THE HONORABLE BRUCE E. KASOLD, JUDGE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

TESTIMONY OF

THE HONORABLE BRUCE E. KASOLD, JUDGE
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

FOR SUBMISSION TO THE UNITED STATES SENATE COMMITTEE ON VETERANS' AFFAIRS, FEBRUARY 11, 2009
TESTIMONY OF THE HONORABLE BRUCE E. KASOLD, JUDGE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS BEFORE THE UNITED STATES SENATE COMMITTEE ON VETERANS' AFFAIRS, FEBRUARY 3, 2009

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:
Thank you for allowing the United States Court of Appeals for Veterans Claims' (the Court) the opportunity to provide testimony today. I am here as the designee of the Court's Chief Judge, William P. Greene, Jr., who is unable to attend the hearing.

As a prelude, I would be remiss if I did not note for the record that the Court passed a milestone this past November 18, 2008, which marked the 20th year since its creation when President Ronald Reagan signed into law the Veterans' Judicial Review Act of 1988 (VJRA). The Court actually convened with three judges on October 16, 1989, and we look forward to celebrating next Fall the 20th year of judicial access for veterans and their families.

According to your January 22, 2009, invitation letter, the hearing "will focus on improvements that can be made to mitigate the delay in processing appeals." More specifically, the Committee has requested whether we have any legislative or policy recommendations that might help expedite the timeliness of appeals, and any perspectives we have on the relationship between the Board and the Court.

I. AN ADMINISTRATIVE AND JUDICIAL APPELLATE PROCESS
As you are aware, the appellate process for those with claims for veterans benefits has two distinct fora: administrative and judicial. Within VA, a Regional Office generally processes the claim and renders the first decision. When a claimant is dissatisfied with that decision, he or she has the right to appeal to the Board. The Board reviews the claim de novo; that is, it reviews the claim without any deference given to the initial decision. The Board ultimately renders the final decision for the Secretary. If the claimant is dissatisfied with the Board decision, he or she may seek reconsideration by the Board, or, appeal to the Court.
Throughout the proceedings below, the claimant and the Secretary should be working together to maximize the claimant's benefits, if any are warranted under the statutes and regulations governing benefits. The Secretary has an affirmative duty to assist the veteran in gathering evidence, which includes, inter alia, liberally reading the scope of his claim, gathering evidence, advising the claimant what is needed to substantiate the claim, and providing a medical examination when needed.

When an appeal is taken to the Court, the claimant enters the judicial arena. In the federal

judicial system, the parties are viewed equally, and the claimant, now the appellant, generally has the burden of demonstrating that the Board decision is either clearly erroneous, or that there is some procedural error that has been prejudicial to the claimant. If dissatisfied with a decision from the Court, an appellant has the right to appeal to the U.S. Court of Appeals for the Federal Circuit, although that court's jurisdiction generally is limited to questions of law, and most appeals are dismissed for lack of jurisdiction. Upon dissatisfaction with the results from the Federal Circuit, appellants may seek certiorari at the Supreme Court. Over our twenty-year existence, the Supreme Court has taken less than a handful of cases involving VA benefits claims.

A. The Judicial Appeal Process

Within our Court, I am pleased to report that we are operating on all cylinders. In contrast to the dynamics experienced just a few years ago, which saw the Court (1) reduced at one point to only three active judges taking a full case-load, and two active judges nearing senior status and not taking new cases, (2) hampered with excessive turnover in leadership, and (3) experiencing anew the growing pains of a virtually re-established Court with the replacement of six judges in a two-year period, I am pleased to report that we now have a full complement of seven experienced, active judges. Moreover, under the outstanding leadership of Chief Judge Greene, we have, inter alia, an active recall-program for our senior judges and a new mediation program; and we now are in the process of fully implementing electronic filing. Without doubt, our senior judges have, overall, significantly helped with the issuance of timely judicial decisions. Equally significant has been the implementation last Spring of an aggressive mediation program, which, to date, has succeeded in expediting a resolution in over 25% of the appeals filed, with the parties agreeing to a disposition that does not need judicial review; generally, the parties are agreeing to a remand for further adjudication below.

