

EAJA Fees for Reasons-and-Bases Remands: The Perspective of a Veterans' Lawyer

David E. Boelzner¹

INTRODUCTION

Volume 4 of the *Veterans Law Review* contained a Note² urging what it characterized as “reform” of the current approach of the Court of Appeals for Veterans Claims (CAVC or Court) toward the award of attorney fees under the Equal Access to Justice Act (EAJA).³ This Article⁴ will advocate and attempt to justify a very different perspective on the EAJA and the award of fees, admittedly that of a lawyer who earns EAJA fees through representation of veterans and their family members.⁵ This Article will contend that what was perceived by the Note as problematic is not so. While the EAJA may need reform, it does not need the sort of reform advocated there. The author believes that the Note was based on misconception and error, which the present article will attempt to clarify and correct.

The discussion will begin, as did the Note that provoked it, with an overview of the EAJA and its function, then will discuss the reasons-and-bases requirement pertaining to Board decisions, which was the focus of the Note’s concern. Finally, the contentions of the Note will be discussed. While the attempt here is to provide legal support from published sources where possible and relevant,⁶ given the nature of the contentions it is unavoidable that there will also be some reference to the personal experience of the author.

I. THE PURPOSE OF THE EAJA AND ITS APPLICATION

The EAJA is codified in Title 28 of the United States Code,⁷ which pertains to the federal courts, and has application far beyond the VA claims system. The EAJA was enacted in 1980 for the purpose of creating an exception to the so-called “American rule” whereby litigating parties bear their own costs of litigation, including the fees paid to their attorneys.⁸ Congress recognized “the deterrent effect” imposed by the considerable expense associated with litigation and sought to diminish that effect for a party “seeking review of, or defending against, governmental action”⁹ The EAJA provides that the private litigant’s expenses, including fees, will be paid by the government when the private

¹ David E. Boelzner is a member of the Virginia bar, practices with Goodman, Allen & Filetti, located in Richmond, Virginia, and has represented veteran claimants since 2003. These views are his own, not necessarily those of his firm (though the firm would, of course, be wise to agree with them).

² Hillary Bunker et al., *Reforming the Equal Access to Justice Act to Maximize Veterans’ Receipt of Benefits and Increase Efficiency of the Claims Process*, 4 VETERANS L. REV. 206 (2012).

³ 28 U.S.C. § 2412 (2012).

⁴ To avoid confusion, the present article is henceforth referred to as “Article,” while the earlier piece will be called “Note.”

⁵ The author therefore earns his living by finding fault with Board decisions. He hastens to observe, however, that there are a great many decisions that do not contain prejudicial error and therefore do not warrant appeal. He also recognizes the inherent difficulty of the Board’s task in evaluating evidence without the benefit of the sort of development, especially cross examination, that occurs in an adversarial litigation system. Any suggestions in this Article regarding the cause of remands are offered against this background acknowledgement of the challenges faced by the Board.

⁶ The author seeks, however, to avoid the fate of a former professor of his, one of whose books was referred to by a reviewer as “several thousand footnotes in search of a text.”

⁷ 28 U.S.C. § 2412.

⁸ Equal Access to Justice Act, Pub. L. No. 96-481, § 202(c), 94 Stat. 2321 (1980).

⁹ *Id.*

litigant's position is vindicated.¹⁰ The impecunious party who has a meritorious claim thereby avoids the litigation expense that otherwise might deter prosecution of the action. Specifically, the party's reasonable attorney's fees are reimbursed by the government when the private litigant "prevail[s]"¹¹ and when the position taken by the government in the litigation was not "substantially justified."¹² It will be readily apparent even to those who have never been involved with EAJA applications and awards that these two conditions, "prevailing party" and "government position not substantially justified," are fodder for much dispute, and they have indeed led to much litigation.¹³

EAJA fees are awarded in veterans' cases through a detailed and exacting process. The successful claimant's lawyer must prepare and submit to the CAVC an application for fees and expenses, accompanied by a detailed itemization of the time spent on the representation at the Court and a statement both that his client was the prevailing party and that the government's position was not substantially justified.¹⁴ This application must be made no later than 30 days after the final judgment in the case;¹⁵ there is no extension available nor any effective excuse for an untimely filing, as the CAVC has held that it no longer has jurisdiction to entertain an application beyond the 30-day period.¹⁶ The Court assesses whether the requested fees are reasonable and also has discretion under the EAJA to deny or reduce an award of fees to the extent the party engaged in conduct which unduly protracted the matter.¹⁷ In the practice of the Court, an EAJA application is reviewed by the Secretary of Veterans Affairs,¹⁸ and the proposed charges are thus scrutinized and their reasonableness subject to challenge by the party against whom the case was argued at the Court.¹⁹ If the parties cannot resolve a dispute over the application, the Court will do so,²⁰ and it may reduce the award on its own.²¹ The rates attorneys can charge as fees are capped by law, calculated on a statutory rate (currently \$125/hour) which is increased via a complicated formula linked to the cost of living in the geographic area where the attorney practices.²² It may be noted that by this means the government ensures that it will be charged relatively modest rates compared with those charged by lawyers in the region for other types of litigation.²³

¹⁰ 28 U.S.C. § 2412.

¹¹ *Id.* § 2412(b).

¹² *Id.* § 2412(d)(1)(A).

¹³ The CAVC issues a number of decisions each year concerning EAJA applications, and they frequently involve one of these factors. *See, e.g.,* Young v. Shinseki, 25 Vet. App. 201 (2012) (addressing prevailing party status); Chute v. Shinseki, 23 Vet. App. 73 (2009) (discussing whether government position was substantially justified); Groves v. Shinseki, 23 Vet. App. 90 (2009) (discussing whether government position was substantially justified); Padgett v. Shinseki, 23 Vet. App. 306 (2009), *rev'd*, 643 F.3d 950 (Fed. Cir. 2011) (discussing both prevailing party and substantial justification);

¹⁴ 28 U.S.C. § 2412(d)(1)(B); U.S. CT. APP. VETERANS CLAIMS R. PRAC. & P. 39(a) [hereinafter CAVC RULE], available at <http://www.uscourts.cavc.gov/rule39.php>.

¹⁵ CAVC RULE 39(a).

¹⁶ Grivois v. Brown, 7 Vet. App. 100, 101–02 (1994).

