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# Veterans Law Review

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## NOTE

### THE FUTURE OF INTERROGATORIES UNDER *NOHR V. MCDONALD*

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INTRODUCTION.....	48
I. <i>NOHR V. MCDONALD</i> .....	49
II. PROCEDURAL CONSIDERATIONS .....	53
III. RESOLUTION .....	63
CONCLUSION .....	66

# The Future of Interrogatories Under *Nohr v. McDonald*

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## INTRODUCTION

The Board of Veterans' Appeals (Board) was established as part of the United States Department of Veterans Affairs (VA) in 1933 to review appeals from rating decisions issued by one of VA's Regional Offices (ROs).<sup>2</sup> The decisions of the Board were not subject to judicial review until Congress enacted the Veterans Judicial Review Act<sup>3</sup> in 1988 and designated a special reviewing body, referred to as the United States Court of Veterans Appeals (later renamed the United States Court of Appeals for Veterans Claims (CAVC)).<sup>4</sup> The congressional intent behind developing the veterans benefits system was that it be non-adversarial and paternalistic, with "no room for such adversarial concepts as cross-examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof."<sup>5</sup> Private attorneys were initially precluded from collecting fees for representing veterans in VA benefits cases.<sup>6</sup> Moreover, traditional litigation tools such as cross-examination and interrogatories were excluded from the process.<sup>7</sup> Although veterans are now allowed to pay private attorneys a reasonable fee for representation to help procure VA benefits, traditional formal litigation tools continue to be barred.

Nonetheless, as case law has developed, so have the rights of appellants to employ the Confrontation Clause of the Sixth Amendment of the United States Constitution. In 2009, the United States Supreme Court discussed a criminal defendant's right to subpoena medical experts under the Confrontation Clause.<sup>8</sup> In veterans law, the issue of whether a veteran claimant should have the right under the Due Process Clause of the Fifth Amendment of the Constitution to challenge medical evidence has also been magnified. The right to challenge an adverse medical opinion specifically through the use of interrogatories has been raised in *Nohr v. McDonald*.<sup>9</sup>

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<sup>2</sup> *Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 1 (2007) (statement of John J. Hall, Chairman of the Subcomm. on Disability Assistance & Mem'l Affairs). Regional Offices (ROs) are local offices of the Department of Veterans Affairs (VA) that serve as veterans' first step in applying for disability benefits. Before their cases can reach the Board, they must be denied by an RO. In 2014, there were fifty-six ROs nationwide. U.S. DEP'T OF VETERANS AFFAIRS, FY 2014-2020 STRATEGIC PLAN 8 (2014), <http://www.va.gov/op3/docs/StrategicPlanning/VA2014-2020strategicPlan.pdf>.

<sup>3</sup> Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>4</sup> H.R. Rep. No. 100-963, at 5790 (instructing that the United States Court of Appeals for Veterans Claims (CAVC) should begin to hear appeals on June 1, 1989).

<sup>5</sup> *Id.* at 5795.

<sup>6</sup> *Id.* at 5798.

<sup>7</sup> *Id.* at 5814 ("The committee expects [the CAVC] to adopt many of the existing [Board] rules, which are informal and respect the fact that many persons appear before the [Board] without any trained representative."). Indeed, Congress noted that "VA employees who are authorized to make decisions on claims for benefits should not be subjected to interrogation about the thought process which led them to deny a veteran's claim." *Id.*

<sup>8</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. CONST. amend. VI.

<sup>9</sup> 27 Vet. App. 124 (2014).

At its core, an interrogatory is defined as “a formal question or inquiry, specially a written question to be answered under direction of a court.”<sup>10</sup> In *Nohr*, the CAVC held that the Board should have addressed and processed an attorney’s requests for information and records regarding an unfavorable VA medical examiner’s opinion, even though the document containing the requests was labeled “Interrogatories.”<sup>11</sup> The potential effects of *Nohr* on the Board’s adjudication policies and the ability of the Veterans Health Administration (VHA) to provide timely medical care are the subject of this Note.

Part I of this Note analyzes the CAVC’s decision in *Nohr*. Part II discusses whether the Due Process Clause of the Fifth Amendment requires the use of interrogatories in the veterans benefits system by weighing the various interests and burdens involved. Part III provides suggestions for implementing the use of interrogatories in an efficient and uniform manner.

## I. NOHR V. MCDONALD

In *Nohr*, the CAVC reviewed an April 2013 Board decision that had denied entitlement to service connection for dysthymic disorder.<sup>12</sup> The Veteran’s<sup>13</sup> claim had originally been denied at the RO level in June 2003, based in part on a VA examiner’s opinion that the Veteran’s dysthymic disorder and symptoms thereof existed prior to his enlistment and were not exacerbated by military service.<sup>14</sup> The Veteran appealed that RO decision to the Board, which twice remanded the Veteran’s case to the RO to secure medical records and obtain VA compensation and pension (C&P) examinations to determine whether there was a nexus between the Veteran’s psychiatric disorder and his active duty service.<sup>15</sup> The Board ultimately denied the Veteran’s case in August 2010.<sup>16</sup>

The Veteran appealed to the CAVC, and the parties filed a joint motion for partial remand to allow the Board to provide adequate reasons and bases regarding whether the presumption of soundness was rebutted by clear and unmistakable evidence that the Veteran’s condition was not aggravated in service.<sup>17</sup> When the case returned to the Board, the Veterans Law Judge (VLJ) requested a specialist medical opinion, asking whether an expert could “conclude with absolute certainty that the preexisting disorder was not aggravated by service.”<sup>18</sup> VA psychiatrist Dr. Y. Feng offered an opinion affirming that the Veteran’s condition was not aggravated by service.<sup>19</sup> The Board again denied the Veteran’s

<sup>10</sup> *Interrogatory*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/interrogatory> (last visited May 20, 2016).

<sup>11</sup> *Nohr*, 27 Vet. App. at 125.

<sup>12</sup> *Id.*

<sup>13</sup> Note that “Veteran” will be used to refer to Mr. Nohr, whereas “veteran” or “veterans” will be used generally.

<sup>14</sup> *Nohr*, 27 Vet. App. at 126-27. The RO decision relied on the presumption of soundness, which states that “every veteran is presumed sound upon entry into service, except for defects, infirmities, or disorders noted at entry.” 38 U.S.C. § 1111 (2012). The presumption of soundness can be rebutted, but the burden shifts to VA to prove by clear and unmistakable evidence that the injury or disease manifested in service both preexisted service and was not aggravated by service. Specifically, VA must show evidence that the injury or disease was present before the veteran entered active duty service, and that the veteran’s condition was not aggravated by service. Methods to show that the condition was not aggravated by service include (a) showing through *clear and unmistakable evidence* that there was no increase in disability during service or (b) that any aggravation of the injury or disease was due to the “natural progression of the preexisting condition.” *Wagner v. Principi*, 370 F.3d 1089, 1095-96 (Fed. Cir. 2004).

<sup>15</sup> No. 04-32 079, 2009 WL 3323926, at \*1, 4 (BVA Aug. 14, 2009).

<sup>16</sup> No. 04-32 079, 2010 WL 4077018 (BVA Aug. 5, 2010).

<sup>17</sup> See *Nohr v. Shinseki*, No. 10-3404 (Vet. App. Mar. 29, 2011).

<sup>18</sup> *Nohr*, 27 Vet. App. at 127.

<sup>19</sup> Dr. Feng opined that “there is obvious and manifest evidence that [Mr. Nohr’s] preexisting dysthymic disorder was not aggravated by service.” *Id.*

claim in October 2011.<sup>20</sup> The Veteran again appealed his case to the CAVC, and the parties again filed a joint motion for remand, finding that Dr. Feng's opinion did not contain sufficient reasons and bases to establish that the Veteran's condition was not aggravated by service.<sup>21</sup>

In June 2012, the case returned to the Board, and the VLJ requested an addendum opinion from Dr. Feng.<sup>22</sup> The doctor reaffirmed her previous conclusions, specifically opining that the Veteran's condition had pre-existed service, and that any of the Veteran's complaints of symptoms during service were typical of the condition "running its own course."<sup>23</sup> In concluding her opinion, Dr. Feng stated: "Respectfully, while I recognize my personal limitation, the Board should seek for the next expert opinion if this examiner's report still is not satisfied by the Board review [sic]."<sup>24</sup> Prior to the issuance of the decision, the Veteran and his counsel were provided with a copy of Dr. Feng's addendum opinion and, as permitted by regulation, allowed sixty days to respond with any additional evidence and argument.<sup>25</sup> The Veteran's counsel responded by submitting eleven questions, one of which asked for an explanation of the doctor's statement regarding her "personal limitation," and requests for documents, including a request for the VA examiner's curriculum vitae.<sup>26</sup> The submitted document was labeled as "interrogatories" for Dr. Feng to answer pertaining to her opinion.<sup>27</sup> In the alternative, the Veteran's counsel requested that the Board subpoena Dr. Feng to testify at a hearing.<sup>28</sup>

Once the case returned to the Board, the Board denied the Veteran's claim in April 2013, and the Veteran appealed, resulting in the CAVC decision at issue.<sup>29</sup> The Board denied the Veteran's claim, finding—based in part on Dr. Feng's June 2012 opinion—that clear and unmistakable evidence illustrated that the Veteran's dysthymic disorder had pre-existed his active duty service and was not aggravated by service.<sup>30</sup> In the decision, the VLJ referenced the submission of interrogatories, but found they did not trigger a duty to obtain responses from the examiner.<sup>31</sup> The VLJ noted that there was "no VA regulatory authority for interrogatories" and that the VA benefits system is non-adversarial.<sup>32</sup> The VLJ further reasoned that the Veteran had been given the opportunity to submit evidence and argument in response to the VA examiner's opinion.<sup>33</sup> For similar reasons, the VLJ also denied the subpoena request.<sup>34</sup>

When the Veteran appealed the April 2013 decision to the CAVC, he argued through counsel that the Board had violated his rights under the Due Process Clause of the Fifth Amendment of the Constitution by failing to process the interrogatories or issue a subpoena to Dr. Feng to testify at a hearing.<sup>35</sup> The Veteran's counsel contended that it was prejudicial error to deny these requests, especially

<sup>20</sup> No. 04-32 079, 2011 WL 6043703 (BVA Oct. 11, 2011).

