Testimony before House Committee on Veterans' Affairs

On May 22, 2007 Mr. Barton F. Stichman, Joint Executive Director, National Legal Services Program gave testimony before the Subcommittee on Disability Assistance & Memorial Affairs of the House Committee on Veterans' Affairs below is his text.

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Testimony Text

House Committee on Veterans' Affairs

Statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program

Testimony Before the Subcommittee on Disability Assistance and Memorial Affairs

of the House Committee on Veterans' Affairs

May 22, 2007

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the National Veterans Legal Services Program (NVLSP) on the challenges facing the U.S. Court of Appeals for Veterans Claims ("the CAVC").

NVLSP is a nonprofit veterans service organization that supported throughout the 1980s bills to repeal the then longstanding bar to judicial review of VA decision-making on claims for benefits. Since the CAVC was created in 1988, NVLSP has represented nearly 1,000 VA claimants before the Court. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, and in that Program, NVLSP recruits and trains volunteer lawyers to represent veterans who appeal to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that have been distributed to thousands of veterans advocates to assist them in their representation of VA claimants.

At the outset, NVLSP wishes to acknowledge and commend Chief Judge Greene, the other judges, and the staff of the CAVC on the affirmative steps they have taken and are scheduled to take in the future to minimize the time lag between the filing of an appeal and a decision by the Court. These efforts are already bearing fruit. The continuing increase in the number of appeals that are annually filed at the CAVC makes these ongoing efforts doubly important.

My testimony today is informed by the frustration and disappointment in the claims adjudication system experienced by many disabled veterans and their survivors. They face a number of serious challenges, including in the judicial appeal process. As we describe below, there are several significant problems that cry out for a legislative fix.

I. <u>The Hamster Wheel</u>

For many years now, those who regularly represent disabled veterans before the CAVC have been using an unflattering phrase to describe the system of justice these veterans too often face: "the Hamster Wheel". This phrase refers to the following common phenomenon: the veteran's claim is transferred back and forth between the CAVC and the Board, and the Board and the RO, before it is finally decided. The net result is that frustrated veterans have to wait many years before receiving a final decision on their claims.

There are at least three aspects of the CAVC's decision-making process that contribute to the Hamster Wheel phenomenon: (1) the policy adopted by the CAVC in 2001 in Best v. Principi, 15 Vet.App. 18, 19-20 (2001) and Mahl v. Principi, 15 Vet.App. 37 (2001); (2) the CAVC's reluctance to reverse erroneous findings of fact made by the Board of Veterans' Appeals; and (3) the case law requiring the CAVC to dismiss an appeal if the veteran dies while the appeal is pending before the Court.

A. How Best and Mahl Contribute to the Hamster Wheel

In Best and Mahl, the Court held that when it concludes that an error in a Board of Veterans' Appeals decision requires a remand, the Court generally will not address other alleged errors raised by the veteran. The CAVC agreed that it had the power to resolve the other allegations of error, but announced that as a matter of policy, the Court would "generally decide cases on the narrowest possible grounds."

The following typical scenario illustrates how the piecemeal adjudication policy adopted by the CAVC in Best and Mahl contributes to the Hamster Wheel phenomenon:

- after prosecuting a VA claim for benefits for three years, the veteran receives a decision from the Board of Veterans' Appeals denying his claim;
- the veteran appeals the Board's decision within 120 days to the CAVC, and files a legal brief contending that the Board made a number of different legal errors in denying the claim. In response, the VA files a legal brief arguing that each of the VA actions about which the veteran complains are perfectly legal;
- then, four and a half years after the claim was filed, the Central Legal Staff of the Court completes a screening memorandum and sends the appeal to a single judge of the CAVC. Five years after the claim was filed, the single judge issues a decision resolving only one of the many different alleged errors briefed by the parties. The single judge issues a written decision that states that: (a) the Board erred in one of the respects discussed in the veteran's legal briefs; (b) the Board's decision is vacated and remanded for the Board to correct the one error and issue a new decision; (c) there is no need for the Court to resolve the other alleged legal errors that have been fully briefed by the parties because the veteran can continue to raise these alleged errors before the VA on remand.
- on remand, the Board ensures that the one legal error identified by the CAVC is corrected, perhaps after a further remand to the regional office. But not surprisingly, the Board does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six years after the claim was filed, the Board denies the claim again;
- 120 days after the new Board denial, the veteran appeals the Board's new decision to the CAVC, raising the same unresolved legal errors he previously briefed to the CAVC.
- the Hamster Wheel keeps churning . . .