¹⁷ 28 U.S.C. § 2412(d)(1)(C).

¹⁸ CAVC RULE 39(a).

¹⁹ *Id.*

²⁰ *See, e.g.,* McDonald v. Nicholson, 21 Vet. App. 257, 263–64 (2007).

²¹ *See, e.g.,* Gordon v. Peake, 22 Vet. App. 265, 272 (2008).

²² *See* 28 U.S.C. § 2412(d)(2)(A)(ii); Pierce v. Underwood, 487 U.S. 552, 571 (1988); Elcyszyn v. Brown, 7 Vet. App. 170, 179–81(1994).

²³ For example, in the author's experience, the approved EAJA rate for a lawyer in the Charlottesville-Richmond, Virginia, area currently works out to just under \$180/hour. By comparison, lawyers in Richmond on a corporate litigation matter, for example, charge between \$310 and \$695 per hour. Deborah Elkins, *Local Legal Rates Used for Out-of-Towners*, VA LAW. WKLY., Mar. 21, 2013 at 1.

II. THE REASONS-AND-BASES REQUIREMENT

The thrust of the Note appearing earlier in this Review was that EAJA fees should not be awarded for remands resulting from the Court's determination or the agreement of the parties in a joint motion that the Board provided inadequate reasons and bases, because such remands secure no benefit for clients but merely permit attorneys to earn fees by "keeping claims in a never-ending appellate process."²⁴ Thus, the Note expresses chagrin that attorneys "are allowed to collect fees under the EAJA when a veteran's case is remanded from the Veterans Court to the Board, even if the veteran's claim ultimately remains denied."²⁵ In other words, in the Note's conception, lawyers representing claimants are "churning" cases, constantly seeking re-appeals to the Court based on lack of reasons and bases in order to obtain EAJA fees.

The Note advocated addressing the "problem of reasons and bases remands"²⁶ through reforms such as limiting EAJA awards to remands "where there has been some relief granted to the veteran"²⁷ or, alternatively, changing the reasons-and-bases requirement in a way that would essentially eliminate it, confining the Court's review of decisions to considering whether the Board's findings were "clearly erroneous."²⁸ The Note also suggested the possibility of changing the Court's review standard from "clearly erroneous" to "substantial evidence"; it did not explain exactly what this change would entail but indicated that it would permit the Court to decide more cases on the merits rather than remand them.²⁹

Leaving aside the Note's low opinion of the fidelity of claimants' lawyers to the interests of their clients, the Note clearly conveyed a belief that the reasons-and-bases requirement itself is troublesome. This conception is flawed, however, and based upon a misunderstanding of what a reasons-and-bases remand is and what it accomplishes.

The requirement of providing "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law" was imposed by Congress in the Veterans Judicial Review Act (VJRA),³⁰ codified at 38 U.S.C. § 7104(d)(1). Congress had a dual purpose for the requirement, as articulated in the legislative history: to enable the claimant to understand how the Board dealt with his or her various arguments, and to "assist the reviewing court to understand and evaluate the VA adjudication action."³¹ In what may be regarded as the veterans law equivalent of *Marbury v. Madison*, the Court fleshed out the implications of the reasons and bases requirement for judicial review in *Gilbert v. Derwinski*.³² The Court conceived of judicial review as the Board decision being "tested by the basis upon which it purports to rest," and the Court declared that the Court cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive."³³

²⁴ Bunker et al., *supra* note 2, at 241.

²⁵ *Id.* at 217.

²⁶ *Id.* at 236.

²⁷ *Id.* at 234.

²⁸ *Id.* at 236.

²⁹ *Id.* at 237-39.

³⁰ Pub. L. No. 100-687, § 205, 102 Stat. 4105 (1988).

³¹ S. REP. NO. 100-418, at 38 (1988).

³² 1 Vet. App. 49, 56-57 (1990) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)).

³³ *Id.*

The earlier Note, in advocating elimination of this requirement in order to “reform” EAJA practice, failed to perceive the significance of the requirement, regarding it as a perfunctory procedural nicety, without substance: hence the complaint that the CAVC’s “liberal interpretation” of the “substantial justification” prong of EAJA analysis allows for the award of fees “even when the Board is correct in its analysis of laws and facts.”³⁴ Remands are granted by the Court, the Note contended, “even when there is no substantive error made at the Board level.”³⁵

But how can anyone tell that the Board correctly understood the facts and properly applied the law if it fails to explain itself, that is, fails to state clear and plausible reasons for its findings and conclusions? As the Note acknowledged, determining whether the government’s position was substantially justified for EAJA purposes requires assessing whether there was a “reasonable basis both in law and fact” for that position.³⁶ How can anyone be sure that no substantive error was made, that there was a reasonable basis both in law and in fact, if insufficient explanation was given or if the reason given for a conclusion does not support it? As the Court stated in *Gilbert*, judicial review tests a Board decision by the basis upon which it purports to rest.³⁷ This is impossible if the Board does not reveal its reasoning. The point of judicial review is that, notwithstanding the best of intention and effort, adjudicators can err, can fail to apply or misapply the law, can ignore or misconstrue relevant facts, can fail to afford the full panoply of due process.³⁸ The reviewing court’s function, as the author constantly must explain to his clients, is not to determine whether benefits should be awarded but rather to police the process, ensuring that law and procedure are faithfully complied with. Thus the frustration expressed in the Note that more cases are not resolved on their merits by the Court is misplaced: ultimate determination of entitlement to benefits is the agency’s province, not the Court’s. The Court serves like a proctor during an examination, having no role in determining outcomes but making sure everyone abides by the rules.

The reasons-and-bases requirement is so extraordinarily important in veterans law because of the unique nature of the system, most specifically the lack of cross examination. The Board is both judge and jury in a veteran’s appeal (not to mention an arm of the agency that will pay benefits if the claimant succeeds); that is, it both administers the law and assesses the strength of the factual contentions. But in order to fairly adjudicate a claim in the non-adversarial VA system, the Board must also subject the evidence to the critical scrutiny that a claimant is powerless to apply. Wigmore termed cross examination “the greatest legal engine ever invented for the discovery of truth.”³⁹ Be that as it may, there can be little question that the strength of evidence, especially in such matters as credibility of witnesses or soundness of expert testimony, can be gauged most effectively by allowing the opponent of the evidence to interrogate it, probing for weakness, for lack of logic, authority, or plausibility. As the Court observed in *Gabrielson v. Brown*, because there is no opportunity in the VA system, as there would be in ordinary litigation, for evidence to be challenged and scrutinized by a party through cross examination, it falls to the Board to perform this critical function.⁴⁰ This is why the Court has said that the Board must include in its written decisions its “response to the various arguments advanced by the claimant” and must provide “an analysis of the credibility or probative

³⁴ Bunker et al., *supra* note 2, at 226.