<sup>21</sup> See *Nohr v. Shinseki*, No. 11-3448 (Vet. App. Mar. 20, 2012). The parties noted that the only basis supporting the VA examiner's conclusion was her notation that the Veteran had not endorsed any traumatic event other than his ordinary military duty, without providing any other supporting data and conclusions.

<sup>22</sup> *Nohr*, 27 Vet. App. at 127-28.

<sup>23</sup> *Id.* at 127.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; see also 38 C.F.R. § 20.903 (2015).

<sup>26</sup> *Nohr*, 27 Vet. App. at 127-28.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 128. The Board has the statutory authority to issue subpoenas under 38 C.F.R. § 20.711 (2015). However, the issuance of subpoenas is outside the scope of the present Note.

<sup>29</sup> *Id.*

<sup>30</sup> No. 04-32 079, 2013 WL 2901488, at \*8-9 (BVA Apr. 19, 2013).

<sup>31</sup> *Id.* at \*3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*4.

<sup>34</sup> *Id.*

<sup>35</sup> *Nohr v. McDonald*, 27 Vet. App. 124, 125 (2014); see also Brief of the Appellant-Veteran at 19-20, *Nohr v. McDonald*, 27 Vet. App. 124

since the burden was on VA to rebut the presumption of soundness by showing through clear and unmistakable evidence that a preexisting disability was not aggravated in service.<sup>36</sup> Further, the Veteran's counsel asserted that Dr. Feng's answers to the interrogatories might have undermined her report to the extent that her opinion could not have been relied upon to rebut the presumption of soundness.<sup>37</sup> At oral argument before the CAVC, the Veteran's counsel argued that representatives should have tools to force VA examiners to answer questions pertaining to their opinions, specifically because the "Disability Benefit Questionnaires" often submitted by VA examiners do not provide enough information for an attorney to determine the adequacy of the opinion and whether it should be challenged.<sup>38</sup>

In response, the VA Secretary, through counsel, contended that there is no right under the Due Process Clause of the Fifth Amendment to submit interrogatories to or otherwise confront VA examiners.<sup>39</sup> Further, even if there were, the interrogatories would not have affected Dr. Feng's determination that the Veteran's mental health condition was not aggravated by service.<sup>40</sup> The Secretary also raised policy concerns about interrogatories fostering an adversarial atmosphere and slowing down the adjudicatory process and noted that other procedural safeguards, such as the low burden of proof and the duty to assist, already fostered claimant advocacy and participation.<sup>41</sup>

In the CAVC's panel decision, it took issue with the Board's refusal to process the interrogatories by either sending the questions to Dr. Feng for response or furnishing the requested documents to the Veteran.<sup>42</sup> The CAVC characterized the Board's refusal to do so as a "knee-jerk reaction based upon Mr. Nohr's characterization of his questions as 'interrogatories.'"<sup>43</sup> Although the CAVC reasoned that, based on congressional intent, the veterans benefits system is paternalistic, it found that the Board should not have summarily denied the request based on the "non-adversarial" rationale, particularly because the questions and requests for documents reasonably raised questions pertaining to Dr. Feng's competency, the adequacy of the opinion, and VA's duty to assist.<sup>44</sup>

As pertaining to the competency of VA medical examiners, the Board has long since relied on the presumption that a VA medical examiner is qualified to render a medical opinion if he or she is asked

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(2014) (No. 13-1321) [hereinafter Appellant's Brief]. The Veteran's counsel also raised the arguments that the Board incorrectly interpreted the presumption of soundness by shifting the burden to the Veteran to produce evidence that his condition was aggravated in service, and failed to address or weigh the Veteran's response to the examiner's unfavorable opinion. Appellant's Brief at 4.

<sup>36</sup> *Nohr*, 27 Vet. App. at 129-30.

<sup>37</sup> *Id.*

<sup>38</sup> Oral Argument at 8:55, *Nohr v. McDonald*, 27 Vet. App. 124 (2014) (No. 13-1321), <https://www.uscourts.cavc.gov/documents/Noir.wma>.

<sup>39</sup> *Nohr*, 27 Vet. App. at 130; *see also* Brief of the Appellee—Secretary of Veterans Affairs at 9-10, *Nohr v. McDonald*, 27 Vet. App. 124 (2014) (No. 13-1321) [hereinafter Appellee's Brief] (citing *Gambill v. Shinseki*, 575 F.3d 1307, 1313 (Fed. Cir. 2009) (Bryson, J., concurring) ("I believe that within the veteran's disability compensation system due process does not require that claimants be given the right to confront physicians who provide such opinions.")). There is often an interested party applying for benefits on behalf of a veteran (a claimant), but for the sake of simplicity all appellants or claimants are referred to as "veterans" in this article.

<sup>40</sup> Appellee's Brief, *supra* note 39, at 21-25.

<sup>41</sup> Appellee's Brief, *supra* note 39, at 5, 15.

<sup>42</sup> *Nohr*, 27 Vet. App. at 130-31.

<sup>43</sup> *Id.* at 131.

<sup>44</sup> *Id.* The duty to assist, discussed in greater detail below, is VA's burden to help the veteran develop his or her claim by securing necessary evidence and providing a VA examination when necessary. *See* 38 U.S.C. § 5103A (2012).

to do so.<sup>45</sup> This presumption of competency may, however, be contested by the veteran.<sup>46</sup> The CAVC found that by asking Dr. Feng for her curriculum vitae and asking her to explain her reference to a “personal limitation” in her most recent opinion, the Veteran was questioning the competency of the VA examiner, which is permitted.<sup>47</sup> The CAVC found that Dr. Feng’s statement of her personal limitation may have suggested an irregularity in the process of selecting her to provide the opinion, thereby preventing the presumption of competency from attaching.<sup>48</sup>

As it pertains to the adequacy of the opinion, the CAVC found that the Veteran’s questions were proper, given the doctor’s own admission of a personal limitation.<sup>49</sup> The CAVC also noted that the Board should have either sought clarification of the opinion or provided an explanation addressing why clarification was not necessary.<sup>50</sup>

Lastly, the CAVC took issue with the Board asserting that it had met its burden under the Veterans Claims and Assistance Act (VCAA), which includes the duty to assist in obtaining records.<sup>51</sup> The VLJ stated in the April 2013 Board decision that the duty to assist had been met because there were no outstanding records that the Veteran had identified.<sup>52</sup> To the contrary, the CAVC found that the interrogatories could have been viewed as a request for records, and that the Board had a duty to assist in obtaining these records or at least explain why a refusal to do so did not run counter to the duty to assist.<sup>53</sup> The CAVC reasoned that it would have been simple for the Board to obtain some of the requested records, including Dr. Feng’s curriculum vitae, as, since Dr. Feng was a VHA employee, many of the requested documents were constructively in VA’s possession.<sup>54</sup>

In finding that the Veteran was justified in challenging the competency and adequacy of Dr. Feng’s opinion and in light of the duty to assist, the CAVC found that the Board’s denial of the request for interrogatories was a prejudicial error.<sup>55</sup> The CAVC reasoned that this was especially true because the burden had shifted to VA to demonstrate by clear and unmistakable evidence that the Veteran’s dysthymic disorder was not aggravated by service.<sup>56</sup> The CAVC also agreed with the Veteran’s argument that Dr. Feng’s potential responses to the interrogatories might have undermined her opinion.<sup>57</sup>

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<sup>45</sup> *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009) (“The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.” (quoting *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004)); see also *Wise v. Shinseki*, 26 Vet. App. 517, 525 (2014) (“The purpose of the presumption is to ‘eliminate the burden [on VA] to produce evidence’ of a medical professional’s competence to answer the medical questions necessary to decide the claim. However, that presumption does not attach when VA’s process of selecting a medical professional appears irregular.” (quoting *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013))).

<sup>46</sup> *But see Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010) (holding that “any challenge ‘to the expertise of a VA expert’ must set forth the specific reasons why the litigant concludes the expert is not qualified to give an opinion” (quoting *Rizzo*, 580 F.3d at 1291)).

<sup>47</sup> See *id.* at 1306 (“A request for information about an expert’s qualifications, however, is not the same as a challenge to those qualifications.”).

<sup>48</sup> See *Nohr*, 27 Vet. App. at 132.

<sup>49</sup> *Id.* at 132-33.

