

Two Perspectives on Legal Authority Within The Department of Veterans Affairs Adjudication

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This comment will suggest that there are two general views toward the legal authority that forms veterans benefits claims adjudication² within the U.S. Department of Veterans Affairs (VA). In VA, there are both nonlawyer adjudicators at the local VA offices³ within the agency of the Veterans Benefits Administration (VBA) and lawyer adjudicators at the appellate agency of the Board of Veterans' Appeals (BVA or "Board").⁴ While there is much similarity within VA in its claims adjudication, this comment will address the broad differences of perspective toward the selection and role of legal authority.

One view toward legal authority, typified by BVA lawyer adjudicators, tends to recognize VA legal authority primarily at and above the level of the regulations, and interprets such legal authority through the various courts' interpretations (this view will be referred to as the "judicial" perspective). The other view, typified by VBA adjudicators, more readily seeks ancillary guidance from VA administrative sources below the level of regulation and tends to view legal authority through such VA directives (this view will be referred to as the "administrative" perspective).

All VA adjudicators apply and cite the formal legal authorities – statutes, regulations, VA General Counsel precedent opinions, and, by separate authority, court interpretations – that are available in VA decision

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² For an overview of the VA appeals process, *see* U.S. Congressional Research Service, Veterans Affairs: The Appeal Process for Veterans' Claims (RL33704; Mar. 20, 2008), by Douglas R. Weimer.

³ *Id.* (noting that there are 58 local VA offices where claims for benefits are received and initially decided, in addition to administrative offices at VA medical centers).

⁴ *Id.* BVA is an appellate level agency within VA that reviews appeals of claims from the local VA offices. Its statutory authority is derived from 38 U.S.C. §§ 7101(a), 7104 (2000). *See* BD. OF VETERANS' APPEALS, UNDERSTANDING THE APPEAL PROCESS 6 (2000).

making.⁵ In addition to the formal legal authorities, there are also various administrative sources of VA quasi-legal authority⁶ that may inform VA adjudicators in administrative claims in veterans benefits law⁷ cases.

Historically, the VA Secretary has exercised broad statutory authority to make and publish rules, regulations, guidelines, interpretations, and orders.⁸ Until the creation in 1988⁹ of the U.S. Court of Appeals for Veterans Claims (CAVC),¹⁰ VA was exempt from judicial review¹¹ and was exempt from the rulemaking requirements of the Administrative Procedure Act (APA).¹² The courts now with relevant jurisdiction over VA administrative adjudications are CAVC,¹³ the U.S. Court of Appeals for the Federal Circuit (Federal Circuit),¹⁴ and the U.S. Supreme Court.¹⁵

⁵ 38 U.S.C. § 511(a) (2000) (“The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits . . .”).

⁶ The term “quasi-legal authority” is used here to refer to various written guidance provided by VA entities other than the VA General Counsel that are designed to aid adjudicators in understanding and addressing veterans benefits claims or are intended to serve as purely administrative guidance in processing claims, but might be read as substantive guidance in claims adjudication. See 38 C.F.R. § 19.5 (2007) (“The Board is not bound by Department manuals, circulars, or similar administrative issues.”).

⁷ Veterans benefits law includes compensation for service-connected disability or death, dependency and indemnity compensation, pension, hospital and medical care, insurance, and burial benefits. 38 U.S.C. §§ 1101–3000 (2000).

⁸ 38 U.S.C. § 501(b) (stating, “[a]ny rule, regulation, guideline, or other published interpretation or order (and any amendment thereto) issued pursuant to the authority granted by this section or any other provision of this title shall contain citations to the particular section or sections of statutory law or other legal authority upon which such issuance is based.”).

⁹ Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 7251 (2000)).

¹⁰ Originally named the U.S. Court of Veterans Appeals.