³⁵ *Id.* at 224.

³⁶ *Id.* at 222 (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

³⁷ 1 Vet. App. at 56.

³⁸ *See, e.g.*, S. REP. NO. 100-418, at 50-51 (1988) (discussing the goals of judicial review of Board decisions).

³⁹ 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourne rev. ed. 1974).

⁴⁰ 7 Vet. App. 36, 40 (1994).

value of the evidence submitted by and on behalf of the veteran” and “a statement of the reasons or bases for the implicit rejection of this evidence by the Board.”⁴¹

It is by providing this explanation that the Board displays its fair and thorough review of the veteran’s claim. When the Board fails to provide it, neither the claimant nor the Court can ascertain whether fair and thorough review occurred or whether, instead, an arbitrary and capricious decision was rendered.⁴² This is why the Court stated in *Thompson v. Principi* the position the Note found objectionable,⁴³ that a reasons-and-bases error is equivalent to the Board’s decision having had “no reasonable basis in law or fact.”⁴⁴ If one cannot tell and confirm from the Board’s explanation that the law was applied correctly, that the facts were judged fairly, that credibility was assessed based on logic and realism, and that the inferences drawn do indeed flow logically from the premises established in the evidence, then there can be no confidence that those fundamental aspects of fair adjudication occurred.

A brief and absurd example may help illustrate. Suppose the Board finds a veteran lacking in credibility. The Board is responsible for assessing the credibility of witnesses,⁴⁵ so this determination is within its province. Consider two possible explanations the Board might give: (a) the veteran is not credible because he said he served in Vietnam but his service records account fully for his period of duty and reflect no service there; (b) the veteran is not credible because medical records indicate he is left-handed. The first reason appears to be a sound, legal basis for questioning a witness’s reliability: he has apparently made a material misrepresentation. The second reason is absurd, premised upon a notion that left-handed people are untrustworthy. If the Board gives no reason at all for finding lack of credibility, merely stating that it has found as much, it is impossible to tell which type of reason was actually employed. Now the Board would presumably never actually decide a case based on an entirely silly reason, but it is capable of illogic on occasion. For example, in *Buczynski v. Shinseki* the Court noted that the Board had assumed that lack of documented report of a symptom meant that it did not occur and held it improper to make such an assumption unless there is a reasonable expectation that documentation would have occurred.⁴⁶ Because—and only because—the Board has to say how it arrives at its conclusions, these sorts of occasional oversights or illogical inferences can be identified and corrected.⁴⁷

⁴¹ Moore v. Derwinski, 1 Vet. App. 401, 404 (1991) (quoting *Gilbert*, 1 Vet. App. at 58).

⁴² The veteran claims system is non-adversarial in form. VA is required to notify veterans about how to develop their claims and must acquire certain types of evidence, and it then is supposed to adjudicate the claim on all the evidence and applicable law. 38 U.S.C. §§ 5103, 5103A, 7104(a) (2012). But legions of veterans and their representatives would attest that the system is not always non-adversarial in nature. The author does not believe that VA adjudicators are often if ever actually biased against claimants, but he does perceive that the constant barrage of claims for benefits from the government, some of which are unquestionably bogus, tends to result, perhaps over time, in a perception on the part of some adjudicators that the claims are *against* the government’s interest, a defensive, even jaded, perception of claimants, such that all submissions become viewed with a hyper-skepticism that goes beyond neutral assessment. And there are the usual errors inherent in any complex human enterprise. Even if the author is wrong about this, Congress made the judgment in 1988, by enacting the VJRA, that the system could not continue to operate under the assumption that VA always did the right thing in adjudicating claims. The reasons-and-bases requirement shines light on the occasions when the agency falters, allowing for correction. This notion is explored further in David E. Boelzner, *In Sight, It Must Be Right: Judicial Review of VA Decisions for Reasons and Bases vs. Clear Error*, __ U. RICH. J.L. & PUB. INT. (forthcoming 2014).

⁴³ See Bunker et al., *supra* note 2, at 226.

⁴⁴ *Thompson v. Principi*, 16 Vet. App. 467, 470 (2002).

⁴⁵ See *Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000) (stating that fact-finding in veterans cases is to be done by the Board); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994) (stating that the weight and credibility of evidence is a “factual determination”).

⁴⁶ 24 Vet. App. 221, 224 (2011); see *Kahana v. Shinseki*, 24 Vet. App. 428, 440 (2011) (Lance, J., concurring) (stating that whether absence of documentation in records is probative depends upon whether condition would likely have been noted).

⁴⁷ The “easy” case of review for reasons and bases is where the Board does not give any explanation for a material finding. Where some explanation has been given, reviewing it for sufficiency and validity is subject to a great deal more variation among the CAVC judges in how exacting they will be in their expectations of the Board. Some decisions give considerable deference, assuming a certain level of propriety and competence, while others require the Board’s explanation to be logical and comprehensive on its face. *Compare* Janssen

III. THE VALUE OF A REASONS-AND-BASES REMAND

The Note also reflects misunderstanding of the consequence and import of a remand for inadequate reasons and bases. Apparently relying in part on a 2010 letter from the Secretary of Veterans Affairs to a U.S. Senator,⁴⁸ the Note said that “on remand for reasons and bases, the Board is to simply better explain the same decision that was previously made.”⁴⁹ This assertion is incorrect. Although this is often what *does* occur—the Board simply reissues its decision with a better attempt at explaining it—it is not what is lawfully *supposed* to occur after a reasons-and-bases remand. When the Court finds lack of adequate reasons and bases, it both vacates and remands the Board decision, and it has repeatedly made plain that a remand requires a full re-adjudication of the claims involved after submission of any new evidence the claimant wishes to submit or any further development the Board deems appropriate.⁵⁰ Indeed, the Court made this explicit in one of its earliest decisions, *Fletcher v. Derwinski*:

