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Lack of Judicial Review of Veterans' Administration Disability Claims: Is the Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act the Answer, 21 J. Marshall L. Rev. 673 (1988)

Michael A. Babiarz

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RECENT DEVELOPMENTS

LACK OF JUDICIAL REVIEW OF VETERANS' ADMINISTRATION DISABILITY CLAIMS: IS THE PROPOSED VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT THE ANSWER?

The Veterans' Administration ("VA") administers a program that provides compensation to veterans for service-connected disabilities.¹ While the VA treats most claimants fairly and efficiently,² critics charge that a considerable number of veterans receive reduced benefits, or no benefits at all, as a result of VA mistakes.³ Furthermore, these errors often go unremedied because federal law precludes a veteran from obtaining judicial review of any VA decision involving disability claims.⁴

Congress has attempted to rectify this situation five times in the last ten years. The Veterans' Administration Adjudication Procedure and Judicial Review Act ("Act" or "proposed Act"), introduced in the Senate most recently in early 1988, includes provisions for judicial review of VA claims.⁵ This article explores the need for

1. See 38 U.S.C. §§ 301-423 (1982), for further details on how the VA's system of providing pensions and disability payments operates.

2. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 358 (1985) (Stevens, J., dissenting) (VA's system of processing claims functions fairly and effectively most of the time); see also S. LEVITAN & K. CLEARLY, *OLD WARS REMAIN UNFINISHED: THE VETERAN BENEFITS SYSTEM* 27 (1973) (VA programs are a model welfare system).

3. See *infra* footnote 16 and accompanying text for a discussion of the VA's error rate.

4. 38 U.S.C. § 211(a) (1982). Section 211(a) provides:

The decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

5. Hochstein, *Hope For Atomic Vets: The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act*, 4 ANTIOCH L.J. 235, (1986); Vietnam Veterans of America Newsletter, March 8, 1988.

judicial review of VA disability claims, examines the proposed Act's response to this need, and discusses why the Act does not provide the best solution to this problem.

To receive disability benefits, a veteran must not have been dishonorably discharged and must have a disability that resulted from service in the armed forces.⁶ The most frequent dispute arising in this context is whether a disability is service-connected.⁷ Although the VA has promulgated regulations mandating that all reasonable doubts as to the causation of an injury or illness must be resolved in favor of the claimant,⁸ critics maintain that the VA routinely ignores these rules.⁹ Moreover, the VA is incapable of assisting veterans with complex cases involving a great deal of investigation to establish the service connection.¹⁰ Consequently, many groups of veterans feel that the VA unjustly denies benefits to thousands of veterans every year.¹¹ Without judicial review, there is no way to remedy these errors.

The lack of judicial review is especially disturbing because the VA is commissioned to simultaneously aid veterans in pursuing claims and to keep a tight rein on the government's purse.¹² This conflict of interest is further aggravated when Congress requires the VA to act as the veteran's advocate, judge, and final appeals court.¹³ The VA contends that it accomplishes these objectives through the use of a non-adversarial system of adjudicating claims.¹⁴ In reality, the agency's informal management system rewards its employees for denying claims, and reportedly uses a quota system to keep benefit payments down.¹⁵ In addition, according to studies, the VA has a substantive error rate of 1½ % to 10% per year.¹⁶ This means thousands of disability claimants may be victims of mistakes that

6. See 38 U.S.C. §§ 101(2), 310 (1982).

7. The National Law Journal, June 15, 1987, at 18, col. 1.

8. 38 C.F.R. § 3.103 (1986).

9. The National Law Journal, June 15, 1987, at 18, col. 3.

10. *Id.* at 18, col. 1. Complex claimants are those whose claims depend on the establishment of difficult proof of causation. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1319 (N.D. Cal. 1984), *rev'd*, 473 U.S. 304 (1985).

11. Two groups of veterans who feel that lack of judicial review hurts them are veterans claiming exposure to atomic radiation during World War Two and Vietnam vets who were exposed to Agent Orange. Note, *Statutory Restrictions on Complex Claimants' Right to Retain Counsel in VA Proceedings: Walters v. National Ass'n of Radiation Survivors*, 71 Iowa L. Rev. 1231, 1232.

12. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1320 n.17 (N.D. Cal. 1984), *rev'd*, 473 U.S. 305 (1985).

13. The National Law Journal, June 15, 1987, at 18, col. 1.

14. *Id.* at 18, col. 2.

15. *Id.* at 19, col. 1.

16. *Id.* at 20, col. 1. The Chief Benefits Officer of the VA claims the agency's substantive error rate is approximately 1.5%. Donald Abrams, an attorney for the VA contends that an internal VA study three years ago found an error rate of 10%. *Id.*

may result in reduced benefits or no benefits at all.¹⁷

Veterans who believed they were victims of VA mistakes have characterized their suits as involving constitutional due process questions as a means of circumventing the preclusion statute and obtaining judicial review.¹⁸ However, any due process¹⁹ violations veterans assert against the VA's adjudication procedures fail because courts consider veterans' benefits gratuities that do not establish vested rights in a recipient.²⁰ Thus, the courts afford veterans fewer due process rights than non-veteran welfare recipients,²¹ criminals, illegal aliens, and spies.²²

The courts and Congress have justified this result as a necessary limitation of veterans' rights in order to prevent the courts from becoming flooded with costly and time-consuming litigation.²³ Lack of judicial review of veterans' claims is inconsistent with other federal agencies because very few federal agencies are insulated from judicial review.²⁴ In fact, review of agency decisions is the norm in administrative law, and there is a strong bias in favor of it.²⁵ Nevertheless, Congress decided not to give veterans the option of pursuing further recourse through judicial review of VA decisions, placing them in a small class of litigants who are denied such a right. As a result of this inequity, some legislators saw the need to treat veterans like most other parties to administrative proceedings and introduced the proposed Act.

The proposed Act allows a veteran to obtain judicial review of a benefit claim in federal district court.²⁶ The Act gives district courts

17. In 1978, the VA processed 800,000 claims. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Using the 1.5% error rate, the VA made 12,000 benefit claims mistakes in 1978.

18. *Johnson v. Robison*, 415 U.S. 361 (1974).

19. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

20. See *Lynch v. United States*, 292 U.S. 571, 577 (1934) (VA benefits are gratuities); *De Rodulfa v. United States*, 461 F.2d 1240, 1257 (D.C. Cir. 1972) (VA benefits establish no vested rights in recipients); see also *Milliken v. Gleason*, 332 F.2d 122, 123 (1st Cir. 1964) (VA benefits may be withdrawn at any time by Congress).

21. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Court afforded recipients of Aid to Families with Dependent Children considerable due process rights).

22. 72 A.B.A.J. 29 (1986) (paraphrase of a quote from Phil Cushman, member of Veterans for Due Process).

23. *Marozsan v. United States*, 635 F. Supp. 578, 581-82 (N.D. Ind. 1986) (citing *Johnson v. Robison*, 415 U.S. 361, 369 (1974)).

24. See generally Note, *The Ten Dollar Attorney Fee Limitation and Preclusion of Judicial Review in the Veterans' Administration*, 14 HASTINGS CONST. L.Q. 141, 164 (1986) (most federal agencies subject to judicial review).

25. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (strong presumption of reviewability unless Congress demonstrates an attempt to cut off review by clear and convincing evidence); *Consumer Fed'n of Am. v. FTC*, 515 F.2d 367 (D.C. Cir. 1975) (general presumption of reviewability exists under the Administrative Procedure Act).

26. *The Veterans' Administration Adjudication Procedure and Judicial Review*

the power to decide questions of law, interpret constitutional and statutory provisions, and compel action that is being unlawfully withheld by the administrator of the VA.²⁷ In addition, the court may set aside decisions that are arbitrary and capricious, an abuse of discretion, contrary to constitutional rights, in excess of statutory authority, or procedurally defective.²⁸ When reviewing findings of fact, the court may set aside those findings that are "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding[s] were not set aside."²⁹ Before it sets aside any such findings, however, the court must first remand the case to the VA to allow it to correct its errors.³⁰

Although the proposed Act provides for district court review, the forum for review of most administrative agency adjudications is the United States Court of Appeals.³¹ Because most agencies perform trial functions themselves, the district courts are generally bypassed.³² Nevertheless, other factors often affect the desirability of a particular forum.

