

# Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims

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“Everyone is entitled to his own opinion, but not his own facts.”<sup>2</sup>  
*Sen. Daniel Patrick Moynahan*

## INTRODUCTION

There is no shortage of opinions on the disposition of cases by the United States Court of Appeals for Veterans Claims [hereinafter CAVC]. The leading academic commentator on veterans law has observed that the rate at which particular remedies are used by the court is among the most sensitive of all issues in veterans law.<sup>3</sup> On one side, veterans advocates argue that the CAVC is afraid of reversing decisions of the Board of Veterans’ Appeals [hereinafter BVA], and remands too many cases inappropriately.<sup>4</sup> On the other side, the BVA complains that the court fails to take due account of the rule of prejudicial error and

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<sup>2</sup> GODFREY HODGSON, *THE GENTLEMAN FROM NEW YORK: DANIEL PATRICK MOYNIHAN* 319 (2000).

<sup>3</sup> WILLIAM F. FOX, JR., *THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION* 75 (3d ed. 2002); *see also* Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 *KAN. J.L. & PUB. POL’Y* 303, 320-22 (2004).

<sup>4</sup> “NOVA believes that there has been resistance [sic] to reversal of Board decisions by the Court.” *Performance and Structure of the United States Court of Appeals for Veterans Claims: Hearing Before the S. Comm. on Veterans’ Affairs*, 110th Cong. (Nov. 7, 2007) (statement of Richard Paul Cohen, President of the National Organization of Veterans Advocates), available at [http://www.senate.gov/~svac/public/index.cfm?pageid=16&release\\_id=11414&sub\\_release\\_id=11464&view=all](http://www.senate.gov/~svac/public/index.cfm?pageid=16&release_id=11414&sub_release_id=11464&view=all); *see also* Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 *ADMIN. L. REV.* 499, 549 (2006) (arguing that “the CAVC has exhibited excessive tolerance for VA delay and error by failing to interpret its powers and the VA’s mandate in ways that could speed decision-making and improve its accuracy.”).

remands many cases that should have been affirmed because the errors involved were harmless.<sup>5</sup> Meanwhile, commentators agree that the whole adjudication system is backlogged and takes too long to finally resolve cases.<sup>6</sup> Radical changes have been suggested, from overhauling the jurisdiction of the CAVC to abolishing it altogether.<sup>7</sup>

What is sorely lacking in these debates is empirical evidence in support of the positions advanced.<sup>8</sup> In second guessing the work of any court, “finding a satisfactory vantage point from which to judge the correctness of outcomes is not easy.”<sup>9</sup> Nonetheless, close scrutiny of the court’s cases is required because, “before we can thoughtfully propose modifications in the judicial system, we must first understand how it works.”<sup>10</sup> As America’s youngest federal court celebrates its twentieth year in operation, the time has come to compare it against other appellate courts. Although veterans law is unique in many ways, a number of the most important issues are analogous to ones faced by the Article III courts. Accordingly, one can learn a great deal by comparing the issues and outcomes at the CAVC with those in the courts of general jurisdiction.

Part I of this article begins the process of looking for a vantage point from which to judge the CAVC by looking at the defining characteristics of the adjudication process within the Department of Veterans Affairs [hereinafter VA]. As with any other appellate court, the nature of the actions

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<sup>5</sup> Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans’ Claims: Hearing Before the S. Comm. on Veterans’ Affairs, 109th Cong. (July 13, 2006) (statement of James P. Terry, Chairman of the BVA), available at [http://www.senate.gov/~svac/public/index.cfm?pageid=16&release\\_id=10616&sub\\_release\\_id=11024&view=all](http://www.senate.gov/~svac/public/index.cfm?pageid=16&release_id=10616&sub_release_id=11024&view=all).

<sup>6</sup> See, e.g., William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 339 (2004); Reynolds Holding, *Insult to Injury*, 2005-APR LEGAL AFF. 26 (2005); see also 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).

<sup>7</sup> See O’Reilly, *supra* note 6, at 243-47 (proposing that the veterans benefits and Social Security appeals processes be merged).

<sup>8</sup> See, e.g., Levy, *supra* note 3, at 321 (asserting without statistical support that the CAVC is more deferential to BVA fact finding than is typical in appellate review).

<sup>9</sup> Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 78 (1985).

<sup>10</sup> Tracey E. George, *Developing a Positive Theory of Decision making on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1637-38 (1998).

being reviewed shapes the review process at the CAVC. Part II of this article directly examines how the CAVC reviews BVA decisions. The CAVC draws its core standards of review from well established law and, therefore, many of the most contentious issues with which the court wrestles have comparable analogies in Article III courts. Part III of this article addresses the difficult issue of whether the outcomes at the CAVC are unusual by conducting an objective analysis of results in reported CAVC decisions. Finally, Part IV confronts the ultimate question of whether the results of review by the CAVC are unusual by comparing the results from Part III's analysis to available information from Article III courts. In particular, it looks at whether there are particular categories of appeals in other federal courts that closely conform to the outcomes in CAVC decisions, and examines the similarities that exist. Perhaps surprisingly, once review by the CAVC is put in perspective, there turns out to be little, if any, support for the proposition that the outcomes in veterans appeals are markedly different from other areas of law.

## **I. THE NATURE OF CASES REVIEWED BY THE CAVC**

It would be unfair and unhelpful to compare the statistics of the CAVC to any other court without first examining the nature of the disputes adjudicated. Only once one understands the nature of veterans benefits law and VA's adjudication system, can one fairly judge any comparisons. Veterans benefits claims present a much more focused set of issues than those seen by courts of general jurisdiction. Accordingly, understanding the nature of these claims and the process that adjudicates them is essential to understanding the propriety of comparisons to other courts.

### ***A. Substantive Aspects of Veterans Law***

#### **1. Timeframe**

The differences between veterans law and other areas of law are fundamental. The most common type of veterans benefits claim is a claim

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<sup>11</sup> In fiscal year 2006, 654,000 of the 806,000 claims received by VA were claims for compensation. INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 169 (2007), available at [http://books.nap.edu/openbook.php?chapselect=yo&page=169&record\\_id=11885](http://books.nap.edu/openbook.php?chapselect=yo&page=169&record_id=11885).

for compensation,<sup>11</sup> and such claims represent over 95% of the claims that are appealed to the BVA.<sup>12</sup> These claims require the veteran to provide evidence linking the veteran's current disability to an injury or disease that occurred in service.<sup>13</sup> A current disability is a necessary element,<sup>14</sup> and, therefore, a veteran does not have a ripe claim for compensation until he or she has a current medical condition. Accordingly, while most areas of law have statutes of limitations to compel claims to be litigated before evidence becomes stale and issues of causation are muddled by intervening events,<sup>15</sup> a veterans benefits claim frequently does not even exist until many years, if not decades, after service. As a result, it is often difficult to obtain evidence demonstrating what happened in service or to determine whether the disability is related to service, an intervening event, or the natural aging process. In short, veterans benefits claims often present very difficult factual issues, which makes it less likely the CAVC will be presented with pure questions of law for which the facts are undisputed.<sup>16</sup>

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<sup>12</sup> JAMES P. TERRY, REPORT OF THE CHAIRMAN OF THE BVA FOR FISCAL YEAR 2006 19 (2007) [hereinafter BVA CHAIRMAN'S REPORT FOR FY 2006], *available at* <http://www.va.gov/Vetapp/ChairRpt/BVA2006AR.pdf>. Although there is no empirical data available, it is probable that disability claims represent a similar proportion of the CAVC's caseload.

<sup>13</sup> *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995). A veteran's next of kin can also apply for compensation if the veteran's death is related to service. *See* 38 U.S.C. § 1310 (2000). For simplicity, this article speaks only in terms of disability compensation claims.

<sup>14</sup> 38 U.S.C. §§ 1110, 1131 (2000); *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

<sup>15</sup> *See* *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (holding that preventing the litigation of stale claims is a legitimate state interest that supports statutes of limitations); *United States v. Or. Lumber Co.*, 260 U.S. 290, 299 (1922) (observing that statutes of limitation "supply the place of evidence lost or impaired by lapse of time by raising a presumption which renders proof unnecessary"); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 538 (1867) ("[D]eficiency of proofs aris[e] from the ambiguity and obscurity or antiquity of transactions."). Statutes of limitations also "serve a policy of repose." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162, 2170 (2007). In that function, they "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Tel. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)).

<sup>16</sup> This is not taken as a criticism of veterans law. It is a sign of the country's commitment to its veterans that it undertakes to litigate these claims rather than ignore service-related disabilities that were not manifest at the time of separation. Nonetheless, timeframes and evidence problems associated with veterans claims are a defining characteristic of the system that make it difficult to obtain definitive evidence and to resolve factual issues with a high degree of certainty.

## 2. Nonadversarial

The evidentiary difficulties in proving claims are balanced by the prevailing ethos of the veterans benefits system. Traditionally, legal systems place the burdens of proof and production on a party pursuing a claim.<sup>17</sup> However, the VA system has historically been nonadversarial and “veteran friendly,”<sup>18</sup> and difficult cases, therefore, cannot be resolved simply by concluding that the claimant has not met his or her burden.

There are deep historical reasons for this departure from traditional adversarial legal principles. The provision of veterans benefits in the United States began with the Revolutionary War and dates back to at least the sixteenth century English legal tradition.<sup>19</sup> Such benefits were not provided under the model of a social contract,<sup>20</sup> but were considered a form of charity provided by the government based on moral obligation.<sup>21</sup> Because such benefits were discretionary rather than an entitlement, nonadversarial procedures replaced traditional due process protections, including the right to hire an attorney.<sup>22</sup> Inherent in this nonadversarial process is that, in most cases, numerous procedural requirements must be satisfied before the denial of a claim can be affirmed based upon a lack of evidence. Moreover, the

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<sup>17</sup> See Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 652 (1997).

<sup>18</sup> See *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000) (noting that, in determining whether a claim is well grounded, “[t]he low threshold is . . . appropriate in light of the uniquely pro-claimant nature of the veterans compensation system”); *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (observing that the system is a “uniquely claimant friendly system of awarding compensation”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that courts have “long recognized that the character of the veteran’s benefits statutes is strongly and uniquely pro-claimant”); see also 146 Cong. Rec. H9913-14 (Oct. 17, 2000) (Explanatory Statement by the House and Senate Committees on Veterans’ Affairs on the VCAA) (noting that under VA’s “claimant friendly” and “nonadversarial” adjudicative system, “VA must provide a substantial amount of assistance to a [claimant] seeking benefits”).

<sup>19</sup> FOX, *supra* note 3, at 3-5.

<sup>20</sup> Levy, *supra* note 3, at 308-09.

<sup>21</sup> *Id.* at 310-13.

<sup>22</sup> *Id.*; see also *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 333-34 (1985) (holding that this prohibition does not violate due process).

Supreme Court has long made veteran friendliness a principle of statutory interpretation for VA benefits.<sup>23</sup>

At the end of the process, a claimant enjoys “the benefit of the doubt,” but this generous standard still requires evidence supporting the claim before it can be applied.<sup>24</sup> As such, there is an inherent tension in veterans law between requiring evidence on difficult factual issues and the aversion to denying uncertain claims. This tension is the fundamental dynamic of veterans benefits adjudication, and reviewing this process is naturally more searching without, what Justice Scalia has called, “the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.”<sup>25</sup>

### 3. Novelty

Another defining characteristic of review by the CAVC is its youth. Prior to the enactment of the Veterans Judicial Review Act in 1988,<sup>26</sup> there was no judicial review of veterans benefits decisions. Just twenty years ago, the VA system existed in “splendid isolation.”<sup>27</sup> After little more than a decade of judicial review, Congress enacted major changes to the adjudication procedures in the Veterans Claims Assistance Act of 2000 [hereinafter VCAA].<sup>28</sup> Now, a little less than a decade after the VCAA, VA is poised to release a complete rewrite of the hundreds of regulations governing the adjudication of benefits claims.<sup>29</sup> Accordingly,

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<sup>23</sup> See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“[I]nterpretive doubt is to be resolved in the veteran’s favor.”); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (recognizing “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor”); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (“[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”).

<sup>24</sup> 38 U.S.C. § 5107 (2000); see also *Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) (explaining that the benefit of the doubt applies where there is “an approximate balance of positive and negative evidence”).

<sup>25</sup> *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment).

<sup>26</sup> Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>27</sup> *Gardner*, 513 U.S. at 122.

<sup>28</sup> See Pub. L. No. 106-475, 114 Stat. 2096 (2000).

<sup>29</sup> William A. Moorman & William F. Russo, *Serving our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 208 (2004).

there has been no shortage of virgin territory for the CAVC to explore, nor is there likely to be one any time soon.

With this background, novel legal issues — especially procedural ones — abound. This is not to say that other appellate courts lack new issues to resolve, as it is the nature of appellate review to be constantly presented with novel arguments. However, the emergent issues in veterans law are more likely to raise fundamental issues with broad implications that can ripple through the system.<sup>30</sup>

#### 4. Complexity

Finally, the relatively short history of judicial review stands in stark contrast to the complexity of the veterans benefits adjudication system. In an effort to ensure that no deserving veteran goes uncompensated, Congress has created numerous theories that a claimant may use to show a relationship between a current disability and an in-service condition.<sup>31</sup> If a claim is granted, then the veteran's level of disability must be rated based on specific criteria set forth in Chapter 4 of Title 38 of the Code of Federal Regulations, which contains hundreds of diagnostic codes used to parse any condition into levels of disability in 10% increments, ranging from noncompensable to 100% disabled.<sup>32</sup> VA must also determine an effective date for the benefits, which often involves complicated procedural issues<sup>33</sup> and difficult factual questions concerning when symptoms of the disability first manifested.<sup>34</sup> This alone begins to suggest that the affirmance rate of the CAVC should be expected to be relatively low, as complex cases are affirmed less frequently than simple ones.<sup>35</sup>

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<sup>30</sup> For an example, see notes Part II.C.3 and accompanying text, *infra*, which describe the controversy over the CAVC's duty to take due account of the rule of prejudicial error.

<sup>31</sup> See generally BARTON F. STICHMAN & RONALD B. ABRAMS, VETERANS BENEFITS MANUAL § 3.4.1, 95-98 (2007) (discussing the five general theories for establishing entitlement to disability benefits).

<sup>32</sup> 38 C.F.R. ch. 4 (2007).

<sup>33</sup> See *Ingram v. Nicholson*, 21 Vet. App. 232, 243-50 (2007).

<sup>34</sup> See *Hart v. Mansfield*, 21 Vet. App. 505, 509-11 (2007).

<sup>35</sup> See *Dalton*, *supra* note 9, at 80.

## ***B. Procedural Aspects of Veterans Law***

To help veterans navigate the substantively complex maze of veterans law without hiring an attorney, Congress has provided claimants with numerous procedural rights. Although each right serves a specific purpose in the process, each also presents an opportunity for VA to commit an error in processing the claim.<sup>36</sup> Procedural issues are especially significant in reviewing veterans benefits adjudication because — unlike actions in district courts — there is no independent judge to resolve procedural issues prior to the decision on review.

### **1. Duty to Notify**

Chronologically, the first duty of the Secretary of VA is to notify a claimant, “[u]pon receipt of a complete or substantially complete application,” of “any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.”<sup>37</sup> Of the Secretary’s major duties, this is the most recently implemented, as it was added as part of the VCAA. Despite the apparently simple nature of the two sentences that define the right, the scope of the duty has been contentiously litigated in the eight years since its creation.<sup>38</sup> Eventually, the CAVC determined that there are four different notice requirements<sup>39</sup> that pertain to all five elements of a claim for

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<sup>36</sup> See *Examining the U.S. Department of Veterans Affairs’ Claims Processing System: Hearing Before the H. Comm. on Veterans’ Affairs*, 110th Cong. (Feb. 14, 2008) (statement of Gerald Manar, Deputy Director, National Veterans Service, Veterans of Foreign Wars of the United States) (testifying that, “as we have seen, increased complexity extends the time it takes to resolve claims and increases the opportunity for error”), available at <http://veterans.house.gov/hearings/Testimony.aspx?TID=25613&Newsid=189&Name=%20Gerald%20T.%20Manar>.

