

# Tommy

*A Lawyer's Guide to Veterans Affairs*

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## **What Veterans Would Gain From Administrative Procedure Act Adjudications**

*By Robin J. Arzt*

**T**here is a crisis of public confidence in the timeliness, fairness, and quality of the VA disability claims process. Our veterans who apply for VA disability benefits are confronted with an inefficient, inaccurate process that undermines administrative fairness and the public's confidence in that fairness.

1. Untimely decisions. There are lengthy case processing times for initial claims at the Department of Veterans Affairs (VA) regional office level and for appeals to the Board of Veterans' Appeals (BVA) and U.S. Court of Appeals for Veterans Claims (Veterans Court) that add up to years. Undecided backlogged initial claims number in the hundreds of thousands and had climbed to 600,000 by the end of 2001. The BVA and Veterans Court also have significant backlogs and increasing case processing times in recent years. There is no limit to the number of appeals. Numerous veterans reportedly die every year while awaiting determinations of their VA disability claims at all levels.

2. Perception of unfairness. The BVA achieved the uniquely low score of 35 in the December 2001 American Customer Satisfaction Index compiled annually regarding federal agencies by the University of Michigan Business School and American Society for Quality.<sup>1</sup> The study's director opined that he never before saw anything like this low score. However, the chairman of the BVA explained it away by saying that a 35 is not bad when only 22 percent of veterans received an increase in benefits at the BVA level,<sup>2</sup> which shows an insensitivity to the public perception of unfairness that this remarkably low satisfaction

score appears to signify. In 2000, the BVA favorably ruled on 26 percent of the benefits claims. Veterans are virtually barred from hiring lawyers to help prosecute their claims through the VA administrative process until their case reaches the Veterans Court, which leaves some veterans feeling that they are being denied counsel of their choice. The lack of legal counsel during the administrative process has been estimated to add substantially to the case processing time.

3. Poor decision quality. The quality of the regional office determinations and BVA decisions as measured by their accuracy is poor. Despite years of VA effort to improve claims processing accuracy and timeliness, VA reported a 41 percent error rate at the regional office level in fiscal year 2000, according to a June 2000 GAO report.<sup>3</sup> In 2000, the BVA vacated 30 percent of the regional office determinations and remanded the cases for another determination. In the same year, the Veterans Court vacated a huge 64 percent of the BVA decisions on appeal, most upon procedural grounds, and remanded the cases for further proceedings.<sup>4</sup> This year, VA increased the monthly regional office disposition rate from 29,000 to 70,000, which reduced the backlog from 600,000 to 389,000 by June 3, but apparently at the cost of a further erosion in the quality of decisions. On June 6, an American Legion official testified before the House Veterans' Affairs Subcommittee that a quality review team that reviewed one regional office found evidence of premature and erroneous denials of claims after cursory review in order to meet stringent VA production quotas, a general lack of compliance with the Veterans'

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Federal Bar Association Veterans Law Section

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*Deadline for the next issue*

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Claims Assistance Act of 2000, and what may be "an orchestrated policy of manipulation of...production figures as a means of meeting...mandated production quotas...."<sup>5</sup>

The current public uproar that has spilled into the media about the perceived lack of fairness, poor decision quality, untimeliness, lack of independence, and weak due process in the VA disability claim process at the BVA appellate level exists precisely because of the lack of the procedural safeguards that now exist for Social Security claimants in the Administrative Procedure Act (APA).

The APA was enacted in 1946 to achieve reasonable uniformity and fairness of the administrative process in the federal government for members of the American public with claims pending before federal agencies. The APA provides the minimum standards for federal administrative due process in the Executive Branch and delineates procedures for adjudicative administrative proceedings, namely individual case decisions about rights or liabilities as an agency's judicial function. This includes uniform standards for the conduct of adjudicatory proceedings, including the merit appointment of hearing examiners, who now are administrative law judges (ALJs). The APA sets forth a due process administrative procedure for the hearing and decision by ALJs of cases brought before the federal agencies to which the APA applies.<sup>6</sup>