<sup>50</sup> *Id.* at 133; see also *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008) (stating that the Board should return a medical report to the examiner for clarification, or explain why such action is unnecessary, when a key point in the report could be fairly read to have different meanings), *vacated on other grounds sub nom. Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009).

<sup>51</sup> See *Nohr*, 27 Vet. App. at 133-34; 38 U.S.C. § 5103A (2012).

<sup>52</sup> No. 04-32 079, 2013 WL 2901488, at \*3-4 (BVA Apr. 19, 2013).

<sup>53</sup> *Nohr*, 27 Vet. App. at 133-34 (“[W]hen a claimant informs the Secretary that records appear to be missing, the Secretary should, at a minimum, respond to the claimant.” (quoting *Tatum v. Shinseki*, 26 Vet. App. 443, 451 (2014))).

<sup>54</sup> See *Bell v. Derwinski*, 2 Vet. App. 611 (1992) (holding that VA-generated documents are constructively part of the record before the Secretary and the Board).

<sup>55</sup> *Nohr*, 27 Vet. App. at 134.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 132-34.

It followed that if her opinion were undermined, this might have precluded the Board from finding that the presumption of soundness had been rebutted.<sup>58</sup>

In closing, the CAVC found it unnecessary to address the Veteran's argument that his rights under the Due Process Clause of the Fifth Amendment were violated.<sup>59</sup> The CAVC reasoned that it did not need to reach the constitutional question because there were already adequate available remedies provided by statute and regulation, which included the duty to assist the Veteran in developing the claim and the requirement of providing a written statement of reasons and bases for a subsequent decision.<sup>60</sup>

The CAVC vacated and remanded the Board's April 2013 decision and issued a mandate for its decision in January 2015.<sup>61</sup> There was no appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit).<sup>62</sup> This leaves the Board facing the issue of how to address interrogatories in the future, considering the complete policy conversion that this development may require.

## II. PROCEDURAL CONSIDERATIONS

As noted above, the CAVC found it did not need to address the constitutional issue raised in *Nohr*.<sup>63</sup> However, in considering whether to allow interrogatories, the CAVC would have relied on *Gambill v. Shinseki*,<sup>64</sup> a Federal Circuit case from 2009 that discussed the use of interrogatories in veterans benefits cases within the context of the Fifth Amendment of the Constitution.<sup>65</sup> In its majority opinion, the Federal Circuit held that, even if there were a right to confront unfavorable medical evidence in veterans benefits cases, any determination that such right were violated would be made on a case-by-case basis, using a harmless error analysis.<sup>66</sup> In *Gambill*, the Federal Circuit found that it did not need to reach the broader issue of whether the proceedings in veterans benefits cases were fundamentally unfair due to a lack of confrontation rights, or whether they were unfair in the veteran's particular case, because he could not have shown that he was prejudiced under the harmless error standard.<sup>67</sup>

While the majority opinion did not evaluate the merits of the use of interrogatories, the two concurring opinions debated the implications of using interrogatories. In his concurring opinion, Judge Bryson concluded that within the veterans benefits system due process does not require a right

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<sup>58</sup> *Id.* at 134.

<sup>59</sup> *Id.* at 134-35.

<sup>60</sup> *Id.* at 134; *see also id.* at 134 n.5 (“Aside from any constitutional due process requirements that may apply to administrative adjudications, it is well-established that the Board must ensure that it provides an appellant fair process in the adjudication of his claim.”); *Best v. Principi*, 15 Vet. App. 18, 18 (2001) (“[I]t has been the practice of this Court that when a remand is ordered because of an undoubted error that requires such a remedy, the Court will not, as a general rule, address other putative errors raised by the appellant.”).

<sup>61</sup> Mandate, *Nohr v. McDonald*, 27 Vet. App. 124 (2014) (No. 13-1321).

<sup>62</sup> *Id.* When the case returned to the Board, entitlement to service connection for dysthymic disorder was granted. No. 04-32 079 (BVA Dec. 11, 2015).

<sup>63</sup> *Nohr*, 27 Vet. App. at 134.

<sup>64</sup> *Gambill v. Shinseki*, 575 F.3d 1307 (Fed. Cir. 2009) (per curiam).

<sup>65</sup> *Id.* at 1310. In *Gambill*, the Federal Circuit examined whether a claimant should be allowed to use interrogatories, and the majority opinion held that the claimant was not so entitled. In so doing the Federal Circuit reasoned that there were alternative methods for veterans to rebut evidence, and the majority opinion referred to congressional intent that VA proceedings be informal and non-adversarial in finding that interrogatories were not necessary. It is noteworthy that the majority opinion did not get into the merits of the use of interrogatories, but the two concurring opinions by Judges Bryson and Moore debated the implications of using interrogatories. These will be addressed in greater detail throughout this Note.

<sup>66</sup> *Id.* at 1311-12.

<sup>67</sup> *Id.*

to confront the physicians who provide opinions, and that alternative methods for veterans to rebut evidence, including medical expert evidence, satisfied due process standards.<sup>68</sup> Judge Bryson relied heavily upon the decision of the United States Supreme Court (Supreme Court) in *Walters v. National Association of Radiation Survivors*,<sup>69</sup> wherein the Supreme Court applied a three-factor framework—developed to determine what specific procedures must be used to satisfy due process in a particular case—to find that a statute that barred compensating attorneys for representation in veterans benefits cases did not deprive claimants of their due process rights under the Fifth Amendment.<sup>70</sup>

The three-factor framework came from *Matthews v. Eldridge*,<sup>71</sup> in which the Supreme Court considered administrative procedures for Social Security Administration (SSA) disability insurance benefits in the context of the Due Process Clause of the Fifth Amendment of the Constitution.<sup>72</sup> In *Matthews*, the Supreme Court held that the framework for determining the requirements of the Due Process Clause relies on the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>73</sup>

To contemplate the due process concerns in allowing interrogatories, this Note will use the same framework and discuss a veteran's private interest, and whether that interest would be affected by the current procedure, given any additional or substitute procedural safeguards currently in place. Then, this Note will analyze the government's interest, weighing the benefits and burdens that interrogatories may cause, before offering suggestions for implementing the use of interrogatories.

### A. Private Interest

The Supreme Court has defined due process as “the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>74</sup> Many judicial decisions generally refer to the edict that due process is a flexible concept, and that the processes required by the Due Process Clause of the Fifth Amendment will vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur; this “flexibility” approach allows room for other forms of dispute resolution.<sup>75</sup>

Historically, due process rights have been found applicable to veterans benefits cases because the benefits at issue have been deemed to constitute a protected property interest.<sup>76</sup> Neither party in

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<sup>68</sup> *Id.* at 1313-15 (Bryson, J., concurring).

<sup>69</sup> 472 U.S. 305 (1985).

<sup>70</sup> *Id.* at 320-22.

<sup>71</sup> 424 U.S. 319 (1976).

<sup>72</sup> *Id.* at 323.

<sup>73</sup> *Id.* at 335.

<sup>74</sup> *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>75</sup> *See, e.g.,* *Goldberg v. Kelley*, 397 U.S. 254, 262-63 (1970) (Frankfurter, J., concurring) (“[T]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’ and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.” (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951))).

<sup>76</sup> *See* *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (holding that “entitlement to [veterans disability benefits] is a property interest protected by the Due Process Clause of the Fifth Amendment”); *see also* *Clennan v. Shinseki*, 26 Vet. App. 144, 154 (2013)



*Nohr* disputed the fact that veterans benefits were a protected private interest. The Federal Circuit found that the Due Process Clause of the Fifth Amendment applies to the VA adjudication process because a veteran's disability benefits are nondiscretionary and statutorily mandated, as a veteran is entitled to these benefits if he or she meets the eligibility requirements described by law.<sup>77</sup>

**B. Risk Of Erroneous Deprivation of Such Interest Through Procedures Used, and Probable Value of Additional or Substitute Procedural Safeguards**

The Veteran's counsel in *Nohr* argued that interrogatories are a tool for confronting adverse evidence, and that failure to provide an opportunity to confront or cross-examine adverse witnesses is fatal to the constitutional adequacy of the procedures.<sup>78</sup> Indeed, in *Goldberg v. Kelly*,<sup>79</sup> a case involving the right to a hearing prior to discontinuance of public assistance payments to welfare recipients, the Supreme Court noted that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."<sup>80</sup> The Supreme Court found the following quote from its prior decision in *Greene v. McElroy*<sup>81</sup> was especially pertinent:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.<sup>82</sup>

In *Nohr*, the Veteran's counsel asserted that, since the Board can ask for clarification of medical opinions, the same right should be given to a veteran.<sup>83</sup> The Veteran's counsel further argued that by not allowing the Veteran to submit interrogatories in this case, the Board was denying him the right to participate in developing evidence to support his case.<sup>84</sup>

In response, the Secretary argued that there were sufficient alternative procedural safeguards already in place to protect the Veteran's private interest—specifically, the low burden of proof and the duty to assist.<sup>85</sup> The Secretary argued that, unlike the higher burdens of proof used in criminal cases and traditional civil litigation, the lower "benefit-of-the-doubt" standard of proof afforded to veterans is a viable substitute safeguard.<sup>86</sup> The Secretary also asserted that, under the duty to assist, veterans have the right to submit additional medical opinions to undermine the VA examiner's findings, or identify probative treatment records that VA would then have a duty to request.<sup>87</sup> Moreover, the Veteran did submit an affidavit, which the Secretary contended was an acceptable alternative to the use

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(quoting *Edwards v. Shinseki*, 582 F.3d 1351, 1355 (Fed. Cir. 2009)).

