particularly critical regarding a VA claimant's ability to challenge evidence of record that is adverse, which often comes from VA examiners or from independent medical opinions that have not been subject to deposition, interrogatory, or even interview by counsel. The paternalistic assumption is that the Secretary has fully developed the record. Yet, Congress does not make such an assumption regarding the Social Security Commissioners' initial decision making. By statute, the ALJ reviewing a denial of benefits is charged with performing specific duties to fully develop the record so as to obtain a just and accurate determination. The VLJs have no such explicit statutory mandate. A Social Security claimant is entitled to, with the assistance of counsel or pursuant to the statutory duty of the ALJ, challenge the premise that the Commissioner had fully and fairly developed the record.

Third, although a VA claimant or the claimant's representative is entitled to review of the claims file, the review of the claims file is undermined by the lack of organization of its contents. Claim files are currently and historically maintained by the Agency in a single and unmanageable file containing information concerning every claim ever made by the claimant. Claim files also include paperwork and evidence of not only the pending claim but also of any other prior unrelated claims, claims for

dependent benefits, apportionment of benefits, overpayment of benefits issues, as well as educational benefits. Claim files are not organized chronologically, nor are their contents paginated. Claim files do not contain a table of contents or in any way provide a description of the contents of the file. There are no means of determining or even ascertaining the chronological order in which the contents of the claims file were received by the Agency. Documents are not uniformly date stamped; there are no mandatory or uniform procedures utilized for identifying the date of receipt of evidence placed in the claims file. There are no means for VA claimants or the claimant's representative to ascertain at any discrete point in time, including the date of the Board's decision, the precise contents of the claims file. As a consequence, claim files, which can range from several hundred to several thousand pages, are without any form of organization, making the task of reviewing and understanding a claims file's contents increasingly problematic as the number of pages contained in the claims file increases.

Additionally, as opposed to decisions of ALJs in Social Security proceedings, decisions from the BVA do not contain an exhibit list, and Board decisions do not reference or identify the evidence relied upon by the Board to support its decision. Board decisions do not contain citations to identify a document relied upon, or where that document can be located by counsel or by the reviewing court within the claims file. Thus, when a VA claimant is allowed by statute to compensate an attorney after a first final decision of the Board, in order to determine the viability of a potential court appeal the task of determining the evidence relied upon by the Board to support the decision made by the Board requires of counsel an examination of the entire contents of the claims file in order to attempt to identify what evidence may have been referred to or relied upon by the Board in its decision.

VA claimants seeking administrative appellate review by the BVA are barred by statute from compensating counsel prior to the first BVA final decision.⁸⁶ This statutory bar is enforced through criminal sanctions.⁸⁷ Although VA claimants may have legal counsel to represent them before the BVA, such counsel must agree to represent claimants without compensation. Such a statutory disincentive to representation by counsel is another example of heavy-handed paternalism inherent in the current statutory scheme.

VI. HOW VA CLAIMANTS ARE ADVERSELY AFFECTED BY PATERNALISM AT THE JUDICIAL APPELLATE LEVEL

A Social Security claimant who appeals a denial of benefits by the Social Security Administration in a U.S. district court receives from the Agency a bound record of all documents related to the claim, submitted to the district court as the administrative record. This record of proceedings before the ALJ contains a table of contents, which is paginated and contains the evidence relied upon as cited by the ALJ in rendering the decision to deny benefits.

A VA claimant who appeals to the CAVC after having not been able to compensate an attorney prior to a first final Board decision, has no reliable means to identify the content of the record of proceedings before the Secretary at the time of the Board's decision.

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When the VA claimant files his notice of appeal to the CAVC, it is the General Counsel for the Secretary, the Appellee, who by Court rule generates the designation of record (DOR). The General Counsel prepares the DOR with no page numbers, no identification or relationship to the evidence relied upon by the BVAs to render the decision which has been appealed, and no table of contents which adequately identifies the items contained in the DOR.

Although a claimant has the right to counter designate the record, the counter designation process is frustrated by the complete disorganization of the claims file, which has been in the exclusive control of the Agency. In addition, the BVA decision did not provide a contemporaneously prepared exhibit list in order to inform the claimant and his representative of the evidence relied upon by the Board in rendering its decision.