¹¹ WILLIAM F. FOX, JR., THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS: AN ANALYSIS OF THE JURISPRUDENCE, ORGANIZATION, AND OPERATION OF THE NEWEST ARTICLE ONE COURT 7–20 (2d ed. Supp. 2000) (providing a historical overview of the Veterans Administration and creation of the U.S. Court of Veterans Appeals).

¹² 5 U.S.C. §§ 551–59, 701–06 (2000).

¹³ CAVC is an Article I Court. The statutory authority and jurisdiction for the CAVC is 38 U.S.C. §§ 7125–292 (2000).

¹⁴ The Federal Circuit is an Article III Court that has exclusive jurisdiction to hear cases challenging CAVC rulings. Authority is set out at 38 U.S.C. § 7292 (2000).

¹⁵ 38 U.S.C. § 7292(c). For an example of decisions of the Federal Circuit that may be, but are infrequently, appealed to the U.S. Supreme Court, see *Brown v. Gardner*, 513 U.S. 115 (1994) (invalidating a VA regulation requiring fault as the cause of additional disability as inconsistent with the language of a no fault statute at 38 U.S.C. § 1151).

Because of such a long and unique history of exemption from APA rulemaking procedures and judicial review, VA routinely established, in addition to regulations, its own legal interpretations, procedural traditions, and administrative practices and guidance.¹⁶ VA refers to such administrative authority as “directives,”¹⁷ which include circulars¹⁸ and manuals.¹⁹ Such administrative authority is also referred to collectively herein as “sub-regulatory” authority, to identify its legal standing in relation to statutory and regulatory authorities.

Such sub-regulatory VA directives range from substantive and nonsubstantive provisions of the VA Adjudication Procedure Manual²⁰ as well as medical and legal guidance from the VBA Director, Compensation and Pension Service, in circulars (e.g., fast letters²¹ and training letters²²) and Service Center Manager memoranda,²³ which set forth local VA office procedures. Even judicial case law and VA General Counsel legal opinions are analyzed, interpreted, and relayed to VBA adjudicators through administrative or quasi-legal VBA sources such as the Decision Assessment Document.²⁴

¹⁶ FOX, *supra* note 11, at 13.

¹⁷ VA ADJUDICATION AND PROCEDURE MANUAL, M21-1, PART I, ¶ 3.03 (2001).

¹⁸ The VA Adjudication and Procedure Manual explains that “[c]irculars are issued to get instructions to the field stations expeditiously. They are used when required for special projects, to implement a program with an ending date, to implement instructions subject to frequent change, or to test a procedure.” *Id.* ¶ 3.03(a).

¹⁹ “Manuals are designed to provide procedures for benefit payments and, in general, for all the work everyone in VA does. They provide uniform procedures for all offices in the *application of* laws, regulations and development activities.” *Id.* ¶ 3.03(b)(1) (emphasis added).

²⁰ *Id.* ¶ 3.04 (“M21-1 deals specifically with the adjudication of claims for compensation, pension, and related benefits within the province of the veterans service center.”).

²¹ Fast letters are administrative circulars published by the Director of the VBA Compensation and Pension Service that are designed to transmit information and instructions to local VA offices about VA programs and projects, but include information about legal changes affected by other authority that affect VA.

²² Training letters are administrative circulars published by the Director of the VBA Compensation and Pension Service that are designed to provide guidance, understanding, and information primarily to VBA adjudicators that pertain to both adjudication and processing of VA compensation and pension benefits. Each training letter explicitly states its purpose.

²³ See 38 U.S.C. § 512(a) (2000) (providing that the VA Secretary may assign functions and duties, and delegate, or authorize successive redelegation of, authority to act and to render decisions).

²⁴ The Decision Assessment Document (DAD) is another form of VBA circular that is a self-contained summary of precedential court cases for use by the VBA adjudicator. The DAD provides a summary of the case, the impact of the case on VBA, and a discussion of the facts and the court’s reasons.