<sup>37</sup> 38 U.S.C. § 5103(a) (2000).

<sup>38</sup> Although a complete discussion of this litigation is beyond the scope of this article, the fundamental problem with the notice requirement is that it is too imprecise to be effective. As Judge Farley pointed out at the court’s Tenth Judicial conference, VA knows very little about a claim at the time a new claim is received. See Remarks of Judge John Farley (Ret.), Tenth Judicial Conference of the Court of Appeals for Veterans Claims (Apr. 14, 2008). Any notice provided at that time will fall somewhere on the spectrum from hopelessly vague to uselessly comprehensive. Although the concept of precisely advising a claimant of what evidence would prove his or her claim is laudable, it is simply impractical until the available evidence is gathered and an initial adjudication has taken place.

<sup>39</sup> *Pelegri v. Principi*, 18 Vet. App. 112, 120-11 (2004); see 38 C.F.R. § 3.159 (2007); but see *infra*, note 45 and accompanying text.



compensation.<sup>40</sup> The CAVC has also made clear that VCAA notice does not require “pre-adjudication” of the claim.<sup>41</sup> Nonetheless, the notice must be tailored to the nature of the claim and to any findings made during previous denials of claims for the same benefit.<sup>42</sup> Additionally, notice may not be provided tangentially through a VA regional office [hereinafter RO] decision or some other action designed to serve an alternate purpose.<sup>43</sup>

Although it now seems that most major aspects of VCAA notice have finally been settled,<sup>44</sup> both the Secretary and veterans are unhappy with the current state of the notice requirements. The Secretary has recently amended his regulations interpreting the notice requirements to reduce the scope of the required notice,<sup>45</sup> and has announced an intention to substantially revise VCAA notice letters.<sup>46</sup> Meanwhile, veterans complain that current notice letters are incomprehensible,<sup>47</sup> and veterans’ groups have pushed for additional notice requirements.<sup>48</sup> Accordingly, it seems probable that pre-adjudication notice will continue to be a contentious procedural issue for the foreseeable future.

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<sup>40</sup> *Dingess v. Nicholson*, 19 Vet. App. 473, 486 (2006).

<sup>41</sup> *Locklear v. Nicholson*, 20 Vet. App. 410, 415-16 (2006).

<sup>42</sup> *Kent v. Nicholson*, 20 Vet. App. 1, 9-10 (2006).

<sup>43</sup> *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006).

<sup>44</sup> One exception would be the question of how to determine whether a notice error was prejudicial. See note Part II.C.3, *infra* and accompanying text.

<sup>45</sup> Notice and Assistance Requirements and Technical Correction, 73 Fed. Reg. 23,353 (Apr. 30, 2008) (to be codified at 38 C.F.R. § 3.159).

<sup>46</sup> See *Examining the U.S. Department of Veterans Affairs’ Claims Processing System: Hearing Before the H. Comm. on Veterans’ Affairs*, 110th Cong. (Feb. 14, 2008) (statement of Michael Walcoff, Deputy Under Secretary for Benefits, Veterans Benefits Administration, U.S. Department of Veterans Affairs) (announcing an intention to implement revised and simplified VCAA notice letters by August 2008), available at <http://veterans.house.gov/hearings/Testimony.aspx?TID=25610&Newsid=189&Name=%20Michael%20Walcoff>.

<sup>47</sup> See, e.g., Holding, *supra* note 6, at 28 (quoting one veteran as saying, “I would start reading these letters with five pages of legal garbage and just give up”).

<sup>48</sup> See, e.g., *Legislative Hearing on the “Veterans Disability Benefits Claims Modernization Act of 2008”* Before the House Comm. on Veterans’ Affairs, 110th Cong. (2008) (testimony of Eric A. Hilleman, Deputy Director, National Legislative Service, Veterans of Foreign Wars of the United States) (supporting a requirement that VA provide “a checklist” of needed evidence when an incomplete claim is submitted), available at <http://veterans.house.gov/hearings/Testimony.aspx?TID=26646&Newsid=223&Name=%20Eric%20A.%20Hilleman>. The checklist provision supported in this testimony was not included in the final version of the bill passed by the full House of Representatives. See H.R. 5892 (Jul. 31, 2008), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h5892rfs.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h5892rfs.txt.pdf) or <http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110U3mVCK:>.

Regardless of these issues, there is no equivalent procedure in ordinary civil or criminal law. In those areas, most litigants have lawyers to assist them, and it is the obligation of their representatives to understand what must be proven to succeed in the matters at issue.<sup>49</sup> To the contrary, in veterans law, even if a claimant is represented, the attorney is not presumed to know how to prove the claim.<sup>50</sup> Rather, any notice failure will be presumed prejudicial unless the record reveals that the attorney has affirmatively demonstrated actual knowledge of the law.<sup>51</sup> As a result, the notice procedure presents an opportunity for error that largely does not exist elsewhere.

## **2. Duties to Assist**

The core of the nonadversarial model of veterans benefits adjudication consists of the Secretary's obligations to assist claimants in the development of evidence in support of their claims so as to obviate the need for assistance from an attorney. The two essential duties are those to obtain potentially relevant records and to provide a medical opinion when needed to decide a claim.

The duty to obtain records has multiple components. First, the Secretary automatically obtains the veteran's service medical records and VA treatment records.<sup>52</sup> However, many veterans' records have been destroyed,<sup>53</sup> and many claims need military records beyond those obtained

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<sup>49</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 and cmt. 5 (setting forth rules for "Competence" and "Thoroughness and Preparation").

<sup>50</sup> See *Overton v. Nicholson*, 20 Vet. App. 427, 438 (2006); see also *Gordon v. Nicholson*, 21 Vet. App. 270, 284 (2007) (Lance, J. dissenting) (observing that the finding of prejudicial notice error was necessarily based upon the premise that the attorney for the appellant did not know what evidence might be relevant to the only factual issue that was contested during the years she handled the case).

<sup>51</sup> *Overton*, 20 Vet. App. at 438.

<sup>52</sup> 38 U.S.C. § 5103A(c)(1) (2000).

<sup>53</sup> See Walter W. Stender & Evans Walker, *The National Personnel Records Center Fire: A Study in Disaster*, 37 THE AMERICAN ARCHIVIST 521 (1974), available at <http://www.archives.gov/st-louis/military-personnel/nprc-fire.pdf>. In cases where the veteran's service records have been lost or destroyed, the BVA has a heightened obligation to consider whether the duty to assist has been satisfied and whether the benefit of the doubt is appropriate. See *Stewart v. Brown*, 10 Vet. App. 15, 19 (1997); *Russo v. Brown*, 9 Vet. App. 46, 51 (1996).

automatically.<sup>54</sup> The Secretary must also obtain other records — usually private medical records — that are adequately identified by the appellant and potentially relevant to the claim.<sup>55</sup> When records are not obtained, the Secretary must notify the appellant and provide the opportunity to submit alternative evidence or additional information that might be used to locate the missing records.<sup>56</sup>

This duty is broadly comparable to document discovery rules in civil cases. However, discovery disputes in civil trials are generally resolved by decisions on pretrial motions, which are accorded substantial deference.<sup>57</sup> If a discovery request is denied, an appeal is not ordinarily preserved unless the losing party presents a theory of relevance or other entitlement to the trial court.<sup>58</sup> This conserves judicial resources by giving trial judges the opportunity either to reconsider the decision or to provide an explicit basis for rejecting it. In veterans benefits claims, there is no adversarial testing of the discovery process until after the matter has been decided and the claim is on appeal. Therefore, it is much less likely that disputes will be examined and avoided at the agency level.

The more contentious of the two duties is the duty to provide a medical opinion that might potentially substantiate the claim. The duty is triggered where there is:

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<sup>54</sup> One of the most common and most difficult claims to prove is a claim for post-traumatic stress disorder [hereinafter PTSD]. A diagnosis of PTSD must be based upon a specific, credible stressor and that stressor must be verified. If the stressor is combat-related, then verification of combat is sufficient to prove the existence of the stressor. In many cases, the relevant information VA must seek are unit records through the U.S. Armed Services Center for Research of Unit Records. *See, e.g.,* Moran v. Principi, 17 Vet. App. 149, 152 (2003). For non-combat stressors, more specific corroboration is necessary, and there are special procedures for seeking records to corroborate an allegation of a personal assault during service. *See* Bradford v. Nicholson, 20 Vet. App. 200, 204-06 (2006); Patton v. West, 12 Vet. App. 272, 278-80 (1999).

<sup>55</sup> Moore v. Nicholson, 21 Vet. App. 211, 213-15 (2007).

<sup>56</sup> 38 U.S.C. § 5103A(b)(2).

<sup>57</sup> *See, e.g.,* Salgado v. Gen. Motors Corp., 150 F.3d 735, 739-42 (7th Cir. 1998) (observing “the court has a right, independent of the parties, to conduct trial preparation in a manner that husbands appropriately the scarce judicial resources of that busy district.”).

<sup>58</sup> *See, e.g.,* Cacevic v. City of Hazel Park, 226 F.3d 483, 488-89 (6th Cir. 2000) (summarizing similar rulings from other circuits).

(1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.<sup>59</sup>

However, an opinion may not be sought by the Secretary to contradict a claim already supported by adequate private evidence.<sup>60</sup> To be adequate to satisfy the duty, an opinion must provide more than a mere conclusion. Rather, it must contain sufficient detail to allow the BVA to weigh it against other opinions and to decide the case without relying on the BVA's own medical judgment.<sup>61</sup> There are many reasons why a medical opinion may be found to be inadequate.<sup>62</sup> Therefore,

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<sup>59</sup> *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006) (citing 38 U.S.C. § 5103A(d)(2)); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1355-57 (Fed. Cir. 2003); *Wells v. Principi*, 326 F.3d 1381, 1384 (Fed. Cir. 2003); 38 C.F.R. § 3.159(c)(4)(i) (2007).

<sup>60</sup> *See Mariano v. Principi*, 17 Vet. App. 305, 312 (2003). However, an examination may be conducted where the appellant merely has a favorable presumption. *See Adams v. Principi*, 256 F.3d 1318, 1321-22 (Fed. Cir. 2001) (affirming that the CAVC had the authority to remand for clarification of a VA examination conducted to rebut the presumption of soundness); *Vanerson v. West*, 12 Vet. App. 254, 262 (1999) (remanding for additional VA examination to rebut the presumption of soundness).

<sup>61</sup> *Steffl v. Nicholson*, 21 Vet. App. 120, 124-25 (2007).

<sup>62</sup> *See, e.g., Daves v. Nicholson*, 21 Vet. App. 46, 51-52 (2007) (holding that the failure to seek recommended medical testing renders opinion inadequate); *Claiborne v. Nicholson*, 19 Vet. App. 181, 186 (2005) (rejecting medical opinions that did not indicate whether the physicians actually examined the veteran, did not provide the extent of any examination, and did not provide any supporting clinical data); *Mariano*, 17 Vet. App. at 311-12 (holding that an examiner's conclusions of questionable probative value when examiner failed to review claims file prior to examination); *Massey v. Brown*, 7 Vet. App. 204, 208 (1994) (holding that an examination must contain reference to the pertinent scheduler rating criteria found in 38 C.F.R. ch. 4 to be adequate); *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (holding that a medical opinion that is not based on an accurate factual premise is of no probative value); *Hyder v. Derwinski*, 1 Vet. App. 221, 224 (1991) (holding that an examination is inadequate when not conducted by an appropriate specialist); *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991) (holding that an adequate medical opinion must ordinarily address prior, contrary evidence).

depending on the circumstances, an appellant may argue on appeal to the CAVC that a medical opinion was needed, that the opinion relied upon by the BVA was inadequate, or even that no opinion should have been obtained in the first place.

Obtaining a medical examination through the discovery process is not unknown in other areas of law. The process is similar in that a veteran's refusal to cooperate can be used against the claim.<sup>63</sup> However, it is significantly different in that a claimant does not bear the responsibility of ensuring that the opinion generated is adequate to support his or her claim. A similar parallel in the broader areas of law would be appellate review of the admission of expert evidence under *Daubert v. Merrell Dow Pharmaceuticals*.<sup>64</sup> However, although both issues are reviewed deferentially,<sup>65</sup> abuse of discretion is generally considered a harder standard to meet,<sup>66</sup> and it is probably easier to point to a single deficiency in an opinion than it is to contest whether it would be potentially useful to a fact finder.<sup>67</sup>

### **3. Claims are Reviewed Numerous Times by VA**

Another aspect of the VA process that indirectly affects appellate review by the CAVC is the numerous reviews of veterans claims at the agency level. Although a BVA decision is de novo, it is not the first review of the evidence in a claim. In fact, it frequently is not even the second review of the evidence. A claimant who disputes an RO decision may opt

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<sup>63</sup> See *Kowalski v. Nicholson*, 19 Vet. App. 171, 177-79 (2005); see also FED. R. CIV. P. 37 (setting forth rules pertaining to "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions").

<sup>64</sup> 509 U.S. 579 (1993).

<sup>65</sup> Compare *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008) ("Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard."), with *General Electric Co. v. Joiner*, 522 U.S. 136, 142-43 (1997) (holding that, under *Daubert*, appellate courts review the admission of expert medical evidence only for an abuse of discretion).

<sup>66</sup> See *Ellen E. Sward, Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 5 (1991).

<sup>67</sup> See *United States v. Brown*, 415 F.3d 1257, 1265-66 (11th Cir. 2005), cert. denied, 547 U.S. 1023 (2006) (suggesting that the usual deferential standard applies with possibly "even greater force" to *Daubert* issues).

to have the decision reviewed at the RO level by a decision review officer [hereinafter DRO], prior to the matter being forwarded to the BVA.<sup>68</sup> Additionally, de novo review may also be conducted by the RO's Veteran's Service Center Manager at VA's discretion.<sup>69</sup> Even if the claimant does not elect DRO review, the record generally remains open after an Notice of Disagreement has been filed, and if any new evidence is submitted, the claim must be readjudicated at the RO before the BVA can decide the appeal.<sup>70</sup> If a veteran continues to submit a stream of treatment records and lay testimony in the form of correspondence, then it is quite possible that a claim will be readjudicated many times — possibly for years — at the RO level before the BVA is finally in a position to hear the appeal.

This process is very different from the typical district court decision reviewed by an Article III court. On the one hand, it has little effect on legal questions presented to the CAVC because VA maintains uniformity in its interpretations through its General Counsel's Office.<sup>71</sup> On the other hand, repeated evaluation of the evidence by different decision makers logically would tend to filter out many close factual cases before they would reach the CAVC. A veteran need only prevail once to obtain benefits, because there is no mechanism for the Secretary to appeal the granting of a claim.<sup>72</sup> This suggests that even though the CAVC may be reviewing a decision by a single Veterans Law Judge [hereinafter VLJ] for clear error in its factual determinations, the cases that are appealed have been more thoroughly reviewed than a factual finding by a district court judge because a claim will not progress to the CAVC unless every VA adjudicator who reviews it agrees that it should be denied.

#### **4. Duty to Address All Reasonably-Raised Theories**

All of the layers of notice, development, and review culminate in a decision on the claim by a VLJ. This part of the process requires the

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<sup>68</sup> 38 C.F.R. § 3.2600 (2007).

<sup>69</sup> *Id.* § 3.2600(a).

<sup>70</sup> *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003) (holding that initial review of evidence by the BVA violates its statutory role as an appellate tribunal).

<sup>71</sup> *See Cottle v. Principi*, 14 Vet. App. 329, 335 (2001).

<sup>72</sup> *See* 38 U.S.C. § 7252(a) (2000) (“The Secretary may not seek review of any [BVA] decision.”).