We do not mean to imply that a remand, such as is done here, is merely for the purposes of rewriting the opinion so that it will superficially comply with the “reasons or bases” requirement of 38 U.S.C. § 7104(d)(1) (formerly § 4004). A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the BVA will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case.⁵¹

As a leading manual on veterans advocacy notes, the effect of a remand for any sort of error committed by the Board provides a double benefit for the claimant, both preserving the original effective date of the claim (usually the date it is received) and permitting further development of the claim at the VA, which improves the chances of ultimate success.⁵² Often this opportunity is also accompanied by legal discussion in a Court decision or joint motion that provides guidance to the Board in avoiding the errors previously made.⁵³

The exposition in the Note failed to appreciate this value, focusing as it did on whether the veteran gained “any benefit, either monetary or a change in eligibility status.”⁵⁴ In attempting to show that reason-and-bases remands benefit only lawyers and not their veteran clients, the Note cited James Ridgway’s comment in his article in volume 1 of this Review that an attorney’s goal at the Court is often “to

v. Principi, 15 Vet. App. 370, 378–79 (2001) (finding reasons and bases statement sufficient “as a whole” though it “could have been more complete”), *with* Hood v. Brown, 4 Vet. App. 301, 303 (1993) (requiring Board to explain why disability was “definite” rather than “considerable” notwithstanding the difficulty of applying the regulatory terms). The distinction often turns on whether the Court views the issue as the legitimacy of the reasons or the plausibility of the factual findings; if it sees primarily the latter, it will review for clear error and sustain the finding if there is anything supportive in the record, while if reasoning is the focus, the Court will look behind the facial statements to the logic of the conclusion. *See* Boelzner, *supra* note 42.

⁴⁸ Bunker et al., *supra* note 2, at 207 (citing Letter from Eric K. Shinseki, Sec’y of Veterans Affairs, to Hon. Charles E. Grassley, U.S. Senator (Apr. 22, 2010) (on file with author)

⁴⁹ *Id.* at 225.

⁵⁰ *See* Kutscherousky v. West, 12 Vet. App. 369, 372 (1999) (per curiam); Colon v. Brown, 9 Vet. App. 104, 108 (1996); Quarles v. Derwinski, 3 Vet. App. 129, 140–41 (1992); Fletcher v. Derwinski, 1 Vet. App. 394, 397 (1991).

⁵¹ *Fletcher*, 1 Vet. App. at 397.

⁵² NAT’L VETERANS LEGAL SERVS PROGRAM, VETERANS BENEFITS MANUAL 1060 (Barton F. Stichman & Ronald B. Abrams eds., 2011).

⁵³ This has two possible practical results, either one favorable to the claimant. Once the Board actually gives its explanation for its decision, the reasoning may turn out to be legally flawed, and the appellant can challenge it and get the flaws corrected. Or the Board, mindful of the recent experience at the Court, will give more careful consideration to the issues in developing satisfactory reasons and bases, thus providing a fair adjudication to the claimant.

⁵⁴ Bunker et al., *supra* note 2, at 207; *see id.* at 209 (complaining of taxpayer money going as fees to lawyers who “merely obtain a joint remand regardless of whether the veteran actually receives a benefit”).

secure a remand on any basis possible.”⁵⁵ That is absolutely true: the Court rarely reverses,⁵⁶ so remand is the most readily available remedy, and the lawyer will be paid nothing for his work representing the client before the Court if he does not secure a remand based on error. But the Note downplayed, relegating to a footnote, the important explanatory continuation of Mr. Ridgway’s comment, that the remand is sought “to preserve the claimant’s effective date, so that the attorney can then proceed with an open record to present a well-developed theory in support of the claim on remand.”⁵⁷

This is exactly the point made above, that a remand accomplishes two positive things for the claimant. Mr. Ridgway correctly articulated this author’s experience that many veterans’ claims are ill-prepared at the agency. It may be pertinently noted here that attorneys may not represent veteran claimants on a contingent fee until after claims have been initially submitted and denied.⁵⁸ This highlights what may be an important difference between the veterans claims system and the Social Security Administration’s claims system touted by the Note as a better model, as the latter does not limit the point at which legal representation may be engaged.⁵⁹ A successful remand by the Court allows a claimant, often now with the assistance of counsel, to go back and develop the claim more fully and not lose several years of benefits because he did not know how to develop and prosecute the claim effectively on his own.

Although the Note acknowledged this effect of remands,⁶⁰ it objected to recognizing this value via EAJA fee awards. Though the Note recognized Congress’s “intent to provide sufficient compensation to attract competent attorneys for the continued handling of veterans’ claims,”⁶¹ the “reform” advocated would remove the avenue by which lawyers can be paid for achieving the all-important remand and preservation of the effective date. The Note objected particularly to remands achieved by joint motion, because joint motions “do not ultimately resolve any aspect of the litigation, but act as an avenue for further development.”⁶² But no remand ultimately resolves litigation: by definition, a remand is an acknowledgement of more work to be done back at the agency. The Note appears to object to remands achieved by joint motion because they do not result from the Court having found error in the Board’s decision.⁶³ But the alternative to a joint motion is to pursue the appeal through briefing and Court decision, resulting in the veteran’s claim being stalled for a year or two.⁶⁴ And, since most errors found by the Court result in remand anyway,⁶⁵ it would be absolutely contrary to a client’s interest for his lawyer to reject a proffered joint motion that addresses the error.

It is not clear why the Note raised such a strenuous objection to the joint motion practice.

⁵⁵ *Id.* at 208 (citing James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 134–35 (2009)).

⁵⁶ See Ridgway, *supra* note 55, at 155 (providing a rough estimate that the CAVC reverses approximately 6% of the Board decisions it addresses).

⁵⁷ Bunker et. al, *supra* note 2, at 209.

⁵⁸ 38 C.F.R. § 14.636(c) (2013). Until 2007, an attorney could not be paid more than \$10 for representing a veteran before the agency until after a final Board decision had been rendered. Congress changed this with the Veterans Benefits, Health Care, and Information Technology Act of 2006. Pub. L. No. 109-461, § 101, 120 Stat. 3403.

