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IN SIGHT, IT MUST BE RIGHT: JUDICIAL REVIEW OF VA DECISIONS FOR REASONS AND BASES VS. CLEAR ERROR

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I. INTRODUCTION

"In sight, it must be right" was the advertising slogan of a chain of hamburger restaurants[1] that featured visible grills so customers could see the food being prepared, the assumption being that under customers' watchful eyes the burgers would be grilled properly. The Board of Veterans' Appeals ("Board") provides the final decision of the Department of Veterans Affairs ("VA") on a veteran claimant's entitlement to benefits, based on de novo review of a previous VA regional office determination.[2] When in 1988 Congress provided in the Veterans Judicial Review Act for court review of agency decisions on veterans' claims for benefits, it imposed a requirement that the Board provide in its written decision a statement of reasons and bases for its findings on all material issues of fact and law.[3] The legislative history of the statute articulated a dual purpose for the reasons-and-bases requirement: to enable the claimant to understand how the Board dealt with his or her arguments and evidence, and to assist a reviewing court to understand and evaluate the VA's adjudication action.[4] These purposes seem quite similar to the hamburger chain's idea that a process conducted in plain sight will likely be done properly.

In the important case of Gilbert v. Derwinski,[5] the then-new Court of Veterans Appeals, now the Court of Appeals for Veterans Claims ("Court"), fleshed out what the reasons and bases requirement entails. The Court referred to a Board decision being "tested by the basis upon which it purports to rest" and declared, in Judge Farley's vivid locution, that the Court cannot be expected "to chisel that which must be precise from what the agency has left vague and indecisive."[6] Thus, the Court will vacate and remand a Board decision that lacks adequate reasons and bases.[7] While the statute explicitly provides for Board decisions to be vacated if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,[8] and it is likely that a decision without adequate reasons and bases falls under one or more of those categories, the Court typically does not cite any

[1] About Us, STEAK 'N SHAKE, http://www.steaknshake.com/about-us (last visited Feb. 24, 2014).

[2] DANIEL T. SHEDD, CONG. RESEARCH SERV., R42609, OVERVIEW OF THE APPEAL PROCESS FOR VETERANS' CLAIMS 2–3 (2013), available at http://www.fas.org/sgp/crs/misc/R42609.pdf.

[3] 38 U.S.C. § 7104(d)(1) (2006).

[4] S. REP. NO. 100-418, at 38 (1988).

[5] Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

[6] Id. at 56–57 (quoting Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196–97 (1947)).

[7] See, e.g., Sanders v. Principi, 17 Vet. App. 232, 235–36 (2003); Mitchem v. Brown, 9 Vet. App. 138, 140–41 (1996).

[8] Veterans' Judicial Review Act, 38 U.S.C. § 7261(a)(3)(A) (2006).

other legal authority for remand, holding the inadequacy of reasons and bases alone sufficient.

II. REASONS-AND-BASES REVIEW IS SUBSTANTIVE

While the focus of much of the court's discussion in Gilbert itself was on the necessity for the Board to provide statement of reasons and bases, it must not be overlooked that both the legislative history and the Court's seminal decision recognized that judicial review involves critical scrutiny of the qualitative basis for decision, i.e. assessment of the soundness of the stated reasons and bases. The Senate report notes that the Court needs both to understand and to evaluate the Board's adjudication action.[9] And the Court in Gilbert refers to testing the decision by the basis upon which it purports to rest.[10] Thus, both legislature and court have expressed the understanding that the purpose of requiring the Board to state the reasons and bases for its decisions is so that the Court can qualitatively assess the correctness of those decisions.[11]

Most subsequent decisions of the Court have focused on the requirement of an explanation per se, as opposed to the validity or soundness of the explanation.[12] The Court has elaborated, however, that the Board is specifically required to "analyze the credibility and probative value of the evidence, account for the evidence it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the veteran."[13]

Obviously, this is the threshold requirement: if, because of a lack of explanation, the Court cannot discern how the Board reached its findings, then it cannot gauge whether the decision was founded upon valid legal principles. The decision just cited also contains a statement that has been repeated often in cases involving reasons-and-bases challenges: "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court."[14] This echoes the legislative history in its concern both for the claimant's understanding of why a decision came out the way it did and for the ability of the reviewing court to assess it.