VA's use of subordinated employees at its final level of administrative review, the BVA, together with the BVA's low favorable ruling rate and high remand rate, unsurprisingly has fostered the public perception that the BVA is an instrument and mouthpiece for VA. Our veterans deserve full administrative due process before an independent decisionmaker for their disability claims. There now is a movement to apply the APA due process requirements to the BVA to address problems of quality, untimeliness, and the perception of unfairness. Using an APA process with ALJs modeled on the SSA system at the BVA level recently has been endorsed by respected academicians.<sup>7</sup> A former BVA

chair also has cited the SSA APA process as a model.<sup>8</sup>

By APA mandate, the ALJ is an independent, impartial adjudicator in the administrative process, and there is a separation of an agency's adjudicative function from its policy-making, policy-implementation, rulemaking, investigation, and prosecutorial functions. The remainder of this article describes the benefits that these features of the APA would afford the veterans who file VA disability claims.

The ALJ is the only impartial, independent adjudicator available to a claimant in the federal administrative process and the only person who stands between the claimant and the whim of agency bias and policy. The APA puts many protections in place to ensure that ALJs are independent, competent, and impartial in adjudicating administrative claims. The decisional independence granted to ALJs is designed to maintain public confidence in the essential fairness and high quality of the process through which benefits are allocated by ensuring impartial decisionmaking. APA creates a comprehensive procedural bulwark to protect ALJs from agency interference. The high professional quality of ALJs and their decisional independence are ensured through the following APA safeguards.

1. ALJs are appointed as a result of a competitive merit selection process administered by the Office of Personnel Management (OPM), rather than by the hiring agencies. Securing fair and competent hearing personnel through a non-political appointment process is the heart of the formal administrative adjudication process. The BVA chairman is appointed by the president with the Senate's advice and consent.<sup>9</sup> The other BVA members are appointed by the VA secretary on the BVA chairman's recommendation and president's approval.<sup>10</sup> The BVA members thus are not appointed through competitive merit selection process. However, in the event that the BVA hearing process were made subject to the APA, the sitting BVA members should be permitted an equitable opportunity to qualify as APA ALJs.

2. ALJs have career permanent civil service appointments without a probationary period to prevent agency dismissal of

ALJs whose decisions are not favored by the agency.

3. ALJ pay levels are set by statute and ALJ pay is regulated by OPM independent of agency recommendations or ratings.

4. Agencies are prohibited from giving performance evaluations of ALJs, or giving bonus pay and honorary awards to ALJs in the performance of adjudicatory functions. Before the APA, hearing officers were impeded in their exercise of independent judgment because they often were subordinate to executive officials within the agency. By statute, the BVA chairman controls and supervises the BVA, is accountable to the VA secretary, and is authorized to appoint a performance review panel to review BVA members' work.<sup>11</sup> The BVA members thus are subordinate VA employees and have performance reviews by VA agency superiors on a regular basis that may result in their removal as BVA members for unacceptable job performance.<sup>12</sup>

5. An ALJ is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of policy-making, policy-implementation, investigative, or prosecution functions for the agency when conducting a hearing or deciding a case. Thus, the public's perception of fairness in the BVA process will be enhanced by due process hearings and decisions by APA ALJs.

6. Procedural safeguards to prevent ex parte communications about the merits of a claim with the ALJ, agency and employees involved in the decisionmaking process. An ALJ may not consult any person or party, including other agency officials, concerning a fact at issue in a claimant's hearing, unless on notice and opportunity for all parties to participate. The prohibition of off-the-record or ex parte communications is a lynchpin of the integrity of an ALJ's decisional independence. Concerns have been expressed about VA's "quality review" for errors (as per the BVA Handbook) of all BVA decisions or remand orders that are drafted after a court remand but before they are issued by the BVA. The pre-decision review is performed by the Litigation Support Division that is located within the BVA under the BVA chairman. The Litigation Support Division refers files with

"erroneous" draft BVA decisions or remand orders to the BVA's senior deputy vice chairman. Differences of opinion between a BVA member and the BVA's senior deputy vice chairman are finally determined by the latter. Concerns also have been expressed about the Litigation Support Division review of, and issuance of memoranda that comment upon, Veterans Court remand orders before they are issued, since the court remand orders govern BVA decisions and the BVA members apparently may also see the memoranda.<sup>13</sup> Ex parte and off-the-record review of and comment upon the Veterans Court remand orders and BVA decisions and remand orders before they are issued by a non-adjudicator part of the BVA undermine BVA member decisional independence and public confidence in the fairness of VA adjudication.

