

Deconstructing and Reconstructing the Veterans Benefits System

William F. Fox, Jr.*

American military veterans have been given various post-service benefits since before the Revolutionary War.¹ Current benefits range from monthly compensation for service-connected injuries to educational and insurance benefits to certain benefits for eligible dependents and survivors of veterans. Veterans housing benefits contributed to a massive housing construction effort immediately after World War II and are still a significant aspect of real estate finance. The veterans hospital system is the largest single hospital system in the United States. Veterans themselves, around 26 million strong, comprise slightly less than ten percent of the United States' population, although the Department of Veterans Affairs ("VA") estimates that nearly a quarter of the population is potentially eligible for veterans benefits.

Each of these benefits schemes has been the subject of both praise and controversy. In recent years, most of the discussion and most of the controversy implicating the veterans benefits system has focused on the application for and payment of compensation payments. In fiscal year 2002, the VA paid out approximately \$25 billion in compensation benefits to approximately 3.3 million people.²

There are few persons who believe that the current system for administering these benefits is working properly. We ought to fix it. But the crazy-quilt makeup of all the various constituencies in the system—and the awesome power that some of them exercise in Congress—always seems to get in the way of a comprehensive restructuring of the system. There is very little pressure from the American public to fix the system. Veterans themselves are not always a popular or politically-correct group. The number of veterans as a percentage of our total population is declining because the military services have shrunk and the existing veterans population is dying off. The veterans themselves, whether as individuals or through the veterans service organizations, have never spoken with a single, clear voice.³

The resulting compensation benefits system just begs for improvement. Indeed, it may beg for radical surgery. Other commentators have called for massive restructuring of the system.⁴ Traditionally, the system has been only tinkered with—an attempt at improvement through what I have called "the progress of small steps." At this writing, I see absolutely no interest on the part of Congress for massive restructuring. That does not mean that those of us who labor in academia, within the

government, or among the practicing bar should not take up these issues and continue to urge for change.

A. The Rationale for Veterans Disability Compensation

The compensation system springs from some of the most generous motives among a people who tend to be generous. President Abraham Lincoln probably put it best when he said this country has an obligation “to care for him who shall have borne the battle and for his widow and his orphan.” Those words, spoken during the Civil War, are just as compelling (albeit with a change in wording to acknowledge the substantial and significant contributions of women veterans) in 2004. Taking President Lincoln’s words as the fundamental statement of policy, a system of compensation benefits will be, ideally, benign and non-adversarial. Indeed, large numbers of commentators over the years have urged this kind of system and a great deal of the current statutory matrix reflects Lincoln’s sentiments. For example, the VA has a “duty to assist” the veteran-claimant in pursuing a benefits claim. When, in the adjudication of a claim, the evidence is evenly balanced between granting and denying a claim, the veteran is to be given “the benefit of the doubt.” There are a number of statutory presumptions such as the prisoner of war presumptions that tilt in favor of an award of compensation.

An ideal system would take Lincoln’s charge, apply the special statutory terms, and quietly and effectively ensure payment of appropriate benefits to all qualifying veterans. But the current system is not ideal. The goal of a non-adversarial system has morphed into one typified by a great deal of bureaucratic gridlock and antagonism among the various constituencies. The transcendent words of Abraham Lincoln have mutated into an artificial and patronizing compensation process that at best lurches from problem to problem and issue to issue. There have been periodic attempts to fix things. Some changes have had no appreciable effect on the quality or quantity of compensation decisions. Others, such as the long-overdue imposition of judicial review, have been welcome and generally helpful albeit with some inherent flaws and unintended consequences of their own.

B. The Current System of Compensation

In analyzing the current system of veterans compensation benefits, a number of commentators have urged a scraping of the existing system and the merging of veterans compensation with the system of social security benefits. I will admit that there are elements of the social security system that are compelling, particularly the use of administrative law judges as adjudicators.⁵ But there are a number of significant

differences in the substantive basis for making VA and social security awards that make me hesitate on the question of outright merger. Moreover, both the VA and the social security administration are currently swamped with claims and an enormous infusion of additional personnel would be required to cope with a merged system, putting aside the myriad other difficulties.