[9]S. REP. NO. 100-418, at 38 (1988).
[10]Gilbert, 1 Vet. App. 49.
[11]S. REP. NO. 100-418, at 38 (1988); Gilbert, 1 Vet. App. 49.
[12] See, e.g.,Simon v. Derwinski, 2 Vet. App. 621 (1992) (citations omitted).
[13]Allday v. Brown, 7 Vet. App. 517, 527 (1995)
[14]Id.

What has received considerably less discussion in the Court's cases, perhaps because the Board often fails to meet the threshold requirement of the explanation itself, is the qualitative evaluation of the Board's reasons and bases that the Court is required to make. Judge Kramer explicitly recognized this in his concurrence in Gilbert, stressing that judicial review involves this qualitative evaluation to make sure decisions are lawful.[15] The reasons-and-bases requirement of 38 U.S.C. § 7104(d)(1),[16] he said, is not meant to replace, nor lower, the scope of review engaged in by the Court. He recognized that reasons or bases, even if provided by the Board, may or may not justify the findings of material fact and decisions of law made by the Board. "No amount of reasons or bases, no matter how articulately made, can justify that which is not justifiable."[17] He cautioned that judicial review, to meet the intent of Congress, must be "real judicial review, not just the appearance thereof," and he found assurance in the majority opinion in Gilbert that the Court did not intend to adopt a review standard that was too deferential to the Board.[18]

Thus, the oft-quoted description of what is required of a statement of reasons and bases, that it be adequate "to facilitate review by the Court," involves more than being merely comprehensible. That is, it will not suffice for the Board merely to state reasons revealing what it was thinking; it must also be apparent that the Board was thinking along legally permissible lines.

III. REVIEW OF BOARD FACT-FINDING

There is, however, another aspect of judicial review addressed in the same legislation that created such review of Board decisions. Under 38 U.S.C. § 7261(a)(4), the Court may hold unlawful and set aside or reverse material findings of fact adverse to the claimant (only claimants can appeal Board decisions; the government cannot), but may do so only if they are clearly erroneous.[19] It is the Board's particular province to assess the weight and credibility of evidence,[20] and findings with respect to such weight and credibility are factual determinations going to the probative value of evidence,[21] which will therefore be overturned only if found clearly erroneous.[22] A finding is clearly erroneous when, although there may be

[15] Gilbert , 1 Vet. App. at 60 (citing statute codified as amended in 38 U.S.C. § 7261(a)(3)(A)).
[16] 38 U.S.C. § 7104(d)(1).
[17] Gilbert,1 Vet. App at 61.
[18] Id.
[19] 38 U.S.C. § 7261(a)(4).
[20] Owens v. Brown, 7 Vet. App. 429, 433 (1995).
[21] Layno v. Brown, 6 Vet. App. 465, 469 (1994).
[22] Butts v. Brown, 5 Vet. App. 532, 535 (1993).

evidence to support it, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[23]

The requirement of substantial deference to factual findings of the Board was included in the legislation establishing judicial review of VA decisions because of a perception that the Board has particular expertise in the sorts of issues raised by veterans' claims and thus is better equipped than reviewing judges to make factual determinations in this specialized area.[24] Whether this perceived expertise actually exists or matters is debatable,[25] but it undoubtedly figured in Congress's provision for deference to Board fact-finding.

The scheme of review enacted by statute as interpreted by the Court thus yields a bifurcated classification of determinations: on one hand, adverse material findings of fact may be set aside or reversed only if they are clearly erroneous, while, on the other hand, reasons and bases for decisions that are inadequate justify vacation and remand of the Board's decision.

A. The Collision

These two crucial aspects of judicial review enacted by Congress actually collide. The different levels of deference to the Board reflected in the two different provisions require the Court to elect one over the other in classifying each issue raised on appeal, because these decisional events, fact-findings and legal reasoning, are not separate and mutually exclusive. On the contrary, many determinations of fact, especially the ultimate conclusions that determine entitlement to benefits, require logical inferences to be drawn from other facts – reasoning, in other words.