<sup>77</sup> *Cushman*, 576 F.3d at 1298; see also *Singleton v. Shinseki*, 659 F.3d 1332, 1335-36 (Fed. Cir. 2011); *Edwards*, 582 F.3d at 1351; *Cogburn v. Shinseki*, 24 Vet. App. 205, 210 (2010) ("Veterans have a Constitutional right to a fair adjudication of their claims for benefits." (citing *Cushman*, 576 F.3d at 1298)).

<sup>78</sup> Appellant's Brief, *supra* note 35, at 7-10.

<sup>79</sup> *Goldberg*, 397 U.S. 254.

<sup>80</sup> *Id.* at 269.

<sup>81</sup> 360 U.S. 474 (1959).

<sup>82</sup> *Id.* at 496.

<sup>83</sup> Appellant's Brief, *supra* note 35, at 18.

<sup>84</sup> *Id.* at 9-11 (noting that a veteran has a right and obligation to develop his case, as the duty to assist is a two-way street); see also 38 U.S.C. § 5103A (2012); *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013); *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991).

<sup>85</sup> Appellee's Brief, *supra* note 39, at 12-15.

<sup>86</sup> *Id.* at 14-15; see also 38 U.S.C. § 5107 (2012); *Clennan v. Shinseki*, 26 Vet. App. 144, 155-56 (2013).

<sup>87</sup> Appellee's Brief, *supra* note 39, at 15-16; see also 38 U.S.C. § 5103A(b)(4).

of interrogatories.<sup>88</sup> Indeed, as previously noted, the relevant regulations provide that VA is required to notify a veteran if it requests a VA examination and opinion, provide a veteran and his or her representative with a copy of the examination report, and allow them 60 days to respond, which may include submission of relevant evidence or argument.<sup>89</sup>

The Veteran's counsel noted that if a veteran can respond to an examination report or opinion only by submitting additional evidence, a veteran's only remedy currently is to challenge the adequacy of the opinion by supplementing the record, rather than by impeaching or undermining existing evidence.<sup>90</sup> The implication is that a veteran has an unnecessary burden of having to add to the record (which may cause a financial disincentive) to prove his or her case rather than directly contesting the evidence already in the record.

Judge Moore considered the adequacy of these alternative procedural safeguards in her concurring opinion in *Gambill*, noting that, even though the low burden of proof and duty to assist helped veterans generally, they would not help in cases where VA relied on an inadequate medical opinion to deny benefits.<sup>91</sup> As noted, the Board has the ability to seek clarification of opinions by remanding the case to the RO. However, the Veteran's counsel in *Nohr* asserted that even Board clarification is still not a sufficient substitute because the Board does not have the same incentive to protect a veteran's self-interest as the veteran.<sup>92</sup>

When considering the alternative procedural safeguards within the SSA benefits system in *Matthews*, the Supreme Court noted that a claimant's representative has full access to all of the information relied upon by the State agency medical consultant (who has the same role as the VA examiner) and may submit additional evidence or argument that can directly challenge the information in the file as well as the adequacy of the State agency determination.<sup>93</sup>

It is notable, in considering procedural safeguards, that the SSA allows representatives to use interrogatories to develop the record.<sup>94</sup> The SSA's adjudication system is similar to VA's, but the SSA's system puts Administrative Law Judges ("ALJs") in an inquisitional, non-adversarial, role, imposing on them a duty to investigate the facts and develop arguments both for and against granting disability benefits.<sup>95</sup> SSA ALJs permit pre-hearing discovery pursuant to the Federal Rules of Evidence, and representatives can submit interrogatories to medical consultants, vocational experts, and any other experts that the ALJ may have relied upon in making the ultimate conclusion in the decision.<sup>96</sup> It is widely held in the SSA system that a claimant's right to procedural due process involves the right to cross-examine providers of adverse opinions.<sup>97</sup>

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<sup>88</sup> Appellee's Brief, *supra* note 39, at 16.

<sup>89</sup> 38 C.F.R. § 20.903(a) (2015).

<sup>90</sup> Reply Brief of the Appellant-Veteran at 8-9; *Nohr v. McDonald*, 27 Vet. App. 124 (2014) (No. 13-1321) [hereinafter Appellant's Reply Brief].

<sup>91</sup> *Gambill v. Shinseki*, 575 F.3d 1307, 1329 (Fed. Cir. 2009) (Moore, J., concurring).

<sup>92</sup> Appellant's Brief, *supra* note 35, at 16.

<sup>93</sup> *Matthews v. Eldridge*, 424 U.S. 319, 345-46 (1976).

<sup>94</sup> See 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, 289 (2004); see also *Richardson v. Perales*, 402 U.S. 389, 412 (1971) (Douglas, J., dissenting) ("Cross examination of doctors in these physical injury cases is, I think, essential to a full and fair disclosure of the facts.").

<sup>95</sup> Carpenter, *supra* note 94, at 288; see also 20 C.F.R. § 404.900 (2015).

<sup>96</sup> Carpenter, *supra* note 94, at 289.

<sup>97</sup> See *Demenech v. Sec'y of the Dept. of Health & Human Servs.*, 913 F.2d 882, 885 (11th Cir. 1990) (holding that "where the ALJ substantially relies upon a post-hearing medical report that directly contradicts the medical evidence that supports the claimant's contentions, cross examination is of extraordinary utility"); *Cowart v. Schweiker*, 662 F.2d 731, 737 (11th Cir. 1981) ("Mrs. Cowart was

In summary, VA has developed several procedural safeguards to protect veterans, such as the low burden of proof and the duty to assist, and the VA claims adjudication system has also progressed, with added procedural hurdles and the advent of attorney representation. Nevertheless, a veteran still has limited methods of confronting unfavorable evidence that do not involve supplementing the record. These limited methods would not be as helpful if the Board relies heavily on an inadequate medical opinion. The SSA has a similar non-adversarial adjudication system that does allow interrogatories and other discovery tools, and there is no distinction between the two adjudication systems that would suggest that veterans should not also be provided with similar procedural protections.

### C. Government's Interest

By allowing the use of interrogatories, the government (in this case, VA) would assume competing benefits and burdens. Arguably, the Board would benefit from the use of interrogatories because they could potentially result in sufficient clarification of necessary facts to allow the Board to make a decision on the merits of an appeal the first time it comes before the Board. Questions solicit answers, and it follows that interrogatories would assist with fact-finding for medical opinions. Indeed, Judge Moore noted in her concurrence in *Gambill* that the use of interrogatories could help the Board understand the limitations of the medical opinions and could “undermine unassailable evidence in favor of denying the veteran his or her benefits.”<sup>98</sup> VLJs have a duty to resolve conflicting medical evidence, and allowing interrogatories would help these adjudicators better understand the evidence, leading to informed decisions supported by plausible reasons and bases.<sup>99</sup> Moreover, the Board has a duty to assist veterans in developing evidence in support of their claims.<sup>100</sup>

A tenet of VA's adjudication process is that the Board, as a legal adjudicator, lacks the medical expertise to draw its own medical conclusions.<sup>101</sup> However, in ordering that an examiner respond to interrogatories, the Board could better understand a VA medical examiner's reasoning and be better able to consider whether an opinion is flawed or does not have sufficient rationale.<sup>102</sup> In the 2009 case *Melendez-Diaz v. Massachusetts*, the Supreme Court held that, under the Confrontation Clause of the Sixth Amendment of the Constitution, in criminal cases it was acceptable to subpoena lab technicians to testify in court about report findings, despite backlog implications.<sup>103</sup> The Supreme Court reasoned that by confronting lab analysts through cross-examination in court, the trier of fact would be able to determine how a report was made and the reasoning behind the findings.<sup>104</sup> Similarly, interrogatories would help a VLJ understand the process and reasoning used by a VA medical examiner in rendering an opinion. Further, answering interrogatories in veterans benefits cases would be a less time-consuming

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not given an opportunity to examine or challenge these reports, nor to cross-examine the physicians, prior to the ALJ's decision. Therefore, the decision of the ALJ must be invalidated.”); *see also* *Calvin v. Chater*, 73 F.3d 187 (6th Cir. 1996); *Flatford v. Chater*, 93 F.3d 1296 (6th Cir. 1996); *Townley v. Heckler*, 748 F.2d 109 (2nd Cir. 1984).

<sup>98</sup> *Gambill v. Shinseki*, 575 F.3d 1307, 1324 (Fed. Cir. 2009) (Moore, J., concurring).

<sup>99</sup> *See Richardson*, 402 U.S. at 412 (Douglas, J., dissenting) (noting that cross-examination of doctors in physical injury cases is “essential to a full and fair disclosure of the facts”).

<sup>100</sup> Indeed, the duty to assist is a large part of the non-adversarial method of adjudication for veterans benefits, and its policy is to minimize the need for veterans to consult an attorney. *See* James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 122 (2009).

<sup>101</sup> *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991), *overruled on other grounds*, *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).

<sup>102</sup> *Gambill*, 575 F.3d at 1330 (Moore, J., concurring); *see also* *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (“Without a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing.”).

<sup>103</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319-20 (2009).