1. The basis for compensation awards

Social security determinations are relatively straightforward. The agency must be assured that the claimant is not capable of gainful employment. The process then requires, ultimately, a “yes” or “no” decision as to whether the claimant is to receive benefits. Everything else—the duration of benefits, the monetary level—is filled in by statute and regulation. By contrast, veterans claims not only require a determination of certain threshold issues such as whether the injury was incurred in line of duty and whether the injury was sustained through the individual’s misconduct, they also involve a sliding scale of monetary benefits set in reference to the percentage disability that a person has suffered. An award of a 10 percent compensation claim results in far less money per month than a 90 percent award. There are frequent disputes as to when compensation should start. Initial compensation awards may be increased or decreased at a later date based on a change in the veteran’s medical condition. Previously denied claims may, in certain circumstances, be reopened and re-adjudicated. As noted earlier, the veterans compensation system also incorporates a number of peculiar statutory formulations (e.g., “benefit of the doubt”) that do not exist in other benefit compensation programs. So both the substantive and the procedural components of veterans compensation benefits are complicated and tricky, but it is mainly on the procedural side that we have so many problems.

2. The adjudication of compensation claims

Veterans claims are initially filed in a VA regional office. The regional office (“RO”) has the authority to both grant and deny claims, and a large number of claims are concluded at that level. Many veterans pursue the claims on their own. Quite a few veterans are assisted, at the RO level, by representatives of the chartered veterans service organizations (“VSO”), many of whom have offices inside the ROs themselves. Indeed, this cozy relationship between the ROs and the VSOs is itself the basis for some criticism of the system. A veteran who is not happy with the disposition of his or her claim at the RO may file an intra-agency appeal with the Board of Veterans’ Appeals.

Since the enactment of the Veterans Judicial Review Act (“VJRA”) in 1988, a

Board decision may be appealed first to the United States Court of Appeals for Veterans Claims (a body established by the VJRA), and later to the United States Court of Appeals for the Federal Circuit and ultimately to the Supreme Court of the United States. Judicial review was hailed as a vast improvement for the system. I said as much in my early writings on the VJRA.

There have been some recent improvements in the decisional process at both the ROs and the Board. The processing times have improved. Many observers believe that there has been at least some improvement in the quality of decisions. There has been some improvement in the speed of the RO/BVA decision making. Concededly, both the ROs and the Board were heavily burdened by the enactment of the Veterans Claims Assistance Act of 2000.⁶ This statute, among many other things, eliminated an earlier concept called the “well-grounded claim” as a threshold requirement for triggering the VA’s duty to assist.⁷ The VCAA required the ROs to readjudicate approximately 100,000 claims that had been previously denied under the well-grounded claim standard. The Board’s own case load was substantially affected by an enormous number of VCAA remands from the courts.⁸

There have been some incremental improvements. For example, the VA by rule now permits the Board to develop evidence on its own. Previously, the Board could only remand to the ROs when a record was incomplete or defective. The Board has dispatched its own attorneys to various ROs to assist in the preparation of cases for appeal. But many problems and issues remain at these two levels and most attempts to work substantial changes in the process have failed. I don’t think it’s an exaggeration to say that a person familiar with the work of the ROs and the Board just after World War II would likely find far more similarities than differences in the work of both those organizations in 2004.

I continue to believe that judicial review is a positive rather than a negative factor in improving the quality of the decision-making. However, in the now almost 15 years since judicial review took hold, a number of people have begun to criticize the reviewing courts for being too passive and way too time-consuming in their review activities. Along with most other commentators, I saw judicial review as necessary if for no other reason than to bring VA procedures within the mainstream of American administrative law.⁹ Furthermore, when I analogized the VA to other federal administrative agencies, I saw judicial review as the new tail that would ultimately wag the dog.

Not all of these predictions have been borne out. Part of my disappointment lies simply in the number of cases taken to the courts. The BVA docketed over 30,000 cases per year and decides around 20,000 per year. In most years, fewer than 2,000 cases are appealed from the Board to the CAVC. It appears clear that many veterans simply give up after a final, negative BVA decision. Even those claimants who take an

appeal are faced with an uphill struggle. The CAVC has an enormous pro se rate—larger by far than any other federal court of appeals. While there are a number of lawyers in private practice, VSOs and other entities that take CAVC cases, many claimants remain in a pro se status through the conclusion of their appeal. A tiny handful will appeal unfavorable decisions issued by the CAVC to the Federal Circuit.

The CAVC has clearly made law and—as noted earlier—has, in my opinion been a positive rather than a negative influence on veterans claims. It has established a body of case law that has had a significant impact on the veterans benefits system. It has done so in the face of numerous challenges. For example, it began, as its first chief judge frequently stated, as a court “without antecedent.” It is required to deal with statutory concepts that have virtually no analogs anywhere else in the federal administrative system. There is no other federal court of appeals in the United States with a pro se rate anywhere near that of the CAVC.