This may be easily demonstrated by two hypothetical determinations: suppose the Board found a veteran not credible because he had given three significantly different accounts of an event, or suppose instead that the

[23] Gilbert, 1 Vet. App. at 52 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

[24] Proposed Veterans Administration Adjudication Procedure and Judicial Review Act and Veterans *Judicial Review Act: Hearing on S. 11 and H. 2292 Before the S Comm. on Veterans' Affairs,* 100th Cong. 335 (1988) (statement of Hon. Morris S. Arnold, Judge, U.S. Dist. Ct. W.D. Ark.) ("The courts are not well equipped to determine such factual issues as whether or not an injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly" (emphasis in original)); see, e.g., Id. at 43 (statement of Hon. Stephen G. Breyer, Judge, U.S. Ct. of App. for the First Cir.) ("I believe that reviewing Agency fact finding is something I don't do very well."); see also Gilbert, 1 Vet. App. at 52.

[25] Although veterans' claims tend to raise certain types of issues routinely, chiefly involving credibility of witness accounts and medical assessments of causation and severity of disability, there is nothing inherently unique or arcane about the factual determinations involved. Courts have every bit as much experience as administrative law judges in weighing credibility of witness accounts and assessing the probative value of expert opinions. The law applicable to veterans' claims is specialized, but the facts involved in such cases do not differ from those of many other sorts of litigation.

Board found the veteran not credible because his testimony was given on a Tuesday. Credibility is a question of fact.[26] There is no doubt that the second reason for finding lack of credibility is absurd and would not be countenanced by a reviewing court, while the first reason seems perfectly sound. But could either explanation, or the credibility finding itself, be held clearly erroneous as a matter of fact? Assuming that the testimony was indeed given on a Tuesday and the veteran indeed gave three different recitations of the same event, then neither of those findings nor the ultimate one, that the veteran is not credible, is clearly erroneous as a pure matter of fact. Were the court to review the conclusion, and the two reasons proffered for it solely for clear factual error, it could not say that a definite mistake had been made, i.e. that any of the facts found were clearly wrong.

Yet the second reason is plainly absurd. Upon what actual statutory or common law basis would a reviewing court invalidate such a determination? The legal defect inheres in the word because. The established fact of testimony being given on a Tuesday does not serve as a proper foundation for an inference drawn from it that the witness is not credible. It was not because the testimony was given on a particular weekday that the witness lacked credibility. The adjudicatory defect, in other words, is one of reasoning, having to do with what sorts of inferences may permissibly be drawn from established facts.

The Supreme Court of the United States has explicated this principle. Only reasonable inferences are permissible, and an inference must be more than speculation and conjecture to be reasonable.[27] In the specific context of review of agency decision-making, the Supreme Court has said that the "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[28]

The second reason given above cannot meet these tests. A witness's credibility is not more likely dubious if he testifies on a Tuesday. There is no rational connection between the fact noted - testimony on a Tuesday - and the conclusion reached, that the testimony and opinion are non-probative. But this does not mean that the conclusion is necessarily wrong.

In judicial review of VA decisions, the collision between deference to-

[26] Wood v. Derwinski, 1 Vet. App. 190, 193 (1991).

[27] See Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); see also Barnes v. United States, 412 U.S. 837, 842 (1973) (quoting Leary v. United States, 395 U.S. 6, 36 (1969) ("an inference is 'irrational' or 'arbitrary' . . . unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.")).

[28] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

ward fact-finding and the necessity of adequate reasons and bases for decision occurs because what may seem to be a pure finding of fact, i.e. what occurred, will often involve the exercise of reason. Circumstantial evidence involves this process, which may be illustrated by borrowing an old chestnut usually used to demonstrate bad cross-examination technique, asking one question too many. A witness concedes that he did not actually observe the defendant bite off the ear of the plaintiff, but when the examiner then recklessly presses him to explain how he could possibly know that the defendant did so, the witness replies that he saw the defendant spit it out. The validity of circumstantial evidence arises through the process of experience guiding inference. In the context of a fight, it is unlikely that the ear of the plaintiff would have found itself inside the mouth of the defendant unless the defendant had bitten it off. Hence, absent another explanation, it is logical to accept that the observed act of spitting it out proves the unobserved act of having bitten it off.