Secretary to be both advocate and adjudicator. As an advocate, the Secretary must sympathetically read all the pleadings and evidence submitted by the claimant<sup>73</sup> and address all arguments and theories of entitlement either presented by the claimant or raised by the record.<sup>74</sup> The failure to discuss a potential theory of entitlement or all the implications of each piece of lay and medical evidence can lead to a remand.<sup>75</sup> Although this duty sounds already broad on its face, its implications for appellate review of BVA decisions is even greater given the complexity of the medical and legal issues, the numerous procedural rights that must be satisfied before the BVA reaches the merits, and the evidentiary difficulties that often arise when the claims are far removed from the veteran's service.

Fundamentally, the appellate role of the BVA is completely contrary to the traditional model. The Supreme Court has held that appellate tribunals "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when they do[, they] normally decide only questions presented by the parties."<sup>76</sup> However, the BVA's role is precisely the opposite. Because the role of the BVA is supposed to be aggressive, it is much easier for it to fall short of this standard. As will be discussed,<sup>77</sup> the existence of this duty makes CAVC review very different from review in an Article III court by dramatically limiting the concepts of waiver and exhaustion within veterans law.

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<sup>73</sup> See *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (holding that VA must give a sympathetic reading to the veteran's filings to "determine all potential claims raised by the evidence, applying all relevant laws and regulations"); *Hodge*, 155 F.3d at 1362-63 (holding that "Congress has mandated that VA is 'to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits'").

<sup>74</sup> See *Urban v. Principi*, 18 Vet. App. 143, 145 (2004) (per curiam) ("When reviewing [the appellant's] claim, the [BVA] was obligated to consider all reasonably raised matters regarding the issue on appeal."); *Brannon v. West*, 12 Vet. App. 32, 34 (1998) (concluding that the BVA must "adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all documents and oral testimony in the record prior to the [BVA]'s decision").

<sup>75</sup> See, e.g., *Coburn v. Nicholson*, 19 Vet. App. 427, 432-33 (2006) (holding that the failure to clearly explain why favorable evidence was being rejected required a remand); *Sanders v. Principi*, 17 Vet. App. 232, 236 (2003) (holding that the failure to discuss statements made at BVA hearing required a remand); *YR v. West*, 11 Vet. App. 393, 398 (1998) (holding that the failure to discuss lay statement submitted by a claimant's family member required remand); *Gaines v. West*, 11 Vet. App. 353, 359 (1998) (holding that the failure to discuss a potentially relevant statute required remand).

<sup>76</sup> *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc)).

<sup>77</sup> See Part II.B.1, *infra*.

## 5. Finality

The last major procedural aspect of veterans claims adjudication is the unique ease with which previously denied claims may be revisited. At any time, a claimant may present “new and material” evidence to reopen a previously denied claim.<sup>78</sup> Alternatively, final decisions may also be attacked collaterally on the basis of “clear and unmistakable error” [hereinafter CUE].<sup>79</sup> An assertion of CUE must allege a specific, outcome-determinative error.<sup>80</sup> Although each theory of CUE may be raised only once, there is no limit to the number of different CUE motions that a claimant may make. It is not uncommon for an unsuccessful claimant to seek the reopening of a claim a dozen or more times.<sup>81</sup> Each time a claim is litigated, it is removed further from the events in service and becomes, most likely, more difficult to prove. Moreover, even if the claim were to be granted, a veteran dissatisfied with the disability rating assigned may file an unlimited number of claims for a higher disability rating.<sup>82</sup>

The ability of veterans to make unlimited attempts to revisit claims means that a majority of the claims filed each year are not new.<sup>83</sup> Accordingly, the full procedural history of a claim before the CAVC can span decades. Although there are some limits to raising procedural errors in prior proceedings,<sup>84</sup> the correct procedural posture of a case can be

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<sup>78</sup> See 38 U.S.C. § 5108 (2000).

<sup>79</sup> *Id.* §§ 5109A, 7111.

<sup>80</sup> *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993).

<sup>81</sup> See *STICHMAN & ABRAMS*, *supra* note 31, § 12.2.2.1, at 866.

<sup>82</sup> *Id.* § 12.2.1.1.2, at 860.

<sup>83</sup> See Paul R. Verkuil & Jeffery S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 768 (2003).

<sup>84</sup> See *Hyatt v. Nicholson*, 21 Vet. App. 390, 396-97 (2007), *withdrawn sub nom.* *Hyatt v. Peake*, 22 Vet. App. 211 (2008) (holding that the Secretary’s failure to obtain evidence must be considered based upon the posture of the current appeal regardless of whether it was error in a prior proceeding although it was later withdrawn because the appellant died prior to the entry of judgment); *Caffrey v. Brown*, 6 Vet. App. 377, 382-84 (1994) (holding that the failure to obtain evidence cannot be the basis of a CUE motion because a manifest change in outcome must be demonstrated based upon the record as it existed at the time of the challenged decision).



difficult to determine, and it is often unclear which issues were properly before the BVA.<sup>85</sup>

By comparison, collateral attacks on decisions in the civil context are very difficult<sup>86</sup> and there is little to suggest that they are attempted with any great frequency. Petitions seeking post-conviction relief in the criminal context are common,<sup>87</sup> but they are very rarely successful.<sup>88</sup> Accordingly, veterans law is unique in that new evidence is generally accepted when a claimant seeks to relitigate a claim. However, the fact that so many claims adjudicated each year have been previously denied, at least as to the disability rating if not outright, suggests that they tend to begin with a record that already works against the claim.

### *C. Practical Aspects of Veterans Law*

Although much of the character of veterans law is defined by theory and procedure, there are a number of practical aspects that shape the adjudication of veterans claims.

#### **1. Veterans Records are Antiquated**

One of the simple, practical truths of veterans benefits adjudication is that the system is plagued by outdated record-keeping practices.

Claim files are currently and historically maintained by [VA] in a single and unmanageable file containing information concerning

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<sup>85</sup> See, e.g., *Juarez v. Peake*, 21 Vet. App. 537, 541 (2008) (modifying a portion of a BVA decision that improperly ruled on a matter that should have been decided in a different proceeding); *Seri v. Nicholson*, 21 Vet. App. 441, 444 (2007) (modifying an improper comment on a matter not before the BVA so as to avoid any preclusive effect); see also *Ingram*, 21 Vet. App. at 253-54 (discussing the difficulty of applying traditional notions of finality to a system with no formal system of docketing claims as separate and distinct matters); *DiCarlo v. Nicholson*, 20 Vet. App. 52, 56-57 (2006) (discussing the options available when an appellant believes that VA has failed to recognize and process a claim for benefits).

<sup>86</sup> FED. R. CIV. P. 60 (setting forth rule relating to “Relief from Entry of Judgment”).

<sup>87</sup> In FY 2007, nearly 30,000 were filed in federal district courts. Statistics Div., Admin. Off. U.S. Cts., *Judicial Business of the United States Courts: 2007 Annual Report of the Director* [hereinafter U.S. COURTS 2007 REPORT], at 146 tbl. C-2, available at <http://www.uscourts.gov/judbus2007/contents.html>.

<sup>88</sup> *Id.* at 170 tbl. C-4 (indicating that such petitions are overwhelmingly resolved without a hearing or other proceeding).

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 [VA]. 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 [BVA'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.<sup>89</sup>

Obviously, this raises numerous problems for appellate review. Simply put, both advocacy and decision making are made more difficult when there is uncertainty as to history of the claim and difficulty verifying the integrity of the record.<sup>90</sup> VA is keenly aware of the need to replace its claims file system with modern, computerized records.<sup>91</sup> However,

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<sup>89</sup> Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 294-95 (2004); see also STICHMAN & ABRAMS, *supra* note 31, § 16.1.2 at 1276 (describing the typical veteran's claims file as a "puzzle box").

<sup>90</sup> In 1993, two BVA attorneys were found to be tampering with claims files in order to ease their workload. See CHARLES CRAGIN, REPORT OF THE CHAIRMAN OF THE BVA FOR FY 1995 15 (1996). There has been no evidence that this was anything more than an isolated incident. However, the difficulties of reconstructing the files described in the report illustrate the potential problems that may be caused even by innocent problems with claims files.

<sup>91</sup> See Walcoff, *supra* note 46 (discussing the efforts with IBM Global Business Services to move to an electronic, paperless environment); PARALYZED VETERANS OF AMERICA ET AL., THE INDEPENDENT BUDGET FOR THE DEPARTMENT OF VETERANS AFFAIRS FISCAL YEAR 2009 27-28 (2008) [hereinafter THE INDEPENDENT BUDGET] (identifying upgrading of VA's information technology infrastructure as a priority), available at <http://es3.pva.org/independentbudget/index.htm>.

converting the records of tens of millions of veterans is an enormous undertaking and, after several years of study and effort, VA is still some time away from making the conversion. In contrast, there is nothing to indicate that many cases in Article III courts persist for decades, and there are clear mechanisms in those courts for resolving any disputes as to the record.<sup>92</sup>

## **2. The BVA and the ROs are Understaffed**

Another factor is that both the BVA and the ROs are understaffed. Although the causes of the problem may be debated, there is ample evidence that adjudicators at both levels are required to decide a high number of claims each year, which makes it hard to produce quality decisions.<sup>93</sup> Indeed, RO adjudicators have not been shy about complaining of their caseloads.<sup>94</sup> At the BVA level, each VLJ produces an average of 700 decisions a year and conducts over 160 hearings.<sup>95</sup> Even with the assistance of at least four or five

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<sup>92</sup> See FED. R. APP. P. 10.

<sup>93</sup> See THE INDEPENDENT BUDGET, *supra* note 91, at 30-31 (advocating for increased staffing to improve claims processing).

<sup>94</sup> In 2005, 57% of RO surveyed adjudicators stated that they had difficulty meeting production standards without compromising their ability to develop claims adequately and thoroughly review the evidence. See VA OFFICE OF INSPECTOR GEN. REP. NO. 05-00765-137, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS 60-61 (2005). Recently, a union representing VA adjudicators at the Cleveland, Ohio RO commented that proposed regulations to rate traumatic brain injuries as “a difficult, burdensome regulation will be subverted by VA managers which will further pressure employees to take shortcuts on the case based on the threat of their livelihood.” ARNOLD SCOTT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES COMMENT ON AM75 (TBI) 1 (“Schedule for Rating Disabilities; Evaluation of Residuals of Traumatic Brain Injury”) (2008), available at <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=09000064803a7f6b>. Mr. Scott concluded, “VBA employees who will be expected to decide and evaluate the complex TBI claim and all of the other issues claimed, in less than two hours, are generally not brain surgeons with law degrees. They are well intentioned, but poorly resourced and very poorly led, patriotic employees, who by and large wish to be enabled to do the best job they can for the veteran before them, if only they were given the tools and the time.” *Id.* at 3-4.

<sup>95</sup> See BVA CHAIRMAN’S REPORT FOR FY 2006, *supra* note 12, at 2, 3; see also *Board of Veterans’ Appeals Adjudication Process and the Appeals Management Center, Hearing Before the Subcomm. On Disability Assistance and Memorial Affairs, House Comm. on Veterans’ Affairs*, 110th Cong. (2007) (statement of James P. Terry, Chairman, Bd. of Veterans’ Appeals) (testifying that, “over the course of the year the [BVA]’s fair share standards call for our attorneys to complete a total of 156 timely decisions of high quality, and for each of our line Judges to complete and sign 752 decisions”), available at <http://veterans.house.gov/hearings/Testimony.a.spx?TID=24241&Newsid=115&Name=The%20Honorable%20James%20P.%20Terry>.

staff attorneys each,<sup>96</sup> it is difficult to believe that VLJs have adequate time and resources to search the hundreds or thousands of pages of disorganized records in every case to discover and address every theory reasonably raised for each of the thousands of contested claims in the hundreds of decisions issued each year.<sup>97</sup> Although there certainly are similar pressures on federal district court judges,<sup>98</sup> unlike the BVA, it is ultimately the responsibility of the attorneys involved in a case in the Article III system to ensure that it is properly developed and presented.

### **3. Attorneys Not Normally Involved at VA Level**

The final defining aspect of veterans law is the fact that attorneys are infrequently involved in veterans benefits claims. As discussed above, attorneys have historically been prevented from charging more than a nominal fee for veterans benefits claims and, as a result, most veterans proceed pro se or with the assistance of a non-attorney veterans service organization [hereinafter VSO]. When the CAVC was created, Congress provided that attorneys could charge for representation before the court<sup>99</sup> and continue to work on any matter remanded for further proceedings.<sup>100</sup>

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<sup>96</sup> BVA CHAIRMAN'S REPORT FOR FY 2006, *supra* note 12, at 2.

<sup>97</sup> See *Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the Subcomm. On Disability Assistance and Memorial Affairs, House Comm. on Veterans' Affairs*, 110th Cong. (2007) (statement of Richard Paul Cohen, President, National Organization of Veterans Advocates, Inc.) (arguing that the productivity demands on BVA members and attorneys adversely affect their performance and advocating for increased staffing), available at <http://veterans.house.gov/hearings/Testimony.aspx?TID=24235&Newsid=115&Name=%20Richard%20Paul%20Cohen>.

<sup>98</sup> See CHIEF JUSTICE JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2006), <http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf>; CHIEF JUSTICE WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2005), <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>.

<sup>99</sup> In practice, most attorneys at the CAVC work on a contingency basis and file for fees under EAJA. The CAVC has ruled that attorneys must offset any fees awarded under EAJA against any benefits awarded on remand in order for a fee agreement to be reasonable. *Carpenter v. Principi*, 15 Vet. App. 64, 73-79 (2001) (en banc).

<sup>100</sup> 38 U.S.C. § 5904(c) (2000). Recently, legislation was enacted to allow attorneys to charge fees for representation upon an initial appeal to the BVA. See *Veterans Benefits, Healthcare, and Information Technology Act of 2006*, Pub. L. No. 109-461, § 101, 120 Stat. 3403. However, there have already been attempts to repeal the law, see *Veterans' Benefits Protection Act*, H.R. 1318, 110th Cong. (1st Sess. 2007).

In recent years, attorneys have been involved in only 5% to 7.5% of BVA decisions.<sup>101</sup> As a result, a majority of appellants do not have attorneys until after they have initiated their appeal to the CAVC.<sup>102</sup>

This has some noteworthy effects. First, unlike many — if not most — cases appealed to Article III courts, it is unlikely that the proceedings at the agency level were conducted with an appeal in mind. Second, the appellant’s attorney before the CAVC cannot benefit from discussing the matter with anyone who would be the equivalent of the trial attorney in a civil or criminal setting. Third, as most veterans claims attorneys do not become involved until after the appeal is initiated, they play no role in screening potential appeals or counseling claimants as to the potential outcomes. Generally, the more clear-cut the case, the less likely it is to be appealed.<sup>103</sup> However, veterans benefits claimants are unlikely to have the advice of an attorney as to whether their case is worth appealing.<sup>104</sup>

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<sup>101</sup> BVA CHAIRMAN’S REPORT FOR FY 2006 at 20; JAMES P. TERRY, REPORT OF THE CHAIRMAN OF THE BOARD OF VETERANS’ APPEALS FOR FISCAL YEAR 2005 18 (2006) [hereinafter BVA CHAIRMAN’S REPORT FOR FY 2005]. Interestingly, claimants represented by attorneys at the BVA do not fare statistically better than those represented by VSOs. See BVA CHAIRMAN’S REPORT FOR FY 2006 at 20; BVA CHAIRMAN’S REPORT FOR FY 2005 at 18. However, because of the restrictions on attorney compensation prior to an initial appeal to the CAVC, it is probable that a substantial portion of the appeals involving attorneys are cases in which the attorney became involved only after the claim was initially denied while the claimant was represented by a VSO. In any event, unrepresented claimants did fare noticeably worse. See BVA CHAIRMAN’S REPORT FOR FY 2006 at 20; BVA CHAIRMAN’S REPORT FOR FY 2005 at 18.

<sup>102</sup> UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS FOR FY 1998-2007 [hereinafter CAVC Annual Reports], [http://www.vetapp.uscourts.gov/documents/Annual\\_Reports\\_2007.pdf](http://www.vetapp.uscourts.gov/documents/Annual_Reports_2007.pdf).

<sup>103</sup> See Dalton, *supra* note 8, at 74-75.

