

by Robin J. Artz

What Veterans Would Gain From Administrative Procedure Act Adjudications

A section member sent this to me with the comment that he had run across it in his files and thought that a reprint of it would be worthwhile as a stimulant for conversation. The issue of converting the adjudicators at Board of Veterans Appeals (BVA) from Veterans Law Judges to Title 5 Administrative Law Judges (ALJs) pursuant to and consistent with the requirements of Administrative Procedure Act under Title 5 is not new. The original author, Robin J. Artz, has passed away. Her article on this issue is as timely now as it was when originally published in 2002.

Despite congressional ire and increasingly futile action, the backlog of veterans' claims has risen beyond the levels of 2002 to a mind-boggling number that varies between 500,000 and 900,000, depending on the day. The level within the Veterans Benefits Administration addressed and the mechanism utilized by VA middle management to hide the reality of the situation. When the backlog of initial claims reached nearly 1 million, personnel were shifted from the appeals level to the claims level, and a significant hiring effort was undertaken to effect a reduction. Several years later, the initial claims level has dropped markedly. However, the appeals backlog has now risen proportionally. The situation addressed by Judge Artz's article has been exacerbated by a continuation of poor performance at the board.

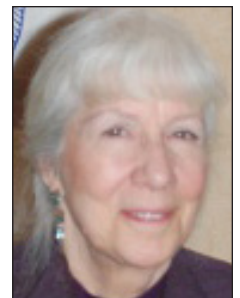
In the 2013 annual report (2014 is not yet available) the BVA reported that they had denied 10,143 appeals (45 percent). Of that 45 percent, 3,673 of them (36 percent) were appealed to the Court of Appeals for Veterans Claims (CAVC). The leadership at the board claims that the accuracy rate is over 90 percent, apparently taking the position that a decision of denial that is not appealed is therefore accurate.

The annual report from the CAVC for 2013 shows that the BVA was correct, and their decisions were affirmed 19 percent of the time (714 decisions), partially correct in mixed decisions, and had another 15 percent (890) in which the case was remanded or reversed on other issues. The report noted that 31.9 percent of the appeals were remanded or reversed. The total number of

remands, including the partials, demonstrates that the BVA was wrong in whole or in part 64 percent of the time. Of those decisions, 67 percent were the result of joint motions for remand in which counsel for the Secretary conceded error in some aspect of the BVA decision. What is disturbing is the realization that if these numbers are extrapolated to those denials that were not appealed timely, approximately 4,910 veterans may well have been improperly denied their benefits.

There have been hearings before the House Committee for Veterans Affairs and increasingly optimistic assurances from the BVA leadership that the corner has been turned and everything is back on track. However, the 2014 Annual Report from the Court of Appeals for Veterans Claims demonstrates that these representations are somewhat disingenuous. There were 3,686 appeals timely filed. Of those, 15.9 percent (589 decisions) were affirmed, and another 26 percent (979 decisions) were affirmed and remanded or reversed on other grounds. In other words, the BVA was wrong, in whole or in part, 70.7 percent of the time. Of that 70 percent, 65 percent were remanded through a joint motion for remand. As the 2014 report from the chairman of the BVA is not yet available, no further comparison is possible. The article written by Judge Artz is even timelier now than it was in 2002. It is time for a reality check in Congress and the realization that as it is currently structured, the board is only contributing to the morass of the Veterans Benefits Administration and the continuing entrapment of veterans in the hamster wheel of the system. Legislation imposing Title 5 requirements on Title 38 Board of Veterans Appeals adjudications is long overdue. Our veterans deserve nothing less. We owe our veterans much better. Please give this article some thought.

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There is a crisis of public confidence

in the timeliness, fairness, and quality of the U.S. Department of Veterans Affairs (VA) disability claims process. Our veterans who apply for VA disability benefits are confronted with an inefficient, inaccurate process that undermines administrative fairness and the public's confidence in that fairness.

1. Untimely decisions. There are lengthy case processing times for initial claims at the VA regional office level and for appeals to the Board of Veterans' Appeals (BVA) and U.S. Court of Appeals for Veterans Claims (Veterans Court) that add up to years. Undecided backlogged initial claims number in the hundreds of thousands and had climbed to 600,000 by the end of 2001. The BVA and Veterans Court also have significant backlogs and increasing case processing times in recent years. There is no limit to the number of appeals. Numerous veterans reportedly die every year while awaiting determinations of their VA disability claims at all levels.