Until 2008, many Board of Veterans' Appeals decisions held that one doctor's medical opinion would be accepted as more probative than another's because the first doctor reviewed the veteran's claims file, which contains all the medical and historical evidence and correspondence between the claimant and VA, while the other doctor did not review this file. On the surface this seems intuitively correct: the more thorough a medical review is, the more likely it is to reflect an accurate understanding of the relevant data and thus be well founded. So the review of the claimant's file would seem probative. But as the Court clarified in a 2008 decision,[29] this is not necessarily so. If the claims file contains information crucial to an informed assessment of the medical condition, information that cannot be procured otherwise, then claims file review vel non is indeed an important factor in determining the probative value of a medical opinion. But if the file lacks such crucial information, or if the expert has access to the same information by another means, such as treating the claimant as a patient, claims file review does not enhance probative value.[30]

B. Reasoning Matters

These examples illustrate a well-established principle of judicial review, whether it is explicitly acknowledged or not: reasoning matters. It obviously matters in how the ascertained facts are filtered through the analysis required under legal rules to reach ultimate conclusions, which in the veterans' claim system, are the decisions on entitlement to benefits. The quality

[29] Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 303 (2008).
[30] Id.

of such legal analysis determines whether the ultimate thumbs-up or thumbs-down conclusion in an adjudication is just. As Judge Kramer explained in his Gilbert concurrence, the legal conclusions drawn from the facts once found must be reviewed to see if they are lawful.[31] One aspect of this lawfulness is that there be a "rational connection" between the subsidiary facts found and the ultimate conclusions reached, that the inferences drawn be reasonable ones.[32]

But the propriety and logic of inferences drawn from established facts are not limited to ultimate conclusions; propriety and logic also matter when determining certain types of facts, those as to which there is some doubt or dispute. Often, many facts bearing on a veteran's claim are uncontroverted, but some are in question and sometimes vital to the outcome. For example, to establish entitlement to compensation a veteran must show qualifying service in the military and a current disability, plus the all-important link between events in service and the current disability.[33] The latter may turn on the truth as to what happened during military service.

If a veteran claims that his asbestos-related disease resulted from exposure in an engine space on board a Navy ship, whether that exposure occurred will make or break the claim. Exposure itself is strictly a question of fact – it either happened or it did not – but the Board will almost always depend upon inferences in determining whether exposure actually occurred. The Board will consider the veteran's statement that he worked in the engine room where asbestos was common, but it might also consider such things as his military occupational specialty (whether it relates to engine room machinery), the record of assigned duty, or even the meaning of a leave document directing him to report back to Division "M," i.e. whether the "M" relates to machinery or to the fact that he later worked as a "messman."[34] Based on what it infers from these various items of evidence, the Board will decide whether the claimed exposure occurred. Were the Board to rely on an absurd factor, such as an unfounded assumption that "M" referred to mopping, or, as above, the day of the week on which the claimant testified, its conclusion would hardly be entitled to respect and would certainly not do justice. Determinations of fact, then, as well as ultimate conclusions, must derive from sound reasoning, not caprice.

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[31] Gilbert, 1 Vet. App. at 60 (Kramer, J., concurring).

[32] Motor Vehicles Mfrs., 463 U.S. at 52 (quoting Burlington Truck Lines, 371 U.S. at 168).

[33] Caluza v. Brown, 7 Vet. App. 498, 506 (1995).

[34] These facts are loosely adapted from actual cases. Cf. McGinty v Brown, 4 Vet. App. 428, 429–32 (1993) (discussing occupational specialty and record of assigned duty); Judgment of May 29, 2009, No. 09-20085 (Bd. Vet. App. May 29, 2009), http://www.va.gov/vetapp09/Files3/0920085.txt (discussing record of assigned duty).

But how can the Court consider the soundness of the Board's reasoning in reaching those factual conclusions without running afoul of the specific admonition in 38 U.S.C. § 7261(a)(4) that the reviewing court must accept the Board's material findings of fact unless they are clearly erroneous? If findings of fact are subject to review and rejection or revision by the Court if inadequately reasoned, is the Court impermissibly substituting its judgment for that of the Board?[35] If the Board provides no statement of reasons and bases, it has violated the statute and committed error warranting remand. But can the Court review the soundness of the reasons and bases and still respect the Board's material findings of fact?