<sup>104</sup> It remains to be seen whether the liberalization of attorney representation at the BVA level, *see* note 100, *supra*, will result in significant increase in veterans law practitioners. “When a court’s procedures are not common to those of other courts, the high cost of becoming familiar with such procedures provides serious disincentives for lawyers to practice before the specialized court only occasionally.” Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1164 (1990). Accordingly, it is reasonable to question whether such practice will be lucrative to attract enough lawyers to handle any significant portion of the 100,000 appeals filed each year.

## II. CHARACTERISTICS OF APPELLATE REVIEW BY THE CAVC

All of the distinguishing features of the agency adjudication process merely beg the question of how comparable review by the CAVC is to that conducted by Article III appellate courts.

### *A. The Appellate Process at the CAVC*

Procedurally, the CAVC is similar to other intermediate appellate courts. Appeals are commenced by filing a Notice of Appeal.<sup>105</sup> Initially, the BVA decision is filed and a record on appeal is compiled.<sup>106</sup> As with other appellate courts, no new evidence may be submitted or considered.<sup>107</sup> Rather, the parties file briefs<sup>108</sup> and the case is submitted for decision.<sup>109</sup>

However, there are some aspects of the submission process that are noteworthy. As discussed above, the typical appeal requires the newly-involved attorney to digest a large and disorganized record and prepare an appeal with little — if any — benefit of a focused strategy prosecuted below.<sup>110</sup> This delay increases the chances that there will have been a relevant intervening development in the law that was not considered by the BVA decision. More importantly, because the attorney has had no opportunity to shape the record or to control the issues presented below to prepare for ultimate victory on appeal, the goal of an attorney taking a case before the CAVC is often to secure a remand on any basis possible to

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<sup>105</sup> 38 U.S.C. § 7266 (2000).

<sup>106</sup> U.S. VET. APP. R. 4, 10.

<sup>107</sup> 38 U.S.C. § 7252(b); *Bonhomme v. Nicholson*, 21 Vet. App. 40, 41-43 (2007) (per curiam).

<sup>108</sup> U.S. VET. APP. R. 28.

<sup>109</sup> *Pekular v. Mansfield*, 21 Vet. App. 495, 505 (2007).

<sup>110</sup> For this reason, it is not surprising that the CAVC receives and grants many thousands of motions for additional time each year. “In fiscal year 2007, the parties requested over 13,000 extensions of time to prepare and file the record, prepare and file the briefs, and to respond to attorney fee applications.” *Legislative Hearing on the “Veterans Disability Benefits Claims Modernization Act of 2008” Before the House Comm. on Veterans’ Affairs*, 110th Cong. (2008) (testimony of The Honorable William P. Greene, Jr., Chief Judge, U.S. Court of Appeals for Veterans Claims), available at [http://veterans.house.gov/hearings/Testimony.aspx?TID=26642&Newsid=223&Name=The%20Honorable%20William%20P.%20Greene,%20Jr.](http://veterans.house.gov/hearings/Testimony.aspx?TID=26642&Newsid=223&Name=The%20Honorable%20William%20P.%20Greene,%20Jr)

preserve the claimant's effective date, so that the attorney can then proceed with an open record to present a well-developed theory in support of the claim on remand.<sup>111</sup>

## ***B. Scope of CAVC Review***

Before turning to how the CAVC reviews BVA decisions, it is important to look at the doctrines that affect which issues are properly before the court.

### **1. Waiver and Exhaustion**

The first unique feature of CAVC review is that the filtering concepts of waiver and exhaustion are very weak. Although other appellate courts will refuse to hear arguments that were not initially presented below and properly developed and preserved for review,<sup>112</sup> the nonadversarial process at the VA level significantly undermines these concepts at the CAVC. Because the Secretary has the obligation to raise and develop issues sua sponte if they are suggested by the record, an appellant rarely can be faulted for an inadequate record or an absence of a ruling below. As the court has explained, exhaustion cannot be properly raised against any allegation of error.<sup>113</sup> Rather, it is a consideration only if the appellant is raising an issue that was not suggested by the record.<sup>114</sup> Even if an issue were not raised by the record, the CAVC may exercise discretion to remand the matter for consideration in the first instance if appropriate.<sup>115</sup> Accordingly, the CAVC's treatment of new issues on appeal favors a higher rate of remand than in appellate courts applying robust doctrines of exhaustion and waiver.<sup>116</sup>

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<sup>111</sup> See STICHMAN & ABRAMS, *supra* note 31, § 15.7, at 1210-12.

<sup>112</sup> See Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987).

<sup>113</sup> See *Robinson v. Mansfield*, 21 Vet. App. 545, 557-58 (2008).

<sup>114</sup> *Id.*

<sup>115</sup> See *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

<sup>116</sup> The precise contours of exhaustion in CAVC jurisprudence are more complicated than this simple summary can capture. For a more detailed discussion, see Gary E. O'Connor, *Did Decide or Should Have Decided: Issue Exhaustion and the Veterans Benefits Appeals Process*, 49 AM. U. L. REV. 1279, 1305-19 (2000) (suggesting a formal analytical framework for determining which issues should be considered by the CAVC when presented in the first instance).

## 2. Reasons or Bases Requirement

The second crucial aspect of CAVC review is the “reasons or bases” requirement. When the CAVC was created,<sup>117</sup> Congress added a requirement to the BVA’s governing statute requiring that each of its decisions be supported by an adequate statement of “reasons or bases.”<sup>118</sup> This requirement was an obvious necessity to enable independent judicial review. Although technically the requirement is not defined in the CAVC’s scope of review, the court has made it a bedrock concept of review by holding that the court is incapable of conducting judicial review of a decision that lacks adequate reasons or bases.<sup>119</sup> In practice, this requirement means that it is not enough that there be sufficient evidence of record to support a BVA decision.<sup>120</sup> Instead, the decision must affirmatively discuss all the relevant evidence and law, and articulate a valid and comprehensive basis for denying benefits. The Secretary’s “post hoc rationalizations” are not an acceptable substitute.<sup>121</sup> Rather, a remand may be required for the BVA to address explicitly a particular piece of evidence or theory that appears potentially relevant. This has the practical effect of shifting the burden away from appellants to prove that an outcome was questionable or wrong, and over to the BVA to prove that the outcome

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<sup>117</sup> See Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>118</sup> 38 U.S.C. § 7104(d)(1) (2000).

<sup>119</sup> See *Fallo v. Derwinski*, 1 Vet. App. 175, 177 (1991) (“[T]he [BVA]’s finding[s] and conclusions in this case are so vague that it is impossible to review them.”); *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991) (“Whether the BVA’s ultimate conclusions are correct or not, . . . the incomplete nature of the decision below does not permit proper review by this Court.”); *Gilbert*, 1 Vet. App. at 57 (“The Supreme Court has held that where the ‘failure to explain administrative action . . . frustrate[d] effective judicial review, the remedy was . . . to obtain from the agency . . . such additional explanation of the reasons for the agency decision as may prove necessary.’ *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). Thus, ‘[t]he proper course in a case with an inadequate record is to vacate the agency’s decision and to remand the matter to the agency for further proceedings.’ *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 347 (D.C. Cir. 1989); see *Camp*, 411 U.S. at 143; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).”).

<sup>120</sup> See *Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992) (holding that a mere listing of the relevant evidence is not adequate to fulfill the Board’s obligation to provide a statement of reasons or bases for its decision).

<sup>121</sup> See *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007) (citing *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991) (“‘Litigating positions’ are not entitled to deference when they are merely appellate counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court.”)).



was correct.<sup>122</sup> The rule has its limits. If the BVA cites the correct law, then the CAVC may require “clear evidence” that it was misapplied.<sup>123</sup> However, the reasons or bases requirement gives the CAVC broad license to remand cases if it is not comfortable that the BVA fully considered all potential theories or procedures in support of the claim.

This contrasts sharply with most other areas of law, which have a strong presumption of correctness in reviewing the merits of decisions that an affirmance will be granted if there is any view of the evidence that would support the decision below. For example, jury verdicts must be affirmed if there is any reasonable interpretation of the evidence that supports the verdict reached.<sup>124</sup> One exception to this deference is the *Baldwin*<sup>125</sup> principle but even this principle is distinguishable from the reasons or bases requirement. In *Maryland v. Baldwin*, the Supreme Court dealt with the problem of appellate review of multi-theory general verdicts. Specifically, if a jury renders a general verdict for one party after a trial where multiple theories are presented, what should an appellate court do if it finds one of the theories was invalid? In *Baldwin*, the Supreme Court decided that the verdict must be vacated if it is impossible to tell whether the verdict relied upon a valid theory. In the last several decades, the federal circuit courts developed numerous exceptions to undermine the *Baldwin* principle.<sup>126</sup> Even so, the reasons or bases requirement is much broader than *Baldwin*. Although a *Baldwin* situation arises only when an invalid legal theory was affirmatively injected into a case, the reasons or bases requirement requires a valid reasoning to be affirmatively articulated in every decision.

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<sup>122</sup> Technically, the CAVC allocates the burden to the appellant to demonstrate error. *See* Coker v. Nicholson, 19 Vet. App. 439, 442 (2006), *vacated on other grounds sub nom.* Coker v. Peake, No. 2006-7089 (Fed. Cir. May 5, 2008); Hilkert v. West, 12 Vet. App. 145, 151 (1999); Berger v. Brown, 10 Vet. App. 166, 169 (1997). However, when silence is error, this burden is substantially easier to meet.

<sup>123</sup> Dolan v. Brown, 9 Vet. App. 358, 362 (1996).

<sup>124</sup> *See* Reeves v. Sanderson Plumbing Prods., Inc. 530 U.S. 133, 150-51 (2000); *see generally* DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 246-51 (2d ed. 2006).

<sup>125</sup> *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884).

<sup>126</sup> *See* Ryan Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the Baldwin Principle*, 4 J. APP. PRAC. & PROCESS 89, 101-35 (2002).

A closer analogy that occurs in administrative law is the *Chenery* doctrine. Under *SEC v. Chenery Corporation*,<sup>127</sup> an agency action may not be affirmed on a basis other than that articulated by the agency itself. If the grounds for the agency decision are “inadequate or improper,” then a court is “powerless” to substitute “an adequate or proper basis.”<sup>128</sup> Although it is clear that the CAVC has broadly interpreted what constitutes an “inadequate” BVA decision because of the reasons or bases requirement, it is not as clear that *Chenery* is less of an issue for agency adjudications reviewed under the Administrative Procedure Act’s<sup>129</sup> substantial evidence standard.<sup>130</sup> The facts in *Chenery* were undisputed, and the essence of the Supreme Court’s decision was that separation-of-powers principles require courts to defer to agency policy making.<sup>131</sup> *Chenery* does not logically extend to situations in which the governing policy is undisputed and merely the historical facts are in dispute.<sup>132</sup> Regardless, the outcomes of decisions before the CAVC cannot be analyzed properly without recognizing that the court generally conducts a much broader and more demanding review than do appellate courts in non-agency contexts.

### ***C. Merits Review by the CAVC***

Turning to the issue of how the CAVC reviews decisions on the merits, a natural first question is whether the CAVC reviews cases in a manner similar to Article III appellate courts. An initial review would suggest that it does. The powers of the CAVC are defined in 38 United States Code Section 7261, and the standards used in the statute are generally familiar to the American legal tradition. Accordingly, the remedies available to the CAVC are typical of appellate courts. The CAVC is also a normal appellate court in that the issues presented to it can be divided roughly into questions of law, questions of fact, and review of exercises of discretion.

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<sup>127</sup> 332 U.S. 194 (1947).

<sup>128</sup> *Id.* at 196.

<sup>129</sup> 5 U.S.C. Subchapter II (2000).

<sup>130</sup> *Id.* § 706.

<sup>131</sup> *Chenery*, 332 U.S. at 207-09.

<sup>132</sup> The Federal Circuit’s treatment of *Chenery* has been inconsistent. Compare *Miechick v. Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (holding that the CAVC must make a determination of whether a notice error was prejudicial even where the BVA made no relevant findings of fact) with *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1363 (Fed. Cir. 2001) (holding that it is not the role of the CAVC to affirm BVA decisions by making factual determinations in the first instance).

## 1. Questions of Law

The Court reviews questions of law de novo,<sup>133</sup> with deference to the Secretary on matters of statutory<sup>134</sup> and regulatory<sup>135</sup> interpretation. Arguably, the CAVC leans toward less deference than might be accorded under *Chevron* and *Martin*. In recent years, the Federal Circuit, which has limited jurisdiction to review the CAVC's interpretations of law,<sup>136</sup> has held in two high profile cases that the CAVC failed to give enough deference to the Secretary's interpretation of controlling authority.<sup>137</sup> However, it is not clear that this makes the CAVC unique or even unusual. The District of Columbia Circuit, which also has a docket geared heavily towards administrative law issues, has also been accused of pushing the limits of *Chevron* in reversing executive interpretations of controlling law.<sup>138</sup> Either way, these cases certainly refute the argument that the CAVC has been overly hesitant to reverse on legal questions.<sup>139</sup>

## 2. Questions of Fact

Although the CAVC's standard of review for issues of law is well connected to controlling Supreme Court precedent, its review of factual questions has a more complicated history. The CAVC generally reviews BVA

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<sup>133</sup> *Colvin v. Derwinski*, 1 Vet. App. 171, 174 (1991).

<sup>134</sup> *Trilles v. West*, 13 Vet. App. 314, 324 (2000) (en banc) (recognizing the requirements of *Chevron*, *U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

<sup>135</sup> *Carpenter v. Brown*, 8 Vet. App. 240, 245 (1995) (recognizing the requirements of *Martin*, 499 U.S. at 150-51).

<sup>136</sup> 38 U.S.C. § 7292 (2000).

<sup>137</sup> See *Haas v. Nicholson*, 20 Vet. App. 257 (2006), *rev'd sub. nom.* *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) (addressing whether sailors who never set foot in Vietnam are presumed to have been exposed to Agent Orange); *Smith v. Nicholson*, 19 Vet. App. 63 (2005), *rev'd* 451 F.3d 1344 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 1147 (2007) (addressing how to rate bilateral tinnitus).

<sup>138</sup> John F. Belcaster, *The D.C. Circuit's Use of the Chevron Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, 44 ADMIN. L. REV. 745 (1992).

<sup>139</sup> There is theoretical support for the expectation that the CAVC would be highly deferential to the Secretary. One of the two major views of Article I courts — the redeterminist view — maintains that they exist primarily to “serve as neutral fact-finders.” David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101, 108-09 (2005). The other view, the institutional discipline model, maintains that Article I courts exercise broad authority equivalent to those of an Article III court so long as their jurisdiction is properly invoked. See *id.* at 112-15. Cases such as *Haas* and *Smith* strongly suggest that the CAVC leans toward the latter view. See note 137, *supra* and accompanying text.

fact finding for “clear error.”<sup>140</sup> Congress’ choice of this standard allocates primary decision-making authority of questions of fact to the BVA.<sup>141</sup>

In its early days, the CAVC looked to Supreme Court decisions in *United States v. U.S. Gypsum Company*<sup>142</sup> and *Anderson v. City of Bessemer City*<sup>143</sup> to define the meaning of clear error.<sup>144</sup> These cases are frequently recognized as the leading precedents on the standard.<sup>145</sup> Nonetheless, the CAVC has struggled with when to reverse the BVA on factual issues.

In one of the CAVC’s earliest cases, *Hersey v. Derwinski*,<sup>146</sup> the court was presented with a situation in which the Secretary conceded that the BVA failed to address a number of relevant pieces of evidence and moved to remand the matter.<sup>147</sup> However, the CAVC reversed the decision instead. After discussing how the BVA misused the evidence that the BVA did discuss, the court cited six pieces of favorable evidence that the BVA did not discuss, and held that the denial of benefits was “clearly erroneous in light of the uncontroverted evidence in appellant’s favor.”<sup>148</sup>

Although *Hersey* was unremarkable on its face, its treatment in *Hicks v. Brown*<sup>149</sup> was problematic. In *Hicks*, the CAVC vacated the BVA decision and remanded the matter, rather than reversing as the appellant had requested. Specifically, the court refused to reverse because the BVA had not made a finding on a specific issue in which there was evidence both for and against the claim.<sup>150</sup> *Hicks* cited to the “uncontroverted evidence” language from *Hersey* as well as a number of other decisions of the court to declare that it could not reverse in the face of contested evidence.<sup>151</sup> Subsequently, *Hicks* was frequently cited for that proposition.