The record on appeal is ultimately paginated but lacks any contextual relationship to what evidence may or may not have been in the claims file, or what evidence was relied upon by the Board. As a consequence, the record on appeal cannot be relied upon by either court or counsel to confirm the evidence of record in the proceedings before the Secretary and the Board at the time of the Board's decision. The record on appeal is an artificial, after the fact reconstruction that in no way identifies to either a court or an appellant's counsel the evidence relied upon by the Secretary or the Board in denying benefits to the claimant.

38 U.S.C. § 7252(b) precludes the court from including in the record on appeal any material not contained in the "record of proceedings before the Secretary and the Board." This further demonstrates the adverse affect of paternalism inherent in the erroneous assumption that claim files as currently maintained by the Secretary can be relied upon to reconstruct a record on appeal. Additionally, the current statutory scheme prevents claimants from compensating counsel to represent them in proceedings before the Secretary and the Board in order to ensure and identify the contents of the record and that the record has been "fully and fairly developed."

By depriving VA claimants of the same rights to discovery, right to compensate counsel, and the right to a record developed, formed, and fully identified by an independent ALJ, the presumptive benefits of paternalism are negated. The current public policy of paternalism, which extends to the review of the denial of veterans' benefits, deprives VA claimants of effective means to challenge the denial of VA benefits as Social Security disability claimants are afforded. While paternalism in the initial decision making process of the Secretary provides a beneficial function to VA claimants, the extension of such paternalism to the review of the Secretary's denial of benefits does not serve the interest of VA claimants creating a de facto and sub silentio adversarial system of administrative appellate review.

VII. RECOMMENDED REMEDIES

Remedies are needed to remove the adverse affects of paternalism in the appellate review process of the denial of VA benefits, while maintaining a non-adversarial and veteran friendly system to adjudicate appeals from the unfavorable decisions of the Secretary. The following recommendations are submitted:

1. Congress should amend 38 U.S.C. § 7105 by removing the cumbersome and burdensome requirement upon VA claimants to file both a Notice of Disagreement and a substantive appeal. If Congress desires to retain a two-tier system, then the Social Security model should be incorporated into the amended text of 38 U.S.C. § 7105. As in Social Security, a reconsideration should be the first step, and if the claimant remains dissatisfied, then a notice of appeal requesting de novo review by the BVA should be allowed.

2. Congress should provide the statutory mechanism to VA claimants appealing a denial of benefits and provide reasonable discovery tools to challenge the decision of the Secretary to deny benefits. These tools should include the right to serve written interrogatories to VA medical examiners regarding the credentials and experience of individuals offering medical opinions relied upon by the Secretary and the right to seek clarification of the opinions rendered in order to understand the basis for and the specific matters considered in rendering the opinions of record. Further, VA claimants should have the right, by statute, to submit to the Secretary requests for admissions regarding the evidence conceded by the Secretary as "substantiating the entitlement to the benefit sought."

3. Congress should amend 38 U.S.C. § 5904 to allow VA claimants to retain and compensate attorneys, on a contingent fee basis only, capped at 25 percent of past due benefits after the Secretary has denied benefits. Attorney representation in the administrative appellate process is necessary and reasonable in order to ensure that the record is fully developed and that the Secretary has considered and granted all benefits to which claimants may be entitled to under law.

4. Congress, by statute, should require the Secretary to maintain segregated files for the adjudication of a denial of benefits. These files must include a table of contents that identifies the documents contained in the file, the date the document was placed in the file, and who caused that document to be entered into the file. Congress should require that these files be paginated in chronological order in order to ensure that claimants and their representative may be able to reliably determine the precise content of the record at any point in time.

5. Congress should require, by statute, that VLJs conduct a de novo, independent, and searching review of the decision to deny benefits by the Secretary. Congress should mandate that VLJs fully and fairly develop the record, so that a just and accurate determination may be made. In addition, Congress should require that the decisions made by VLJs contain citations to the record, so as to adequately identify the specific evidence relied upon in rendering their decisions. VLJs should be required by statute to identify the total number of pages contained in the claims file at the time of their decision.