Such an accumulated body of administrative authority that is available to VA adjudicators may de facto function as quasi-legal authority to VA adjudicators, whether or not the sources purport to be legally authoritative or even disclaim any legal authority. Although manuals were meant only to provide procedures for *applying* laws and regulations, and were not meant to become substantive rules, the procedural versus substantive rule distinction is not always clear or maintained.²⁵ As Robert Hall put it, we “[a]re apt to be strongly prejudiced in favor of whatever is countenanced by antiquity, enforced by authority, and recommended by custom.”²⁶

The “administrative” perspective recognizes VA’s practice of using administrative directives in the application of laws and regulations in VA claims adjudication. In this view, the sub-regulatory VA directives such as manuals and circulars that direct the application of laws and regulations tend also to be recognized as authoritative for the adjudicator’s use in decision making.

Such an administrative perspective is more likely to be exemplified by VBA adjudicators at a local VA office. VBA adjudicators have at their disposal several legal and quasi-legal authorities from multiple levels and from both legal sources and administrative management sources. Such sources include the VA Adjudication Procedures Manual, fast letters, and training letters. Such quasi-legal authority elaborates and expands upon the statutes and regulations in an attempt to implement the regulation.

In some cases, these administrative directives are more favorable to the VA benefits claimant. In such cases, the VBA adjudicator may choose to rely on such administrative directives as legal authority. An administrative perspective readily and routinely draws from sub-regulatory VA administrative sources without debating source of law or higher authority questions.

²⁵ See *Fugere v. Derwinski*, 1 Vet. App. 103, 106–07 (1990); DVA Op. Gen. Counsel Prec. 7-92 (1992) (explaining that when a manual or circular or similar administrative document creates a substantive, as opposed to a procedural right, VA will be bound to its terms).

²⁶ CHARLES N. DOUGLAS, *FORTY THOUSAND QUOTATIONS PROSE AND POETICAL* 124 (Blue Ribbon Books 1940) (1904).

The concept of incorporating administrative guidance as part of the adjudication process is so woven into VBA custom and practice that such practice and formal management structure only reinforces the concept that there is little, if any, distinction between legal authority and administrative management authority. In VBA, the legal adjudicative functions and the administrative management functions are indistinct.

As an example of the blurring of the adjudicative versus management functions, the local VA office's Veterans Service Center Manager (and by further delegation to an Assistant Service Center Manager) is given adjudicative authority to actually decide veterans benefits claims.²⁷ The veterans service center manager, and his or her delegates, adjudicate some claims *de novo*²⁸ and may grant a benefit²⁹ or even change the outcome of a previous VA adjudicative decision.³⁰ In addition to the adjudicative authority, the Veterans Service Center Manager issues local policy and administrative directives regarding the handling and processing of all types of claims at the local office; sets and enforces local VBA decision production standards; makes personnel hiring, firing, and promotion decisions; and signs the VBA adjudicators' job performance evaluations.

As an example of quasi-legal authority derived from VA administrative directives, in Training Letter 05-04, the Director, VA Compensation and Pension Services, substantially redefined and expanded the regulatory definition of a personal assault in-service stressor required in post-traumatic stress disorder (PTSD) service connection claims. The applicable regulation requires that the in-service stressor or traumatic event involve actual or threatened death, serious injury, or a threat to the *physical*

²⁷ 38 C.F.R. § 3.100(a) (2007) ("Authority is delegated to the Under Secretary for Benefits and to *supervisory* or adjudicative *personnel* within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to *make findings and decisions* under the applicable laws, regulations, precedents, and instructions as to entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans and their dependents within the jurisdiction of Compensation and Pension Service." (emphasis added)).

²⁸ 38 C.F.R. § 3.2600(a) (2007).

²⁹ *Id.* § 3.2600(d).