<sup>104</sup> *Id.* at 319.

method than issuing subpoenas for medical expert testimony during hearings. Although *Melendez-Diaz* is a criminal case and is therefore governed by criminal procedure and the Federal Rules of Evidence, there is nothing distinguishable about VA medical opinions that would preclude them from being examined in a way similar to the reports of lab technicians in *Melendez-Diaz*.<sup>105</sup> Moreover, although a criminal defendant has different rights under different amendments to the Constitution, as noted above, entitlement to veterans benefits is a property interest similarly protected by the requirements of the Due Process Clause of the Fifth Amendment.

In *Nohr*, the ability to gain more knowledge about the VA examiner's opinion would have been beneficial. As noted above, Dr. Feng's medical opinion conceded to a "personal limitation" in the doctor's expertise, which triggered the Board's duty to investigate the adequacy of the opinion.<sup>106</sup> Usually, such investigation would require the Board to remand the case for another opinion or clarification; however, interrogatories would provide an alternative method of clarifying the opinion to assist the VLJ. Additionally, as the Veteran's counsel argued in *Nohr*, use of interrogatories could have helped the Veteran obtain information to discredit the unfavorable opinion, which could have prevented the presumption of soundness from being rebutted.<sup>107</sup> It follows that improvements in methods used to obtain relevant facts could allow a VLJ to more frequently make a decision on the merits of an appeal the first time it comes before the Board.<sup>108</sup> As noted, the Board has the opportunity to clarify an opinion by remanding the case to the RO; however, if the Board could clarify the opinion while the case remained at the Board, this could eliminate the time spent remanding the case to the RO.<sup>109</sup>

Interrogatories could also illuminate an inadequate opinion. Although VA examiners are presumed to be competent, interrogatories could provide the VLJ with more information regarding the VA examiner's expertise and the foundation of the examiner's rationale. Indeed, the Supreme Court noted one of the benefits of the ability to ask questions of medical experts in *Melendez-Diaz*—it would "weed out" incompetent analysts and draw attention to any training insufficiencies or improper judgments.<sup>110</sup> A similar argument could be made for allowing interrogatories to examine the competency of VA examiner.

Moreover, there is a definite need to evaluate the adequacy of VA opinions. A 2005 report from the VA Inspector General's Office contains a selection of comments from survey respondents, one of which indicated that ROs and the VHA will occasionally work together in an unspoken agreement to avoid returning inadequate medical opinions to the VHA for clarification so that the RO could meet production quotas.<sup>111</sup> A major reason the Board remands cases is due to inadequate VA opinions, but

<sup>105</sup> See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (2008) (noting that VA examiners are considered expert witnesses); see also *Gambill*, 575 F.3d at 1326 (Moore, J., concurring).

<sup>106</sup> See 38 C.F.R. § 4.2 (2015); *Wise v. Shinseki*, 26 Vet. App. 517, 525-27 (2014); *Green v. Derwinski*, 1 Vet. App. 121, 123-24 (1991).

<sup>107</sup> See *Nohr v. McDonald*, 27 Vet. App. 124 (2014); see also *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

<sup>108</sup> In fiscal year 2014, 45.5% of Board cases were remanded to the RO. See 2014 U.S. DEP'T OF VETERANS AFFAIRS, BD. OF VETERANS' APPEALS ANN. REP. 28 [hereinafter BVA FY 2014 REP]. This percentage is an increase from fiscal year 2006, when only 32% of the Board cases were remanded to the RO. See INST. OF MED. OF THE NAT'L ACADS., A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 161 (Michael McGeary et al. eds., 2007) [hereinafter INST. OF MED. OF THE NAT'L ACADS.], <http://www.nap.edu/catalog/11885/a-21st-century-system-for-evaluating-veterans-for-disability-benefits>.

<sup>109</sup> This assumes that the veteran does not want the new evidence to be reviewed by the agency of original jurisdiction.

<sup>110</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).

<sup>111</sup> See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF VETERANS AFFAIRS, REP. NO. 05-00765-137, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS 62 (May 19, 2005) (noting response to survey indicating collusion between ROs and the Veterans Health Administration (VHA)). Manipulation of data by VBA employees to reflect a lower backlog is not uncommon. See OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS & EVALUATIONS, U.S. DEP'T OF VETERANS AFFAIRS, REP. NO. 14-03736-273, REVIEW OF ALLEGED DATA MANIPULATION AT THE LOS

having interrogatories that require the VA examiner to explain his or her rationale might preclude some of these remands and allow the VLJ to make a timelier decision on the merits rather than sending the case back to the RO for additional development.<sup>112</sup>

Even if only a percentage of cases are affected by interrogatories, the use of interrogatories would still help that percentage of veterans. In *Walters*, discussed above, the majority opinion found that VA procedures were constitutionally sufficient in part because the appellants had not proved that prejudicial error would be more likely to occur if paid attorney representation were not allowed; however, the dissenting opinion noted that even if eighty or ninety percent of the denials were correctly decided, in at least ten percent of cases, there might have been a different outcome if an attorney representative had been involved.<sup>113</sup> Arguably, having a tool to disclose more information could reduce any percentage of erroneous denials. In *Gambill*, the Federal Circuit found that the use of interrogatories would not have aided that veteran's specific case, but allowing VLJs to make a decision on interrogatories on a case-by-case basis, rather than precluding interrogatories entirely, would prevent at least some unnecessary remands, or even some erroneous denials.<sup>114</sup>

Moreover, Board decisions are frequently appealed to the CAVC and subsequently remanded, either through panel decisions, memorandum decisions, or joint motions for remand. In fiscal year 2014, approximately 3,800 Board decisions were appealed to the CAVC; of those decisions, the CAVC remanded approximately 2,600 back to the Board, at least in part.<sup>115</sup> The CAVC remands cases for many reasons, but deficiency in a medical examination is a common reason for remand; in 2014, this reason accounted for approximately twenty percent of the issues remanded by the CAVC.<sup>116</sup> Further, since veterans are the only party that may appeal to the CAVC, the rulings tend to create policy favoring veterans.<sup>117</sup> Allowing interrogatories would give the CAVC a reason to address the issue of VA examination adequacy when evaluating whether a Board decision was supported by plausible reasons and bases.<sup>118</sup> If the Board requested or implemented interrogatories in a veteran's case, that veteran would have an opportunity to identify, and have the Board address, any deficiencies in the VA examination. It follows that if the CAVC had more information on the development undertaken

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ANGELES VA REGIONAL OFFICE (Sept. 18, 2014); OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS & EVALUATIONS, U.S. DEP'T OF VETERANS AFFAIRS, REP. NO. 15-02354-220, REVIEW OF SECOND INSTANCE OF EMPLOYEE MANIPULATION AT THE HOUSTON VA REGIONAL OFFICE (June 15, 2015).

<sup>112</sup> In 2001, it was reported that inadequate medical evidence caused one-third of the remands from the Board. See *Hearing to Receive the Report of the VA Claims Processing Task Force (Cooper Report): Before the H. Comm. on Veterans' Affairs*, 107th Cong. 11 (2001) [hereinafter *Hearing to Receive the Cooper Report*]; *Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before H. Subcomm. on Disability Assistance & Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. (2007) (statement of James P. Terry, Chairman, Board of Veterans' Appeals); see also James D. Ridgway, *Lessons the Veterans Benefits System Must Learn on Gathering Expert Witness Evidence*, 18 FED. CIR. B.J. 405, 416 (2009).

<sup>113</sup> *Walters v. Nat'l Ass'n of Radiation Survivors*, 472 U.S. 305, 331 (1985); *id.* at 368-69 (1985) (Stevens, J., dissenting).

<sup>114</sup> *Gambill v. Shinseki*, 575 F.3d 1307, 1315-17 (Fed. Cir. 2009) (Bryson, J., concurring).

<sup>115</sup> 2014 U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANN. REP. 2 (2014) <https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf>. The author included in the 2,600 figure cases that were affirmed or dismissed in part; reversed or vacated and remanded in part; reversed or vacated and remanded in whole; and remanded.

<sup>116</sup> See Ridgway, *supra* note 100, at 127 ("the failure to discuss . . . each piece of . . . medical evidence can lead to a remand"). In 2014, the CAVC remanded 5,815 issues; 1,019 were remanded due to either failure to provide an examination or opinion (367) or failure to provide adequate reasons and bases addressing a potentially inadequate medical exam (201) or potentially inadequate medical opinion (451). See Board of Veterans' Appeals, 2014 CAVC Remand Reasons Summary, Veterans Appeals Control and Locator System [VACOLS] (Jan. 21, 2016) (on file with author).

<sup>117</sup> James D. Ridgway, *The Veterans Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 257 (2010). Because a veteran would only bring an appeal to the CAVC if he or she lost an appeal before the Board, the CAVC's rulings typically either "affirm the status quo" or expand claimants' interests "by expanding substance or procedure in their favor." *Id.*

<sup>118</sup> 38 U.S.C. § 7104(d)(1) (2012).

regarding VA examinations and opinions, potentially fewer cases would be remanded to the Board, which could also eliminate some of the Board's backlog of cases.