Although the Veterans Court has not articulated it in such terms, its formulation of review for adequate reasons and bases arguably falls under its power to invalidate decisions if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[36]; it is argued here that insisting on adequate explanations is essential to guard against arbitrary decision-making.

Each appeal confronts the Court with the challenge of how to properly classify alleged errors as either fact-finding or reasoning errors. Often the result for an appellant will turn on whether the Court views the asserted error as essentially one of fact, which can be undone only if clearly erroneous, or instead as essentially one of law or procedure, where an error of reasoning will justify a remand for the agency to adjudicate the claim properly.

Because most fact-finding also involves a certain amount of reasoning, as discussed above, this crucial classification will turn largely on where the issue is seen to fall in the sequence of adjudicative analysis. If, for example, the issue is understood to be the legal sufficiency of the Board's ultimate conclusion that the veteran lacked credibility, it will be regarded as a determination of fact based on weighing evidence, subject to reversal only if it is clearly erroneous. But, if the issue is seen instead as whether the Board employed proper logic in reaching the factual conclusion bearing on credibility, the Court will be free to assess the logic and reject it if it is defective. The consequences are momentous for the claimant. If the Court remands, the veteran preserves his claim and the effective date of any benefits ultimately awarded based on that claim, and lives to fight another day. If the Court affirms the Board based on deferring to its findings of fact, then the veteran's claim dies and he must start over, with a new and less advantageous potential effective date.

[35] The Court must not substitute its judgment for that of the Board. Gilbert, 1 Vet. App. at 53.
[36] 38 U.S.C. § 7261(a)(4)(A) (2006).

To illustrate, suppose the veteran asserts that he had an orthopedic condition in service but the Board rejects that evidence because he did not complain of the condition in a psychiatric examination during service. If the question is understood as one of proper inferences, the appellant will have a fair chance of success on appeal, because the Court will assess the logic of the Board's assumption that a soldier would necessarily have reported any orthopedic condition to a psychiatrist, and this seems doubtful. It would be much harder to show, however, that the Board's assumption was clearly erroneous as a matter of fact; since people often do mention anything bothering them to a psychiatrist, there is some plausible basis in the record for the Board's assumption that it would have been reported, and thus the reviewing court would likely not be left with "the definite and firm conviction" that a mistake was made.

C. Ramifications of Classification in the VA Claims System

It is particularly crucial that the Veterans Court handle this classification of issues carefully because of the unique nature of Board decision-making. The classic model of litigation in this country is the jury trial in a court of record. In that context, there is a careful distinction made between fact-finding, which is the province of the jury, and application of law, which the jury does under the direction of the judge. Decisions and instruction on the law are reviewable on appeal, while the facts are mostly not so; the fact determinations of a jury will be disturbed by a reviewing court only if there is a lack of substantial evidence for them,[37] i.e. "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[38] Fact finding by a trial judge will likewise be set aside only if clearly erroneous, and due regard is to be given to the opportunity of the trial court to judge of the credibility of the witnesses.[39]

The appellate deference incorporated by 38 U.S.C. § 7261(a)(4) into judicial review of VA decisions looks rather like the deference accorded jury or trial court findings of fact. As discussed above, the Veterans Court may not disturb material fact-findings by the Board unless the court determines that they are clearly erroneous, having no plausible basis in the record. But is fact-finding by the Board essentially the same as fact-finding by a jury or trial judge based on live testimony?

[37] Glasser v. United States, 315 U.S. 60, 80 (1942); see also 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (3d. ed. 2008).

[38] N.L.R.B. v. Columbian Enameling & Stamping, Co., 306 U.S. 292, 300 (1939).

[39] U.S. Gypsum Co., 333 U.S. at 394.

It is not. There are two major differences. The first is that in VA adjudication, very little of the evidence comes from live testimony. It is common for a Board judge to conduct a non-adversarial hearing at which a veteran claimant and perhaps a spouse will testify in person or via video, but with this exception the Board receives all of the evidence on which it will decide the case in written form. Even where there is a hearing with live testimony, rarely if ever will a Board make a credibility determination based on the demeanor of witnesses at a hearing, the way a jury or trial judge sizes up a witness based on verbal and non-verbal cues. Thus, in veterans' jurisprudence the Board's assessment of witness credibility is not the same kind of assessment made by juries or judges in a trial.