³⁰ *Id.* § 3.2600(e).

integrity of self or others.³¹ Training Letter 05-04 expanded the definition of the type of event that qualifies as an in-service stressor to include unwelcome verbal conduct based on “gender harassment (e.g., put you down because of your gender).”³²

As a result, in claims for service connection for PTSD based on personal assault assertions, the VBA adjudicator is presented with a choice of authority. The adjudicator may require that the evidence show that an in-service stressful event involved a threat of death, serious injury, or threat to *physical* integrity (the legal regulatory requirement); or, additionally, may allow a *verbal* put down based on gender to suffice as the in-service stressor (the quasi-legal circular requirement).

Another example of quasi-legal authority derived from VA administrative sources is the VA Adjudication and Procedural Manual section pertaining to claims for compensation based on asbestos exposure in service.³³ The general regulatory requirements for establishing service

³¹ 38 C.F.R. § 3.304(f) (2007) (requiring that to establish service connection for PTSD there must be medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a)). THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass’n 4th ed.) (1994) [hereinafter DSM-IV] requires a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. See 38 C.F.R. § 4.125(a) (2007). DSM-IV requirements for a PTSD diagnosis include that “[t]he person has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.” DSM-IV, § 309.81 (Am. Psychiatric Ass’n 4th ed.) (1994).

³² COMP. & PENSION SERV., DEP’T OF VETERANS AFFAIRS, TRAINING LETTER 05-04 (2005) (quoting Amy Street & Jane Stafford, *Military Sexual Trauma: Issues in Caring for Veterans*, in IRAQ WAR CLINICIAN GUIDE 66–69 (Nat’l Ctr. for Post-Traumatic Stress Disorder ed., 2d ed. 2000) (2004), available at http://www.globalsecurity.org/military/library/report/2004/Chapter_IX.pdf). In explaining this expanded definition of traumatic event, Training Letter 05-04 correctly notes that the new term of “military sexual trauma” that it was now introducing into PTSD claims is not contained in VA regulations. Training Letter 05-04 instead boot-strapped onto its own previous sub-regulatory administrative guidance as the reference authority it chose to reinterpret. In a creative reinterpretation of VA’s own previous adjudication procedure manual (M21-1) definition of “personal assault” that includes “an event of human design that threatens or inflicts harm,” the Training Letter paints around the fact that even its own M21-1 examples all involved some type of threat of *physical* harm.

³³ VA ADJUDICATION AND PROCEDURE MANUAL, M21-1, PART IV, SUBPT. ii, CH. 2, § C5 (2008).

connection are not specific to asbestos claims. The administrative manual provisions more liberally expand the claimant's ability to establish service connection by providing a list of common materials that may contain asbestos and a list of some of the major occupations that involve exposure to asbestos.

These manual directives pertaining to asbestos-related claims have been held by CAVC to be substantive rules which constitute binding legal authority on all VA adjudicators;³⁴ however, even without the court's declaration that these manual provisions were substantive rulemaking, the VBA adjudicator's administrative perspective would strongly suggest that the VBA adjudicator follow the manual guidance when adjudicating claims for service connection for asbestosis. The administrative perspective does not seek, nor does it find, conflicts between the formal legal sources and sub-regulatory administrative sources.

Another view of VA's legal authority in its administrative adjudications is the "judicial" perspective, which relies on legal authority primarily from the regulatory level upwards as interpreted through the courts. Such authority includes statutes, regulations, and their interpretive authorities (i.e., VA General Counsel precedent opinions and precedential decisions of the courts).³⁵ This approach, which tends to only look at statutes and regulations, places substantially greater weight on the interpretive authorities of precedential court decisions and VA General Counsel opinions. Such a historical perspective is reflected within the VA regulations, which specifically exempt BVA adjudicators (but not VBA adjudicators) from sub-regulatory administrative guidance. Specifically, 38 C.F.R. § 19.5 (2007) provides, "[t]he Board is not bound by Department manuals, circulars, or similar administrative issues."