⁵⁹ 42 U.S.C. § 406 (2012).

⁶⁰ See Bunker et. al, *supra* note 2, at 232.

⁶¹ *Id.* at 209.

⁶² *Id.* at 232.

⁶³ See *id.* at 214-15 (discussing the difference between Court remands and joint motions).

⁶⁴ See Ridgway, *supra* note 55, at 151 n.218 (acknowledging that, at least in 2008, “most CAVC decisions are not issued in the same fiscal year as the BVA decision on review”).

⁶⁵ See *id.* at 151-57 (providing a statistical overview of the number of joint motions and remands issued by the CAVC).

A remand is a remand; the propriety of a remand due to lack of reasons and bases in the Board's decision does not turn on whether the error was acknowledged by the Court or by the Secretary through his counsel. Indeed, it is arguably more compelling when an error is recognized by VA's own lawyer, who is confronting the prospect of standing up in a court of law and defending what the Board did. As the Note acknowledged, to defeat an award of fees under the EAJA, the government must show that its position was substantially justified both at the administrative and judicial level,⁶⁶ so the government's counsel must consider whether her representation of a position before the Court is justified. When the Board provides inadequate reasons and bases, it has not complied with the law, and the government's position before the Court is untenable; indeed, if the government's lawyer cannot ascertain precisely what the reason for the decision was or that it was adequate, she will surely have a difficult time convincing herself that she can defend it substantively. If a qualified attorney, experienced in litigating cases before the very tribunal that will decide the issue, has enough trepidation about the outcome to lead her to believe a joint motion is warranted, then this is surely an expert legal opinion that must be respected.

Joint motions for remand, moreover, are not entered into solely for the benefit of claimants' attorneys. Where there is error, or even likely error, agreed remands are good for everyone: they save much time and effort being spent by the parties and the lawyers on both sides, as well as by the Court and its staff; the latter explains why the Court's rules mandate conferences aimed at achieving such remands.⁶⁷ The Note's objection was necessarily predicated upon an erroneous notion that a reasons-and-bases error is mere smoke without fire.

IV. THE EAJA AS AN INCENTIVE FOR MULTIPLE APPEALS

The theme running through the Note is the belief that EAJA fees are such an incentive that lawyers representing veterans opt to churn cases through multiple trips to the Court, perhaps even instead of attempting to succeed in actually obtaining benefits for a veteran.⁶⁸ The Note pointed out that some attorneys do not continue representing veterans after a remand by the Court to the agency—they only represent cases at the Court—and speculated that a reason for this may be the availability of EAJA fees.⁶⁹

Again deferring for the moment the suggestion that veterans' attorneys are willing to ignore their ethical duties toward their clients, there may be perfectly sensible reasons for limiting one's practice to Court work, apart from EAJA fees.⁷⁰ Work at the Court and work at the agency are quite different from a legal perspective. Developing a claim at the agency is chiefly about trying to secure crucial evidence—records, medical opinions, witness statements. There is some legal argumentation involved, but even that is rather different from what happens at the Court. To establish a basic claim for disability compensation benefits, for example, a claimant must show that she has a current disability, that there was an injury, disease, or other event in service, and that the current disability is related to the in-

⁶⁶ *Id.* at 220 (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

⁶⁷ CAVC RULE 33.

⁶⁸ See Bunker et al., *supra* note 2, at 208 (discussing the “incentive” for seeking “multiple remands . . . rather than a final decision”), 233 (noting the “economic incentive” for attorneys to pursue joint motions), 239 (discussing payment of fees for “harmless error” remands), 240 (suggesting that veterans experience “hardship” while their cases are being remanded for procedural errors that did not cause harm), 241 (discussing the gain for attorneys who seek remand at the Court without benefitting the veterans).

⁶⁹ *Id.* at 208.

⁷⁰ Here the author must begin to draw on his own experience; he apologizes to footnote fans for the sudden dearth.

service occurrence.⁷¹ At the agency all effort is devoted to establishing those elements. To succeed on a Court appeal, on the other hand, a claimant must identify errors made by the agency that the Court will both acknowledge as error and recognize as prejudicial.⁷² That requires a specific sort of critical legal argument that is really quite different from the affirmative argument that evidence satisfies a certain element of a claim. Lawyers may find themselves more adept at one sort of analysis than the other and may choose to specialize in work at the Court simply because they are better at, or at least more familiar with, that sort of analysis.⁷³ Or a law firm that represents clients both at the agency and at the Court may perceive that it achieves efficiencies by having different lawyers specialize in handling its cases in the separate venues.⁷⁴

To confront the incentive concept head on, it must first be noted that lawyers represent clients, to whom they owe duties. Not only does the client expect that his lawyer will zealously advance his interest to the best of the lawyer's ability, but that duty is imposed on the lawyer by ethical rules, if not by law.⁷⁵ Serious sanctions await the lawyer who would serve his own interest at the expense of the client's.⁷⁶ And, while lawyers want to be paid for their work like any other worker, they also want to achieve results for their clients. It gives them professional satisfaction, makes for smooth relations with clients, and creates goodwill that may result in more clients. Lawyers are ultimately successful if they win their clients' cases, which in the veterans-law context means obtaining benefits. Court remands do not make clients giddy with pleasure, especially given how long the process will take once the case is back at the agency (and how long the veteran has already been striving at the agency before his case went to the Court).⁷⁷ Few clients would put up with a lawyer who repeatedly appealed to the Court but never achieved any award of benefits.

EAJA fees are also not a financial bonanza for lawyers. As mentioned above, the rates that can be charged under the EAJA are quite modest compared with other sorts of legal work.⁷⁸ The bills are critically reviewed by the Secretary and by the Court, and after-the-fact judgments about what was reasonable can result in reductions.⁷⁹ By comparison, when a veteran is awarded benefits through the efforts of an attorney working on a contingent fee agreement at the VA, the fee payment calculation and payment are straightforward and uncomplicated. The Note reflected inconsistent thinking regarding incentive effects: it regarded EAJA fee availability as an incentive for joint motion remands, but a joint motion *reduces* rather than increases the EAJA fee by truncating the work at the Court, so the lawyer would arguably have a selfish interest in not agreeing to one, if he had no regard for the ethics

⁷¹ *Hickson v. West*, 12 Vet. App. 247, 252 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table).