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<sup>140</sup> 38 U.S.C. § 7261(a)(4).

<sup>141</sup> See Sward, *supra* note 66, at 4-5 (discussing the implications of different standards of review).

<sup>142</sup> 333 U.S. 364 (1948).

<sup>143</sup> 470 U.S. 564 (1985).

<sup>144</sup> *Gilbert*, 1 Vet. App. at 52.

<sup>145</sup> See MEADOR ET AL., *supra* note 124, at 238-44; Sward, *supra* note 66, at 2 n.4.

<sup>146</sup> 2 Vet. App. 91 (1992).

<sup>147</sup> *Id.* at 93-95.

<sup>148</sup> *Id.* at 95.

<sup>149</sup> 8 Vet. App. 417 (1995).

<sup>150</sup> *Id.* at 422.

<sup>151</sup> *Id.*

A decade later, in *Padgett v. Nicholson*,<sup>152</sup> the court finally retreated from the apparent conflict between *Hicks* and the Supreme Court precedent cited in *Gilbert*. The en banc opinion in *Padgett* explicitly overruled the assertion that evidence needed to be uncontroverted in order for reversal to be appropriate. Judge Ivers, the author of *Hicks*, observed in his separate statement in *Padgett* that “*Hersey* and *Hicks* were thereafter followed in a number of opinions requiring that the evidence in favor of the appellant be uncontroverted for reversal, an unanticipated result.”<sup>153</sup> Accordingly, *Padgett* reanchored the CAVC’s reversal standard in the leading Supreme Court interpretations.

Nevertheless, the *Padgett* opinion addressed only the standard for reversing explicit findings of fact. A closer look at *Hicks* demonstrates that part of the reason that it was misapplied before *Padgett* was that it was dealing with a different problem. The specific problem in *Hicks* was not that the BVA’s finding was wrong as it was in *Hersey*, but that the crucial finding was never made at all.<sup>154</sup> It is relatively easy to apply the clear error standard to explicit factual findings. It is much less clear how a nonexistent factual finding is reviewed for clear error. In fact, *Hicks* itself parenthetically indicated that the lack of a BVA finding on a relevant issue “frustrates effective judicial review.”<sup>155</sup> Therefore, even though *Hicks* extensively discussed the standard of review, it may actually be interpreted as a holding that no review is even possible before the BVA first weighs the evidence.<sup>156</sup> When the BVA has not addressed a necessary factual issue for some reason, it may not be unreasonable to hold that the evidence must be

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<sup>152</sup> 19 Vet. App. 133 (2005) (en banc). Although the full Court’s opinion in *Padgett* was later withdrawn by the Court because the appellant had died, see *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (en banc order), that decision was subsequently reversed by the Federal Circuit, see *Padgett v. Nicholson*, 473 F.3d 1364 (Fed. Cir. 2007). On remand from the Federal Circuit, the Court reissued the 2005 full Court opinion *nunc pro tunc* to a date before the appellant’s death. See *Padgett v. Peake*, 22 Vet. App. 159 (2008).

<sup>153</sup> *Padgett*, 19 Vet. App. at 156 (Ivers, J., dissenting).

<sup>154</sup> *Hicks*, 8 Vet. App. at 422.

<sup>155</sup> *Id.* (citing *Gilbert*, 1 Vet. App. at 57).

<sup>156</sup> This is supported by the additional citations in *Hicks* to *Fla. Power & Light Co.*, 470 U.S. at 744, and *Occidental Petroleum Corp.*, 873 F.2d at 347, for their discussions of when agency actions simply cannot be evaluated.

uncontroverted before the CAVC will reverse without an initial fact finding by the BVA.<sup>157</sup> The CAVC was not confronted with the second scenario in *Padgett* and, therefore, did not address what standard should be applied in the absence of any findings of fact to review. Where the court might ultimately end up remains uncertain.

In this regard, the CAVC is not unique in facing this problem. The absence of appropriate fact finding is also a problem for Article III appellate courts. For example, in *Schenck v. Pro-Choice Network*,<sup>158</sup> the Supreme Court concluded that the district court had granted an injunction using an incorrect standard under the First Amendment. Nonetheless, the Supreme Court affirmed after concluding that an injunction would be proper under the correct standard.<sup>159</sup> This provoked a dissent from Justice Scalia, who argued that once it was determined that an improper standard had been used, the injunction had to be vacated and the matter remanded so that the district judge could make initial findings of fact appropriate to the proper standard.<sup>160</sup>

The Supreme Court has not only affirmed in the absence of relevant fact finding, it has also reversed. Very recently, in *Snyder v.*

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<sup>157</sup> The CAVC is prohibited by 38 U.S.C. § 7261(a)(3) (2000) from making factual findings in the first instance. See *Sanchez-Benitez*, 259 F.3d at 1363 (holding that it “is not the role of the Veterans Court to make such factual determinations *sua sponte*”). However, if the evidence is both sufficient and uncontradicted, it can be argued that reversal of the BVA decision by the Court does not amount to fact finding, in the same manner that a grant of a judgment as a matter of law by an appellate court that contradicts a jury verdict may not violate the Seventh Amendment. See *Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (affirming the appellate court’s authority to enter a final decision in favor of the party that lost the jury verdict); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 331 (1967). However, the scope and propriety of this exception is quite contentious. See Debra Lyn Bassett, “*I Lost at Trial — In the Court of Appeals!*”: *The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129 (2001); Margret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000); Robert A. Ragazzo, *The Power of a Federal Appellate Court to Direct Entry of Judgment as a Matter of Law: Reflections on Weisgram v. Marley Co.*, 3 J. APP. PRAC. & PROCESS 107 (2001); Eric Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237 (1989); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005).

<sup>158</sup> 519 U.S. 357 (1997).

<sup>159</sup> *Id.* at 376-84.

<sup>160</sup> *Id.* at 394-95 (Scalia, J., dissenting).

*Louisiana*,<sup>161</sup> the Supreme Court was faced with a similar situation when it reviewed a prosecutor's preemptory strikes of jurors in a criminal case. The prosecutor provided two reasons for striking a potential African-American juror, one of which the Supreme Court determined was invalid.<sup>162</sup> However, the trial judge had ruled on the *Batson* challenge generally without addressing whether the alternative, valid explanation was credible.<sup>163</sup> In the absence of explicit fact-finding in support of the valid explanation, the Supreme Court reversed the conviction because it could not tell whether that was the actual basis for the trial judge's denial of the motion.<sup>164</sup>

Similar to *Schenck*, there was a dissent decrying the Supreme Court's lack of deference to the district court's role as fact finder. "[W]hen the grounds for a trial court's decision are ambiguous, an appellate court should not presume that the lower court based its decision on an improper ground, particularly when applying a deferential standard of review."<sup>165</sup> In the view of the dissent, the clear error standard could not be satisfied by presuming an improper basis when a proper basis was also supported by the record.<sup>166</sup>

Together, *Schenck* and *Snyder* and the cases cited by the dissenting opinions demonstrate that Article III courts also struggle when there is a lack of fact finding either because the initial decision maker applied an incorrect legal standard or because the ruling was too general to determine the reasoning applied to a specific issue. The outcomes in *Schenck* and *Snyder* may be attributable to the lesser deference paid to factual findings in deciding constitutional questions.<sup>167</sup> Nonetheless, a comparison of the

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<sup>161</sup> 128 S. Ct. 1203 (2008).

<sup>162</sup> *Id.* at 1209-12.

<sup>163</sup> *Id.* at 1209.

<sup>164</sup> *Id.* at 1212.

<sup>165</sup> *Id.* at 1213 (Thomas, J., dissenting) (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1145 (2008), which held that "[a]n appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading, particularly when the applicable standard of review is deferential.").

<sup>166</sup> *Id.* at 1214 (Thomas, J., dissenting).

<sup>167</sup> See *Sward*, *supra* note 66, at 34-38 (suggesting that the desire to vindicate constitutional rights may cause appellate courts to ignore traditional deference to lower tribunal fact finding).

majority and dissenting opinions in the two cases clearly demonstrate that the CAVC is hardly alone in wrestling with the issue.

### **3. The Rule of Prejudicial Error**

The final aspect of CAVC review that must be examined to appreciate the results in the cases it reviews is its application of the rule of prejudicial error. By statute, the CAVC is required to “take due account of the rule of prejudicial error.”<sup>168</sup> Although this is not controversial in the abstract, the requirement has recently raised numerous issues in practice.

In its early history, the CAVC held that a remand was not appropriate when “blind adherence” to the law “in the face of overwhelming evidence” would “unnecessarily impos[e] additional burdens on the BVA . . . with no benefit flowing to the veteran.”<sup>169</sup> However, the passage of the VCAA put the CAVC’s prejudicial-error jurisprudence on a collision course with one of the fundamental aspects of veterans law. The CAVC’s initial reaction to VCAA notice errors was to hold that “it is not for the Secretary or this Court to predict what evidentiary development may or may not result from such notice.”<sup>170</sup> The Federal Circuit held that this position violated the CAVC’s statutory mandate.<sup>171</sup> In response, the CAVC concluded in a subsequent case that adequate notice had been provided, even though the BVA’s notice finding had been erroneous.<sup>172</sup> The Federal Circuit reversed the CAVC again, holding that the CAVC could not determine in the first instance whether a notice document was compliant in order to assess prejudice.<sup>173</sup> The CAVC responded by concluding that some notice errors were presumptively prejudicial while others were not.<sup>174</sup> The Federal Circuit disagreed again in *Sanders v. Nicholson*,<sup>175</sup> and held that all VCAA notice errors were prejudicial.<sup>176</sup> Finally, after the CAVC remanded a case for the BVA to make notice findings in the first instance, the Federal

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<sup>168</sup> 38 U.S.C. § 7261(b)(2) (2000).

<sup>169</sup> *Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991).

<sup>170</sup> *Huston v. Principi*, 17 Vet. App. 195, 203 (2003).

<sup>171</sup> *Conway v. Principi*, 353 F.3d 1369, 1374-75 (2004).

<sup>172</sup> *Mayfield v. Nicholson*, 19 Vet. App. 103, 123-27 (2005).

<sup>173</sup> *Mayfield*, 444 F.3d at 1335-37.

<sup>174</sup> *Overton*, 20 Vet. App. at 435-37.

<sup>175</sup> 487 F.3d 881 (2007).

<sup>176</sup> *Id.* at 889.



Circuit reversed yet again and held that, even though the CAVC could not determine the adequacy of notice in the first instance, it must still determine if the documents in the record were sufficient to give the claimant enough information to overcome the presumption of prejudice.<sup>177</sup>

A complete analysis of the saga of VCAA notice and the rule of prejudicial error is beyond the scope of this article.<sup>178</sup> In fact, the saga is not yet complete because the Supreme Court has recently granted certiorari to review the Federal Circuit's presumption of prejudicial error in *Sanders*.<sup>179</sup> Regardless of the ultimate outcome, this issue demonstrates the difficulty of determining prejudice as to procedural errors that affect the evidence-gathering process in a nonadversarial system. Although the adversarial system usually requires a proffer as to the nature of evidence being excluded,<sup>180</sup> veterans benefits claimants simply cannot be held to that standard. As a result, assessing prejudice is often a much more speculative problem for the CAVC than it is for Article III appellate courts in general.

### III. STATISTICS ON VETERANS BENEFITS CLAIMS AND THE CAVC

The above analysis sets the stage for comparing the CAVC to other appellate courts. To truly appreciate the role of the CAVC, one must look both at the system it reviews as well as its body of cases. Unfortunately, the available information is limited in both respects. Nonetheless, it is possible to gather sufficient data to develop a reasonable understanding. However, one fundamental semantic issue remains that must be addressed first.

#### *A. Claims Versus Decisions*

A significant difficulty in understanding statistics on veterans law and outcomes in cases decided by the CAVC is that there are two

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<sup>177</sup> *Mlechick*, 503 F.3d at 1345. The precise distinction between a *Chenery* violation and a finding that an error was not prejudicial has yet to be explored by the CAVC or the Federal Circuit.

<sup>178</sup> For a more detailed discussion, see C. Robert Luthman, Note, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 FED. CIRCUIT B.J. 509 (2007).

<sup>179</sup> *Peake v. Sanders*, 76 U.S.L.W. 3529 (June 16, 2008) (No. 07-1209).

<sup>180</sup> See 4 C.J.S. *Appeal and Error* § 292, at 275-76 (2007).

major terms that are used inconsistently within the veterans law system and in a manner different from other areas of law. These are “claim” and “decision.” Outside of veterans law, a claim usually refers to one cause of action.<sup>181</sup> However, VA statistics treat an application for benefits as a single “claim,” regardless of how many unrelated benefits are sought.<sup>182</sup> Each individual benefit sought — including each individually claimed disability — is referred to as an “issue.”<sup>183</sup> The difference is not trivial. It is quite common for a “claim” to have multiple “issues.” In fiscal year 2006, 22% of disability claims — which represent the bulk of benefits claims<sup>184</sup> — had at least eight “issues.”<sup>185</sup> Therefore, the number of different benefits sought is at least double and probably more than triple the number of “claims” VA reports receiving each year. Furthermore, if “issues” within a single “claim” need different types of development, then the RO will issue separate decisions as each “issue” or group of “issues” becomes ready.<sup>186</sup> The fiscal year 2006 numbers represent the latest peak in a trend of increasing “issues” per application.<sup>187</sup> Therefore, both the number of “claims” reported by VA and the number of RO decisions issued each year dramatically under-report the number of different causes of action requiring adjudication.<sup>188</sup>

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<sup>181</sup> BLACK’S LAW DICTIONARY 240 (7th ed. 1999) (defining a “claim” as “[t]he aggregate of operative facts giving rise to a right enforceable by a court”).

<sup>182</sup> Benefits available to veterans include compensation for disabilities caused by service, pensions for other disabilities, health care services, home loan guarantees, vocational rehabilitation assistance, life insurance programs, educational benefits, and burial benefits. See generally STICHMAN & ABRAMS, *supra* note 31, at chs. 3, 6, 10, 11. Benefits for family members include compensation for service-related deaths and dependent’s educational benefits. *Id.* at chs. 4, 7.

<sup>183</sup> INSTITUTE OF MEDICINE, *supra* note 11, at 169.

<sup>184</sup> *Id.* (indicating in fiscal year 2006, 654,000 of the 806,000 claims received by VA were claims for compensation).

<sup>185</sup> *Id.*

<sup>186</sup> See VA ADJUDICATION PROCEDURE MANUAL M21-1 PART. III, ¶ 2.01(h)(1)(b) (“Identifying Partial Grants”); VA ADJUDICATION PROCEDURE MANUAL REWRITE, PART III, SUBPART IV, CH. 6, § A (“Partial and Deferred Rating Decisions”).

<sup>187</sup> See INSTITUTE OF MEDICINE, *supra* note 11, at 169.

<sup>188</sup> See *id.* There is no indication that this is intentional. Rather, it seems more likely that the bookkeeping system was reasonable when it was adopted and that the significant increase in claims per application was simply unanticipated.

<sup>189</sup> See, e.g., 38 U.S.C. §§ 5100, 5101, 5102 (2000).

This usage in VA statistics is inconsistent with the usage of the term in Title 38<sup>189</sup> and VA adjudication regulations,<sup>190</sup> which treat “claims” on a benefit-by-benefit basis rather than an application basis. It is also inconsistent with the usage by the CAVC, which likewise treats each disabling condition sought as a separate claim.<sup>191</sup> For consistency, this article will generally use the word “claim” to refer to the seeking of one specific benefit. Any different usage will be in quotation marks.