The judicial perspective is exemplified more typically in appellate level adjudication by BVA lawyers and Veterans Law Judges. The judicial perspective places more weight on the courts' explicit holdings and also tends to rely on court opinions, including *dicta* and nonprecedential opinions, for perceived trends or direction the courts may take in future

³⁴ Ennis v. Brown, 4 Vet. App. 523 (1993); McGinty v. Brown, 4 Vet. App. 428 (1993); Campbell v. Gober, 14 Vet. App. 142, 144 (2000) (finding that the BVA remand was inadequate because it did not follow more expansive manual requirements to develop evidence).

³⁵ 38 U.S.C. § 7104(c) (2000); 38 C.F.R. § 19.5 (2007).

cases. In practice, such a view deemphasizes even the substantive rulemaking provisions³⁶ within VA administrative manuals.

The BVA adjudicator's legal training suggests that the hierarchy of legal authority needs to be resolved. One way to avoid conflicts between the sources of law is to view VA administrative materials as legally irrelevant for purposes of BVA appellate adjudication, except where the BVA adjudicator is told by the court, though not by statute or regulation, that select administrative manual provisions are in fact a substantive rule with the equivalent legal force of regulation.

Where it is not possible to ignore the sub-regulatory directives altogether, the BVA adjudicator tends to look for the courts to resolve such conflicts. Even the substantive rulemaking provisions that are contained in VBA's administrative manual are identified and brought to BVA's attention through a court's declaration that such an administrative manual provision is in fact a substantive rule. For example, in *Patton v. West*,³⁷ CAVC announced that VA Adjudication and Procedure Manual (M21-1MR) provisions regarding the types of documentation that may be used to corroborate the occurrence of an in-service stressful event of personal physical or sexual assault were substantive and must be followed.

Another example of a court being the identifier of a substantive provision of law in a VA administrative manual is reflected in the cases of *Ennis*³⁸ and *McGinty*,³⁹ wherein CAVC held that VA must analyze an appellant's claim for service connection for asbestosis or asbestos-related disabilities under VA's administrative guidelines. In these cases, CAVC

³⁶ See *Hamilton v. Derwinski*, 2 Vet. App. 671, 675 (1991) (holding that substantive rules in the VA Adjudication Procedure Manual, "those which have the force of law and narrowly limit administrative action," are the equivalent of regulations); *Fugere v. Derwinski*, 1 Vet. App. 103, 106-07 (1990) (holding that a rule that "prescribes what action must be taken in the initial levels of adjudication" is substantive rather than procedural and has the force and effect of law).

³⁷ 12 Vet. App. 272 (1999); see also *YR v. West*, 11 Vet. App. 393, 399 (1998) (stating that CAVC held that VA manual provision was a substantive rule, so it was equivalent to a VA regulation).

³⁸ *Ennis*, 4 Vet. App. at 527 (noting specifically that the veteran had occupational asbestos exposure, VA circular 21-88-8 recognized that asbestos exposure could lead to bronchial or lung cancer, and VA had not considered the circular in its adjudication).

³⁹ *McGinty*, 4 Vet. App. at 432-33 (vacating VA's determination that a veteran did not have occupational asbestos exposure where VA did not consider favorable VA circular 21-88-8).

noted the absence of a statute or regulation regarding asbestos-related claims and faulted VA for failure to consider the circular in its adjudication.