C. Is the System Broken and Can The System Be Fixed?

This, then, is the system of veterans benefits as it presently exists. Some observers are content to let it go at that, suggesting that there is not much more that can be done. But this symposium has posed a challenging, daunting question: Is the system broken and can it be fixed? I believe there are two different ways to approach this question. First, we must address the threshold question and ask whether the system is broken? It is not totally broken. Large numbers of disabled veterans have their claims approved, collect their compensation without argument, and get on with their lives.¹⁰ The VA denies many claims, but many of the denied claims are properly denied. Even so, there are clearly enough problems and sufficient discontent among affected individuals and groups that we would be derelict not to address the second question: how might the system be fixed?

1. Designing an “ideal” system

If I were asked (as someone familiar with the federal administrative process) to design a fair, effective and speedy system for administering veterans benefits—i.e., if I were permitted to write on a completely blank sheet of paper—I would not have prescribed the current system. I believe, as have a number of other persons, that the current system is excessively cumbersome and unwieldy. Some might argue that it contains the seeds of its own destruction. The optimum system that I foresee would be much simpler, with far fewer levels of review, and with a streamlined substantive statutory matrix underlying the simpler process.

With regard to the underlying statutory requirements, some elements such as

the requirement that an injury be suffered in line of duty and not caused by the misconduct of the claimant are fundamental to a rational system of benefits. Beyond these threshold requirements, I would preserve the concepts of “duty to assist” and “benefit of the doubt” because I believe these two concepts place a proper share of the burden on the agency and not on the veteran-claimant. Unquestionably, these requirements maintain many of the paternal aspects of the benefits system, but I am willing to argue that the system was *intended* to be paternalistic and not adversarial. I believe that it is possible to retain the percentage-disability concept and some of the other unique elements of veterans compensation even though percentage-disability makes the ultimate decision much more complicated than the normal social security disability benefit decision. Furthermore, I am not convinced that it is the substantive requirements that are causing most of the problems. I believe most of the problems stem from the cumbersome, lurching *process* that has been created.

My ideal process is not one I can claim as totally my own creation. Many others have discussed it. It has an elegant simplicity. First and foremost, I would eliminate the remaining and totally artificial restrictions on the use of attorneys in the system to permit attorneys to represent claimants at every stage of the proceeding, including the initial claims process.¹¹

With lawyers participating freely, I would make the initial claims process essentially a paper-hearing process. Claimants would submit their claims in writing to claims examiners in the regional offices. These claims examiners would communicate with the claimants and their representatives to develop the claims file under the “duty to assist” admonition. I would assign an appropriate number of federal administrative law judges (“ALJ”) to each of the regional offices. Claimants dissatisfied with the outcome of the paper hearing process would be permitted to take their claims before an ALJ for full adjudication under the procedures outlined in the Federal Administrative Procedure Act, §§ 556 and 557.¹²

I believe I would simply eliminate the Board of Veterans’ Appeals. With properly trained and commissioned ALJs presiding over formal adjudications at the RO level (recall currently Board members are *not* ALJs), I believe the VA might be able to eliminate an elaborate system of intra-agency review. It might be possible and perhaps even advisable to establish some type of review authority within the department to preserve some degree of uniformity and quality control among the various ROs but I am not sure this is absolutely necessary *so long as* the initial presiding officer is an ALJ. In the current social security system, initial decisions of an ALJ can become the final decision of the agency if not appealed within the Social Security Administration and those decisions may be taken directly to federal court.

As an alternative, it might be possible to have merely a paper hearing process within the VA itself with disputed claims moving into a separate decisional body,

staffed by ALJs, for adjudication. This model is currently used under the Occupational Safety and Health and the Mine Safety and Health Acts. In those two systems, initial enforcement actions are commenced within the Department of Labor, but adjudications of the enforcement actions are handled by a separate independent regulatory commission: for OSHA, it is the Occupational Safety and Health Review Commission; for MSHA, it is the Mine Safety and Health Review Commission. Each commission employs a body of ALJs with the full commission providing the final intra-agency review. In this latter scenario, the Board might be preserved but as an entity separate and independent from the VA. This new Board would use ALJs as decisional officers on the OSHRC/MSHRC model.

I believe judicial review must be preserved. One alternative might be to send cases, as does social security, into the federal district courts and eventually to the various geographic courts of appeals and the Supreme Court. Another alternative might be to dispense with federal district court review and send cases from the ALJs directly to the geographical circuits. Because ALJs are highly skilled at developing solid records and articulating well-reasoned findings and conclusions (not terribly different from similar decisions issued by federal district judges), the circuits should be able to review these cases with no appreciable difficulties.