⁷² See 38 U.S.C. § 7261(a)(3)(A) (2012) (stating that the Court will set aside decisions that are “not in accordance with law”) and § 7261(b) (2) (stating that the Court must “take due account of the rule of prejudicial error”).

⁷³ The author believes this description fits him.

⁷⁴ The author's law firm operates under this perception.

⁷⁵ See, e.g., VA RULES OF PROF'L CONDUCT R. 1.3(a) (requiring Virginia lawyers to “act with reasonable diligence and promptness in representing a client”).

⁷⁶ In Virginia, the state in which the author is admitted to practice, penalties for violating rules of professional conduct range from a private reprimand to the permanent revocation of the offending attorney's license. See *Guide to Lawyer Discipline*, VA STATE BAR, <http://www.vsb.org/site/regulation/lawyer-discipline> (last updated Apr. 14, 2014).

⁷⁷ The average length of time to complete processing of a claim to decision was 262 days in 2012; the average length of time for completion of the appeal process from the filing of a Notice of Disagreement through final Board decision was 866 days in 2012. DEP'T OF VETERANS AFFAIRS, 2012 VA PERFORMANCE AND ACCOUNTABILITY REPORT II-71.

⁷⁸ See *supra* note 23 and accompanying text.

⁷⁹ The author once had an extremely demanding client who insisted on frequent e-mail explanations of every step of the process, haggling over minor details of the record and briefing. When the EAJA application sought reimbursement of the actual costs associated with this more-frequent-than-average attorney-client communication, VA challenged and succeeded in persuading the Court to reduce the amount. It was thus deemed, after the fact, unreasonable to have spent this much time communicating with a client.

of representing his client. If VA's counsel agrees to a remand at the mandatory settlement conference, then the only work on the file put in by the lawyer to that point has been basic investigation such as review of the Board decision and talk with the client, review of the record, and preparation of the summary of issues. This typically results in an EAJA application in the low four figures. In contrast, at 2014 payment rates, getting a veteran service connected at 50% for six years would result in a 20% contingency fee in five figures.⁸⁰ The greater financial incentive for a lawyer, even apart from his client's interest, will usually be for achieving a generous benefits award.

And, despite the fact that the work done by a lawyer at the Court is not actually the same work as that at the agency—not even the same sort of analysis is involved, as noted above—the Court has relied on the EAJA's "same work" proscription to hold that the lesser of the EAJA fee or the contingent fee must be refunded to a client if both are recovered.⁸¹ In effect, the "same work" rule thus already incorporates the reform advocated by the Note, since it treats a remand by the Court as a way-station on the road to benefits; if benefits are eventually awarded, then the EAJA fee offsets the attorney's share of the past-due benefits awarded.

The financial and practical realities do not support the notion of EAJA fees serving as a powerful incentive for pursuing remands at the Court. Moreover, the Note approached the problem from the wrong perspective. Its presumption seemed to be that lawyers elect to appeal and re-appeal cases to the Court *for the purpose of* earning fees under the EAJA.⁸² But appeals to the Court are not instigated by lawyers out of the blue. Appeals result from decisions, in this instance decisions of the Board of Veterans' Appeals. Until 2007 a lawyer could not be paid for representing a veteran until there was already a Board decision.⁸³ The law now allows lawyers to be compensated for representation in the agency process earlier,⁸⁴ but there still is no option to appeal to the Court until the Board has issued a decision.⁸⁵ It is that decision which creates the opportunity, and basis, for appeal.

When the Board denies a veteran's claim, the veteran is confronting the end of the road for that claim: if he does not appeal, the claim ends.⁸⁶ Even if he reopens the claim later, his effective date for any benefits ultimately awarded will be the date of the reopened claim,⁸⁷ which could cause an enormously significant difference in the amount of money he will receive, depending on how long the original claim had been pending. After an adverse final Board decision, then, the veteran must fish or cut bait. Thus it is the client, not the lawyer, who has the incentive to appeal to the Court if there is any prospect of prejudicial error. Without a successful appeal, he must wade into the VA claims system anew. The Note failed to perceive this in its advocacy for what it called "the *Buckhannon*

⁸⁰ Current and historical rates of compensation for service-connected disabilities are set forth on the Veterans Benefits Administration's website. *Compensation: Veterans Compensation Benefits Rate Tables*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp (last visited Sept. 9, 2014).

⁸¹ The "same work" condition is set forth as a note to 28 U.S.C. § 2412 (2012). *See* *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (discussing the "same work" rule); *see also* *Shaw v. Gober*, 10 Vet. App. 498, 505 (1997) (invalidating fee agreement because it would constitute "double dipping" contrary to the "same work" proscription).

⁸² *See* *Bunker et. al*, *supra* note 2, at 208.

⁸³ *See* 38 C.F.R. § 14.636(c) (2013) (noting the June 20, 2007, effective date for the change in law).

⁸⁴ *See* 38 U.S.C. § 5904(c)(1) (2012) (allowing for attorney representation once a notice of disagreement has been filed); 38 C.F.R. § 14.636(c) (implementing the law).

⁸⁵ 38 U.S.C. § 7266(a) (establishing that in order to appeal a final decision of the Board, an appeal must be filed within 120 days).

⁸⁶ *Id.*

⁸⁷ *See id.* § 5110(a) (governing effective dates); 38 C.F.R. § 3.400 (implementing the law); *see also* *Livesay v. Principi*, 15 Vet. App. 165 (171–72 (2001) (en banc) (discussing effective dates).

standard,”⁸⁸ invoking the Supreme Court’s linking of prevailing party status to there being a “material alteration” in the claimant’s legal relationship with the adversary.⁸⁹ A remand for reasons and bases (or for any other reason) *does* change the legal relationship of the veteran vis-à-vis the agency: he is able to continue his claim. This was explicitly recognized by the Court in *Swiney v. Gober*.⁹⁰ Without a Court remand, the veteran’s claim is over, and he forfeits the money he would have been paid upon ultimate award of benefits from the date his initial claim was filed.