As always, the Court is looking for ways to ensure timely judicial review. The primary time-consuming process that warrants review is the time to prepare the record before the agency and the briefing process. Both are essential to a judicial process that is not only fair and just to both parties, but perceived to be fair and just by the parties. On this issue, I note that there are a significant number of requests for additional time to prepare the record before the agency or a brief. Both parties have time-management problems, but the Secretary has the greater number of requests for an extension of time. I am not familiar with the Secretary's internal operations, but I understand there is recognition that additional staffing might be warranted, and I suspect it might be the most significant factor in helping to reduce the number of requests for additional time in which to prepare the record or required briefs.

Viewing the judicial appeal process overall, and particularly in context of twenty-years of the development of Veterans law, it appears time to seriously consider the added value of the unique, additional right of the parties to seek review by another federal appellate court. The majority of cases appealed to the Federal Circuit generally are dismissed for lack of jurisdiction - that is, they generally present no legal issue for review - or they are affirmed because the legal issue raised on appeal is well-settled. Appeals presenting a more novel or difficult issue can be more time consuming, and these appeals in particular can generate significant delays in the processing of claims below and appeals at the U.S. Court of Appeals for Veterans Claims. Moreover, a party dissatisfied with the decision might seek certiorari at the Supreme Court, with a resultant, further delay in the processing of other cases and appeals involving the same issue.

There would appear to be little added-value to the current judicial process which not only permits, but requires an appeal to the Federal Circuit, before an appellant dissatisfied with a decision from the U.S. Court of Appeals for Veterans Claims might seek certiorari from the Supreme Court. Regarding the value of multiple layers of appellate review I am reminded of the wisdom of Supreme Court Justice Robert H. Jackson, who observed:

Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.
Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring.).

Is the time right to evaluate the need for the unique, additional appellate review provided by the Federal Circuit? I understand Chief Judge Greene is on record in support of such an evaluation, as is our first Chief Judge - Chief Judge Nebeker - and I too strongly suggest that it is now worthy of consideration. I note that although direct certiorari review by the Supreme Court initially was not provided for the other two Article I appellate courts - the U.S. Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), and the District of Columbia Court of Appeals - over time, as those courts matured and developed a seasoned body of case law, such review was provided. Moreover, when such review was provided for the D.C. Circuit Court of Appeals, the intermediate review previously provided by the U.S. Court of Appeals for the District of Columbia was eliminated.

Eliminating the intermediate appellate review currently extant with veterans judicial appeals not only would reduce the time involved in the judicial appeal process for a particular case, it would reduce the overall processing time for many cases as issues that have a system-wide impact generally would be brought to final resolution in a more timely manner. I know some will object to losing that unique, additional bite at the apple, but it has been my observation that the few significant cases that the Federal Circuit viewed differently than our Court, generally have come down fairly equally, with the Secretary or the appellant being satisfied in one case only to be dissatisfied in another. Given Justice Jackson's observation, and the fact that we now have a seasoned body of case law, it appears timely to bring the judicial appeals process provided for review of claims for veterans benefits in line with the overall federal judicial appeals process.

B. The Administrative Appeal Process
When he spoke at the Court's Eighth Judicial Conference in April 2004 about the relationship between the Court and VA, Professor Richard J. Pierce, Jr., Administrative Law Professor at the George Washington University Law School, cautioned that:

"Reviewing courts have important roles in the decisionmaking process, but they are narrowly confined roles. The relationship is definitely not that of a partnership or a hierarchical relationship in which the court can tell the agency what to do."

Professor Pierce went on to state that in situations where the reviewing court specializes in the subject matter that it reviews, such as here, the reviewing court must work hard to resist the temptation to fall into a partnership-type mentality with the agency, and must remember that "agencies are autonomous entities that are entitled to respect and deference from the courts." (Pierce quoting Vermont Yankee Nuclear Power Corp. v. NRD, 439 U.S. 961 (1978). In sum, the Court sits in a judicial role and lacks the day-to-day administrative claims processing experience that might enlighten one on ways to improve on the timeliness of processing claims below.

Nevertheless, we have some general observations, although I note that the Chairman of the Board generally has recognized these problem areas already, as stated in his annual report to Congress. Any observations of problem areas must take into consideration the gravamen of the situation. It is my understanding that in the past couple of years, the Secretary has processed and rendered an initial decision in hundreds of thousands of claims annually, with about 40,000 being appealed to the Board. About 15% of these decisions are appealed to our Court, but it is my understanding that a good number of the Board decisions involve a remand for continued adjudication by the regional office. This general fact presents two areas for discussion.