Legal training appears to predispose one's perception of VA legal authority. The Board attorneys who draft the tentative final decisions are lawyers with a juris doctorate (J.D.) degree who have studied law using primarily the judicial case law method, have passed a state bar examination that demands knowledge of general principles of law in a broad range of legal areas that may or may not include administrative law, and subsequently, as VA employees, were trained in veterans benefits law.⁴⁰ The Veterans Law Judges, who actually and finally decide appealed claims, are also lawyers with normally years of experience as Board attorneys.⁴¹

Law school emphasis on learning to “think like a lawyer” evokes the quote from Hart Pomerantz, “[l]aw school taught me one thing: how to take two situations that are exactly the same and show how they are different.”⁴² The “systematic and correlated biases induced by common professional training . . .”⁴³ that includes such doctrines as *stare decisis* (which means to abide by, or adhere to, decided cases)⁴⁴ has steeped the BVA lawyer adjudicators in the use of judicial case law as the defining legal authority through which even statutes and regulations are to be understood and interpreted. This reliance on case law for statutory and regulatory meaning, for identification of substantive law provisions, and for identification of trends in the law reflects the essence of the judicial perspective.

Alternatively, the front line VA adjudicators at the local VA offices (VBA adjudicators) are predominantly lay adjudicators, VA career employees who have undergone extensive training in veterans benefits law. Many of the

provisions regarding service occupational exposure that included work in shipyards, a latency period consistent with the veteran's claim, and higher prevalence of certain diseases following asbestos exposure).

⁴⁰ BD. OF VETERANS' APPEALS, *supra* note 4.

⁴¹ The employment titles of BVA attorneys are Associate Counsel, Counsel, and Senior Counsel. Veterans Law Judges are appointed by the President.

⁴² Historic Quotes and Proverbs Archives, <http://www.worldofquotes.com/author/Hart-Pomerantz/1/index.html> (last visited Oct. 29, 2008).

⁴³ Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1571 (2007).

⁴⁴ Implicit in the concept of *stare decisis* is the idea that a court has deliberately and solemnly decided a question, so the court's decision is authoritative or binding precedent to be followed. BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

local VA office adjudicators have extensive practical knowledge of VBA agency perspectives in the processing and adjudication of VA benefits that they have obtained through VA career experience prior to becoming a VA claims adjudicator.⁴⁵

The VBA adjudicator's cumulative and specialized military medical rating knowledge has been largely acquired through a combination of administrative and quasi-legal sources, such as the VA Adjudication Procedure Manual, fast letters, training letters, VA Compensation and Pension training materials and guides, conference call reports, and local station manager memos. Through both experience and uniform national adjudication training materials, most VBA adjudicators are familiar with VBA agency customs and traditions, as well as specific administrative or quasi-legal administrative directives from VBA sources.

To illustrate the different VA adjudicative perspectives, the Federal Circuit held in *Savitz v. Peake*⁴⁶ that, in addition to a statutory postmark rule in VA statute and regulation, VA must recognize and apply the common law mailbox rule in its administrative adjudications.⁴⁷ Such an interpretation is not surprising to BVA lawyer adjudicators because it imports into a VA administrative law context a well-established, common law tradition that is familiar to lawyers in other civil law contexts.⁴⁸ The BVA adjudicator immediately asks questions such as, "What, then, is the legal standard for the veteran claimant to prove such mailing?"

⁴⁵ VBA career claims adjudicators are now referred to as Rating Veterans Service Representatives (RVSR) and Decision Review Officers (DRO). Many RVSRs were previously Veterans Service Representatives (VSR), previously referred to as claims clerks, and were promoted from within the local VA office. Most DROs were previously RVSRs with extensive adjudication experience.

⁴⁶ 519 F.3d 1312 (Fed. Cir. 2008) (holding that whether a notice of disagreement is timely filed and the record does not contain proof of a postmark or actual receipt of a filing claimed to be a notice of disagreement, VA must consider the common law mailbox rule, which creates a presumption of receipt upon proof that a particular document was placed in the custody of the Postal Service).

⁴⁷ *Id.* at 1315.

⁴⁸ See also DVA Op. Gen. Counsel Prec. 5-2001 (2001) (stating another example of importation of common law or civil law concepts into the VA administrative law context, stating that the civil law doctrine of fault by proof of negligence by omission was "interpreted" into a no-fault statute).

