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TESTIMONY

Statement of

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Chairman Luttrell, Ranking Member Pappas, and Members of the Committee:

My name is Daniel Shedd, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on the proposed legislation entitled the "Veterans Appeals Efficiency Act of 2024" that is before the Subcommittee today. My testimony will focus on two aspects of the proposed legislation: (1) the aggregation of agency adjudications and (2) the authority of the Court of Appeals for Veterans Claims (CAVC) to issue limited remands.

The first section of this testimony provides an overview of agency aggregation of adjudications that involve claims with substantially similar questions of law or fact. The proposed legislation would specifically authorize the Board of Veterans' Appeals (BVA or Board) to aggregate certain appeals that are pending before the Board. The proposed legislation provides that "[i]f the Chairman of the Board determines that more than one appeal involves substantially similar questions of law or fact, the Chairman may aggregate such appeals for review."[1] Further, the proposed legislation would require the Department of Veterans Affairs (VA) to seek an independent assessment from a federally funded research and development center (FFRDC) regarding the BVA's authority to aggregate appeals with substantially similar questions of law or fact.[2] To assist the Subcommittee in evaluating these provisions, this written statement will (1) provide an overview of how other executive agencies and non-Article III courts have implemented aggregation procedures for claims or appeals; (2) summarize commentators' views as to the potential benefits and drawbacks related to the aggregation of claims; and (3) provide analysis of how courts and other jurists have evaluated whether an agency has the authority to aggregate adjudications. Finally, it will briefly review how the CAVC has implemented class action procedures in the context of appeals from BVA decisions.

Next, this testimony will provide an overview of the CAVC's use of limited remands. The proposed legislation would require the CAVC to retain jurisdiction over a matter that it remands to the BVA when it finds that the Board failed to address an issue raised by the claimant or reasonably raised by the evidence of record. This section of the testimony provides a brief overview of limited remands. It then reviews the CAVC's authority to issue limited remands in light of the court's 1995 decision in *Cleary v. Brown*, which held that the CAVC lacked authority to retain jurisdiction over matters remanded to the BVA for a new adjudication.[3] This testimony then discusses the CAVC's departure from that holding in more recent cases such as *Skaar v. Wilkie*, where the court determined that it has authority to issue limited remands in certain circumstances.[4] Finally, the written statement concludes by examining the text of the proposed legislation in light of the CAVC's history of issuing limited remands.

Aggregation of Agency Adjudications

The Veterans Appeals Efficiency Act of 2024 would authorize the BVA to aggregate certain appeals that are before the Board. The proposed legislation provides: "If the Chairman of the Board determines that more than one appeal involves substantially similar questions of law or fact, the Chairman may aggregate such appeals for review."[5] The proposed legislation would also require VA to seek an independent assessment from an FFRDC regarding the BVA's authority "to aggregate, for review, more than one appeal . . . that involves substantially similar questions of law or fact pursuant to section 7104 of such

[1] Veterans Appeals Efficiency Act of 2024, H.R. ___, 118th Cong. § 2(c)(1) [hereinafter Veterans Appeals Efficiency Act].

[2] *Id.* § 2(f)(2).

[3] Cleary v. Brown, 8 Vet. App. 305 (1995), *on reconsideration in part*, 9 Vet. App. 201 (1996).

[4] Skaar v. Wilkie, 31 Vet. App. 16 (2019) (per curiam).

[5] Veterans Appeals Efficiency Act § 2(c)(1) (2024).

title," as amended by the proposed legislation.[6] The FFRDC would provide recommendations regarding rules or principles that should govern BVA's aggregation of appeals and the BVA, in turn, would be required to establish "policies and procedures to implement the recommendations."[7]

This section of the testimony discusses how other executive agencies and non-Article III tribunals have implemented policies to provide for aggregation of administrative adjudications. First, this section provides a brief overview of the appeal process at the BVA to provide context to the current legislation. It then provides an overview of the benefits and drawbacks of claim aggregation. It also discusses the legal authority of agencies to establish aggregation policies and procedures and addresses the BVA's authority to implement such policies under the proposed legislation. Finally, this section provides an overview of certain best practice guidelines established by the Administrative Conference of the United States (ACUS) in its recommendation regarding aggregation of claims before an executive agency.