7. ALJs are insulated from at will removal by the president and employing agency by the requirement that a due process hearing be held before the Merit Systems Protection Board before an adverse personnel action may be taken against an ALJ. This provision helps protect APA adjudications from political intrusion. BVA members' fixed terms were ended by statute in 1994. A removal action against a BVA member for a reason other than job performance is subject to the same procedural requirements that are afforded ALJs pursuant to 5 U.S.C. § 7521 of the APA. The BVA member also has the procedural rights to notice of the reasons for removal, reasonable answer time, representation, and a timely written decision that are set forth in 5 U.S.C. § 7513(b). 5 U.S.C. § 554(a)(2) does not apply to a removal action for a reason other than job performance.<sup>14</sup>

8. The requirement that cases be rotated among all of the ALJs employed by an agency prevents an agency from "judge shopping" for a particular outcome or giving fewer cases to ALJs whose decisions the agency does not like. By regulation, the BVA chairman is empowered to assign cases to the BVA members and disqualify a BVA member from hearing and deciding a given case.<sup>15</sup>

9. The requirement that ALJ functions may not be delegated to, or performed by, non-ALJ employees prevents an agency

from avoiding giving cases to ALJs whose decisions the agency does not like. The BVA chairman is permitted to appoint VA employees as acting BVA members for a maximum of 90 days at a time, but such an individual may serve up to 270 days per year. Acting BVA members cannot be more than 20% of the total number of BVA members and acting BVA members.<sup>16</sup>

10. ALJs are placed in a separate part of an agency from the initial decisionmakers and policy-makers to provide administrative review that is free of actual or perceived bias. There is no separation of the BVA from the VA policy-making structure.

11. ALJs may not perform duties inconsistent with their duties as ALJs. Prior to the APA, there was considerable concern that those hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work.

The APA's procedural separation of an agency's adjudicative function from the policy-making, policy-implementation, rulemaking, investigation, and prosecutorial functions of an agency would provide many benefits for veterans who appeal to the BVA.

1. A full and fair hearing that is conducted by an ALJ appointed pursuant to the APA, free of political and policy implementation pressure by the agency.

2. A de novo hearing that is on the record. The BVA does de novo hearings on the record that are nonadversarial. Formal rules of evidence are not followed. However, unlike the SSA de novo ALJ hearing, a veteran must move for permission to submit evidence that was not considered by the regional office and show good cause for not filing the evidence at the earlier step. Good cause is limited to several specific reasons by regulation. Also, a veteran must waive his right to have the new evidence considered by the regional office in order to avoid a remand of the case and stay before the BVA.<sup>17</sup>

3. A right to representation by a lawyer or nonlawyer at the hearing and during the rest of the application and appeals pro-

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cess. A veteran essentially is barred by statute from hiring a lawyer at the initial regional office claims level and the BVA level because the lawyer is not permitted to be paid for his services, unless the BVA already has issued a final decision in issues raised in the case and the lawyer was retained within one year of the final decision issue date.<sup>18</sup> Thus, while BVA rules permit a veteran to be represented by an attorney, only three to five percent of veterans are so represented. Instead, in practice, most veterans who apply for VA disability benefits are limited to using nonattorney representatives from veterans service organizations chartered by Congress and state veterans organizations that represent the veterans.<sup>19</sup> By contrast, the SSA disability process permits a claimant's attorney and nonattorney representative to either submit a fee petition without a statutory maximum amount for ALJ approval or to enter into a contingent fee agreement with his or her client to accept the lesser of \$4,000 or 25 percent of the past due benefits in the event that the client is awarded benefits, which has resulted in a high participation by lawyers in SSA disability claims. Permitting attorney representation is not a denigration of the veterans groups that now represent the veterans in the bulk of the cases at the initial and BVA levels, but affords veterans the full range of representation of their choice and the option of having a representative who is not a lay person in building a record and dealing with the increasingly complex VA claims procedures.

4. A decision based upon an evidentiary record introduced before, at, and after the hearing. ALJs can subpoena records and would be empowered by the APA to require VA to develop the record before and after the hearing for the benefit of the claimants.