In contrast, nonlawyer VBA adjudicators are blindsided by the Federal Circuit's reading of an unfamiliar and purely legal civil law concept into VA administrative law. Indeed, the nonlawyer VBA adjudicator, being more familiar with such sub-regulatory resources than the *Savitz* Court itself, or most lawyer BVA adjudicators, performs the impossible mental task of trying to recall a mention of such a concept as the common law mailbox rule in any of VA's regulations, directives, or memoranda, or in any previous training. Finding none, the nonlawyer VBA adjudicator is more likely to ask, "Where did such a rule come from?" The nonlawyer finds little direction or practicality in the highly ethereal legal standards of shifting burden-bearing in the raising and rebuttal of such a presumption with which even the courts struggle.⁴⁹

In such cases where the adjudication is based on specialized military medical rating knowledge that is fact driven and not legal in nature (although legal tests are involved), the VBA nonlawyer adjudicators' expertise may be more beneficial in adjudication.⁵⁰ VBA adjudicators are more apt to ascertain the correct facts from clues in the documentary evidence and are more likely to consider VA's longstanding customs and traditions in the adjudication, including directive provisions that may be more favorable to the claimant.

Lay VBA adjudicators also tend to view a claim and the claimant in a more comprehensive sense as a complex package of real life facts, some facts that are of legal relevance and some that are not. Such an approach tends to look more for a fair result rather than for legal purity and may be more open to considering non-legal factors in the decision making process. From an administrative perspective, the highly abstract legal standards, especially ones involving burden shifting in mid-claim, make fact finding as difficult as playing a game of football with movable goal posts.

A BVA lawyer's legal training generally renders the lawyer better equipped for cases where specialized legal knowledge is all that matters.

⁴⁹ See *Goodwin v. Peake*, 22 Vet. App. 128 (2008); *Sanders v. Nicholson*, 487 F.3d 881 (2007), *cert. granted*, 128 S. Ct. 2935 (U.S. June 16, 2008) (No. 07-1209); *Simmons v. Nicholson*, 487 F.3d 892 (2007), *cert. granted*, 128 S. Ct. 2935 (U.S. June 16, 2008) (No. 07-1209) (showing an ongoing intramural contest of "who has the burden?" being played between the CAVC and the Federal Circuit).

⁵⁰ Vermeule, *supra* note 43.

For example, the various legal standards in veterans benefits law include the rule to resolve any doubt in favor of the claimant,⁵¹ VA's duties to notify and assist a claimant with the evidence or information needed to substantiate a claim for benefits,⁵² the requirement to present new and material evidence⁵³ to reopen a previously denied or final⁵⁴ claim, and the corollary presumptions of credibility of the new evidence to determine if the claim should be reopened.⁵⁵ Other examples of abstract legal standards in veterans benefits law include clear and unmistakable error to reverse or change prior final adjudications;⁵⁶ fraud, misrepresentation, and bad faith;⁵⁷ and various rebuttable presumptions, such as the presumption of in-service incurrence of an injury where a veteran was involved in combat,⁵⁸ the presumption that a disease or injury that a veteran had prior to service was permanently worsened or aggravated by service,⁵⁹ the presumption that the veteran was in sound physical and mental condition when entering service,⁶⁰ and the presumption of administrative regularity of government officials in the discharge of their official duties.⁶¹

BVA lawyers are more likely to arrive at the correct legal conclusions when such standards are involved⁶² as BVA lawyer adjudicators are more thoroughly trained to understand and apply abstract legal standards, especially as they are refined and nuanced through judicial interpretations. From a judicial perspective, correct understanding of case law and accurate application of such standards in a specific factual context is important for defining what the law is, as well as for ensuring compliance with the court's interpretations.

⁵¹ 38 U.S.C. § 5107(b) (2000); 38 C.F.R. § 3.102 (2007).

⁵² 38 U.S.C. §§ 5100–03, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a).

⁵³ 38 U.S.C. § 5108; 38 C.F.R. § 3.156.