6. Congress should enact a statute specifically directing that the appellant, not the Secretary, designate the record on appeal. This statute should limit the items capable of inclusion in the record on appeal to those items contained in the claims file on the date of the decision of the VLJ. If an appellant is pro se at court, then the statute should provide that the record on appeal constitute the entire claims file as it existed at the time of the BVA's decision. The Secretary should be allowed to counter designate any item of evidence not designated by the appellant that was contained in the claims file at the time of the Board decision.

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The implementation of these recommendations will remove the detrimental and adverse effects of paternalism in the administrative and judicial review process of the denial of benefits to VA claimants. The implementations of these recommendations would allow for the maintenance of a non-adversarial system of administrative and judicial appellate review as currently exists for the benefit of Social Security claimants.

Notes

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Ken Carpenter has been engaged in the private practice of law in Topeka, Kansas since 1973. He is admitted to the following courts: Kansas Supreme Court, 1973; Federal District Court for the District of Kansas, 1973; 10th Circuit Court of Appeals, 1984; U. S. Court of Federal Claims, 1987; Federal Circuit Court of Appeals, 1989; Court of Veterans Appeals, 1990; United States Supreme Court, 1990. The practice of Veterans Disability Law is now the exclusive area of law practiced by Carpenter, Chartered. Ken is a founding member of the National Organization of Veterans' Advocates, and currently serves as Treasurer of the Board of Directors; Chairman of the Seminar Program Committee; and Chairman of the Advocate Referral Service.

Carpenter is President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, most often combat veterans with Post Traumatic Stress Disorder. The firm also specializes in total disability cases and claims of entitlement to an earlier effective date. The firm currently has an open case load of more than 750 veterans at every adjudicatory level, from initial claims at the Regional Office to claims at the CAVC and Federal Circuit Court of Appeals. The firm has 121 cases pending at the CAVC, more than 182 cases at the Federal Circuit.

1. *Walters v. Nat'l Ass'n of Radiation Survivors et al.*, 473 U.S. 305, 309 (1985).
2. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).
3. *Id.*
4. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).
5. WILLIAM F. FOX, *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 13 (2002).
6. *See* 38 U.S.C. §§ 5904 and 5905 (2003).
7. *Id.*
8. *See Hodge*, 155 F.3d at 1363.
9. H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95.
10. *Id.*
11. *See* 38 U.S.C. § 511(a) (2003).
12. UNITED STATES GENERAL ACCOUNTING OFFICE, *REPORT TO CONGRESSIONAL REQUESTERS, VETERANS' BENEFITS: IMPROVEMENTS NEEDED IN THE REPORTING AND USE OF DATA ON THE ACCURACY OF DISABILITY CLAIMS DECISIONS* 3 (Sept. 2003).

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 3-4.
17. *Id.* at 4.
18. *Id.*
19. *Id.*
20. *See* 38 U.S.C. §§ 5107(a), 5103(a), & 5103A (2003).
21. *See* 38 U.S.C. § 7105(a).
22. *See* 38 C.F.R. § 19.26 (2003).
23. *See* 38 U.S.C. § 7105(d)(1)(A)-(C)(2003).
24. *See* 38 U.S.C. § 7105(d)(2)-(3) (2003).
25. *See* 38 U.S.C. §§ 5103(a), (b) (2003).
26. *See* 38 U.S.C. § 5103A (2003).
27. *See* 38 U.S.C. § 5103A(c)(1) (2003).
28. *See* 38 U.S.C. §§ 5103A(b), (c) (2003).
29. *See* 38 U.S.C. § 5106 (2003). Such Agencies would include the National Personnel Records Center in St. Louis, Missouri, which maintains Armed Services personnel records necessary to establish the incurrence of a disease or injury during service or the description of the nature of military service. Social Security, as well as Office of Personnel Management, records are necessary to establish that other federal agencies have determined that a disability suffered by a claimant entitles that claimant to disability claimants from that Agency. Any federal agency or department is required by this statute to provide such information to the Secretary.
30. Pub. L. No. 106-475, 114 Stat. 2096 (2000).
31. *See* 38 C.F.R. § 19.35 (2004).
32. *See* 38 C.F.R. § 19.36 (2004).
33. *See* 38 U.S.C. § 7104(a) (2003).
34. Board of Veterans' Appeals' 70th anniversary, VA Pamphlet 1-04 (July 2003).
35. *See* 38 U.S.C. § 7266(a) (2003).
36. *See* 38 U.S.C. § 7261(a)(3)(A)-(D) (2003); FOX, *supra* note 5, at 22.
37. *See* VET. APP. CT. R. 10(a).
38. *Id.*
39. *See* VET. APP. CT. R. 10(b).
40. *See* 38 U.S.C. § 7252(b) (2003); *see* Rogozinski v. Derwinski, 1 Vet. App. 19 (1990) (stating that reviews in court shall be on the record of proceedings before the Secretary and the Board).
41. BLACK'S LAW DICTIONARY 1148 (7th ed. 1999).
42. K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 9.10, at 103 (3d ed. 1994).
43. B. SCHWARTZ, ADMINISTRATIVE LAW 469-70 (4th ed. 1994).
44. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290 (1975).
45. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000).
46. *See* Richardson v. Perales, 402 U.S. 389, 400-01 (1971).
47. *See generally* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1301-05, 1325-29