2. Perception of unfairness. The BVA achieved the uniquely low score of 35 in the December 2001 American Customer Satisfaction Index of federal agencies compiled annually by the University of Michigan Business School and American Society for Quality.¹ The study's director opined that he never before saw anything like this low score. However, the chairman of the BVA explained it away by saying that a 35 is not bad when only 22 percent of veterans received an increase in benefits at the BVA level,² which shows insensitivity to the public perception of unfairness that this remarkably low satisfaction score appears to signify. In 2000, the BVA favorably ruled on 26 percent of the benefits claims. Veterans are virtually barred from hiring lawyers to help prosecute their claims through the VA administrative process until their case reaches the Veterans Court, which leaves some veterans feeling that they are being denied counsel of their choice. The lack of legal counsel during the administrative process has been estimated to add substantially to the case processing time.

3. Poor decision quality. The quality of the regional office determinations and BVA decisions as measured by their accuracy is poor. Despite years of VA effort to improve claims processing accuracy and timeliness, VA reported a 41 percent error rate at the regional office level in fiscal year 2000, according to a June 2000 GAO report.³ In 2000, the BVA vacated 30 percent of the regional office determinations and remanded the cases for another determination. In the same year, the Veterans Court vacated a huge 64 percent of the BVA decisions on appeal, most upon procedural grounds, and remanded the cases for further proceedings.⁴ This year, the VA increased the monthly regional office disposition rate from 29,000 to 70,000, which reduced the backlog from 600,000 to 389,000 by June 3—but apparently at the cost of a further erosion in the quality of decisions. On June 6, an American Legion official testified before the House Veterans' Affairs Subcommittee that a quality review team that reviewed one regional office found evidence of premature and erroneous denials of claims after a cursory review in order to meet stringent VA production quotas, a general lack of compliance with the Veterans' Adjudications Claims Assistance Act of 2000 and what may be "an orchestrated policy of manipulation of ... production figures as a means of meeting ... mandated production quotas."⁵



The current public uproar that has spilled into the media about the perceived lack of fairness, poor decision quality, untimeliness, lack of independence, and weak due process in the VA disability claim process at the BVA appellate level exists precisely because of the lack of the procedural safeguards that now exist for Social Security claimants in the Administrative Procedure Act (APA).

The APA was enacted in 1946 to achieve reasonable uniformity and fairness of the administrative process in the federal government for members of the American public with claims pending before federal agencies. The APA provides the minimum standards for federal administrative due process in the executive branch and delineates procedures for adjudicative administrative proceedings, namely individual case decisions about rights or liabilities as an agency's judicial function. This includes uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of hearing examiners, who now are administrative law judges (ALJs). The APA sets forth a due process administrative procedure for the hearing and decision by ALJs of cases brought before the federal agencies to which the APA applies.⁶

The VA's use of subordinated employees at its final level of administrative review at the BVA, together with the BVA's low favorable ruling rate and high remand rate, unsurprisingly has fostered the public perception that the BVA is an instrument and mouthpiece for the VA. Our veterans deserve full administrative due process before an independent decision-maker for their disability claims. There now is a movement to apply the APA due process requirements to the BVA to address problems of quality, untimeliness, and the perception of unfairness. Using an APA process with ALJs modeled on the Social Security Administration (SSA) system at the BVA level recently has been endorsed by respected academicians. A former BVA chair also has cited the SSA APA process as a model.⁸

By APA mandate, the ALJ is an independent, impartial adjudicator in the administrative process, and there is a separation of an agency's adjudicative function from its policymaking, policy implementation, rule-making, investigation, and prosecutorial functions. The remainder of this article describes the benefits that these features of the APA would afford the veterans who file VA disability claims.

The ALJ is the only impartial, independent adjudicator available to a claimant in the federal administrative process and the only person who stands between the claimant and the whim of agency bias and policy. The APA puts many protections in place to ensure that

hearing, a veteran must move for permission to submit evidence that was not considered by the regional office and show good cause for not filing the evidence at the earlier step. Good cause is limited to several specific reasons by regulation. Also, a veteran must waive his right to have the new evidence considered by the regional office in order to avoid a remand of the case and stay before the BVA.¹⁷