The court of appeals is a desirable forum because it possesses superior decision-making ability.³³ Review by a panel of judges, who are of high caliber, and are accustomed to performing appellate work, yields higher quality decision making.³⁴ Incompetence and personal bias are unlikely to be problems at this level.³⁵

The district court, however, has three major advantages as a reviewing forum. First, it is often closer, more convenient, and less expensive for the litigant than is the court of appeals.³⁶ Second, the government incurs less cost when one judge instead of three hears

Act, S.367, 99th Cong. 1st Sess. (1985).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3), 1 C.F.R. § 305.75-3 (1986).

32. 5 STEIN, MITCHELL & MEZINES, ADMINISTRATIVE LAW § 45.04[1] (1987).

33. Currie & Goodman, *Judicial Review Of Federal Administrative Action: Quest For The Optimum Forum*, 75 COLUM. L. REV. 1, 12 (1975).

34. *Id.* at 12-13. First, when multi-member judicial panels review action, they are more likely to represent a broader spectrum of views. *Id.* This process of "collegial decisionmaking" also minimizes the "luck of the draw" aspect of which single judge would hear a case. *Id.* Second, judges at this level are drawn from the best of the trial bar and the district court judges. *Id.* They are presumed to be the best the legal profession can offer. *Id.* Finally, judges of the circuit courts normally perform appellate work. *Id.* Evaluating the decisions of other tribunals is the primary function of the appellate court. *Id.*

35. *Id.*

36. *Id.* at 8. District court review helps ensure that the expense of litigation for persons such as disability claimants will not "swallow the recovery or price it beyond pursuit." *Id.*

each case.³⁷ Finally, the district court judge has more flexibility, which can be an aid when deciding factual questions.³⁸ In addition, although review in the court of appeals is the norm,³⁹ some agency adjudications are reviewed by the district courts.⁴⁰ This usually occurs when the potential number of litigants is so large that such adjudications would overwhelm the limited resources of the appellate courts.⁴¹ District court review is also favored when the type of claim would rarely result in further appeal.⁴²

The district courts should review VA benefit claims. Most of the problems that veterans now have with the current administrative process can be resolved in this forum.⁴³ Furthermore, only the district courts are equipped to handle the expected volume of appeals, which may exceed 1,000 per year.⁴⁴ Consequently, the Act's choice of the district court as a forum for review is appropriate.

The proposed Act provides a scope of review for factual questions that is not currently in use in administrative law. Under the Administrative Procedure Act ("APA"), a court normally uses a "substantial evidence" test to evaluate an agency's factual determinations,⁴⁵ and it will set aside agency findings of fact that are not supported by substantial evidence.⁴⁶ Substantial evidence is "more than a scintilla. It means such relevant evidence as a reasonable

37. *Id.* at 9. Because judges spend some of their time writing opinions, Professors Currie and Goodman estimate that use of the district court results in overall savings of one-third "judge-hours" over the court of appeals. *Id.*

38. *Id.* at 10. For example, district courts can take evidence if necessary.

39. See *supra* note 31 and accompanying text for a discussion of the forum for judicial review.

40. For example, the district courts review Social Security disability claims. *Richardson v. Perales*, 402 U.S. 389 (1971). The Administrative Conference recommends that, in addition to Social Security claims, the district courts provide the first level of judicial review for black lung disease claims and cases under the Longshoremen's and Harbor Worker's Compensation Act. The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3). 1 C.F.R. § 305.75-3 (1986).

41. *Id.*

42. *Id.* The Social Security disability compensation program, a program analogous to the VA's compensation system, allows claimants to appeal first to the district court and then to the appellate court. Crawford, *Judicial Review Of Social Security Disability Decisions: A Proposal For Change*, 11 TEX. TECH. L. REV. 215 (1980).

43. See generally *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (N.D. Cal. 1984).

44. In 1978, the VA denied 379,000 of the 800,000 claims brought before it. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). The Board of Veterans Appeals accepted 36,000, or 4.5%, of these claims. *Id.* Assuming, *arguendo*, that the appeal rate up to the district court would also be 4.5%, then 1,620 appeals would result.