The piecemeal adjudication policy adopted in Best and Mahl may benefit the Court in the short term. By resolving only one of the issues briefed by the parties, a judge can finish an appeal in less time than would be

required if he or she had to resolve all of the other disputed issues, thereby allowing the judge to turn his or her attention at an earlier time to other appeals. But the policy is myopic. Both disabled veterans and the VA are seriously harmed by how Best and Mahl contribute to the Hamster Wheel. Moreover, the CAVC may not be saving time in the long run. Each time a veteran appeals a case that was previously remanded by the CAVC due to Best and Mahl, the Central Legal Staff and at least one judge of the Court will have to duplicate the time they expended on the case the first time around by taking the time to analyze the case for a second time. Congress should amend Chapter 72 of Title 38 to correct this obstacle to justice.

B. How the Court's Reluctance to Reverse Erroneous BVA Findings of Fact Contributes to the Hamster Wheel

Over the years, NVLSP has reviewed many Board decisions in which the evidence on a critical point is in conflict. The Board is obligated to weigh the conflicting evidence and make a finding of fact that resolves all reasonable doubt in favor of the veteran. In some of these cases, the Board's decision resolves the factual issue against the veteran even though the evidence favorable to the veteran appears to strongly outweigh the unfavorable evidence.

If such a Board decision is appealed to the CAVC, Congress has authorized the Court to decide if the Board's weighing of the evidence was "clearly erroneous." But the Court interprets the phrase "clearly erroneous" very narrowly. The Court will reverse the Board's finding on the ground that it is "clearly erroneous" and order the VA to grant benefits in only the most extreme of circumstances. As the CAVC stated in one of its precedential decisions: "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. . . . To be clearly erroneous, then, the [decision being appealed] must be dead wrong . . . ." Booton v. Brown, 8 Vet.App. 368, 372 (1995) (quoting Parts & Electric Motors, Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)).

The net result of the Court's extreme deference to the findings of fact made by the Board is that even if it believes the Board's weighing of evidence is wrong, it will not reverse the Board's finding and order the grant of benefits; instead, it will typically vacate the Board decision and remand the case for a better explanation from the Board as to why it decided what it did – thereby placing the veteran on the Hamster Wheel again. Congress should amend the Court's scope of review of Board findings of fact in order to correct this problem

C. How the Case Law Requiring the CAVC to Dismiss an Appeal if the Veteran Dies While the Appeal is Pending Contributes to the Hamster Wheel

On April 24, 2007, Christine Cote testified on NVLSP's behalf before this Subcommittee about another contributor to the Hamster Wheel: the case law that requires the CAVC to dismiss an appeal if the claimant dies before the appeals process has been completed. Under this case law, a qualified surviving family member cannot continue the appeal at the CAVC. Instead, the qualified surviving family member must start from square one and file a new claim at a VA regional office for the benefits that the veteran had been seeking for years at the time of his death. As Ms. Cote explained, Congress should take legislative action to allow a qualified surviving family member to substitute for the deceased veteran and continue the appeal at the CAVC.

II. Injustice and Inefficiency Due to the Lack of Class Action Authority

The second major set of issues we would like to address involves the injustice and inefficiency that derives from the fact that federal courts do not currently have clear authority to certify a veteran's lawsuit as a class action. When Congress enacted the Veterans' Judicial Review Act (VJRA) in 1988, it inadvertently erected

a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. See, e.g., Nehmer v. U.S. Veterans Administration, 712 F. Supp. 1404 (N.D. Cal. 1989); Giusti-Bravo v. U.S. Veterans Administration, 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or veterans organization to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (see Lefkowitz v. Derwinski, 1 Vet.App. 439 (1991), and the Federal Circuit has indicated the same. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

The lack of class action authority has led to great injustice and waste of the limited resources of the VA and the courts. To demonstrate the injustice and waste that result from the unavailability of the class action mechanism, we have set forth below an illustrative case study taken from real events.