⁵⁴ 38 U.S.C. §§ 7104–05; 38 C.F.R. §§ 20.1100, 20.1103–04.

⁵⁵ *Justus v. Principi*, 3 Vet. App. 510, 513 (1992).

⁵⁶ 38 C.F.R. § 3.105.

⁵⁷ *See, e.g.*, 38 U.S.C. § 5302(c); 38 C.F.R. §§ 1.962–63, 1.965.

⁵⁸ 38 U.S.C. § 1154(b).

⁵⁹ 38 U.S.C. § 1153; 38 C.F.R. § 3.306.

⁶⁰ 38 U.S.C. § 1111; 38 C.F.R. § 3.304.

⁶¹ *Baldwin v. West*, 13 Vet. App. 1, 6 (1999); *Mindenhall v. Brown*, 7 Vet. App. 271, 274 (1994); *Ashley v. Derwinski*, 2 Vet. App. 307, 308–09 (1992).

⁶² *Vermeule, supra* note 43, at 1578.

The legal training predisposes the BVA lawyer adjudicator to identify the legal issue or legal questions, and work toward the legal answer or resolution of a legal case. Once the legally correct answer has been deduced, the case is legally resolved with a sense of completion and academic satisfaction. That is not to say that from a judicial perspective there is a lessened consideration of the claimant as a person or as a veteran whose service and disability deserve recognition; it is just that such recognition is likely to be expressed through the application of some legal standard, such as a resolution of reasonable doubt or interpretive doubt in the veteran claimant's favor.

Whether from a judicial or an administrative view, the VA adjudicator's perspective on legal authority has implications as to whom the adjudication is addressed. When the adjudicator is writing for the purpose of having a lay veteran claimant understand an adjudicative decision, direct and straightforward language is called for and almost all legal citations are superfluous. For example, VBA adjudications (referred to as rating decisions) intentionally eschew virtually all legal references in the body of the adjudicative decisions. In most VBA rating decisions, the VBA adjudicator explains the result to the claimant in a few brief paragraphs, using plain language and addressing the claimant in the second person. References to legal authority are reserved for cases in which the claimant appeals and then only when required by statute⁶³ and regulation.⁶⁴ An administrative perspective is better suited for expressing its adjudication in this manner.

At the BVA level, because the BVA attorney is more aware of the courts, the focus shifts to writing for both the claimant (generally a veteran) as well as the court, to which a lay claimant may appeal the Board decision. When writing for the purpose of having the court understand the legal adequacy of the decision, statutory and regulatory authority needs to be more frequently cited and an appeal to the court's own precedent is both a deferential gesture and an attempt to demonstrate that the VA adjudicator's reasoning is consistent with the body of case law.

⁶³ 38 U.S.C. § 7105(d)(1).

⁶⁴ 38 C.F.R. § 19.29.

A claimant for benefits under VA law who appeals the initial VBA adjudication to the BVA garners the benefit of both perspectives. VBA's initial adjudication affords the VA benefits claimant application of not only the statutory and regulatory provisions, but also any liberally expanded quasi-legal guidance found in VA directives. Once the claim is appealed to BVA, the VA benefits claimant profits from an additional de novo review of the claim with a thorough application of VA's legal standards as liberalized through various court interpretations.

Despite the inherent differences between the judicial perspective and the administrative perspective, both perspectives serve important roles in the adjudication process of veterans benefits claims. Both perspectives toward VA legal authority share the same goal of both a liberal and fair distribution of benefits to which claimants are entitled under the law. To paraphrase D. A. Wasson, in VA claims adjudication, VA legal "[a]uthority is properly the servant of justice."⁶⁵ It is the VA benefits claimant, most often the veteran of military service, who stands to gain by VA adjudicators viewing the benefits claim through both a judicial and an administrative perspective.

⁶⁵ DOUGLAS, *supra* note 26, at 124–25.