One of the main contentions raised by the VA Secretary in *Gambill* was that interrogatories would make the VA adjudication process more adversarial.<sup>119</sup> Making the process more adversarial would go against the congressional intent behind creating the VA adjudication system.<sup>120</sup> On its face, allowing interrogatories as a fact-finding tool would add a litigation component to a non-adversarial system, appearing to make VA's adjudication system more adversarial. Nonetheless, Congress has noted that the VA benefits process has become more complex; for this reason, it began allowing veterans to pay attorneys to represent them and guide them through the adjudication system.<sup>121</sup> By doing this Congress added a litigious element, and yet the VA adjudication system is still considered non-adversarial.

Thus, it stands to reason that the system would continue to be non-adversarial despite adding the use of interrogatories. There are other aspects of the VA benefits adjudication system that could be deemed adversarial, but are not. For example, VA already has the authority to issue subpoenas to compel testimony at hearings.<sup>122</sup> In comparing interrogatories and subpoenas, it would be less burdensome for the Board and VHA to submit interrogatories to a VA examiner than to compel his or her presence to testify or produce documents.<sup>123</sup> Additionally, the Board can already remand cases for clarification of VA examinations and private physician opinions.<sup>124</sup> Remanding for opinion clarification and issuing interrogatories would have the same purpose: gaining information about a medical opinion.<sup>125</sup> Since interrogatories would be just another tool to accomplish the same goal, they could be added to the system without affecting its non-adversarial nature.

Judge Moore weighed in on the arguably adversarial nature of the existing VA adjudication process in *Gambill* and noted that when a VA examiner provides an opinion contrary to a veteran, the process has already become adversarial; by submitting interrogatories, a veteran is only questioning an opinion that has been posited against his or her interest.<sup>126</sup> In this vein, interrogatories can be considered "pro-veteran," as they could help a veteran find more information about the contrary opinion.<sup>127</sup> In *Nohr*, the Veteran's counsel argued that the VA adjudication system becomes more adversarial when the Board "hide[s]" VA examiners by not allowing veterans to submit interrogatories to explore the VA examiner's thought process.<sup>128</sup> Nonetheless, as discussed above, given that the potentially adversarial elements already present at the Board level, such as the use of attorneys and subpoenas and the opinion clarification, have not transformed the system into an adversarial one, the argument that the system would become adversarial if interrogatories were used does not stand. Moreover, as the use of interrogatories would benefit veterans, it would align with, rather than challenge, the concepts of the duty to assist and the low burden of proof helping veterans. In *Nohr*, the Veteran's counsel also argued that interrogatories are questions, and nothing more, that would

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<sup>119</sup> *Gambill*, 575 F.3d at 1315-17; Appellee's Brief, *supra* note 39, at 12-15.

<sup>120</sup> See H.R. Rep. No. 100-963 (1988).

<sup>121</sup> *Gambill*, 575 F.3d at 1328 (Moore, J., concurring).

<sup>122</sup> *Id.* at 1329 (citing 38 U.S.C. § 5711 (2012) and 38 C.F.R. § 20.711 (2015)).

<sup>123</sup> *Id.* (noting that interrogatories would be "considerably less burdensome than live testimony").

<sup>124</sup> See *Savage v. Shinseki*, 24 Vet. App. 259, 260 (2011) ("in some circumstances, VA does have a duty to return for clarification unclear or insufficient private examination reports . . . [or] explain why such clarification is not needed").

<sup>125</sup> See Appellant's Reply Brief, *supra* note 90, at 3.

<sup>126</sup> *Gambill*, 575 F.3d at 1324 (Moore, J., concurring).

<sup>127</sup> *Id.*

<sup>128</sup> Appellant's Reply Brief, *supra* note 90, at 3.

allow a veteran to seek information, providing transparency and impartiality to the VA adjudication process consistent with VA's goal to provide an accurate and complete record.<sup>129</sup> Providing clarity in the adjudication system is part of the duty to assist, and interrogatories would be useful as an investigative instrument to help provide that clarity.

Nonetheless, there is a danger that, given the opportunity, attorneys will abuse the ability to issue interrogatories to VA C&P examiners. Often attorneys do not become involved in a veteran's case until it reaches the CAVC; because of that, the attorneys have not had the opportunity to develop issues and assert bases for an appeal.<sup>130</sup> They thus have an incentive to have the CAVC remand the case on any basis possible to allow them to develop a theory of entitlement while the record remains open, and to make it more likely that the veteran could obtain past due benefits.<sup>131</sup> Moreover, attorneys representing veterans at the CAVC work on a contingency fee basis, and a CAVC remand allows them to obtain attorney's fees under the Equal Access to Justice Act.<sup>132</sup> The danger is that private attorneys will argue at the CAVC that interrogatories should have been used, and the CAVC will remand the case, allowing the attorney to collect fees but further delaying the veteran's case. For this reason, as discussed below, the decision to allow interrogatories should be made on an individual basis, considering their relevance to the case and the reasonableness of the request.

Lastly, one of the biggest concerns raised by the VA Secretary in *Nohr* is the effect interrogatories would have on the backlog of cases pending at the Board.<sup>133</sup> However, they would affect not only the Board, as one of the biggest burdens on VHA is that many medical personnel have to perform C&P examinations in addition to their role treating patients. Allowing interrogatories to be served on C&P examiners would only add to this time burden and keep these personnel from treating patients, potentially adding to the wait time of veterans seeking care from VHA facilities. Further, it is likely that the use of interrogatories would require more of a time commitment from medical personnel, thereby necessitating an increase in staffing and facilities. This would be especially difficult in more rural areas with less staff and would also require a massive contract renegotiation for those medical personnel providing opinions.<sup>134</sup>

However, in developing policy for improving the C&P examination process, several suggestions have been made that could improve the system and make it more efficient, which could free up time for C&P examiners to answer interrogatories.<sup>135</sup> First, there is an argument that C&P examinations are

<sup>129</sup> *Id.* at 2; *see also* 38 U.S.C. § 5103A (2012).

<sup>130</sup> *See* Ridgway, *supra* note 100, at 134-35.

<sup>131</sup> *See* Ridgway, *supra* note 117, at 285-86 (noting that paid attorneys have an incentive to look back for old claims that should have been recognized).

<sup>132</sup> 28 U.S.C. § 2412(d) (2012).

<sup>133</sup> Appellee's Brief, *supra* note 39, at 19-20. In 2014, the average length of time between filing a substantive appeal at the agency of original jurisdiction and the Board's disposition of the appeal was 1,038 days. The average added time for a remand was 311 days. *See* BVA FY 2014 REP., *supra* note 108, at 22. As of December 2015, VA had a backlog of 74,348 claims. U.S. DEP'T OF VETERANS AFFAIRS, VETERANS BENEFITS ADMINISTRATION REPORTS: CLAIMS BACKLOG (2015), [http://benefits.va.gov/reports/mmwr\\_va\\_claims\\_backlog.asp](http://benefits.va.gov/reports/mmwr_va_claims_backlog.asp).

<sup>134</sup> As of June 2014, VHA employed 8,200 compensation and pension ("C&P") examiners, including physicians, nurse practitioners, physician assistants, and psychologists. In 2011, VHA established a nationwide medical examination contract which is held by four vendors who provide their services to meet VHA standards, and it is likely that VA will have to work with the Government Services Administration (GSA) to fund and modify the contract. *See VBA and VHA Interactions: Ordering and Conducting Medical Examinations: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. 12-13 (2014) [hereinafter *VBA and VHA Interactions*] (statement of Thomas Murphy, Director, Compensation Service, Veterans Benefits Admin.).

<sup>135</sup> Many of these suggestions have been raised over the years to maintain the current VA examination process system. It is undeniable that interrogatories will add to VHA's backlog, but as interrogatories are likely now a reality in VA, the agency must take some action to

unnecessary in many instances; for example, if the veteran receives all of his or her care for the claimed impairment at VA, a C&P examination to verify the diagnosis seems unnecessary.<sup>136</sup> In that instance, VA could expand its Acceptable Clinical Evidence process, wherein a medical examiner provides a medical opinion based on the available records without examining the veteran, minimizing the time needed.<sup>137</sup> In contrast, if the veteran receives all of his or her care from an outside provider, there is likely no need for a C&P examination to confirm a diagnosis, especially if the impairment is a complex one requiring specialist treatment where VA might not have an equivalent provider in proximity to the veteran.<sup>138</sup> Another argument suggests that VA outsource more C&P examinations to private treatment providers.<sup>139</sup> At this point, there are few private contractors performing C&P examinations.<sup>140</sup> Outsourcing more C&P examinations would require additional funding, but this option would likely cost less than having to hire more VHA staff and build more VHA facilities.<sup>141</sup> These alternatives could streamline the C&P examination process, and it follows that if VHA personnel spent less time on C&P examinations, it could compensate for the increased time spent answering interrogatories.

Overall, interrogatories would positively impact the government's interest by aiding in fact-finding and by allowing VLJs to make a decision on the merits the first time an appeal comes before the Board. While there is a concern that the use of interrogatories may shift the system slightly more to the adversarial side, as discussed, this argument has limited merit. While there is also a concern that interrogatories will affect the backlog of appeals at the Board and increase the burden on VHA, there are ways to minimize the time spent on the C&P examination process, which would compensate for any time increase for answering interrogatories. Regarding how interrogatories will affect the Board's backlog and not become unduly burdensome, the following section suggests several ways to include interrogatories in the appeals process without making large procedural changes.

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account for the increased time spent for interrogatory responses.