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- (1997); *Apfel*, 530 U.S. at 111.
48. *See* *Hormel v. Helvering*, 312 U.S. 552 (1941).
 49. *See* RICHARD C. RUSKELL, *SOCIAL SECURITY DISABILITY CLAIMS HANDBOOK* 337 (West 2003).
 50. *Id.*
 51. *Id.*
 52. *Id.*
 53. *Id.*
 54. *Id.*
 55. *Id.*
 56. *Id.*
 57. *Id.*
 58. 42 U.S.C. § 405(d) (2003); 20 C.F.R. § 404.950(d)(3) (2003); 20 C.F.R. § 416.1450(d)(3) (2003); and *see* 28 U.S.C.A. § 1821 (2003). The claimant must file a written request of the issuance of a subpoena; *see also* RUSKELL, *supra* note 49, at 337.
 59. *See* RUSKELL, *supra* note 49, at 337.
 60. 42 U.S.C. § 405(e) (2003). If a subpoenaed witness does not appear at the hearing, the ALJ should proceed with the hearing. If after the hearing, the ALJ deems the potential evidence of the subpoenaed witness not necessary to make a determination, then he should prepare a memorandum so stating. *Treadwell v. Schweiker*, 698 F.2d 137, 143 (2d Cir. 1983). However, if the ALJ determines that the evidence is required, he will prepare a memorandum directed to the Office of the General Counsel requesting enforcement of the subpoena. *Id.* at 142, n.9. Failure to do so could be denial of due process. *Id.*
 61. *Clark v. Harris*, 638 F.2d 1347, 1350 (5th Cir. 1981), *opinion withdrawn in sub nom.*, 652 F.2d 399, 400 (5th Cir. 1981).
 62. *See* RUSKELL, *supra* note 49, at 339.
 63. *Brooks v. Califano*, 586 F.2d 834 (3d Cir. 1978)(unpublished table decision). However, failure to give notice is not cause for remand unless there is a showing that the record was not fully developed.
 64. *Ware v. Schweiker*, 651 F.2d 408, 414 (5th Cir. 1981).
 65. *Thomas v. Schweiker*, 573 F.Supp. 327, 329 (W.D. Tex. 1983). Here, the claimant received from the OHA a notice that did not explain that fees are regulated and that free legal services may be available.
 66. *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980), *citing* 20 C.F.R. § 404.927.
 67. *See* RUSKELL, *supra* note 49, at 339-400. *Donato v. Sec. of Dept. of Health and Human Serv. of U.S.*, 721 F.2d 414, 419 (2d Cir. 1983). In order for claimant to waive his right to counsel ALJ must explain to claimant (1) how an attorney can help, (2) possibility of free representation, and (3) limitation on attorney's fees. *Oyen v. Shalala*, 865 F.Supp. 497, 507 (N.D. Ill. 1994), *as amended in*, No. 94 C 6, 1994 U.S. Dist. LEXIS 16386 at *1 (N.D. Ill.) (Nov. 16, 1994); *Binion v. Shalala*, 13 F.3d 243, 245 (7th Cir. 1994).
 68. *Finney v. Schweiker*, 566 F. Supp. 1541, 1542 (W.D.N.C. 1983). *But see* *Vance v. Heckler*, 579 F.Supp. 318, 322-23 (N.D. Ill. 1984), where the court granted a remand because the claimant lacked counsel. The court based its decision on the fact that the claimant did not knowingly and intelligently waive his right to counsel because of his limited education and history of mental illness