Case Study: The Ongoing Battle Between the VA and Navy "Blue Water" Veterans

This case study involves the five-year old battle that is still being fought between the VA and thousands of Vietnam veterans who served on ships offshore the Republic of Vietnam during the Vietnam War (hereinafter referred to as "Navy blue water veterans"). In section A below, we summarize this five-year old battle being waged without the benefit of a class action mechanism. In section B, we describe the more efficient and just way the battle would have been waged if a class action mechanism had been available. Finally, in section C, we describe how the piecemeal way the battle is currently being fought will inevitably result in dissimilar VA treatment of similarly situated veterans.

A. The Five-Year Old Battle Between the VA and Navy Blue Water Veterans

From 1991 to 2002, the VA granted hundreds, if not thousands of disability claims filed by Navy blue water veterans suffering from one of the many diseases that VA recognizes as related to Agent Orange exposure. These benefits were awarded based on VA rules providing that service in the waters offshore Vietnam qualified the veteran for the presumption of exposure to Agent Orange set forth in 38 U.S.C. § 1116.

In February 2002, VA did an about face. It issued an unpublished VA MANUAL M21-1 provision stating that a "veteran must have actually served on land within the Republic of Vietnam. . . to qualify for the presumption of exposure to" Agent Orange. As a result, all pending and new disability claims filed by Navy blue water veterans for an Agent Orange-related disease were denied unless there was proof that that the veteran actually set foot on Vietnamese soil. In addition, the VA began to sever benefits that had been granted to Navy blue water veterans prior to the 2002 change in VA rules.

In November 2003, the CAVC convened a panel of three judges and set oral argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Navy blue water veteran who was denied service-connected death benefits (DIC) by the Board of Veterans' Appeals on the ground that her deceased husband, who died of an Agent Orange-related cancer, had never set foot on the land mass of Vietnam. See Johnson v. Principi, U.S. Vet. App. No. 01-0135 (Order, Nov. 7, 2003). The legal briefs filed by Mrs. Johnson's attorneys

challenged the legality of the 2002 Manual M21-1 provision mentioned above. Thus, it appeared that the CAVC would issue a precedential decision deciding the legality of VA's set-foot-on-land requirement.

Six days before the oral argument, however, the VA General Counsel's Office made the widow an offer she could not refuse: full DIC benefits retroactive to the date of her husband's death – the maximum benefits that she could possibly receive. Because Mrs. Johnson did not and could not file a class action, once she signed the VA's settlement agreement, the oral argument was cancelled, the Court panel convened to hear the case was disbanded, and the appeal was dismissed. Buying off the widow allowed the VA to continue for the next three years to deny disability and DIC benefits to Navy blue water veterans and their survivors based on VA's new set-foot-on-land rule.

Some Navy blue water veterans and survivors who were denied benefits by a VA regional office based on the 2002 rule gave up and did not appeal the RO's decision. Some appealed the RO's decision to the Board of Veterans' Appeals, which affirmed the denial. Some of those who received a BVA denial gave up and did not appeal the BVA's denial to the CAVC. And some of those who were denied by the RO and the BVA did not give up and appealed to the CAVC.

One of those who doggedly pursued his disability claim all the way to the CAVC was former Navy Commander Jonathan L. Haas. He filed his appeal in March 2004. The CAVC ultimately convened a panel of the Court and scheduled oral argument for January 10, 2006 to decide Commander Haas' challenge to VA's set-foot-on-land rule. This time, however, the VA did not offer to settle. On August 16, 2006, a panel of three judges unanimously ruled that VA's 2002 set-foot-on-land requirement was illegal. See Haas v. Nicholson, 20 Vet.App. 257 (2006).