I can appreciate arguments that suggest that the current CAVC should be preserved. Veterans claims are different from many other types of federal administrative action. It may be that a specialized federal court of appeals is warranted to deal with these claims and it is unquestioned that the CAVC over the nearly 15 years of its existence has developed a substantial body of expertise and understanding of these claims. However, I am not totally convinced that the CAVC needs to be preserved in the system I have just designed.

The issue will likely become one about economics and efficiency. I firmly believe that good decisions by my newly-commissioned corps of ALJs in a system in which lawyers fully participate through the entire agency decisional process would likely produce fewer appeals. The ALJs decisions will be principled and well-articulated. The lawyers will serve as a screening mechanism and will, presumably, be able to make sound judgments as to the reasonableness of an appeal. The current CAVC, as noted above, has an annual docket of less than 2,000 cases. If that workload were to be preserved or reduced, it may be difficult to justify an entirely separate court to deal with these appeals. One possibility would be to merge the CAVC and the Federal Circuit. The Circuit, after all, is itself the product of the merger of the Court of Claims and the Court of Customs and Patent Appeals. The Federal Circuit already deals with veterans claims, although the current number of claims actually taken to the Federal Circuit is a drop in the bucket. Adding the current complement of CAVC judges to the Federal Circuit bench would likely give the Circuit the judicial personnel

necessary to deal with direct review of claims out of my ALJ system.

2. The prospect of merely incremental changes

I have just described a system that I believe would be far more fair, effective and cost-efficient than the present system of adjudication of veterans benefits claims. But I am totally pessimistic about ever seeing such a system—at least in my lifetime. I suspect that the changes we are likely to see in the next several years will be merely incremental changes. Because I have essentially given up on radical change in this system, I believe it is appropriate to think about what I call improvements by “small steps.” I have a few such suggestions.

- a. I think most of the problems encountered in this system are in the RO/BVA stages of the process and I think most of our attention ought to be focused on improving those levels of decision making. Once again, I would start with the simple expedient of permitting lawyers to handle claims at the initial claims level and throughout the rest of the process. This one change would likely ensure better accumulation of evidence, better compilations of the record, and better screening of frivolous claims. The VCAA’s elimination of the well-grounded claim requirement and the reinforcing of the duty to assist concept are additional examples of productive small steps. The sheer number of claims at the RO level suggest that more resources and more efficiencies gained at that level would be highly productive.
- b. The BVA might well be reorganized and dispersed on a geographical basis. Although the Board has done marvelous work with the so-called travel hearing process and the device of teleconferenced hearings, a lot of efficiencies would be gained by having board members spread throughout the United States rather than concentrated in Washington D.C. Some type of internal review and quality control process could be maintained in Washington D.C. even if the Board members themselves were scattered. The Board’s membership should be revised. It is currently made up almost exclusively of people who began their careers within the VA. Even if I never see my ALJ proposal realized, the Board would do well to cast a wider net in seeking new members. Even if the Board is not staffed with ALJs, it would do well to establish the equivalent of ALJ standards in its hiring processes. As I mentioned earlier, the current Board is to be commended for attempting a number of new initiatives to speed up and improve the quality of its decisions.

- c. The CAVC is now an established court with an elaborate body of jurisprudence. Its body of jurisprudence has been essentially stable for the past 18 months as the court remands so many cases because of the VCAA. But the court might well reconsider its position on reversal of cases versus merely remanding cases to the Board. The judges on the court remain convinced that remands are the best solution because they permit the VA to fix errors and decide cases, but one of the singular problems with this approach is that too many cases linger in the system for far too long without a final decision on the merits. While Article III courts are understandably hesitant to substitute their judgment for that of a jurisdictional agency, the CAVC was always intended to be a specialized, Article I court. Having developed, over nearly 15 years, this specialized knowledge of veterans law, the court, I believe, could simply decide on the merits far more cases than it has been deciding.

If the court is reluctant to reverse rather than remand, it should rethink its plenary opposition to the use of its mandamus powers. Even after several congressional directives to speed up processing of remanded cases, the BVA continues to have problems processing remanded cases speedily. While I am not suggesting unfettered use of mandamus, a few carefully considered uses of the writ might well provoke changes such as we've never before seen in veterans law.