- and the ALJ's brief and discouraging statement regarding the claimant's right to counsel. *Id.*
69. See RUSKELL, *supra* note 49, at 341. *Todd v. Heckler*, 736 F.2d 641, 642-43 (11th Cir. 1984); *Cowart v. Schweiker*, 662 F.2d 731, 737 (11th Cir. 1981). See *Nesselrotte v. Sullivan*, 939 F.2d 596, 598-99 (8th Cir. 1991). *But see Bady v. Sullivan*, 787 F. Supp. 809, 817 (N.D. Ill. 1992), *on reconsideration*, 1992 WL 107293 (N.D. Ill. 1992), *amended in*, 1992 WL 332307 (N.D. Ill. 1992) (holding that if a claimant is represented by counsel the ALJ may presume that he has presented his best case).
70. *Richardson v. Perales*, 402 U.S. 389, 399 (1971). If an ALJ wanted to discredit claimant's testimony because of lack of medical evidence, he had a duty to supplement the record with updated physical examination report, particularly since claimant's condition was degenerative. *Barry v. Shalala*, 885 F. Supp. 1224, 1251 (N.D. Iowa 1995). Also, in *Pastrana*, statements by the ALJ could have led a reasonable person to believe that the ALJ was not capable of hearing case in a fair and impartial matter because the ALJ suggested that claimant, a Puerto Rican, did not want to work at her job because it was hot and uncomfortable. *Pastrana v. Chater*, 917 F. Supp. 103, 109 (D.P.R. 1996). Additionally, it was not an abuse of discretion for the ALJ to deny claimant's request for a subpoena to allow him to cross-examine medical expert whom judge had questioned. *Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996). Claimant was allowed to submit interrogatories to expert. *Id.*
71. *Mitchell v. Bowen*, 827 F.2d 387, 389 (8th Cir. 1987). ALJ has duty to insure that claimant receives a full and fair hearing under the regulations. When claimant is unrepresented, ALJ has duty to probe and explore in order to fully develop the record. *Peed v. Sullivan*, 778 F. Supp. 1241, 1246-47 (E.D.N.Y. 1991). ALJ has a duty to fully develop the record even if the claimant has a representative. However, the brevity of a hearing does not necessarily mean the ALJ failed to develop the record. *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993). ALJ's duty to develop the record is heightened where the claimant may be mentally ill and unable to protect her own interest. This case is remanded for further development of the claimant's mental impairment. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).
72. See RUSKELL, *supra* note 49, at 341. *Highfill v. Bowen*, 832 F. 2d 112, 115 (8th Cir. 1987). A significant omission is required before a U.S. Court of Appeals will decide that an ALJ has failed to assist an unrepresented claimant to fully develop the record. *Luna v. Shalala*, 22 F.3d 687, 692 (7th Cir. 1994). See also *Mitchell v. Shalala*, 25 F.3d 712, 714 (8th Cir. 1994). The ALJ's duty to fully develop the record is not lessened when the claimant is represented by an individual who is not familiar with disability claims process. *Barrera v. Sec. of Health and Human Serv.*, 872 F. Supp. 24, 27 (E.D.N.Y. 1995). The ALJ has the basic duty to fully and fairly develop the record. This duty is greater when the claimant is not represented by counsel. *Fletcher v. Chater*, 916 F. Supp. 1086, 1089 (D. Kan. 1996). See *Scott v. Callahan*, 977 F. Supp. 856, 866 (N.D. Ill. 1997). The ALJ failed in his duty to assist a pro se claimant when he failed to inform the claimant that there was a right to subpoena and cross-examination doctors and to obtain medical records from the doctors. A general request to submit additional evidence was not sufficient. *Rodriguez v. Callahan*, 971 F. Supp. 150, 153 (S.D.N.Y. 1997). The claimant's waiver of counsel was not valid. The ALJ did not inform claimant of the possibility of free counsel and the cap on attorney fees. The burden shifted to the Commissioner to show that the ALJ fully developed the record. In this case, the ALJ failed to do so. *Castrejon v. Apfel*, 131 F. Supp. 2d 1053, 1054 (E.D. Wis. 2001).