- A right to representation by a lawyer or nonlawyer at the hearing and during the rest of the application and appeals process. A veteran essentially is barred by statute from hiring a lawyer at the initial regional office claims level and the BVA level, because the lawyer is not permitted to be paid for his services unless the BVA already has issued a final decision in issues raised in the case and the lawyer was retained within one year of the final decision issue date.¹⁸ Thus, while BVA rules permit a veteran to be represented by an attorney, only 3 to 5 percent of veterans are so represented. Instead, in practice, most veterans who apply for VA disability benefits are limited to using nonattorney representative from veterans service organizations chartered by Congress and state veterans organizations that represent the veterans.¹⁹ By contrast, the SSA disability process permits a claimant's attorney and nonattorney representative to either submit a fee petition without a statutory maximum amount for ALJ approval or to enter into a contingent fee agreement with his or her client to accept the lesser of \$4,000 or 25 percent of the past-due benefits in the event that the client is awarded benefits, which has resulted in a high participation by lawyers in SSA disability claims. Permitting attorney representation is not a denigration of the veterans groups that now represent the veterans in the bulk of the cases at the initial and BVA levels; it affords veterans the full range of representation of their choice and the option of having a representative who is not a layperson in building a record and dealing with the increasingly complex VA claims procedures.
- A decision based upon an evidentiary record introduced before, at, and after the hearing. ALJs can subpoena records and would be empowered by the APA to require the VA to develop the record before and after the hearing for the benefit of the claimants.
- A written decision that states the facts and law relied upon, rulings on exceptions, the ALJ's rationale and the ALJ's findings of fact, rulings on the law, and decision. A BVA decision is a written statement of the findings and conclusions on all material issues of fact and law, the reasons for the findings and conclusions, and an order granting or denying relief.²⁰
- Decisions in accordance with the applicable federal statutes, regulations, and case law. Subordinate employees who are without the decisional independence safeguards of ALJs will not be able to resist an agency's policy that may conflict with federal law without risking an insubordination charge. By statute, the BVA is bound by the regulations and instructions of the VA secretary and the "precedent opinions of the chief legal officer of the Department . . .," which is the VA general counsel.²¹ The Litigation Support Division reportedly seeks out issues that it identifies as needing a consistent VA position and asks the BVA chairman to request a precedential general counsel opinion that will bind the BVA members. The BVA chairman reportedly often asks for and obtains such precedential opinions from the general counsel. This statute and provision reduce BVA decisional independence to follow federal law.

- Mandatory judicial review of the final administrative decisions by the agency. Given that the veterans disability claims process is one of the largest administrative adjudication systems in the United States, with hundreds of thousands of cases decided per year, VA is the face of the U.S. government to the veterans who seek benefits. How veterans view that face depends upon the quality of due process they receive, particularly when they seek a review of an unfavorable initial decision by VA. The use of an APA due process procedure with APA ALJs at the BVA appeals level will provide our nation's veterans high-quality appellate due process and a sense of fair play. ☺

Endnotes

¹Patrick Barta, *Customer Satisfaction Index Suggests More Patience with U.S. Government*, THE WALL STREET JOURNAL (Dec. 17, 2001).

²Del Jones, *More Consumers Give Government Services Thumbs-Up*, USA TODAY (Dec. 17, 2001).

³"Veterans' Benefits: Training for Claims Processors Needs Evaluation," (GAO 01-601).

⁴See Joan Mazzolini, *Veterans Discover Entirely New Battle to Obtain Benefits*, THE PLAIN DEALER (Cleveland) (May 13, 2001). See generally William F. Fox Jr., *The United States Board of Veterans' Appeals: The Unfinished Struggle to Reconcile Speed and Justice During Intra-Agency Review*, PARALYZED VETERANS OF AMERICA, 25-32 (2000W).

⁵*Veterans' Affairs Department Cleans Up Benefits Claims Backlog*, FEDERAL EMPLOYEES NEWS DIGEST, www.fedonline.com (May 31, 2002); Tanya Ballard, *VA Benefits Production Quotas Called into Question*, GOVERNMENT EXECUTIVE MAGAZINE, www.govexec.com (6/7/02).

⁶The APA is codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372, and 7521.

⁷William F. Fox Jr., in Issue 3 (2001) of *Tommy*; James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, n5, 243-247 (2001).

⁸O'Reilly, *supra* at 243, citing Charles L. Cragin, *The Impact of the Judicial Review on the Department of Veterans Affairs Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 40 (1994).

⁹38 U.S.C. § 7101.

¹⁰38 U.S.C. § 7101A(a).

¹¹38 U.S.C. § 7101A(c)-(g).

¹²38 U.S.C. § 7101A(c)-(e).

¹³Fifth Judicial Conference, *BVA's Role in Cases before the Court*, moderated by Jeffrey N. Luthi, 12 Vet. App. 75, 76-84 (September 1968).

¹⁴38 U.S.C. § 7101A(e)(2).

¹⁵38 C.F.R. §§ 19.3, 19.10(c).

¹⁶38 U.S.C. § 7101A(c)-(1).

¹⁷38 C.F.R. § 20.1304(b)-(c).

¹⁸28 U.S.C. § 5904(c).

¹⁹Fox, at 37-42.

²⁰38 U.S.C. § 7104(d).

²¹38 U.S.C. § 7104(c).