V. IS REFORM NEEDED?

The Note cited the hope expressed by Congress that, in view of potential EAJA liability for agency mistakes, agencies would be led to “make few such mistakes.”⁹¹ But the Note also argued that, due to the “reality of the constrained VA system,” by which was meant the burden of backlogged claims and a limited budget, VA should not have to bear the additional burden of paying for its mistakes via EAJA fees, or at least not at the interlocutory stage where there is a reasons-and-bases remand.⁹² In other words, the urged reform would remove the disincentive hoped for by Congress, excusing VA from paying the fees of lawyers who have successfully labored to demonstrate that the Board has not complied with the law requiring it to explain the bases of its decisions.⁹³ Thus, the Note proposed “reforms” aimed not just at eliminating fees for reasons-and-bases remands but, in effect, at eliminating the requirement of reasons and bases altogether.

The first possible reform proposed by the Note was that EAJA fees not be available for remands done by joint motion, thus eliminating “the monetary incentive” for a joint motion.⁹⁴ This Article has sought to dispel the myths, repeated throughout the Note, that a remand for the Board to provide adequate reasons and bases is of no value to the claimant and that lawyers have an incentive to seek repeated joint motion remands. As noted above, the actual monetary incentive for a *lawyer* at the Court would be to oppose a joint motion and instead inflate the eventual EAJA amount by going through briefing; it is the *client* who has an incentive to agree to a joint motion, as does the government to save the expense of further litigation. This “reform” is actually aimed at making a claimant’s lawyer pay the cost of VA’s error by removing the means to pay him for successfully challenging the Board decision. It would also have the effect of encouraging litigants to fight claims to the death rather than acquiesce in an agreed disposition, resulting in an increased case load that would likely be most unwelcome at the Court.

⁸⁸ Bunker et al., *supra* note 2, at 234.

⁸⁹ *Id.* at 218 (citing *Buckhannon Bd. & Home Care, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598 (2001)).

⁹⁰ 14 Vet. App. 65, 69 (2000) (citing *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)) (recognizing change in legal relationship from one of denial of the claim to a “continuing adjudicatory process”).

⁹¹ Bunker et al., *supra* note 2, at 241 (citing 126 CONG. REC. H28653 (daily ed. Oct. 1, 1980) (statement of Rep. Heckler)).

⁹² *Id.*

⁹³ The Note’s authors complain that payments of attorney fees under the EAJA draws money away from other needs of the agency, noting that VA paid fees of \$12.7 million in 2008 and \$12.3 million in 2009. *Id.* at 209. But where the costs of VA operations, just for the benefits side of the agency, completely ignoring health care and other programs, were \$70.8 billion in 2011 and \$151.5 billion in 2012, fee payments on the order of \$12 million are a relative pittance, almost rounding errors. DEP’T OF VETERANS AFFAIRS, 2012 VA PERFORMANCE AND ACCOUNTABILITY REPORT III-4. The comparable costs in 2008 appear to be about \$42 billion. DEP’T OF VETERANS AFFAIRS, 2008 VA PERFORMANCE AND ACCOUNTABILITY REPORT III-329.

⁹⁴ Bunker et al., *supra* note 2, at 232.

The second reform proposed by the Note was to redefine “prevailing party” as limited to one who has received “a monetary or other benefit,” what it called the *Buckhannon* standard.⁹⁵ As explained above, a remand by the Court, even if only to require the Board to supply additional reasons and bases, provides a double benefit to a claimant, permitting him to introduce new evidence and argument in support of his ongoing claim (instead of having to reopen a previously denied claim), and mandating that the Board re-adjudicate the further-developed claim, heeding any instructions aimed at avoiding a repetition of the error that led to the CAVC appeal. This is a tangible benefit to the claimant, and it warrants EAJA fees. Any concern that the attorney is being paid “prematurely,” before any monetary benefits are paid to the client, is remedied when he has to disgorge the EAJA payment if it is less than his share of the retroactive benefits awarded. Only where a claim never succeeds in obtaining benefits would the attorney be paid solely for advancing the case at the interlocutory stage. In such a case the lawyer is like a criminal defense attorney, whose job is to hold the government to faithful compliance with its rules. A criminal defense attorney’s work is not worthless just because her client goes to jail.⁹⁶

Another proposal in the Note was to change the standard of review from “clearly erroneous” to “substantial evidence,” which the Note contended would allow the Court to decide more cases on the merits.⁹⁷ It did not explain how this is so. “Clearly erroneous” is a highly deferential standard, leaving the findings of the agency undisturbed unless the Court “on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”⁹⁸ The Note also did not make clear how the “substantial evidence” standard would allow the Court more freedom to decide cases on the merits.⁹⁹ It did assert that the Court “rarely uses the harmless error doctrine,” thus remanding cases unnecessarily.¹⁰⁰ But the cited authority was not Court statistics but rather a 2006 statement by the Chairman of the Board of Veterans’ Appeals, and it is not clear what the Chairman’s basis was in making such an assertion.¹⁰¹ Whatever may have been the case in 2006, since the Supreme Court’s decision in *Shinseki v. Sanders*¹⁰² discussing harmless error, the CAVC has certainly not hesitated to dismiss appeals where an error was harmless. The Note’s suggestion, however, that error should be deemed harmless where the remand does not “resolve any aspect of the litigation” is untenable.¹⁰³ As noted above, remands never resolve anything finally; however, reasons-and-bases remands do resolve the matter of the ongoing viability of the veteran’s claim. Moreover, adopting the Note’s suggestion of having the Court decide more cases on the merits would result in much longer waits at the Court and crowding of its dockets. Where the principal remedy for error is remand in any case, requiring more cases to go all the way to decision at the Court would needlessly clog the Court’s dockets to reach the same result that is accomplished via joint motion.

⁹⁵ *Id.* at 234–35.

⁹⁶ In advocating for a system where an interlocutory remand would not be acknowledged by payment to the lawyer achieving it, the Note is actually urging that the magnitude of the gamble taken by a lawyer in undertaking to represent a veteran be increased significantly. When a process error has occurred in the development of a claim, the ultimate merit of the claim often cannot accurately be gauged. Where a claim is remanded, even for reasons and bases, the remand will permit the claimant to obtain new evidence; if that new evidence includes a solid supporting medical opinion where there was none before, the whole complexion of the claim changes for the better. On the other hand, if a doctor consulted by the claimant opines against the claim, then there may be no hope for it ultimately. Neither clients nor their attorneys are prescient enough when they undertake an appeal to foretell which way future-developed evidence would weigh.