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73. Jurisdiction over denials of benefits under the Social Security Act is conferred in the U.S. district courts by 42 U.S.C. § 405(g) (2003). This section clearly limits judicial review to a particular type of agency action, a "final decision of the Secretary made after a hearing" to which the claimant was a party. *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975); *Califano v. Sanders*, 430 U.S. 99, 97 (1977). The doctrine of administrative exhaustion is to be applied. However, the purposes behind the requirement of exhaustion have been served once the Commissioner has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and the claim is neither otherwise invalid nor cognizable under a different section of the Social Security Act. *Weinberger*, 422 U.S. 749, 765-66. *See also* *Mathews v. Eldridge*, 424 U.S. 319, 329-30 (1976).
74. 42 U.S.C. § 405(g) (2003); *Rodriguez v. Schweiker*, 640 F.2d 682, 685 (5th Cir. 1981); *Davis v. Schweiker*, 641 F.2d 283, 285-86 (5th Cir. 1981). Neither the Social Security Act nor the Administrative Procedure Act authorizes judicial review of a decision of the Commissioner not to reopen a claim of benefits. After the time within which the claimant may seek judicial review has expired, the claimant may request that the Commissioner reopen and review the decision. If the Commissioner denies that request, however, the claimant is not entitled to judicial review of that decision and, concomitantly, a review of the decision denying or terminating benefits as to which the appeal period has already expired. *Califano v. Sanders*, 430 U.S. 99, 97 (1977); *Colon v. Sec. of Health and Human Serv.*, 877 F.2d 148, 152 (1st Cir. 1989), and cases cited therein.
75. 42 U.S.C. § 405(g) (2003); *Miles v. Harris*, 645 F.2d 122, 124 (2d Cir. 1981); *Rivera v. Harris*, 623 F.2d 212, 216 (2d Cir. 1980); *Alexander v. Weinberger*, 536 F.2d 779, 784 (8th Cir. 1976); *Gonzalez v. Richardson*, 455 F.2d 953, 954 (1st Cir. 1972); *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972); *Chavies v. Finch*, 443 F.2d 356, 357 (9th Cir. 1971).
76. *See* RUSKELL, *supra* note 49, at 397-99.
77. *Dorsey v. Heckler*, 702 F.2d 597, 605 (5th Cir. 1983).
78. *See* RUSKELL, *supra* note 49, at 402-3. *Boyd v. Heckler*, 704 F.2d 1207, 1211 (11th Cir. 1983).
79. *See* RUSKELL, *supra* note 49, at 403-4.
80. *Id.*
81. *Id.* *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989); *Green v. Heckler*, 803 F.2d 528, 530 (9th Cir. 1986); *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985).
82. *See* *Roy v. Brown*, 5 Vet.App. 554, 555-56 (1993), *Waddell v. Brown*, 5 Vet.App. 454, 455-56 (1993).
83. *See* 38 C.F.R. § 19.26 (2003).
84. *See* *Gallegos v. Gober*, 14 Vet.App. 50, 54 (2000) (invalidating 38 C.F.R. § 19.26); *see also* *Gallegos v. Principi*, 283 F.3d 1309, 1312 (2002) (reversing the CAVC's invalidation of 38 C.F.R. § 19.26 and upholding the Secretary's interpretation based upon *Chevron* deference).
85. VLJ's travel periodically to regional offices to conduct hearings on site. However, these hearings with a traveling ALJ result in additional delays in receiving a decision from the Board. Video conferencing is also available to claimants who are unable or unwilling to travel to Washington, D.C.
86. *See* 38 U.S.C. § 5904 (2003).
87. *See* 38 U.S.C. § 5905 (2003).