The veterans benefits adjudication system also uses “decision” in a different manner than do other areas of law. In courts of general jurisdiction, unrelated matters are rarely heard together.<sup>192</sup> Therefore, a “decision” by a court will ordinarily revolve around a single set of operative facts even though multiple theories may be involved. In contrast, RO and BVA “decisions” routinely — if not usually — contain determinations on multiple claims for benefits that may have little or nothing to do with one another. Similarly, a significant proportion of the decisions by the CAVC involve multiple claims.<sup>193</sup> Accordingly, every available number about VA claims adjudication fails to reflect the actual burden on the system. Moreover, the distortion has been growing steadily worse as the number of claims per application has risen.<sup>194</sup>

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<sup>190</sup> 38 C.F.R. § 3.160(c) (2007).

<sup>191</sup> See *Boggs v. Peake*, 520 F.3d 1330, 1335-37 (Fed. Cir. 2008) (holding that each different diagnosis for the same symptoms is a different claim); *Schroeder v. West*, 212 F.3d 1265, 1269 (Fed. Cir. 2000) (noting that a claim is defined as an application for benefits for a specific current disability); *Roebuck v. Nicholson*, 20 Vet. App. 307, 313-16 (2006) (holding that separate adjudications of different theories of entitlement for the same disability were part of the same claim).

<sup>192</sup> In criminal law, unrelated matters may not be joined in a single indictment. FED. R. CIV. P. 8(a); see generally James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMPORARY PROBLEMS 325 (1989). In civil law, unrelated cases may be joined permissively. FED. R. CIV. P. 18(a). However, they will ordinarily be separated for trial to avoid confusion and prejudice. FED. R. CIV. P. 42(b).

<sup>193</sup> See note 232 *infra*, and accompanying text.

<sup>194</sup> See *Performance and Structure of the United States Court of Appeals for Veterans Claims: Hearing Before the Senate Comm. on Veterans' Affairs*, 110th Cong. (2007) (statement of R. Randall Campbell, Assistant General Counsel, Professional Staff Group VII, Department of Veterans Affairs) (“Empirics, however, do not tell the entire story. From our perspective, cases tend to involve much larger records these days and issues that are more numerous and complex. Even a case with just a few simple issues takes more time to process, when, as is increasingly common, the record on appeal may constitute thousands and thousands of pages.”), <http://veterans.senate.gov/public/documents/Campbell%20-%20Nov%207%2007.pdf>.

## ***B. The Volume of Adjudications in the Veterans Benefits System***

Despite their limitations, the available numbers provide a good deal of perspective on the system. As mentioned above, in fiscal year 2006, VA received 806,000 “claims,” of which 654,000 were “claims” for compensation. At the RO level, 39% of claims are denied.<sup>195</sup> However, if a claim is granted, the veteran may still be dissatisfied with the disability rating or the effective date assigned. Of the 61% of claims that are granted, VA does not report how many are granted in full.<sup>196</sup> Accordingly, it is unclear how many “claims” and “decisions” are potentially appealable.

In the VA system, claims are appealed by filing a Notice of Disagreement [hereinafter NOD].<sup>197</sup> In fiscal year 2006, 101,240 NODs were filed,<sup>198</sup> approximately one for every twelve “claims” filed. Once again, it is unclear how many individual claims are represented by these NODs, but not all of these NODs result in BVA decisions. There are a number of reasons why an NOD may not lead to a BVA decision. First, the record generally remains open after an NOD is filed, and, each time new evidence is submitted, the claim must be readjudicated at the RO level.<sup>199</sup> Second, even if no new evidence is submitted, an NOD will often result in a review by a DRO, who may decide to render a more favorable decision.<sup>200</sup> Third, if the claim remains denied, the appellant is provided with a Statement of the Case<sup>201</sup> and must respond by filing a Substantive

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<sup>195</sup> James P. Terry, Chairman of the Bd. of Veterans’ Appeals, Remarks at the Federal Circuit Judicial Conference (May 15, 2008).

<sup>196</sup> This number may be impossible to determine. Even if the claimant were to be given the highest rating under the diagnostic code assigned and an effective date of the date that the application were filed, there are still theories that may be asserted seeking a higher rating or an earlier effective date. A more obtainable number would be the percentage of granted claims that are appealed, but even that number is not available.

<sup>197</sup> 38 U.S.C. § 7105(a) (2000); *Jarvis v. West*, 12 Vet. App. 559, 561 (1999); *Rowell v. Principi*, 4 Vet. App. 9, 14-15 (1993).

<sup>198</sup> BVA CHAIRMAN’S REPORT FOR FY 2006, *supra* note 11, at 18.

<sup>199</sup> *Disabled Am. Veterans*, 327 F.3d at 1346 (holding that the initial review of evidence by the BVA violates its statutory role as an appellate tribunal); *accord* 38 C.F.R. § 19.31(b) (1) (2007).

<sup>200</sup> 38 C.F.R. § 3.2600.

<sup>201</sup> 38 U.S.C. § 7105(d)(1).

Appeal setting forth specific allegations of error for the BVA to consider.<sup>202</sup> If an adequate and timely Substantive Appeal is not filed, then no BVA decision will issue.<sup>203</sup> Therefore, there are a variety of reasons why an NOD might not lead to a BVA decision, but there is no information on the frequency of each cause.

Regardless of the reason, it seems that fewer than half of NODs result in BVA decisions. In fiscal year 2006, the BVA issued 39,076 decisions, over 95% of which involved claims for compensation.<sup>204</sup> This represents a little over one BVA decision for every twenty “claims” filed. Although the BVA Chairman’s report indicates that 32% of decisions resulted in remands and 46% of decisions were denials,<sup>205</sup> it does not explain how the statistics account for mixed outcomes in the frequent decisions in which multiple claims were addressed. One representative of a major veterans organization testified before Congress that decisions listed in BVA statistics as grants include decisions in which some claims are not granted or not granted in full.<sup>206</sup> Accordingly, the statistics provided by the BVA do not grant a clear picture as to either how many decisions or how many individual claims might be appealable to the CAVC.

In contrast, there is substantial information available about proceedings in Article III courts. For example, in fiscal year 2007 there were 257,507 new civil cases<sup>207</sup> and 68,413 new criminal cases<sup>208</sup> commenced in federal district courts. These are fewer than half the

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<sup>202</sup> *Id.* § 7105(d)(3); *Roy v. Brown*, 5 Vet. App. 554, 555 (1993); 38 C.F.R. § 20.201. The BVA is obligated to address not only the issues raised in the Substantive Appeal, but also all issues reasonably raised by the record. *See* Part I.B.4, *supra*. This raises the question of why a claimant should be obligated to articulate one issue before triggering the BVA’s duty to search the record for other issues.

<sup>203</sup> 38 U.S.C. § 7105(d)(3),(5); 38 C.F.R. §§ 20.302, 20.303, *Gibson v. Peake*, 22 Vet. App. 11, 17 (2007).

<sup>204</sup> BVA CHAIRMAN’S REPORT FOR FY 2006, *supra* note 11, at 19.

<sup>205</sup> *Id.*

<sup>206</sup> *Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans’ Claims: Hearing Before the Senate Comm. on Veterans’ Affairs*, 109th Cong. (2006) (statement of Joseph A. Violante, National Legislative Director of the Disabled American Veterans), available at [http://www.senate.gov/~svac/public/index.cfm?pageid=16&release\\_id=10616&sub\\_release\\_id=11026&view=all](http://www.senate.gov/~svac/public/index.cfm?pageid=16&release_id=10616&sub_release_id=11026&view=all).

<sup>207</sup> U.S. COURTS 2007 REPORT, *supra* note 87, at 139 tbl. C.

<sup>208</sup> *Id.* at 208 tbl. D.

number of applications for benefits filed each year. Moreover, because applications often contain numerous claims, it is probable that VA's 57 ROs<sup>209</sup> process five or six times more causes of action than all the federal district courts combined.<sup>210</sup> The federal district courts can also be compared to the BVA, as both are generally the last step before appellate review. Federal district court judges handle fewer than 500 cases per judge, while VLJs handle more than 700 each.<sup>211</sup> This comparison actually understates the disparity in workload, given the number of BVA decisions that handle multiple claims, the VLJ's duty to act as an advocate rather than merely a passive referee, and the overwhelming tendency of cases in federal courts to terminate prior to trial.

In fiscal year 2007, there were also 58,410 appeals filed in the circuit courts of appeals.<sup>212</sup> Hence, approximately 17% of district court cases resulted in appeals, which means appeals in the Article III system are more likely than in veterans benefits claims. As with the BVA, not all appeals in the Article III system result in decisions on the merits. In fiscal year 2007, the Article III appellate courts of general jurisdiction issued 31,717 merits dispositions, and there were 167 authorized judgeships on those courts.<sup>213</sup> Therefore, the judges of the appeals court decide fewer than 200 cases, on average, per judge compared to over 700 cases per VLJ on the BVA.<sup>214</sup> Accordingly, regardless of which comparison is made, it is clear that the veterans claims adjudication system is extremely busy.

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<sup>209</sup> The precise number of adjudicators at the RO level is difficult to determine. VA has approximately 13,000 employees in the Veterans Benefits Administration. INSTITUTE OF MEDICINE, *supra* note 11, at 140, available at [http://books.nap.edu/openbook.php?chapsel ect=yo&page=140&record\\_id=11885](http://books.nap.edu/openbook.php?chapsel ect=yo&page=140&record_id=11885). Approximately half of those employees were directly involved in adjudications in some manner. *Id.*

<sup>210</sup> In fiscal year 2007, there were 678 authorized federal district court judgeships. U.S. COURTS 2007 REPORT, *supra* note 87, at 22 tbl. 3.

<sup>211</sup> See note 95, *supra* and accompanying text. Administrative law judges in the Social Security system are expected to handle between 400 and 500 case each year. Stephen Barr, *Federal Diary*, WASHINGTON POST, Feb. 29, 2008, at D4 (attributing this statistic to Social Security Commissioner Michael J. Astrue), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/28/AR2008022803625.html>.

<sup>212</sup> U.S. COURTS 2007 REPORT, *supra* note 87, at 85 tbl. B.

<sup>213</sup> *Id.* at 19 tbl. 1, 46 tbl. S-1.

<sup>214</sup> This comparison is somewhat inapt because of the differences in the types of review and because of the number of authorized judgeships is both over and under inclusive. See note 219, *infra*.

### C. Statistics on the CAVC

This busy system is overseen by the CAVC. Like the BVA, the CAVC reports its statistics in terms of decisions rather than claims.<sup>215</sup> In fiscal year [hereinafter FY or fiscal year] 2007, the CAVC disposed of 4,877 cases, of which 3,211 were resolved on the merits.<sup>216</sup> The number of merits decisions has increased steadily in the last several years.<sup>217</sup> Accordingly, the percentage of BVA decisions that result in a merits determination by the CAVC has risen from fewer than 5% to closer to 10%,<sup>218</sup> while the court's output has reached 459 merits dispositions per judge.<sup>219</sup> Nonetheless, the number of merits decisions by the CAVC is less than one half of one percent of the number of "claims" filed each year.

Despite the hotly contested nature of the issue, the CAVC does not distinguish between remands and reversals in reporting its statistics.<sup>220</sup> Unlike other appellate courts,<sup>221</sup> there has never been a comprehensive, empirical review of the decisions of the CAVC. Nonetheless, some

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<sup>215</sup> CAVC ANNUAL REPORTS, *supra* note 102.

<sup>216</sup> *Id.*

<sup>217</sup> In the three fiscal years previous, the number of cases decided increased from 1,780 to 1,905 and then to 2,842. *Id.* The number of decisions has tracked the number of new cases filed. *Id.*

<sup>218</sup> Although it is true that most CAVC decisions are not issued in the same fiscal year as the BVA decision on review, the number of BVA decisions issued each year is stable enough for this to be a reasonable comparison.

<sup>219</sup> This is over two and a half times the number of merits decisions per judge compared to Article III appellate courts. See notes 213-14, *supra* and accompanying text. However, this calculation somewhat overstates the workload of CAVC judges because a significant portion of cases are resolved by agreement of the parties. See notes 226-31, *infra* and accompanying text. It is also not clear how many authorized judgeships are filled or how to properly quantify the contributions to Article III courts made by senior judges and district court judges sitting by designation or the contribution to the CAVC made by retired judges serving periods of recall.

<sup>220</sup> This is consistent with the practice of the Administrative Office of the Federal Courts, which also does not track such numbers for Article III appellate courts even though it releases hundreds of pages of statistics each year. See e.g., U.S. COURTS 2007 REPORT, *supra* note 87.

<sup>221</sup> See Part IV.A, *infra*.

reasonable back-of-the-envelope numbers can be obtained.<sup>222</sup> The CAVC reports its opinions and decisions<sup>223</sup> on the merits (not including decisions on petitions for extraordinary relief) in four broad categories: “affirmed,” “vacated,” “reversed/vacated & remanded,” and “affirmed or dismissed in part, reversed/vacated and remanded in part.”<sup>224</sup> The Court’s statistics contain no official explanation of these categories. In particular, there is no explanation of the difference between “remanded” and “reversed/vacated and remanded.” Accordingly, the terms are easy to misinterpret.<sup>225</sup> “Remands” are cases in which the parties agreed to that remedy through a joint motion granted by the court.<sup>266</sup> The cases in this category do not reflect decision making by the court. The categories “reversed/vacated and remanded” and “affirmed or dismissed in part, reversed/vacated and remanded in part” also include some remedies granted by joint motion of the parties.<sup>227</sup> It is difficult to determine how many joint motions fall

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<sup>222</sup> The CAVC maintains a database of all cases reported to Westlaw and LEXIS, which court personnel and the public can search using similar boolean tools. This database was used to obtain the figures analyzed in this article. The numbers produced might vary somewhat from those obtained through other methods. However, it is very unlikely that any difference would be significant enough to affect the conclusions reached here, as the database is essentially duplicative of the popular commercial databases. The system is available to the public at [http://www.vetapp.uscourts.gov/research\\_court\\_cases/DecisionsOpinions.cfm](http://www.vetapp.uscourts.gov/research_court_cases/DecisionsOpinions.cfm).

<sup>223</sup> In the parlance of the CAVC, panels issue “opinions,” and single judges issue “decisions.” For consistency and clarity, this terminology will be used when discussing other courts as well.

<sup>224</sup> See note 222, *supra* and accompanying text.

<sup>225</sup> For example, one recent commentator apparently interpreted “reversed/vacated & remanded” as cases that reversed the BVA in some form and “remanded” as cases that remanded the matter without any reversal. See Michael P. Allen, *The United States Court of Appeals for Veterans Claims Significant Developments (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 495-96 (2007). Despite this misunderstanding, more accurate numbers present an even more extreme situation than that considered in the article, and do not undermine his analysis.

<sup>226</sup> Interview with Norman Herring, Clerk of the CAVC, in Washington, D.C. (May 28, 2008). The Court’s statistics list no cases in this category prior to 2001. In that year, 1,724 cases were remanded. CAVC ANNUAL REPORTS, *supra* note 102.

<sup>227</sup> Interview with Norman Herring, *supra* note 226.



into these categories.<sup>228</sup> However, this suggests that the affirmance rate in cases decided by a judge is actually somewhat higher than the preliminary analysis suggests.

Decisions “remanded” by the CAVC have important implications for this analysis because the volume of cases resolved by joint motion of the parties to remand is not remotely trivial. At least one-third of BVA decisions appealed to the CAVC in fiscal year 2007 that were not dismissed on procedural grounds (1,079 of 3,143) were remanded by agreement of the Secretary. Nor was fiscal year 2007 unique. In fiscal year 2006, remands constituted at least 40% (847 of 2079),<sup>229</sup> and in fiscal year 2005, there were at least 53% (641 of 1210).<sup>230</sup> Much attention is paid to how supposedly rarely the CAVC reverses BVA decisions, but very little attention is given to how frequently appellants and the Secretary agree to resolve an appeal by joint motion to remand.<sup>231</sup> However, it is inescapable that the CAVC’s overall remand rate is heavily affected such agreements.