<sup>136</sup> Similarly, it would be unnecessary to refer a veteran to an outside provider to confirm a diagnosis that was already confirmed through VA treatment. *VBA and VHA Interactions*, *supra* note 134, at 22 (written statement of George C. Turek, Majority Shareholder, Veterans Evaluation Services) (recommending outsourcing all medical examinations to private contractors).

<sup>137</sup> *Id.*; see also VA ADJUDICATION PROCEDURE MANUAL M21-1, pt. III, subpt. iv, ch. 3, § A.4 (Nov. 3, 2016) (explaining the Acceptable Clinical Evidence examination process, which allows VHA examiners to complete an examination form based on their review of the existing medical evidence, without conducting an in-person examination).

<sup>138</sup> *Discovering a More Efficient Process: Improving Timeliness and Adequacy of VA Compensation and Pension Examinations: Field Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 112th Cong. 17 (2012) (statement of Walter J. Tafe, Director, Burlington County Military and Veterans Services). Regulations provide that VA may accept a medical report from a private physician if it is "adequate for rating purposes." 38 C.F.R. § 3.326 (2015). According to VA's Office of Inspector General, there is "little difference between the quality of contractor-produced C&P examinations and [VHA] examinations and their impact on the degrees of disability that are eventually awarded to the veterans." INST. OF MED. OF THE NAT'L ACADS., *supra* note 108, at 154.

<sup>139</sup> *Id.* at 22-24. The regulations provide that VA may accept a medical report from a private physician if it is "adequate for rating purposes." 38 C.F.R. § 3.326 (2015). According to the VA Office of Inspector General, "[t]here is little difference between the quality of contractor-produced C&P examinations and VHA examinations and their impact on the degrees of disability that are eventually awarded to the veterans." INSTIT. OF MED. OF THE NAT'L ACADS., *supra* note 108, at 154.

<sup>140</sup> Less than 10 percent of the C&P examinations performed in fiscal year 2013 were performed by private treatment providers. *VBA and VHA Interactions*, *supra* note 134, at 67 (VA Responses to Pre-Hearing Inquiries). In 2006, the QTC Medical Group, Inc. provided C&P examinations for 10 ROs, utilizing a network of 1,600 contract providers. INSTIT. OF MED. OF THE NAT'L ACADS., *supra* note 108, at 140, 153.

<sup>141</sup> By outsourcing C&P examinations, VHA could also allow medical providers licensed in one state to provide C&P examinations in other states, which would be helpful especially in rural areas where there are fewer treatment providers. This would be especially pertinent with mental health cases, where a treatment relationship could be easily fractured with an adverse opinion. *VBA and VHA Interactions*, *supra* note 134, at 24 (written statement of George C. Turek, Majority Shareholder, Veterans Evaluation Services).



### III. RESOLUTION

Post-*Nohr*, the Board is left with unclear guidance on how to address any future requests for interrogatories. For workload management purposes, the use of interrogatories should be considered in a limited setting on a case-by-case basis. This decision should rest with the VLJ, rather than the RO.<sup>142</sup> Indeed, the VLJ will have had extensive experience with case adjudication and is therefore better equipped to make a decision as to the reasonableness of the use of interrogatories. Moreover, the decisions on whether to use interrogatories will likely become more uniform if made by a VLJ rather than an RO employee.<sup>143</sup> Not every case will require interrogatories, and in many cases using interrogatories might not help the veteran.<sup>144</sup> VLJs will have to make a decision considering both the specific facts of the case and the Secretary's duty to assist the veteran in developing the claim. Realistically, interrogatories would not be applicable in every case; they would only be applicable if their use was relevant to the case and the request was reasonable. This standard would not be a large departure from the current system, in which the Board has an open record policy and representatives are encouraged to participate and submit briefs. In turn, VLJs have the opportunity to weigh the arguments submitted in the briefs and decide whether to take any action on them. VLJs could view interrogatories in a similar manner.

If the VLJ decided to allow interrogatories, under the duty to assist, VA is required to make reasonable efforts to obtain relevant records to develop the claim, including records from VA medical facilities.<sup>145</sup> Assuming the purpose of interrogatories would be to solicit information from a VA examiner, it follows that this development would fall under the duty to assist. As noted above, in *Nohr*, the CAVC took issue with the Board not obtaining the requested information under the duty to assist, or at least explaining why the duty to assist did not require obtaining the information.<sup>146</sup>

Another danger in using interrogatories is determining their limit. Although, in *Nohr*, the Veteran's counsel noted that interrogatories were questions and nothing more, how much can a representative "interrogate" a VA examiner?<sup>147</sup> For example, in *Nohr* the Veteran's counsel asked for the VA examiner's *curriculum vitae*, which was a challenge to her competency; however, it is unclear whether the Board is able to make a competency determination based on the VA examiner's credentials using only that document, or should instead have to rely on the presumption of regularity, as noted above. There is also a risk of opening a veritable floodgate of private attorneys simply submitting interrogatories for whatever information they want. Therefore, a VLJ would have to make sure that the questions fairly raise issues pertaining to the examination and opinion, and that obtaining the requested information would qualify as "reasonable assistance" under the duty to assist.

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<sup>142</sup> I concede that by having the Veterans Law Judges (VLJs), rather than the RO, oversee interrogatories, the system would only allow for interrogatories for cases that have been appealed to the Board. However, I argue that interrogatories should only be allowed in limited circumstances, and, moreover, the Board would be better equipped to make that decision based on the relevancy to the case and the reasonableness of the request.

<sup>143</sup> By virtue of the number of VLJs at the Board versus the number of RO employees, it follows that a Board policy would be easier to implement than an RO-wide policy. While waiting for the case to reach the Board to allow interrogatories increases the time between the VA examination and the interrogatories, the argument still stands that implementing interrogatories would be easier for a smaller entity like the Board.

<sup>144</sup> See *Gambill v. Shinseki*, 575 F.3d 1307, 1311-12 (Fed. Cir. 2009).

<sup>145</sup> 38 U.S.C. § 5103A (2012).

<sup>146</sup> *Nohr v. McDonald*, 27 Vet. App. 124, 133-34 (2014).

<sup>147</sup> Appellant's Reply Brief, *supra* note 90, at 2.

The use of interrogatories on a case-by-case basis would allow a VLJ to make a determination on the relevance and reasonableness of the request, but if the VLJ decided not to obtain responses to the interrogatories, the rationale should be communicated to the veteran. This rationale should discuss the interrogatories requested and provide reasons for why the VLJ is denying the request. Again, this would not represent a large departure from current practice, since VLJs already have to weigh arguments in briefs and provide plausible reasons and bases for how they considered the arguments and acted on them. If some rationale were provided in these instances, the CAVC would likely not characterize the denial of interrogatories as a “knee-jerk reaction” and subsequently remand the case to the Board.<sup>148</sup>

If the VLJ decided to allow interrogatories in a case, it should be left to the VLJ to determine the specific questions submitted to the C&P examiner. The veteran’s representative could submit a proposed set of questions, but, similar to the process attorneys use to submit jury instructions in traditional civil litigation, it would be the VLJ who would then decide which questions to submit to the VA examiner.<sup>149</sup> It would not be necessary to have a rule specifying the number of questions that would be submitted to the VA examiner, but the VLJ should have the discretion to decide the final number to submit to the VA examiner and to edit the proposed questions as needed. Giving the VLJ this discretion would ensure that the questions addressed only the competency and adequacy of the examiners and opinions in light of the duty to assist, as emphasized in *Nohr*. Although the VLJ would submit the interrogatories to the VA examiner, if the VA examiner who performed the VA examination is not available, the VLJ should weigh this in the decision, but not exclude the prior opinion entirely.

Even with VLJ oversight, it is likely that an attorney may argue at the CAVC level that the VLJ improperly discarded one of the proposed interrogatories. However, the CAVC would still review the VLJ’s determinations under the “clearly erroneous” standard of review.<sup>150</sup> Judge Bryson’s concurring opinion in *Gambill* raised a concern about line-drawing: that the use of interrogatories could lead to “collateral conflicts over the content of the interrogatories and the adequacy of the responses” that would be burdensome.<sup>151</sup> However, having the VLJ oversee and exercise discretion over the proposed questions would assuage that concern. The duty to assist is very broad, and VA already has discretion to decide how much development is necessary.<sup>152</sup> Moreover, as previously discussed, the SSA has similar problems with a backlog of cases, and, as noted in Judge Moore’s concurrence in *Gambill*, there has been no “explosion of cases” over the scope of the ability to cross-examine medical professionals.<sup>153</sup>

Once a VLJ has decided that the use of interrogatories is needed in a case, the implementation of the procedure becomes more complicated—further supporting the position that interrogatories should only be used in limited circumstances. Historically, the Federal Circuit has been wary of relying on evidence outside of the record.<sup>154</sup> In *Kyhn v. Shinseki*, the Federal Circuit held that the CAVC did not have the jurisdiction to review internal employee affidavits because they were not considered to

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<sup>148</sup> *Nohr*, 27 Vet. App. at 131.

<sup>149</sup> An argument could be made that interrogatories would favor private attorneys over Veterans Service Organizations (VSOs). A large caseload can keep VSOs from fully developing a veteran’s claim. However, often VSOs submit a one-to-two page uniform brief for the cases, so having a uniform set of interrogatories to submit to the VLJ would seem similarly feasible. Moreover, interrogatories would help the VSOs gain knowledge about the individual cases, which is sometimes difficult for them given the high caseload.