5. A written decision that states the facts and law relied upon, rulings on exceptions, the ALJ's rationale, and the ALJ's findings of fact, rulings on the law, and decision. A BVA decision is a written statement of the findings and conclusions on all material issues of fact and law, the

reasons for the findings and conclusions, and an order granting or denying relief.<sup>20</sup>

6. Decisions in accordance with the applicable federal statutes, regulations, and case law. Subordinate employees who are without the decisional independence safeguards of ALJs will not be able to resist an agency's policy that may conflict with federal law without risking an insubordination charge. By statute, the BVA is bound by the regulations and instructions of the VA secretary and the "precedent opinions of the chief legal officer of the Department..." which is the VA general counsel.<sup>21</sup> The Litigation Support Division reportedly seeks out issues that it identifies as needing a consistent VA position and asks the BVA chairman to request a precedential general counsel opinion that will bind the BVA members. The BVA chairman reportedly often asks for and obtains such precedential opinions from the general counsel. This statute and provision reduce BVA decisional independence to follow federal law.

7. Mandatory judicial review of the final administrative decisions by the agency.

Given that the veterans disability claims process is one of the largest administrative adjudication systems in the United States, with hundreds of thousands of cases decided per year, VA is the face of the United States government to the veterans who seek benefits. How veterans view that face depends upon the quality of due process they receive, particularly when they seek a review of an unfavorable initial decision by VA. The use of an APA due process procedure with APA ALJs at the BVA appeals level will provide our nation's veterans high quality appellate due process and a sense of fair play.

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*expressed in this article are those of the author and do not necessarily represent the views of the SSA or the United States.*

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<sup>1</sup> Patrick Barta, *Customer Satisfaction Index Suggests More Patience with U.S. Government*, Wall Street Journal (Dec. 17, 2001).

<sup>2</sup> Del Jones, *More Consumers Give Government Services Thumbs-Up*, USA Today (Dec. 17, 2001).

<sup>3</sup> "Veterans' Benefits: Training for Claims Processors Needs Evaluation," (GAO-01-601).

<sup>4</sup> See, Joan Mazzolini, *Veterans Discover Entirely New Battle to Obtain Benefits*, The Plain Dealer (Cleveland) (May 13, 2001). See generally, Fox, *The United States Board of Veterans' Appeals: The Unfinished Struggle to Reconcile Speed and Justice During Intra-Agency Review*, Paralyzed Veterans of America, 25-32 (2000).

<sup>5</sup> *Veterans' Affairs Department Cleans Up Benefits Claims Backlog*, Federal Employees News Digest, www.fedonline.com (May 31, 2002); Tanya Ballard, *VA Benefits Production Quotas Called into Question*, Government Executive Magazine, www.govexec.com (6/7/02).

<sup>6</sup> The APA is codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372, and 7521.

<sup>7</sup> William F. Fox, Jr., in Issue 3 (2001) of this newsletter; James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, 225, 243-247 (2001).

<sup>8</sup> O'Reilly, *supra* at 243, citing, Charles L. Cragin, *The Impact of the Judicial Review on the Department of Veterans Affairs Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 Me. L. Rev. 23, 40 (1994).

<sup>9</sup> 38 U.S.C. § 7101.

<sup>10</sup> 38 U.S.C. § 7101A(a).

<sup>11</sup> 38 U.S.C. § 7101A(c)-(g).

<sup>12</sup> 38 U.S.C. § 7101A(c)-(e).

<sup>13</sup> Fifth Judicial Conference, *BVA's Role in Cases before the Court*, moderated by Jeffrey N. Luthi, 12 Vet. App. 75, 76-84 (September 1998).

<sup>14</sup> 38 U.S.C. § 7101A(e)(2).

<sup>15</sup> 38 C.F.R. §§ 19.3, 19.10(c).

<sup>16</sup> 38 U.S.C. § 7101(c)(1).

<sup>17</sup> 38 C.F.R. § 20.1304(b)-(c).

<sup>18</sup> 38 U.S.C. § 5904(c).

<sup>19</sup> Fox, at 37-42.

<sup>20</sup> 38 U.S.C. § 7104(d).

<sup>21</sup> 38 U.S.C. § 7104(c).

**END OF EXHIBIT**