45. 5 U.S.C. § 706(2)(E) (1982).

46. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In *Universal Camera*, the Court held that substantial evidence review imposes a duty on courts to ensure that agencies do not act unreasonably. *Id.* Congress empowered courts to set aside agency findings of fact that do not meet this test. *Id.*

mind might accept as adequate to support a conclusion."⁴⁷ Substantial evidence has also been described as enough evidence to justify not granting a directed verdict against its proponent.⁴⁸ Because it is less than a preponderance of the evidence,⁴⁹ it allows a reviewing court great latitude in examining a factual record.

The scope of review under the APA narrows when an agency action results in a less formal record. The court's function is to insure that an agency decision was not arbitrary or capricious.⁵⁰ Under this test, the court must look at the facts the agency relied upon and determine if a clear error in judgment was made.⁵¹ In doing so, the court must give greater deference to the agency because discretionary actions reviewed under this standard are presumed to be correct.⁵²

The proposed Act sets forth a unique standard of review for factual questions. Its uniqueness reflects a legislative intent to hold reviewing courts to a very narrow standard of review.⁵³ Allowing only this restricted scrutiny, however, will create two problems. First, presenting courts with this peculiar standard of review may produce a wide variety of interpretations of what the standard means, thus leading to a lack of uniformity in results.⁵⁴ Alternatively, courts may try to adhere to the plain meaning of the statute, give total deference to the VA, and thus create only the illusion of review.⁵⁵ Because of these inherent problems, the scope of review contained in the Act is unworkable.

Rather than trying to create a new standard of review of factual questions, the proposed Act should employ the arbitrary and capricious test.⁵⁶ This test provides an ideal compromise because it gives proper deference to the VA, yet protects veterans from mistaken or

47. Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).

48. NLRB v. Columbia Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

49. Consolo v. FMA, 383 U.S. 607, 620 (1966).

50. 5 U.S.C. § 706(2)(A) (1982).

51. See *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.* 419 U.S. 281 (1974) (arbitrary and capricious standard a narrow scope of review because court must find clear error to set aside agency action); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (court cannot substitute its judgment for that of the agency's).

52. *Overton Park*, 401 U.S. 402 (1971). The "presumption of regularity" created in *Overton Park* leaves open the question as to how long a court must defer to agency discretion before it can step in and correct the situation. See Schotland, *Scope of Review of Administrative Action: Remarks Before the D.C. Circuit Judicial Conference*, March 18, 1874, 34 Fed. B.J. 54, 61 (1974).

53. Hochstein, *supra* note 5, at 243.

54. *Id.* at 247.

55. An example of "illusory review" is the scrutiny given Social Security disability claims. In 1977, district courts reviewed 4,295 of these cases. Crawford, *supra* note 42, at 228 n.98. Courts affirmed the denial of benefits in 93% of the cases. *Id.*

56. 5 U.S.C. § 706(2)(A) (1982).

unreasonable decisions.⁵⁷ Moreover, because the proposed Act already utilizes this test for other purposes,⁵⁸ it would not be difficult to extend the test to questions of fact. Although the arbitrary and capricious standard is normally used to review agency rulemaking rather than adjudications, the key to its applicability is the type of record being reviewed.⁵⁹ Because the VA's informal proceedings yield an informal record, this standard of review would be appropriate.

The proposed Act is a good solution to many of the problems that are plaguing the VA. The Act correctly allows the district courts to be the forum for review of VA actions. Nevertheless, as drafted, the Act does not provide a meaningful scope of judicial review. Congress needs to amend the Act to utilize the arbitrary and capricious standard for review of factual questions in the district court. If modified and enacted, the proposed Act would effectively serve both the veteran and the VA.

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57. The purpose of judicial review of agency actions is to prevent mistaken or arbitrary actions. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

58. *See supra* text accompanying note 28.

59. *Camp v. Pitts*, 411 U.S. 138 (1973). When an agency does not make formal findings of fact based on a hearing record, the proper standard of review is not the substantial evidence test, but rather the arbitrary and capricious test. *Id.* at 141-42.