1. Appeal of Board Decisions

Of those Board decisions appealed to the Court, about 70% are remanded for further adjudication. The most common error is the failure to sufficiently explain the basis for a decision. The Board is statutorily required to explain its decision, and our case law requires an explanation that discusses the material and relevant evidence and explains the basis for the decision so that it allows the appellant to understand the precise reason for the decision as well as permits judicial review.

It is important to understand the impact of this requirement. Under our case law, except in very limited circumstances, an appeal is not remanded for the sole purpose of requiring the Board to explain its decision, which likely could be done in relatively short order if evidence was not further developed. Rather, a remand from our Court also permits the appellant a new opportunity to further develop the claim. He or she might gather new evidence, request the Secretary to assist in gathering records, and even present a basis for an initial or new medical examination to be given. This development takes time, particularly given the fact that the claim had been denied on the facts previously developed. Since this involves the development of a claim for veterans benefits, as opposed to an added judicial review of a completed record, this second chance to develop the claim seems consistent with our Nation's commitment to seeing that those entitled to veterans benefits receive those benefits. The time added to processing the claim seems justified, although efforts should certainly be undertaken - and continued - to reduce the need for the Board remand in the first instance.

Another large number of cases are remanded because the development below was inadequate. A medical exam was not provided, or records were not obtained, or a hearing officer failed to inform a claimant of a reasonably raised, undeveloped issue with the claim. Should these be properly done in the first instance? Certainly. But here, we cross the threshold into management and resources, and I defer to the Secretary and Chairman of the Board for their insight on this.

Suffice it to say, human error is the sustaining basis for the creation and continuation of appellate courts, including the U.S. Court of Appeals for Veterans Claims.

Approximately one quarter of the cases appealed to the Court are affirmed. This often ends the matter, although a dissatisfied party has a right to appeal to the Federal Circuit, delaying the time in which resolution is final. Less than 5% of the appeals to the U.S. Court of Appeals for Veterans Claims involve an outright reversal of the Board. No doubt appellants would like to see that higher, but I note that the high remand rate can often result in an award, and it is an award based on the proper development of the facts (improperly done initially), or renewed development of the facts (generated by the claimant in conjunction with a remand based on a faulty explanation of a Board decision).

2. Remand of Claims by the Board

Pursuant to statute, and consistent with general appellate review, the Court does not review a decision of the Board that has remanded a claim for further development. There has been no suggestion that I know of to change this, but for the record, we perceive that doing so would only delay processing further with no benefit to anyone.

Nevertheless, we are cognizant of the high number of remands generated by the Board. This appears consistent with their mandate, which includes de novo review of the claim - that is a complete review of the matter without any deference to the initial decision maker, as well as application of the benefit of the doubt and the duty to assist. As I understand it, only a small percentage of the hundreds of thousands of claims adjudicated by the Secretary are appealed to the Board. Nevertheless, a high number of remands suggests a high degree of error in those claims appealed to the Board, and this would appear to be an area that might be improved. As noted above, however, here we cross into the administration and management of the claims process, where we defer to the Secretary, the Board Chairman, and the oversight provided by Congress and the President.

II. RELATIONSHIP BETWEEN THE COURT AND THE BOARD

As indicated previously, the Board sits atop the administrative adjudication of claims for veterans benefits. It is an independent body within VA and it conducts de novo review of the claims it reviews, although it is required to apply the Secretary's regulations and policies, and opinions of the General Counsel. Under these parameters, the Board ultimately renders the final decision for the Secretary under laws that affect the provision of veterans benefits.

Once the Board renders its final decision on a matter, it may be appealed to the Court. Only a dissatisfied claimant may appeal. The Secretary is not permitted to initiate an appeal; however, once an appeal is initiated, he may defend the decision of the Board, although he is not required to do so. Indeed, the Secretary frequently suggests to the Court that there is Board error and that remand is appropriate, and the high success rate in our mediation process indicates the Secretary's cooperation with the mediation process.

When appealing to the Court, the claimant transitions from the veteran-friendly administrative process, where the Secretary has a duty to assist and apply the benefit of the doubt, to the traditional adversarial, judicial, appellate process, where both parties are equal and expected to present their positions to the Court for judicial decision (or mediation).