But this did not end the battle between the VA and Navy blue water veterans. In October 2006, the VA appealed the decision in Haas to the U.S. Court of Appeals for the Federal Circuit, where it is currently pending. Last fall, Secretary of Veterans Affairs R. James Nicholson also ordered a moratorium at the 57 VA regional offices and the Board of Veterans' Appeals that prevents the ROs and the BVA from deciding any claim filed by a Navy blue water veteran or survivor based on an Agent Orange-related disease unless there is proof that the veteran had actually set foot on Vietnamese soil. VA estimates that the moratorium covers 1,500 claims pending at the BVA and an untold number of similar claims pending at the 57 ROs. This moratorium will stay in effect at least until the Federal Circuit decides the VA's appeal. A decision by the Federal Circuit is not expected for another year.

Thus, if the VA ultimately loses its challenge to the unanimous CAVC decision at the Federal Circuit, the VA will nonetheless have succeeded in withholding disability benefits from thousands of Navy blue water veterans and survivors for the six-year period from 2002 to 2008.

B. How This Battle Would Have Been Waged If A Veteran Could File a Class Action

Compare the true events described above with how the battle between the VA and Navy blue water veterans would have been coordinated if a federal court (the Federal Circuit or the CAVC) had authority to certify a case as a class action on behalf of similarly situated VA claimants. Years ago, Mrs. Johnson could have asked the Court with class action authority to certify her lawsuit as a class action on behalf of the following class members: (1) Navy blue water veterans who (a) have filed or henceforth file a VA disability claim based on an Agent Orange-related disease and (b) never set foot on the land mass of Vietnam and (2) all surviving family members who filed or henceforth file a DIC claim based on the death of such a Navy blue water veteran from an Agent Orange-related disease.

If the Court certified Mrs. Johnson's lawsuit case as a class action, the VA would not have been able to end the case by buying her off. Class actions cannot be dismissed merely because one class member is granted

benefits. The Court could then have ordered the VA to keep track of, but not decide, the pending claims of all class members until the parties filed their briefs and the Court issued an opinion deciding the legality of VA's set-foot-on-land requirement. This action would have conserved the limited claims adjudication resources of the VA by allowing the agency to adjudicate other claims while the class action was pending. When actually occurred instead is that the regional offices and the Board expended scarce resources adjudicating and denying thousands of claims filed by Navy blue water veterans during the period from 2002 to the fall of 2006, when Secretary Nicholson's moratorium went into effect.

This action would also have conserved the resources of thousands of disabled class members and their representatives. They would not have to complete and submit notices of disagreement, substantive appeals forms, and responses to VA correspondence in order to keep their claims alive.

Then, after the Court resolved the legality of VA's set-foot-on-land requirement, it could act to ensure that all of the pending claims filed by class members were uniformly and promptly decided by the VA in accordance with the Court's decision. And all of this would have occurred well before 2008 because Mrs. Johnson's earlier case would have led to the key Court decision, not the later filed case of Commander Haas.

C. Why the Current Battle Will Inevitably Result In Dissimilar Treatment of Similarly Situated Disabled Veterans and Their Survivors

By definition, all of the Navy blue water veterans and their survivors who have been denied benefits due to the VA's set-foot-on-land rule are suffering from, or are survivors of a veteran who died from, one of the following diseases that the VA recognizes as related to Agent Orange exposure: soft-tissue sarcomas, Hodgkin's disease, lung cancer, bronchus cancer, larynx cancer, trachea cancer, prostate cancer, multiple myeloma, chronic lymphocytic leukemia, and diabetes mellitus (Type 2). These are seriously disabling, often fatal diseases.

Assume that the Federal Circuit ultimately agrees with the unanimous panel of the CAVC and affirms its ruling that VA's set-foot-on-land requirement is unlawful. Further assume that Secretary Nicholson agrees to comply with the Court's ruling, lifts his moratorium, and orders the ROs and BVA to decide all of the claims subject to the moratorium and belatedly pay these disabled war veterans and their survivors – to the extent that they are still alive -- the many-years-worth of retroactive disability or death benefits they were long ago denied due to VA's set-foot-on-land requirement.