Related to this, and more important, is the second major difference between a jury trial and Board fact-finding. The evidence presented to the VA upon which the Board makes its decision is not subject to cross-examination, as trial testimony is. Whether cross-examination quite lives up to Wigmore's encomium, describing it as the "greatest legal engine ever invented for the discovery of truth,"[40] there is no doubt that it is the heart of the adversary system. By cross-examination inconsistencies in testimony are exposed, vague recollection is discredited, and half-formed or ill-considered opinion is dissected and its weaknesses revealed. This is the crux of litigation before a jury or judge sitting as finder of fact, and it does not occur in veterans' cases.

If a VA doctor asserts in a medical opinion that a veteran's condition is not related to service because there are no records indicating treatment in service, the veteran does not have an opportunity to ask the VA doctor, for example, if she was aware that seven neutral witnesses, including three nuns and the doctor's own mother, have all testified that the veteran had continual symptoms but was afraid of military command retaliation if he signaled weakness by consulting a doctor. In ordinary litigation, such a question posed on cross-examination would likely induce some backtracking by the expert witness. In a veteran's case the question does not get asked and, unless the Board approximates such an inquisition through its critical review of the evidence, the record will not be developed in the way it would be developed in ordinary litigation.

The Veterans Court has recognized this lacuna in the veterans' claims system and has said that the Board must, by its statement of reasons and bases, serve "a function similar to that of cross-examination in adversarial lit-

[40] 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (2d ed. 1923).

igation."[41] This is both easier and more often said than done. The Supreme Court of the United States has observed that the veterans' claim "adjudicatory process is not truly adversarial" and the veteran is often unrepresented; the Court added that these aspects "might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances."[42] In other words, the lack of the adversarial challenge to evidence creates a greater possibility for prejudicial error.

Only a very particular and most exacting form of analysis could stand in the shoes of a crafty and energetic cross-examiner, probing and pressing to reveal weakness or to raise doubt. If the reviewing court does not insist on this rigor in the reasoning to support Board decisions, the non-adversarial nature of the system, which was meant to ease the passage of veterans through the VA claims system, becomes instead a trap into which they unwittingly fall. That is, if the court sweeps into the fact-weighing category – subject to review only for clear error – all of the Board's factual conclusions, but ignores poor reasoning in arriving at those conclusions, then the veteran is back where he was before court review was instituted, relying on the good offices of the Board alone. Effective recourse to the Court becomes an illusion.

D. Practical Realities Working Against Veterans

As noted above, to the extent the constraints on judicial review of Board decisions were derived from the tradition of appellate review of jury trials, the premise underlying imposition of those constraints was flawed. Moreover, there are other realities in actual VA adjudication, as opposed to how things are set out on paper, that augment the possibility of error. The system is often described as veteran-friendly,[43] and this character is reflected in two aspects of the system. First, the VA is required to tell claimants what evidence, in general, they need to submit to prove their claims and to assist them in developing certain kinds of evidence to support entitlement to benefits.[44] Second, if the evidence on any given material point is in balance, the benefit of the doubt is to be given to the claimant.[45] In actual practice each of these veteran-friendly features of the system is less helpful than would appear in theory.

[41]Gabrielson v. Brown, 7 Vet. App. 36, 40 (1994).
[42] Shinseki v. Sanders, 556 U.S. 396, 412 (2009) (internal citation omitted).
[43] Mayfield v. Nicholson, 19 Vet. App. 103, 120–21 (2005).
[44] 38 U.S.C.S. § 5103(a) (2006); 38 C.F.R. § 3.159 (2013).
[45] 38 U.S.C. § 5107(b) (2006); 38 C.F.R. § 3.102 (2013).

The Veterans Court has declared that the VA's duty of notice goes "to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the processing of his or her claim."[46] Unfortunately, the notice given to claimants is not always pellucid.