<sup>150</sup> See *Edwards v. Shinseki*, 582 F.3d 1351, 1354 (Fed. Cir. 2009).

<sup>151</sup> *Gambill v. Shinseki*, 575 F.3d 1307, 1320 (Fed. Cir. 2009) (Bryson, J., concurring).

<sup>152</sup> See 38 U.S.C. § 5103A (2012).

<sup>153</sup> *Gambill*, 575 F.3d at 1327 (Moore, J., concurring).

<sup>154</sup> *Kyhn v. Shinseki*, 716 F.3d 572, 578 (Fed. Cir. 2013).

be evidence in the record before the RO and the Board.<sup>155</sup> However, *Nohr* is distinguishable from *Kyhn*, as the interrogatories would be made part of the record, and both the Board and the veteran would have an opportunity to participate in the process, rather than the Board relying on an ex-parte communication. Further, in *Kyhn*, the Board relied on employee affidavits regarding internal policy, whereas interrogatories would help explain the VA examiner's opinion specifically as it relates to the veteran's case.<sup>156</sup>

To mitigate any potential additional backlog of appeals at the Board caused by the use of interrogatories, a time-limit policy should be implemented to ensure that the responses are received promptly and appeals are not further delayed.<sup>157</sup> Normally, once veterans' cases are docketed at the Board, they receive a letter telling them that they have 90 days (or until the VLJ makes a decision) to submit further evidence or argument. Thus, there is a pre-established time frame for a veteran's representative to submit an interrogatory request. As for completing interrogatories, in 2014, the national standard for completing C&P examinations was thirty days; however, on average, they took only twenty-four days to complete.<sup>158</sup> It stands to reason that the VA examiner should have at least the same amount of time, thirty days, to answer interrogatories, absent good cause for a delay.

There is a question of who would work with VHA to make sure the interrogatories are completed—specifically, whether this would be the responsibility of the RO or the Board. In developing policy to improve the efficiency of C&P examinations, it has been suggested that VBA employees could be staffed in VHA facilities to ensure an ongoing connection between the two entities.<sup>159</sup> It follows that RO employees could be similarly staffed in VHA facilities to implement interrogatories. However, it seems more feasible to utilize and expand a current unit in the Board's Office of Veterans Law Judges Management Support Branch that currently assists with procuring outside medical opinions.<sup>160</sup> This unit, known as the "Outside Medical Opinions" (OMO) office, already assists with obtaining outside medical opinions for various cases, as directed by VLJs, and it seems feasible to have this branch expand their workload and staffing as necessary to obtain interrogatories as directed by the VLJ.<sup>161</sup> The job duties would likely be similar to securing outside medical opinions, and, moreover, having the OMO office process the interrogatory request would keep the case at the Board for adjudication purposes. Additionally, it would be easier for a VLJ to communicate regarding the specifics of an interrogatory request with a branch that is already housed within the Board. Likewise, if the VLJs can exercise discretion over the interrogatories, it makes

<sup>155</sup> *Id.* This case pertained to the use of employee affidavits to prove whether a veteran received proper notice of a scheduled examination. The Federal Circuit found that the CAVC acted outside of its jurisdiction when it accepted employee affidavits describing the notification process for examinations to prove the presumption of regularity.

<sup>156</sup> *Id.* at 576.

<sup>157</sup> It would be prudent to have the veteran acknowledge in writing that his or her case may be delayed if interrogatories are submitted to a medical expert. A similar instance occurs when a veteran requests a Travel Board hearing—he or she has to acknowledge that this may delay the case—and a similar form could be used for interrogatories.

<sup>158</sup> *VBA and VHA Interactions*, *supra* note 134, at 8 (statement of Thomas Murphy, Director, Compensation Service, Veterans Benefits Admin.); *see also* INST. OF MED. OF THE NAT'L ACADS., *supra* note 108, at 149.

<sup>159</sup> Hearing to Receive the Cooper Report, *supra* note 112, at 40 (written statement of Daniel L. Cooper, Chairman, VA Claims Processing Task Force).

<sup>160</sup> *See* BVA FY 2014 REP., *supra* note 108, at 3. BVA established a VHA medical opinion program, where the Board maintains a list of participating hospitals and their specialties; when an opinion is requested, this program cuts the cost and time, by up to nine months, of obtaining an independent outside medical opinion. In Fiscal Year 2006, the Board requested 643 outside medical opinions. *See* INST. OF MED. OF THE NAT'L ACADS., *supra* note 108, at 162.

<sup>161</sup> *See, e.g.,* Goldberg v. Kelley, 397 U.S. 254, 266 (1970) (“[M]uch of the drain on fiscal resources can be reduced by developing procedures . . . and by skillful use of personnel and facilities.”).

more sense to have a branch within the Board, rather than an RO, secure these interrogatories. Having the OMO office secure the interrogatories could also provide uniformity and efficiency in the request process. Since interrogatories would only be used in limited circumstances, the additional employees hired to specialize in interrogatory requests could use their remaining time to help with the branch's other workload needs.

The biggest drawbacks to having the OMO office process interrogatories are the jurisdictional requirements and the right to "one review on appeal."<sup>162</sup> In *Disabled American Veterans v. Secretary of Veterans Affairs*, the Federal Circuit held that the Board was precluded from considering new evidence in the first instance.<sup>163</sup> This decision terminated the Board's Evidence Development Unit in favor of RO development.<sup>164</sup> However, the Board is still able to request outside medical opinions for consideration in the first instance,<sup>165</sup> and securing an interrogatory would not be a very different process. Further, since *Disabled American Veterans*, the Board has developed a policy allowing veterans to waive RO review of new evidence.<sup>166</sup> The Board could develop a similar process wherein a veteran could waive RO development in lieu of having the case remain at the Board for the use of interrogatories.

In sum, the implications of *Nohr* will require policy changes at both the Board and VHA, and the use of interrogatories has the potential to become burdensome. However, allowing VLJs to exercise discretion in determining whether interrogatories are necessary should make the transition easier. Further, although the implementation of interrogatories will likely require many discussions and procedural suggestions, it would behoove the Board to employ "Occam's razor" and utilize an existing branch at the Board with similar job responsibilities.<sup>167</sup>

## CONCLUSION

The CAVC's decision in *Nohr* continued the progression of VA's adjudication system, which, as discussed above, was originally devised as paternalistic, but has slowly become more litigation-minded, while still non-adversarial in nature. Although *Nohr* did not address the constitutional issue under the Fifth Amendment of the Constitution, both parties submitted argument on the Veteran's right to procedural due process in relation to the use of interrogatories. It was not disputed that veterans benefits are a protected interest; rather, the question was whether the Veteran would be deprived of this interest, and to what extent, without access to interrogatories, given the safeguards already in place. While the VA Secretary noted that the duty to assist and the low burden of proof protect veterans, historically the only method veterans had to challenge unfavorable medical evidence was to supplement the record with additional evidence.

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<sup>162</sup> 38 U.S.C. § 7104(a) (2012).

<sup>163</sup> 327 F.3d 1339 (Fed. Cir. 2003).

<sup>164</sup> See Ridgway, *supra* note 117, at 276.

<sup>165</sup> 38 C.F.R. §§ 20.901-03 (2015) (establishing that the Board may request outside medical opinions without remanding for initial consideration by the RO).

<sup>166</sup> See, e.g., 73 Fed. Reg. 65,726 (Nov. 5, 2008); see also Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012 § 501, Pub. L. 112-154 (codified at 38 U.S.C. § 7105(e) (2012)) (establishing a presumption that for substantive appeals received by VA on or after February 2, 2013, evidence submitted after that date is subject to initial review by the Board unless initial RO consideration of the evidence is explicitly requested).

<sup>167</sup> "Occam's razor" is the principle that "plurality should not be posited without necessity," suggesting that simplicity is preferable when there are competing theories. Brian Duignan, *Occam's Razor*, ENCYCLOPEDIA BRITANNICA (June 4, 2015), available at <http://www.britannica.com/topic/Occams-razor>.

The government interest in using interrogatories includes the incentive of obtaining additional information regarding opinions, which could allow a VLJ to make a decision on the merits the first time an appeal is before the Board. To the extent that allowing interrogatories could make the adjudication process more adversarial, given their similarity to several methods and policies already in place, their use would not transform the entire system into an adversarial one. SSA's adjudication system is similar to VA's, and its allowance of the use of interrogatories and cross-examination has not caused procedural havoc such as increased backlog or collateral conflicts over confrontation issues. While there is an issue regarding the effect of the use of interrogatories on the Board's backlog of appeals and the VHA's workload, streamlining the C&P examination process by eliminating unnecessary examinations could allow VA examiners to devote time to answering interrogatories. Having VLJs determine the need for interrogatories based on relevance and reasonableness and enforcing time limits for responses could reduce that risk. Finally, using an already existing branch at the Board to secure interrogatories would make the transition easier and promote uniformity in the requests and efficiency in the process.

While the decision in *Nohr* arguably pushes VA's benefits adjudication system towards being more litigious, this push may both help veterans properly develop their claims and assist the Board in making informed decisions, which could in turn decrease the number of erroneous remands or denials. The Board should exercise discretion over the use of interrogatories so that the process can be implemented in the most efficient and uniform manner, thereby protecting veterans and strengthening Board decisions while maintaining the integrity of the VA benefits adjudication system.