Even if all this were done, the fact would remain that hundreds, if not thousands of similarly situated Navy blue water veterans and their survivors would never receive the benefits that those whose claims were subject to the moratorium would receive. That is because VA's denial of their claims for disability or death benefits for an Agent Orange-related disease became final before Secretary Nicholson's moratorium. To be specific, the following similarly situated VA claimants are not subject to Secretary Nicholson's moratorium and will never receive benefits based on their claims:

Navy blue water veterans who filed a disability claim and survivors of Navy blue water veterans who filed a DIC claim that was denied by a VA regional office based on its set-foot-on-land rule, and who either

- did not file a notice of disagreement with the RO decision during the one-year appeal period; or
- filed a timely notice of disagreement, but failed to file a timely substantive appeal to the Board of Veterans Appeal; or

- filed a timely notice of disagreement and a timely substantive appeal, received a decision from the Board of Veterans' Appeals denying their claim based on VA's set-foot-on-land rule, and failed to file a timely appeal with the CAVC.

The number of these similarly situated claimants is likely to be high. Veterans with seriously disabling diseases often give up on their claim when the VA tells them that they are not entitled to the benefits they seek. Their disabilities deplete their energy and their resources. Fighting the VA bureaucracy can seem a very daunting task to a veteran suffering from cancer. Plus, they are not lawyers and are not familiar with the legal authorities relied upon the CAVC in Haas. When the VA tells them they are not entitled to benefits because they did not set foot on land in Vietnam, they often believe that the VA must know what it is doing. Thus, many of these disabled veterans simply give up and don't appeal their cases all the way to the CAVC.

If the Federal Circuit rules in the favor of the Navy blue water veterans, no law requires the VA to use their computer systems to identify similarly situated claimants who are not included in the Nicholson moratorium. No law requires the VA to notify these similarly situated claimants about the Court's decision. And even if these similarly situated claimants somehow found out about the Court decision and reapplied, the VA would refuse to pay them the retroactive benefits that it paid to the claimants subject to the Nicholson moratorium because the VA would conclude that its previous final denial of the claim – which occurred before the Haas decision -- was not the product of "clear and unmistakable error."

Thus, the unavailability of a class action mechanism dooms the claims of all similarly situated Navy blue water veterans and their survivors who are not part of the Nicholson moratorium. Legislative action is needed to ensure that unjust situations like this are not repeated in the future.

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Please note the references to Blue Water Veterans. (**Case Study: The Ongoing Battle Between the VA and Navy "Blue Water" Veterans)**
http://veterans.house.gov/hearings/schedule110/may07/05-22-07/5-22-07stichman.shtml

There are also copies of testimony http://veterans.house.gov/hearings/ from other witness: http://veterans.house.gov/hearings/ . You can also hearing the audio of the Court of Appeals for Veterans Claims that was held on May 22, 2007. Even though the text is available the audio covers many other questions and answers that are most interesting. (Note the right side where the witness list and audio coverage is identified).

Listen to one of the Congressman Hall's question where he asked the witnesses to express why the VA is **cantankerous** about the "benefit of the doubt" which appears as being toward the VA rather than toward the Veteran.

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Additional Information from these Proceedings

Member Opening Statements

Opening Statement of the Honorable John Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs, and a Representative in Congress from the State of New York

Panel 1

Chief Judge William P. Greene, Jr.
U.S. Court of Appeals for Veterans Claims
(Prepared Testimony)

Panel 2

Bart Stichman
Joint Executive Director
National Veterans Legal Services
(Prepared Testimony)

Robert Chisholm
Former President
National Organization of Veterans' Advocates
(Prepared Testimony)

Brian Lawrence
Assistant National Legislative Director
Disabled American Veterans
(http://veterans.house.gov/hearings/schedule110/may07/05-22-07/5-22-07lawrence.shtml Prepared Testimony)

Panel 3

The Honorable James P. Terry
Chairman, Board of Veterans' Appeals
U.S. Department of Veterans Affairs
(Prepared Testimony)

Accompanied by
Randy Campbell
General Counsel Group VII
U.S. Department of Veterans Affairs