For example, the "Statement of the Case" that is supposed to advise a claimant why her claim was denied usually consists of page after page of excerpts from statutes and regulations, which sometimes have little or nothing to do with the actual decision. These are followed by a few terse paragraphs that usually recite a few findings by a VA medical examiner and then assert a conclusion that service connection or a higher rating is not warranted. This document is supposed to enable the veteran to formulate an appeal to the Board, but even if the veteran is tenacious enough to wade through all the irrelevant verbiage, she will find little actual explanation of the legal or factual basis for the decision so as to challenge it before the Board, and she will get no guidance whatever as to how to go about effectively challenging it.

Similarly, for many years the standard VA notice letter concerning initial submission of evidence outlined the elements necessary to prove a claim, including a causal connection between a current disability and an event during military service, and then the letter explained that this evidence usually comes from medical records or medical opinions. It then advised the veteran that, "[i]f appropriate, [the VA] may also try to get this evidence for you by requesting a medical opinion from a VA doctor."[47] While this explanation conveyed to claimant the requirement of nexus evidence, it also misleadingly suggested that the VA would get it in the form of a medical opinion "if appropriate."[48] This misled veterans into thinking it was not something they had to worry about, which was not so. Veterans are unrepresented by counsel at this initial stage, and often after a Statement of the Case is issued as well.

The duty to assist by obtaining records is also limited. The Court has held that VA need not go on a "fishing expedition" looking for any records that might support a claim, but rather that the claimant must specify what records exist and are relevant, such that the VA should seek them.[49] This can pose significant practical problems. A widow whose husband died from a radiogenic cancer or from asbestosis may have a very difficult time

[46] Mayfield, 19 Vet. App. at 120–21.

[47] A typical letter containing this language is attached as a appendix to Mayfield v. Nicholson, 19 Vet. App. 103, 131 (2005), reversed on other grounds, 444 F.3d 1328 (Fed. Cir. 2006).

[48] Id.

[49] Gobber v. Derwinski, 2 Vet. App. 470, 472 (1992).

discerning what sorts of relevant records might exist or where they might reside, since she will likely be unfamiliar with her husband's actual duties in the military, will lack any information about possible exposures, and will have little idea about military practices for creating or maintaining records. The VA will not go outside the routine requests for military service medical records and personnel records, so if the claim presents anything unusual, crucial evidence will not be obtained, and the veteran will not be told effectively that he or she should pursue it.

The second veteran-friendly aspect of the claims system is generally evaded by a VA finding that the preponderance of the evidence is against the claim, i.e. the evidence is not in equipoise, so the benefit-of-the-doubt principle does not apply. Although the evidence of record really does preponderate against the veteran in some cases, many appeals allege that the Board has reached this conclusion based on less than sound reasoning. If unsound reasoning cannot be effectively attacked on appeal, then the VA can take away a significant portion of the favorable treatment Congress intended for veterans to receive in the claims system.

The theoretical basis of the VA claims system also ignores some inherent human-nature aspects of the system that can cause non-neutral decision-making. When the Court remands a case to the agency, it does so on the narrowest basis possible; if the Court identifies one error warranting remand, it will not address other errors asserted by the appellant, since the agency theoretically will address any other problems when it re-adjudicates. The VA's practice, however, is to assign the case to the same Board judge who decided it originally unless he or she is no longer with the agency. This policy perhaps seeks some efficiency from having continuity of the same decision-maker, but its effect is quite different.

Most humans do not enjoy being criticized and may manifest a natural impulse to respond to criticism by being defensive. Thus, it is extremely common for a Board judge on remand to simply concoct other reasons for the same decision she made originally. This practice is asserted as proper in a published article co-authored by two lawyers serving as counsel to the Board, who assert that a remand by the Court for inadequate reasons and bases merely requires the Board "to simply better explain the same decision that was previously made."[50] This is incorrect. The Court has long made clear that a remand for reasons and bases requires a full re-adjudication.[51]

[50] Hillary Bunker, Shera Finn & Chaz Lehman, Reforming the Equal Access to Justice Act (EAJA) to *Maximize Veterans'* Receipt of Benefits and Increase Efficiency of the Claims Process, 4 VETERANS L. REV. 206, 206, 225 (2012).

[51] Mahl v. Principi, 15 Vet. App. 37, 38 (2001); Fletcher v. Derwinski, 1 Vet. App. 394, 397 (1991).