D. Conclusion

I am not sure where we are going in the search for improvements in the veterans benefits system. If history is a guide, Congress will continue to pursue its “Scotch tape and bailing wire” approach, legislating mainly small fixes rather than radical change. It may be that all the countervailing and conflicting constituencies in this system prevent Congress from doing anything more. The VA can institute a number of procedural changes by rule—at least insofar as the ROs and the BVA are concerned, but the VA is ultimately constrained by its budget—and a large part of the problem may be a simple shortage of properly-credentialed, adequately trained personnel. The CAVC is in an interesting position. The cases taken to the court are a pittance of the total number of claims filed each year. For the first time in its history, the court is undergoing substantial changes in judicial personnel as the 15-year terms of the first group of judges expire. But even new judges cannot provoke more appeals and the doctrine of stare decisis will probably and severely limit changes in the court's jurisprudence. I have been working in the area of veterans law for quite a few years. I

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have a hard time being optimistic about large-scale, beneficial changes in the system at this point in time.

Notes

* William F. Fox, Jr., Dean and Professor of Law, Columbus School of Law, Catholic University of America. Dean William F. Fox Jr. has been on the faculty at CUA for nearly thirty years. He regularly teaches civil procedure, administrative law, international business transactions and alternative dispute resolution. He is a graduate of the CUA School of Law as well as Harvard Law School. He is a member of the permanent faculty of the ALI-ABA program, Fundamentals of International Business and has served as a senior lecturer in the Fulbright program in Indonesia. He continues to serve as a consultant in a number of different matters including international business transactions, international dispute resolution, global standardization and others.

1. A great deal of the information and background for this paper is taken from my treatise on veterans law: WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* (3d ed., Paralyzed Veterans of America, 2002) (hereafter “VETERANS BENEFITS”) and a shorter monograph, WILLIAM F. FOX, JR., *THE UNITED STATES BOARD OF VETERANS APPEALS: THE UNFINISHED SEARCH FOR A BALANCE BETWEEN SPEED AND JUSTICE IN INTRA-AGENCY APPEALS* (Paralyzed Veterans of America, 2002). In keeping with the tone and philosophy of the *Kansas Journal of Law and Public Policy*, footnotes have been kept to a minimum.
2. See the VA website, at <http://www.1.va.gov/opa/fact/docs/vafacts.htm> (last visited on Feb. 21, 2004).
3. The VSOs comprise a vital element of the entire system of veterans benefits. Some of the VSOs are chartered by Congress and are permitted, by statute, to represent veterans in presenting and adjudicating compensation benefits. Other VSOs are not chartered. A comprehensive list and explanation of VSOs can be found on the VA website.
4. See, e.g., James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001). In that same issue of the *Administrative Law Review*, an experienced appellate attorney in the Department of Veterans Affairs took issue with many of the views and arguments asserted by Professor O’Reilly. Gary E. O’Connor, *Rendering to Caesar: A Response to Professor O’Reilly*, 53 ADMIN. L. REV. 344 (2001).
5. See, e.g., Robin Arzt, *What Veterans with Disability Claims Would Gain from Administrative Procedure Act Adjudications*, 49 FED. LAW. 60 (Nov/Dec. 2002). Judge Arzt is a social security administrative law judge. This article was initially published in *Tommy*, the newsletter of the veterans law section of the Federal Bar Association.
6. 106 Pub. L. 475, 114 Stat. 2096 (2000) (codified in scattered sections of Title 38, U.S.C.).
7. See FOX, *VETERANS BENEFITS*, *supra* note 1, at 83-92.
8. The Board’s Fiscal Year 2002 report states that the CAVC “remanded most of its docket to the

Board, including many that had final CAVC decisions. Many of those cases had to be further remanded to the [ROs] pursuant to existing law.” Board of Veterans’ Appeals, Report of the Chairman Fiscal Year 2002 at 2, at <http://www.va.gov/Vetapp/ChairRpt/BVA2002AR.pdf> (last visited on April 26, 2004). The Board further asserted that the VCAA’s readjudication requirement “brought appeals to the Board to a virtual halt during the first few months of the fiscal year.” *Id.*

9. *See, e.g.*, WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW (4th ed., 1998). Until 1988, the VA was virtually the only federal administrative agency of any appreciable size that was virtually exempt from judicial review.
10. This sentence describes the author of this article and his experiences with the VA over the past nearly 40 years since he was injured in the line of duty while serving in the U.S. Army.
11. I have written and spoken on this topic for many years. While too intricate and detailed for this article, a reader can get a good understanding of these restrictions in FOX, VETERANS BENEFITS, *supra* note 1, at 186-223.
12. 5 U.S.C. §§ 556, 557 (2003).