Unlike the Board, the Court generally does not conduct de novo review, except when questions of law are presented. Thus, the facts are developed below and weighed below with application of the benefit of the doubt. On appeal to the Court, the facts found by the Board (which may differ from those found by the Regional Office, particularly since they are reviewed by the Board de novo) are reviewed for clear error. Consequently, consistent with general federal appellate review, a degree of deference is given to agency fact-finding. In contrast, but also consistent with general federal appellate review, questions of law are reviewed without deference. Also consistent with general federal appellate review, the appellant generally has the burden of demonstrating error.

By statute, the Court is permitted to render single-judge decisions. Given the fact that a claim on appeal to the Court has undergone at least two reviews below, with fact-development available at each stage, the nature of an appeal frequently presents no new issue of law, and involves only a review of the facts and application of the law. The single-judge authority permits a case to be reviewed and a decision rendered, and written, more timely than a panel case can be issued. To ensure uniformity and soundness of decision, however, each single-judge decision is circulated for review by all active judges. Further, a party dissatisfied with the decision has a right to request reconsideration by the single judge and/or panel review, which generates a panel decision that either finds no basis for full-panel review and lets the single-judge decision stand, or conducts a full review of the appeal, de novo to the single-judge decision. A single-judge decision is binding with regard to the appeal considered but it has no binding effect on other cases being processed below - this is because it generally is fact specific or involves an already accepted application of law.

Those appeals presenting novel questions of law or reasonably debatable questions of fact or law are reviewed by panel or the full-court. Over the past couple of years, the Court has averaged about 65 appeals that are sent to panel for initial decision or decided by the full-court. Full-court and panel decisions have full precedential effect and are binding on the Secretary and the Board, as well as future decisions of the Court when issued by a single judge or another panel.

Judicial review by a specialized Court, as is the U.S. Court of Appeals for Veterans Claims - limited to review of final Board decisions and ancillary matters - might be viewed as twofold. It provides judicial review for the individual claimant; that is review that is wholly independent of the executive or legislative branch and administrative pressures that might be presented outside the context of legislation. Within our Nation and set of values, this is a sacred right, and one for which our veterans fought many years to achieve. But there is a second aspect to limited jurisdictional review by a specialized court. Judicial decisions that have precedential value (our panel and full-court decisions) are binding on the agency, and can help establish uniformity in the adjudication of matters within the agency. Compliance is enforced not only by the Secretary and the Board, but by the uniform application of law and subsequent decisions of the Court.

With rare exception, we perceive no bad faith or gross negligence in the processing and adjudication of claims below. From our perspective, an enormous number of claims are processed and adjudicated by the Secretary and the Board. Judicial review helps to ensure mistakes are corrected. Efforts should indeed be taken to reduce the number of errors made,

particularly the repetitive errors, but the overall review structure between the Court and the Board is sound.

It strongly appears that at least for the present and near future, the number of claims filed below will remain increasingly high, which likely will keep appeals to the Board and the Court increasingly high. Congress has authorized two new judges and, I understand, additional staffing at the Board and within VA. At this time, we perceive no need for any significant additional increase in staffing for the Court. I defer to the Secretary and the Board with regard to their operations.

III. CONCLUSION

At his nomination hearing before the Senate Judiciary Committee in September 2005, now Chief Justice John Roberts compared the work of judges and justices to that of a baseball umpire and said: "I will remember that it's my job to call balls or strikes, and not to pitch or bat." Although I and my colleagues at the U.S. Court of Appeals for Veterans Claims do not equate ourselves to the Chief Justice, we certainly heed his counsel. Thus, I assure this Committee that each judge on the Court strives to live up to the oath that we took when we were appointed to the bench - to administer justice and to faithfully and impartially discharge and perform the duties incumbent upon us as judges of a court of law. We appreciate the opportunity to engage in dialogue aimed at strengthening and improving the veterans benefits adjudication system as a whole. However, we recognize that it is the legislative branch of government that must take the steps necessary to create the laws and the framework which the Executive branch is charged to administer, and it is our responsibility to provide judicial review. On behalf of the judges of the Court, I thank you for the Committee's efforts in this regard, and for your invitation to share our views on this subject.