But it is telling that lawyers employed by the Board believe it is correct. This phenomenon leads to re-appeals if the newly concocted reasons are not sound, and, where natural human defensiveness motivates confirming or justifying an earlier decision, rather than neutrally reassessing the case, there is a greater likelihood that the reasons will be substandard and the decision not well founded.

Another aspect of human nature may affect Board decisions. Unlike a civil litigation judge who sees a variety of cases, a Veterans Law Judge sees only one sort of claim: all VA claims are an attempt to obtain money from the government. Thus, day after day, claim after claim, a Board judge sees story after story seeking to justify payment of benefits. While Board judges will properly have one eye on the integrity of the public fisc, protecting it from meritless claims, they are supposed to ignore the fact that benefits will be paid by the same agency that pays their salaries. Assuming they can do that, there is a subtler dynamic. Given the relentless waves of claims, always advocated from one side, it would not be surprising if a judge began to develop an acute skepticism about claimants' contentions generally. That is, the very non-adversarial aspect of the system could end up disadvantaging the claimant through a subtle form of compensation by the Board judge for the absent, adverse party. Whether this actually occurs no one knows, but the risk that it could occur is another argument for careful scrutiny of Board reasoning to ensure that it clearly displays a neutral analysis.[52]

There is evidence that VA decision-makers do not fully comprehend the importance of providing adequate reasons and bases, or the purpose for that requirement. The VA has officially advised a member of Congress that:

> a 'reason-or-bases' remand does not necessarily indicate that VA committed any factual or legal error in finding that a claimant did not meet the requirements for entitlement to benefits, but may reflect only the Veterans Court's judgment that a fuller explanation is needed with respect to a particular issue.53

This advice to Congress was correct insofar as a reason-and-bases remand does not necessarily mean that the Board's ultimate determination of non-entitlement was wrong, as it may or may not have been. But the assertion is inaccurate in suggesting that this is not legal error. It is a violation of

[52]Appeals to the Veterans Court likewise come only from one side, but before the Court the case is adversarial, so the judges can choose between two competently presented storylines; there is no subliminal sense that one side is not being heard from. The one-sided nature of Board adjudications, where the record is not developed through an adversarial contest of development and argument, requires extraordinary sensitivity to the potential for defensiveness, and great discipline by the Board judges to resist it.

[53] Letter from Erik K. Shinseki, Sec'y, Veterans Affairs, to Hon. Charles E. Grassley, U.S. Sen. (Apr. 22, 2010), available at http://www.grassley.senate.gov/about/upload/Veterans-04-22-10-VA-response-to-CEG-letter.pdf.; see also Bunker, Finn, & Lehman, supra note 50, at 206–07.

statute, because Congress has imposed the requirement that the Board explain its decisions, and the Veterans Court has construed that requirement as including a qualitative component, i.e. the Board may not merely supply any old reason that comes to mind but must be provide legally sound reasons.

IV. CONCLUSION

The aforementioned discussion of factors that do or could militate against completely thorough or neutral adjudication of veterans' claims is not meant to imply that VA adjudicators, and Board judges in particular, do not seek to carry out their responsibilities with integrity and diligence. On the contrary, the author is convinced that the vast majority of the time they do exactly that, and even when they fail, they do not do so knowingly. But judicial review is founded on the notion that every decision-maker is fallible, subject to error from time to time. As the preceding discussion is intended to show, there are some special risks associated with the unique nature of the VA claim system that mandate a high level of scrutiny of decisions.

If judicial review is to serve the function Congress intended, i.e. removing decisions from the absolute discretion of the Board, the Court must be willing not only to examine pure issues of law but also to insist upon fact-finding that is supported by logical, legally sufficient reasoning. Deference to the agency's findings of fact via the clearly-erroneous review standard is not irreconcilable with review of the adequacy of reasons and bases, but carrying out the congressional purpose of subjecting agency decisions to effective judicial review requires that the latter trump the former. As Judge Kramer recognized in Gilbert early in the Court's history, if there are defects in the reasoning supporting factual conclusions, the defects must be remedied, lest deference to Board fact-finding swallow up the most powerful recourse veterans have in the aftermath of an unfair decision.[54] Only through this sort of review does the reasons-and-bases requirement carry out Congress's conception that "in sight, it must be right."

[54]Gilbert, 1 Vet. App. at 60 (Kramer, J., concurring).