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<sup>228</sup> If no joint motions fell in these categories, then 2,064 cases were decided by a single judge or panel fiscal year 2007. *See* note 232, *infra* and accompanying text. A rate of 295 merits decisions per judge would be 55% higher than the circuit courts of appeals. *See* note 214, *supra* and accompanying text. However, an electronic database search of the CAVC’s decisions from fiscal year 2007 yields 1,631 cases once “dismissed” and “petitioner” are excluded. Compared to the remaining 2,064 cases, this indicates that as many as 20% of the outcomes in these two categories were reached by agreement. However, those terms almost certainly exclude too many cases, so the likely result is fewer. The numbers for fiscal year 2006 are similar (961 decisions versus 1,232 cases in the remaining three categories). Even if the results did not improperly exclude any cases, that would still equal 233 decisions per judge on the CAVC — about 23% more decisions per judge than the circuit courts of appeals. In any event, ignoring such joint motions does not affect the general conclusions reached by the article.

<sup>229</sup> CAVC ANNUAL REPORTS, *supra* note 102.

<sup>230</sup> *Id.*

<sup>231</sup> The leading practice guide for veterans law acknowledged that “a large percentage of the appeals filed with the CAVC are ultimately resolved” by agreement. STICHMAN & ABRAMS, *supra* note 31, §15.7, 1210. The most likely explanation of this phenomenon is that most appeals to the CAVC involve newly hired attorneys. *See* Parts I.C.3 & II.A, *supra*. Unless the record supports a good argument for reversal despite the numerous levels of VA review, *see* Part I.B.3, *supra*, it is usually in the claimant’s best interest to secure a remand to reopen the record by raising some theory or piece of evidence that was not fully addressed by the BVA decision. As the Secretary cannot defend against such assertions of error by presenting post hoc rationalizations, *see* note 121, *supra*, he is likely to agree to a remand for additional reasons or bases if such an error is raised. On remand, the attorney can take advantage of the reopened record to present a stronger case for granting the claim(s).

Eliminating the “remands” leaves approximately 2,064 decisions by a single judge or panel (approximately 295 per judge), divided among 1,098 BVA decisions that were affirmed, 524 that were “reversed/vacated and remanded,” and 442 that had mixed outcomes. Accordingly, the court affirmed 53% of BVA decisions, reversed or vacated 25%, and issued a mixed outcome in the remaining cases when reviewing them on the merits.<sup>232</sup> Of course, this is only one way to look at the numbers. Including agreed remands, the CAVC fully affirmed fewer than 35% of BVA decisions properly before the court. Therefore, there is support for the perception that the court has a low affirmance rate and a high rate of remands or reversals. Before trying to distinguish between remands and reversals, one must consider how CAVC cases are decided.

One statistic that is not kept by the CAVC is how many cases are resolved by panel opinions versus single-judge memorandum decisions. The CAVC is unique in its authority to decide cases on appeal in either manner.<sup>233</sup> In one of its very first decisions, the court announced that single-judge decisions would be used only for cases that did not present novel questions of law or application of law to fact.<sup>234</sup> Therefore, the court’s panel decisions serve its role as a law giver while the single-judge decisions correct errors.<sup>235</sup> Several commentators have concluded that the number of panel decisions is a very small fraction of the total issued.<sup>236</sup>

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<sup>232</sup> The fact that mixed outcomes represent a quarter of decisions supports the proposition that a large portion of BVA decisions present multiple claims. Certainly, there must be a significant number of decisions in which the outcome was not mixed even though multiple claims were decided. Accordingly, the CAVC’s statistics support the proposition that decision-based reporting significantly under reports the workload of the CAVC.

<sup>233</sup> 38 U.S.C. § 7254 (2002) (“The Court may hear cases by judges sitting alone or in panels.”).

<sup>234</sup> Frankel v. Derwinski, 1 Vet. App. 23, 25-26 (1990).

<sup>235</sup> See Allen, *supra* note 225, at 514-21.

<sup>236</sup> See FOX, *supra* note 2, at 21-22 (reporting that, as of 2002, 75% of the CAVC’s decisions were issued by single judge); Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 548 (2004) (calculating that for the years 1999, 2000, and 2002, 92.9% of CAVC’s decisions were by single judge); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL’Y 279, 282 (2004) (reporting that approximately 80% of the matters reported in Volume 16 of the Veterans Appeals Reporter were decided by a single judge).

Indeed, as the court's caseload has exploded in recent years, as many as 98% of the latest decisions have been by single judges.<sup>237</sup> Regardless of the disproportionate numbers, it is worth analyzing the two types of decisions separately because the decisions serve different functions.

For single judge decisions, the CAVC had logged 614 single-judge decisions in its database after the first twenty-one weeks of 2008. Of these decisions, 483 remained once "dismissed" was excluded from the results. Of these, 48% contain the phrase "decision is affirmed."<sup>238</sup> Fifty nine percent contain either "vacated and the matter is remanded" or "set aside and the matter is remanded."<sup>239</sup> Only 6% contain "reversed and the matter is remanded." The affirmance rate generated by this search method is slightly lower than that reported in the fiscal year 2007 numbers and the results suggest fewer mixed outcomes found through using this search technique. However, the results are similar enough to suggest that it produces results that are accurate enough to give a general understanding of outcomes.

These numbers provide insight into how often the CAVC vacates BVA decisions rather than reversing them. Clearly, remands dominate over reversals.<sup>240</sup> It seems that 6% is probably a fair estimate of how frequently the CAVC reverses the BVA in single-judge decisions. Given that single-judge decisions constitute the overwhelming majority of dispositions, the overall rate of reversal by the CAVC must also be near 6%.

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<sup>237</sup> After almost 20 years of operation, the CAVC has recently completed the twenty-first volume of the Veterans Appeals Reporter — just over one per year. Volume 21 contains 39 decisions reviewing BVA decisions on the merits. Although this volume is not precisely concurrent with fiscal year 2007, in which 2,064 BVA decisions were reviewed on the merits, there can be little doubt that panel decisions currently represent only a tiny fraction of decisions issued. Even using the lower number of 1,631 cases, *see* note 228 *supra*, does not significantly alter the percentage.

<sup>238</sup> Decisions are inconsistent as to whether claims abandoned on appeal are formally affirmed. Only 57 of the 72 decisions that use the word "abandoned" also use the word "affirmed."

<sup>239</sup> Some of the judges of the CAVC prefer "vacate," which is more prevalent in courts generally, while others prefer "set aside," which is the language used in the court's jurisdictional statute. 38 U.S.C. § 7261(a)(3) (2000). There is no functional difference between the terms. *Diorio v. Nicholson*, 20 Vet. App. 193, 195 n.1 (2006) ("We note that this Court uses the terms 'vacate' and 'set aside' interchangeably.").

<sup>240</sup> It does not appear that the first part of 2008 is unique. The low reversal rate is consistent with similar searches from recent years. Excluding a bubble of cases that applied *Smith*, 19 Vet. App. at 63, in 2007 the reversal rate in single judge decisions was 7.8% (121 out of 1,535), and was 6.2% in 2006 (71 out of 1,141).

As for panel opinions, rather than looking at the relatively small number that were issued during the same twenty-one weeks of 2008, a larger sample is worth considering. The recently-completed, twenty-first volume of reported CAVC cases contains 39 decisions reviewing BVA decisions on the merits.<sup>241</sup> Among those thirty-nine opinions, the BVA decision was fully affirmed seventeen times (44%),<sup>242</sup> vacated and remanded twelve times (31%),<sup>243</sup> reversed three times (7%),<sup>244</sup> and the outcome was mixed seven times (18%).<sup>245</sup> In total, 62% of the BVA decisions were affirmed on at least one claim and 56% of the decisions were reversed or vacated on at least one claim. Two of the mixed outcome claims were reversed in part.<sup>246</sup> Accordingly, five of the thirty-nine

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<sup>241</sup> Excluding one opinion that was withdrawn, *Palor v. Nicholson*, 21 Vet. App. 202 (2007), the volume contains a total of 60 non-ceremonial, published actions. These include decisions on applications for attorney fees under the Equal Access to Justice Act [hereinafter EAJA], 38 U.S.C. § 2412 (2000), *see, e.g.*, *Coleman v. Nicholson*, 21 Vet. App. 386 (2007); decisions on petitions for extraordinary relief, *see, e.g.*, *Grant v. Nicholson*, 21 Vet. App. 399 (2007); attorney discipline actions, *see, e.g.*, *In re Ellison*, 21 Vet. App. 464 (2007); decisions on procedural motions, *see, e.g.*, *Ribaud v. Nicholson*, 21 Vet. App. 16 (2007) (en banc); and briefing orders, *see, e.g.*, *Domino v. Nicholson*, 21 Vet. App. 398 (2007) (en banc).

<sup>242</sup> *Turk v. Peake*, 21 Vet. App. 565 (2008); *Robinson*, 21 Vet. App. at 545; *Juarez v. Peake*, 21 Vet. App. 537 (2008); *Ross v. Peake*, 21 Vet. App. 528 (2008); *Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007); *Camacho v. Nicholson*, 21 Vet. App. 360 (2007); *George-Harvey v. Nicholson*, 21 Vet. App. 334 (2007); *Palor v. Nicholson*, 21 Vet. App. 325 (2007); *Canlas v. Nicholson*, 21 Vet. App. 312 (2007); *Brown v. Nicholson*, 21 Vet. App. 290 (2007); *Moore*, 21 Vet. App. at 211; *Ricafort v. Nicholson*, 21 Vet. App. 198 (2007); *Medrano v. Nicholson*, 21 Vet. App. 165 (2007); *Clarke v. Nicholson*, 21 Vet. App. 130 (2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007); *O'Connell v. Nicholson*, 21 Vet. App. 89 (2007); *Allen v. Nicholson*, 21 Vet. App. 54 (2007).

<sup>243</sup> *Hart*, 21 Vet. App. at 505; *Stover v. Mansfield*, 21 Vet. App. 485 (2007); *Friedlund v. Nicholson*, 21 Vet. App. 380 (2007); *Barr*, 21 Vet. App. at 303; *Gordon v. Nicholson*, 21 Vet. App. 270 (2007); *Ingram*, 21 Vet. App. at 232; *Washington v. Nicholson*, 21 Vet. App. 191 (2007); *Lippman v. Nicholson*, 21 Vet. App. 184 (2007); *Steff*, 21 Vet. App. at 120; *Daves*, 21 Vet. App. at 53; *Crecco v. Nicholson*, 21 Vet. App. 46 (2007) (per curiam order granting a joint motion to remand); *Dennis v. Nicholson*, 21 Vet. App. 18 (2007).

<sup>244</sup> *Palmer v. Nicholson*, 21 Vet. App. 434 (2007); *McClain v. Nicholson*, 21 Vet. App. 319 (2007); *Osborn v. Nicholson*, 21 Vet. App. 223 (2007).

<sup>245</sup> *Martinak v. Nicholson*, 21 Vet. App. 447 (2007); *Hyatt*, 21 Vet. App. at 390; *Reyes v. Nicholson*, 21 Vet. App. 370 (2007); *Hupp v. Nicholson*, 21 Vet. App. 342 (2007); *Palczewski v. Nicholson*, 21 Vet. App. 174 (2007); *Dalton v. Nicholson*, 21 Vet. App. 23 (2007); *Taylor v. Nicholson*, 21 Vet. App. 126 (2007). Although *Hyatt* was eventually withdrawn due to the death of the veteran, it is still included in the analysis because the basis of the withdrawal is unrelated to the merits of the decision. 22 Vet. App. at 214.

<sup>246</sup> *Hyatt*, 21 Vet. App. at 390; *Taylor*, 21 Vet. App. at 126.

opinions (18%) were reversed at least in part. This data for panel opinions indicates that reversal is more likely in a panel opinion, although still not very likely. Affirmance is somewhat more likely as well. However, even in panel opinions, remand is the most likely outcome for any given claim.

Although these numbers might be rough, they are a starting point for understanding the CAVC's caseload. They support the widely-held beliefs that the CAVC affirms less often than it vacates or reverses, and that it reverses far less than it remands. The big question these numbers cannot answer on their own is whether these outcomes are unusual when compared to other courts.

#### **IV. COMPARISONS BETWEEN THE CAVC AND ARTICLE III APPELLATE COURTS**

##### ***A. General Statistics of the Circuit Courts of Appeals***

The obvious touchstone that comes to mind when looking for perspective on the CAVC is a comparison to other federal courts of appeals. A large-scale review of published opinions from the Article III appellate courts by Professors Ashlyn K. Kuersten and Donald R. Songer shows that “[a]ppellants in the courts of appeals usually lose. Overall, the courts of appeals have affirmed the decision of the district court or administrative agency in 62% of all the cases they decide with a published opinion and have reversed the decision below in only 8% of the cases.”<sup>247</sup>

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<sup>247</sup> ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 40 (2001). Kuersten and Songer's book is an absolute necessity for any empirical understanding of the federal appellate courts. To prepare the volume, the authors used the United States Court of Appeals Database, created under a grant from the National Science Foundation. *See id.* at 241. The database contains more than 18,000 cases from 1925 through 1996, each coded for 229 potential values covering, inter alia, the circuit, the case origin, the parties, the subject matter, the outcome, and the judges. *See id.* at 241-263. A limiting factor is that the database covers only the twelve circuit courts of general jurisdiction. *Id.* at 246. It does not cover the Federal Circuit, which has limited, exclusive jurisdiction to review decisions of the CAVC. *Id.*

Notably, Kuersten and Songer's analysis does not report any mixed outcomes.<sup>248</sup> As a result, there are multiple ways to compare outcomes depending upon how one treats mixed outcomes at the CAVC.

The published opinions of the Article III appellate courts provide an interesting comparison to the published opinions of the CAVC. The first number that jumps out is that the rate at which the circuit courts of appeals affirm decisions (62%) is exactly the same at which the CAVC affirms BVA decisions at least in part in published decisions. Of course, due to the phenomenon of mixed outcomes, the CAVC vacates more frequently than do the circuit courts of appeals. However, what is particularly noteworthy is that in published opinions, the CAVC reverses (at least in part) more than twice as often as the circuit courts.<sup>249</sup>

Kuersten and Songer theorize that unpublished cases are more likely to be affirmances.<sup>250</sup> The available data on this point is limited, but supports this theory. One study conducted shortly after unpublished decisions became widespread in the 1970s concluded that such decisions were affirmances 86% of the time.<sup>251</sup> A more recent study found the rate during the year 2000 to be 79%.<sup>252</sup> There does not appear to have been any study as to how often unpublished decisions reverse the tribunal below. However, the authors of the first study suggest that reversals should occur in unpublished decisions only when based upon a standard or fact that was unknown when the tribunal acted.<sup>253</sup> Whether that is true remains unproven. Assuming that the circuit courts of appeals reverse

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<sup>248</sup> This supports the inference that the circuit courts of appeal rarely, if ever, deal with multiple causes of actions in a single opinion, which reinforces the point that there are substantial differences between the CAVC and the circuit courts that must ultimately be confronted to understand what can be learned from the comparison. See Part III.A, *supra*.

<sup>249</sup> By comparison, data from a variety of state appellate courts show reversal rates ranging from 1.4% (the Illinois Appellate Court) to 17.65% (the Minnesota Supreme Court). See MEADOR ET AL. *supra* note 124, at 623-24. However, the higher reversal rates are found in those courts that have discretion as to which appeals they hear. See Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1201, 1212-13 (1978).

<sup>250</sup> KUERSTEN & SONGER, *supra* note 247, at 40-41.

<sup>251</sup> See William L. Reynolds & William M. Richman, *Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 617 (1981).

<sup>252</sup> See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 216 (2001).

<sup>253</sup> Reynolds & Richman, *supra* note 251, at 620.

less frequently in unpublished cases, then it would seem that the CAVC's reversal rate in unpublished decisions is about the same (or perhaps a bit higher) than those of the circuit courts while its remand rate is much higher.