⁹⁷ Bunker et al., *supra* note 2, at 237–39.

⁹⁸ *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁹⁹ Bunker et al., *supra* note 2, at 237–39.

¹⁰⁰ *Id.* at 238.

¹⁰¹ *Id.* (citing *Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans Claims*: Hearing Before the Committee on Veterans Affairs, S. Hrg. 109-694 (2006)).

¹⁰² 556 U.S. 396 (2009).

¹⁰³ Bunker et al., *supra* note 2, at 239.

The third proposal of the Note, although addressed last here, and the one that is behind much of its approach to EAJA analysis, was to abolish the statutory requirement of reasons and bases, substituting a requirement of a “plausible statement”;¹⁰⁴ however, the Note did not say what would be contained in the “plausible statement.” The Court already looks to see if the Board’s findings have a plausible basis; it is part of the clearly erroneous review standard.¹⁰⁵ The Note cited Judge Holdaway’s comment in dissent that no other court awards EAJA fees when an agency fails to articulate reasons for its decisions.¹⁰⁶ From this it may be inferred that the Note intended to limit judicial review to considering whether the Board’s findings are clearly erroneous. But in no other system is the requirement of a clear statement of reasons so important as it is in the unique veterans system, for the reasons discussed above. The elimination of that requirement would take the heart out of the judicial review provided by Congress, which is a veteran’s sole bulwark against arbitrary and capricious decision-making.

The Board is highly competent at reviewing often lengthy records and discerning what is material, and frank mistakes of fact are, in the author’s experience, relatively rare. Drawing sound inferences and conclusions from the facts, what might be called the “ultimate facts,” constitutes the much tougher job, and it is, unsurprisingly, where the Board is more apt to err. Before Congress stepped in with the VJRA, the Board made the final decision on claims. Although there was some requirement that the basis for the decision be set out,¹⁰⁷ there was no recourse to challenge that basis. This cannot be overemphasized: it is the requirement that the Board state its reasons and bases for decision which enables the claimant to understand why his claim has been denied and, more importantly, allows the Court to discern *and evaluate* the basis for that decision.¹⁰⁸ Abolition of this requirement would, in effect, return matters to the status quo ante passage of the VJRA, because review for clear error is rarely of value to veterans.

If the Board merely said it had considered all the evidence and found no entitlement to benefits, for example, this could not be deemed clearly erroneous, but it would leave decisions entirely to the discretion of the Board, since the Board would not have to explain how it reached the decision it reached. Where the facts and legal positions have not been established through the rough-and-tumble of ordinary litigation, where the claimant has had no opportunity, for example, to challenge through cross examination the basis of a medical opinion against his claim, it is crucial for due process and basic fairness that the *Board* be obliged to say how *it* considered the evidence. This is not to say, of course, that the Board would deliberately be unfair, but as previously noted, judicial review is predicated on the idea that all decision-makers are fallible. As long as that premise is accepted as true, the requirement that the Board explain how it reaches its decisions is essential.

The Note thoughtfully proposed solutions to a problem that does not exist. If, as it contended, EAJA payments for remands, and especially those based on lack of reasons and bases, are draining VA resources and posing a problem for the agency,¹⁰⁹ it must be submitted that the agency holds the means

¹⁰⁴ *Id.* at 236–37.

¹⁰⁵ See *Owens v. Brown*, 7 Vet. App. 429, 432 (1995) (citing *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990)) (“If there is a plausible basis in the record for the factual determination, this Court cannot overturn the BVA’s factual determination.”).

¹⁰⁶ *Bunker et al.*, *supra* note 2, at 236 (citing *Cullens v. Gober*, 14 Vet. App. 234, 251 (2001) (Holdaway, J., dissenting)).

¹⁰⁷ 38 C.F.R. § 19.180(c) (1986) (requiring that decisions of the Board contain “separately stated findings of fact and conclusions of law, and the reasons for the Board’s decision”).

¹⁰⁸ See *Gilbert*, 1 Vet. App. at 56–57 (citing S. REP. NO. 100-418, at 38 (1988)).

¹⁰⁹ *Bunker et al.*, *supra* note 2, at 209. *But see supra* note 90 (noting how the quantum of fees paid to attorneys is dwarfed by the scale of the VA’s finances overall).

to remedy that problem. It is not up to lawyers whether Board decisions contain error. The hard fact is that VA can put a stop to reasons-and-bases remands; it is entirely within its power to do so. It must merely provide adequate reasons and bases for its decisions as the law requires.¹¹⁰ If many people are ticketed for speeding on a particular highway, it may be that the police are particularly targeting that area, but it is also likely that many people are, in fact, exceeding the posted speed limit on the road. Even if it is a speed trap—even if patrol cars are lying in wait to catch the speeding driver—if the driver is exceeding a clearly posted limit, the driver has violated the law. The use above of the word “merely” in connection with providing adequate reasons and bases is in no way meant to suggest that the Board’s task in providing reasons and bases for its conclusions is easy. It is quite difficult, made more so by the lack of adversary evidentiary development.¹¹¹ But transparency of the decision-making ensures fairness and, perhaps just important, the perception of fairness and thus confidence in the system, and that is why adequate reasons and bases are required. When the Board fails to provide them it has violated the law, and that is not the fault of the lawyers who demonstrate it.

¹¹⁰ In a Board decision in a case handled by the author, the Veterans Law Judge remarked, with undisguised annoyance, that the case, which in the judge’s view involved a minor issue, had been in appeal status for some seven years. Upon investigation, counsel discovered and was able to point out, one hopes not too smugly, that most of those seven years had been devoted to three appeals to the Court, each of them successful, due to errors committed by the Board.

¹¹¹ See Boelzner, *supra* note 42. This difficulty has been recognized explicitly by at least one judge. Concurring in *Gabrielson*, Judge Holdaway noted that on remand the Board would have to determine which of two contradictory accounts of a veteran’s drinking habits was truthful and explain why it made the determination it did. *Gabrielson v. Brown*, 7 Vet. App. 36, 42 (1994) (Holdaway, J., concurring). He acknowledged the obligation of the Board to do so, which he felt was the result of requirements regrettably grafted onto the statute by the Court, but he also recognized the challenge in making this sort of assessment. *Id.*