The similarities and differences in the above statistics are provocative. Initially, they dispel the myth that the CAVC's reversal rate is dramatically lower than other courts. However, they confirm the view that the remand rate of the CAVC is relatively high. They do not explain the causes behind either rate. To better understand the reversal, affirmance, and remand rates of the CAVC, one must look to subcategories of appeals that share particular characteristics with veterans benefits cases.

### ***B. Criminal Appeals***

One common category of cases that has a distinct pattern of results is criminal appeals. Like veterans benefits cases, criminal appeals have a reputation for rarely resulting in reversal. The Kuersten and Songer study bears this out. In published cases, criminal verdicts are affirmed 72% of the time and reversed only 6% of the time.<sup>254</sup> Therefore, both reversal and remand are less common in these cases than the average for all cases. There are a few factors that likely drive these numbers.

Initially, most criminal appellants are indigent and face little cost or potential downside to appealing their convictions regardless of merit.<sup>255</sup> Although appellants in civil cases have to seriously weigh the costs against the potential of an appeal, criminal appeals are not generally filtered for merit. As a consequence, sufficiency of the evidence is one of the most common issues raised in criminal appeals.<sup>256</sup> The strong deference to jury fact finding<sup>257</sup> naturally makes these appeals poor candidates for reversal. One commentator, Professor William J. Stuntz, has suggested that the difficulty of prevailing on factual appeals has led counsel representing criminal appellants instead to rely heavily on procedural arguments in

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<sup>254</sup> KUERSTEN & SONGER, *supra* note 247, at 41.

<sup>255</sup> Chad M. Oldfather, *Appellate Courts, Historical Facts, and Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 489 (2004).

<sup>256</sup> PAUL H. ROBINSON, CRIMINAL LAW 40 (1997).

<sup>257</sup> See *Holland v. United States*, 348 U.S. 121, 138 (1954).

hopes of disputing the facts again on retrial.<sup>258</sup> Accordingly, the defining characteristics of criminal appeals are a lack of filtering for merit, especially factual merit, and a focus on procedural arguments seeking remand.

Although veterans benefits adjudications are different from criminal trials in almost every detail, they share a lack of filtering in which cases get appealed. As noted above, few claimants at the BVA level have counsel to advise them on the merits of an appeal. For those that wish to do so, the process can be completed with an informal brief at a minimal cost.<sup>259</sup> Accordingly, Stuntz's theory that this lack of filtering drives arguments towards the procedural seeking remand closely matches the general incentives for veterans appeals observed above.<sup>260</sup> In particular, the theory explains why the reversal rate in criminal cases is essentially the same as the rate in single-judge decisions, which are by definition focused on factual review rather than novel legal arguments.

What cannot be ignored is that the rate of affirmances by the CAVC — even if understated<sup>261</sup> — is a far cry from the rate in criminal cases. The obvious explanation for this disparity is that — even though both classes of appeals largely assert procedural errors — the nature of the process below is very different. Unlike veterans benefits claimants, criminal defendants are entitled to the assistance of an attorney, who is presumed to be competent and to act within a broad range of acceptable tactics.<sup>262</sup> Additionally, criminal verdicts are usually rendered by juries, whose decisions need no explanation and are entitled to much greater deference than a BVA decision.<sup>263</sup> Furthermore, although the sentiment is impossible to quantify, convicted criminal defendants are among the least sympathetic appellants while veterans are among the most. Nevertheless,

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<sup>258</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 60-62 (1997).

<sup>259</sup> “In essence, EAJA acts as a quasi-contingency fee that allows veterans to pursue their claims with little up-front financial risk.” Jeffrey E. Marion, *Getting Paid for What You Do: How to Obtain Attorney's Fees in Veterans Cases*, WINTER 2008 AAJ-CLE 497 (2008).

<sup>260</sup> See Part II.A, *supra*.

<sup>261</sup> See note 228, *supra*.

<sup>262</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.”).

<sup>263</sup> See Part II.B.2, *supra*.



the characteristics that veterans claims share with criminal appeals provide a compelling explanation of why the reversal rate at the CAVC is not substantially higher.

### *C. Civil Appeals*

The obvious contrast to criminal appeals is civil appeals. While Kuersten and Songer did not publish a composite number for non-criminal cases, the affirmance rate must necessarily be lower and the reversal rate must be higher. The reason for the higher reversal rate is that “reversals are more likely when the question is one of law.”<sup>264</sup> Although it is not clear exactly how many civil appeals present legal arguments, it must necessarily be a high number. In fiscal year 2007, over 257,000 civil cases were filed in federal district courts.<sup>265</sup> However, there were fewer than 3,400 trials in civil cases<sup>266</sup> and only 2,200 evidentiary hearings on motions, injunctions, and other non-merits matters.<sup>267</sup> Nonetheless, there were over 24,000 appeals filed in civil cases.<sup>268</sup> Accordingly, although more than 90% of civil cases are not appealed, there are over four times more appeals than trials or evidentiary hearings. Thus, it seems clear that civil appeals are much more likely to present legal issues than factual ones.

This inference is supported by the fact that losing litigants usually bear significant costs in bringing an appeal and, therefore, have a disincentive to battle uphill against a deferential standard of appeal unless the cost of the verdict is substantially higher than the cost of appeal. Therefore, contrary to criminal appeals, civil appeals are much more likely to be filtered for merit and to have a legal issue to invoke *de novo* review. Accordingly, it should be no surprise that civil appeals result in fewer affirmances and more reversals in published opinions. This observation explains why the reversal rate for the CAVC is higher in published panel decisions, which focus on the court’s role as a law giver, than it is in single-judge decisions.

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<sup>264</sup> See Dalton, *supra* note 8, at 80. This is, of course, no surprise given the lack of deference in reviewing legal questions.

<sup>265</sup> U.S. COURTS 2007 REPORT, *supra* note 87, at 139 tbl. C.

<sup>266</sup> *Id.* at 390 tbl. T-1.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 90 tbl. B-1A.

As for affirmances, the rate at which the CAVC affirms individual claims in published cases probably falls somewhere between the rate at which BVA decisions are affirmed in whole (44%) and the rate at which they are affirmed at least in part (62%). Accepting the assertion of Kuersten and Songer that the affirmance rate for civil cases in published decisions is somewhat below the overall rate of 62%, then it appears that the CAVC's affirmance rate in published opinions is comparable to that of Article III appellate courts of general jurisdiction reviewing civil cases.

Other than the observation that civil appeals are much more likely to present questions of law, it is difficult to generalize about the nature of the decisions on appeal and how they compare to veterans benefits claims. Therefore, it makes sense to look for the subset of civil appeals that most closely approximates veterans claims.

#### ***D. Statistics on Review of Social Security Disability Claims***

If there is a system in the federal judiciary closely analogous to veterans law, it is the social security disability system. Although the areas are not directly related, they have a number of similarities.<sup>269</sup> Substantively, social security disability insurance [hereinafter SSDI] benefits are provided to those who are currently unable to work.<sup>270</sup> These benefits are somewhat less complex than veterans claims and do not present as many evidentiary problems, but they still require numerous questions to be addressed during an adjudication.<sup>271</sup> The procedures for adjudicating these claims also have a number of similarities.

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<sup>269</sup> See KUERSTEN & SONGER, *supra* note 247, at 40-41, 55, 61, 214.

<sup>270</sup> SOCIAL SECURITY ADVISORY BOARD, A DISABILITY SYSTEM FOR THE 21ST CENTURY 13 (2006), <http://www.ssab.gov/documents/disability-system-21st.pdf>. The Social Security Advisory Board is a seven-member commission created by Congress in 1994 to provide independent, bipartisan information on matters relating to Social Security benefits. *See id.* at 47.

<sup>271</sup> INSTITUTE OF MEDICINE, THE NATIONAL ACADEMIES, THE SOCIAL SECURITY ADMINISTRATION'S DISABILITY DECISION PROCESS: A FRAMEWORK FOR RESEARCH, SECOND INTERIM REPORT 7 (1998) [hereinafter INSTITUTE OF MEDICINE II]. This review of the process summarizes a five-step evaluation process that includes assessing the medical evidence of disability against the degrees of severity specified in the SSA's "listing of impairments," and determining whether the claimant has sufficient residual functional capacity to perform past relevant work. *See id.* Although a detailed comparison of the two areas of law is beyond the scope of this article, it is clear that both systems involve applying medical evidence to technical legal requirements.

Like the veterans benefits system, the SSDI process is nonadversarial,<sup>272</sup> and SSDI claims proceed through numerous levels of review. SSDI decisions are initially made through state agencies that employ various procedures.<sup>273</sup> If benefits are denied by the state office, then a claimant can have the claim reviewed de novo by a federal administrative law judge [hereinafter ALJ].<sup>274</sup> ALJ decisions may then be appealed to the Social Security Appeals Council.<sup>275</sup> Decisions of the administrative appeals judges of the Appeals Council are the final level of agency review and can be appealed to federal district courts, which review them deferentially.<sup>276</sup> As with an ordinary civil case, district court decisions may be appealed to the appropriate federal circuits.

Not only is the process similar to veterans benefits claims in the numerous layers of agency and court review, but the criticisms of the system are much the same: “Over time the process has become lengthy, fragmented, confusing, and burdened by complex policies applied at different adjudicatory levels. . . . [M]any have complained that the Social Security claims process takes too long, is confusing, complicated, and fragmented, resulting in inconsistent decisions often based on subjective criteria.”<sup>277</sup> Accordingly, the SSDI program is at least generally comparable to the veterans benefits system in terms of substance, procedure, and reputation. Therefore, Article III appellate review of SSDI cases should provide a useful yardstick for evaluating the CAVC.

Kuersten and Songer did not look at SSDI cases specifically, but they did analyze social security and government benefits cases generally. From 1981 to 1996, Social Security and government benefits cases represented three to four percent of the caseload at the federal courts of appeals.<sup>278</sup> Historically, 49% of such cases were affirmed, 11% were reversed, and 36% were remanded.<sup>279</sup> However, the most recent data

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<sup>272</sup> *Sims v. Apfel*, 530 U.S. 103, 111 (2000).

<sup>273</sup> SOCIAL SECURITY ADVISORY BOARD, *DISABILITY DECISION MAKING: DATA AND MATERIALS 107-08* (2006) [hereinafter *DISABILITY DECISION MAKING*], <http://www.ssab.gov/documents/chartbook.pdf>.

<sup>274</sup> *Id.* at 108.

<sup>275</sup> *Id.* at 109.

<sup>276</sup> *Id.* at 109-10; *see also* note 285, *infra* and accompanying text.

<sup>277</sup> INSTITUTE OF MEDICINE II, *supra* note 271, at 4.

<sup>278</sup> KUERSTEN & SONGER, *supra* note 247, at 55.

<sup>279</sup> *Id.* at 61.

(1991-1996) indicates that such cases have been more likely to be affirmed (60%) and less likely to be reversed (5%).<sup>280</sup> When these numbers are compared to the CAVC's published panel decisions, the CAVC's results are comfortably within the range defined by the historic and recent numbers for Article III review of SSDI claims.

The deeper analysis by Kuersten and Songer is consistent with the available information from the CAVC. Historically, the federal government prevails in 58% of social security and other benefits cases, which is much lower than its overall success rate of 70%.<sup>281</sup> In summarizing their study of all appeals to the Article III appellate courts, Kuersten and Songer also observed that, “[i]nterestingly, the rate of affirmance is lowest in First Amendment and privacy cases and in disputes over social security benefits, issues generally characterized by appeals individuals against governments.”<sup>282</sup> Therefore, although it may be true that the CAVC affirms less frequently than Article III courts in general, its tendency to be more favorable to appellants is consistent with the relative success of benefits claimants in the Article III courts.

Perhaps even more interesting are the results when we look at the results at the federal district court level. As mentioned above, the bulk of the CAVC's caseload is handled through single judge decisions that primarily serve to correct errors rather than settle questions of law.<sup>283</sup> In this regard, single judge decisions more closely approximate the function of federal district courts. Although federal district courts review SSDI decisions under the “substantial evidence” standard rather than the “clearly erroneous” standard, Justice Breyer writing for the Supreme Court in *Dickinson v. Zurko*<sup>284</sup> confessed that the Court was unable to find a single case in which the two standards would have produced different results.<sup>285</sup> Therefore, it seems that the comparison is likely to be useful.

Between 1995 and 2004, the affirmance rate of SSDI claims at the federal district court level fluctuated between 35% and 57%, while the

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 239.

<sup>282</sup> *Id.* at 41.

<sup>283</sup> See notes 235-37, *supra* and accompanying text.

<sup>284</sup> 527 U.S. 150 (1999).

<sup>285</sup> *Id.* at 163.

reversal rate was a stable 6%.<sup>286</sup> These numbers are rather stunning to the degree with which they conform to the results of decisions by the CAVC. As noted above, the CAVC's affirmance rate for fiscal year 2007 was approximately 35% of cases overall and approximately 53% of contested cases, while the reversal rate in recent years has been between 6% and 8%.<sup>287</sup> The reversal rates are nearly identical, and the relatively low affirmance rates both fall in a range that is much lower than average for appeals to the Article III appellate courts of general jurisdiction.

In summary, it appears that the best way to analogize the outcomes of CAVC review to Article III courts is to compare the outcomes in veterans benefits claims to the outcomes in SSDI claims. When analyzed, the outcomes of panel decisions by the CAVC are comparable to precedential decisions by the circuit courts of appeals, and the outcomes of single-judge decisions are comparable to the outcomes of federal district court review. This analogy is justified both by similarities between the two systems and similarities in the types of appellate functions being served. From this specific comparison, the statistics the outcomes of cases reviewed by the CAVC are well within the norms for comparable review of SSDI decisions.

## CONCLUSION

Although the nation's youngest federal court has been in operation for two decades now, the era of informed academic analysis of veterans law is only just beginning. Much of the debate since the creation of the CAVC has been premised on the belief that the outcomes of the court's appeals are highly unusual, but this turns out to be unsubstantiated by an empirical analysis. First, the perception that the reversal rate is unusually low at the CAVC is unfounded. Second, both the reversal and remand rates of the court are consistent with classes of appeals in Article III courts with similar characteristics. In particular, the outcomes of cases at the CAVC strongly resemble the outcomes of SSDI cases in Article III courts. Accordingly, the arguments that available statistics demonstrate some inherent problem with the court turn out to be completely without

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<sup>286</sup> DISABILITY DECISION MAKING, *supra* note 273, at 89.

<sup>287</sup> See note 240, *supra* and accompanying text.

foundation, and the numbers available contradict the assertion that the process of independent appellate review is malfunctioning.

Although there is some truth in the prevailing perception that the remand rate at the CAVC is higher than the general average for Article III courts, there are a number of aspects of veterans benefits law and CAVC review that would explain this finding. Veterans benefits claims tend to be complex and present difficult factual issues due to the periods of time involved. They are adjudicated by a system that must process a very high volume of claims while providing a great deal of procedural assistance. Once the claims reach the CAVC, the outcomes are affected by litigation strategies of newly-involved attorneys and the reasons-or-bases requirement, which, in practice, shifts the burden to the BVA to demonstrate that the issued decision is correct. Therefore, it is not surprising that a relatively large percentage of BVA decisions are remanded for additional explanation or procedural development.

There is a greater lesson to be learned from these statistical comparisons. The conclusions raise questions about which other deeply ingrained “truths” about veterans law are suspect. Currently, veterans law does not enjoy a comprehensive statistical database similar to the United States Court of Appeals Database<sup>288</sup> or an independent congressional study group like the Social Security Advisory Board.<sup>289</sup> Therefore, a clear lesson from this initial attempt to empirically analyze the CAVC’s decisions is that veterans law is long overdue for a serious effort to objectively gather and digest critical information that could dramatically improve the quality of the debate in the future. As a nation, we owe it to those men and women who have served our country to raise the level of discussion about how best “to care for him who shall have borne the battle and for his widow, and his orphan. . . .”<sup>290</sup>

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<sup>288</sup> See note 247, *supra*.

<sup>289</sup> See note 270, *supra*.

<sup>290</sup> Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.nationalcenter.org/LincolnSecondInaugural.html>.