Brief Overview of BVA's Appeals Process

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act (AMA) in an effort to "expedite VA's appeals process while protecting veterans' due process rights."[8] Pursuant to the AMA, if a claimant disagrees with the initial decision of a VA agency of original jurisdiction (AOJ) (e.g., a VA regional office, medical center, or other VA entity) on a claim for benefits or reimbursement, they may appeal it.[9] The AMA provides three avenues for review: (1) requesting higher-level review from a more experienced adjudicator within the AOJ; (2) filing a supplemental claim with new evidence at the AOJ; or (3) appealing to the BVA.[10] To elect BVA review, a claimant must file a notice of disagreement (NOD) (more formally known as a VA Form 10182) with the BVA within one year of the AOJ's decision.[11]

When electing BVA review, the claimant must select one of three review options available at the Board: (1) the direct review docket, (2) the new evidence docket, or (3) the hearing docket.[12] Once the Board receives the completed NOD, it assigns the appeal a docket number. The BVA is statutorily obligated to hear appeals from each docket in the order in which they are received.[13] However, an appeal may be advanced on the docket (1) "if the case involves interpretation of law of general application affecting other claims"; (2) if the claimant is suffering severe financial hardship or has a severe illness; or (3) if there is other sufficient cause.[14]

When reviewing a claim on appeal, the BVA is bound by statute, VA regulations, "instructions of the Secretary, and the precedent opinions of the chief legal officer of the [VA]."[15] VA regulations authorize the VA General Counsel to issue "precedent opinions involving veterans' benefits under laws

[6] *Id.* at § (f)(2).

[7] *Id.*

[8] H. REP. NO. 115-135, at 2 (2017).

[9] 38 U.S.C. § 5104C.

[10] *Id.* The AMA provides that a claimant may seek an unlimited number of reviews and, as long as each subsequent appeal is filed within one year of the most recent decision, keep the original claim's effective date. *Id*. Because the proposed Veterans Appeals Efficiency Act of 2024 addresses appeals at the BVA, this testimony will focus on the third option—the BVA appeal process.

[11] 38 U.S.C. § 7105.

[12] 38 C.F.R. § 20.202(b) (2024).

[13] 38 U.S.C. § 7107(a) ("Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board.").

[14] *Id.* § 7107(b).

[15] *Id.* § 7104(c).

administered by the [VA]."[16] Current regulations provide that the Chairman of the BVA[17] may request an opinion from the General Counsel, and the General Counsel's written legal opinion is considered "conclusive . . . with respect to the matter at issue."[18] The General Counsel may designate an opinion as "precedential" and, if so designated, the opinion will be "binding on Department officials and employees in subsequent matters involving a legal issue decided in the precedent opinion."[19] Reviewing courts have upheld the binding nature of and procedures for issuing these General Counsel opinions.[20] Although the VA Office of General Counsel may issue precedential opinions that are binding on the BVA, BVA decisions themselves *do not* have precedential effect—that is, the decision of any individual case does not bind the Board to rule in the same manner in any subsequent case.[21] Appellate courts have upheld this on judicial review and have thwarted attempts to circumvent the regulation.[22]

The VA adjudication process at the BVA is unique compared to many other agencies, as Congress has established a "uniquely pro-claimant adjudicatory system."[23] BVA proceedings are non-adversarial—there is no party that argues *against* the claimant in front of the BVA.[24] Further, the scope of review favors claimants: by statute, the BVA is bound by all AOJ findings that are *favorable* to the claimant.[25] In addition, the burden of proof is also uniquely pro-claimant, as the BVA is to award benefits to the claimant based on a "benefit of the doubt" standard, instead of the typical "preponderance of the evidence" standard.[26]

When review is complete, the BVA will grant, deny, or remand the claim to the AOJ for further development.[27] If the claimant disagrees with the BVA's decision, the claimant may continue to pursue their claim before VA by filing a supplemental claim with new evidence or seek judicial review of the

[16] 38 C.F.R. § 2.6(e); *id.* § 14.507(b).

[17] *Id.* § 14.502 ("Requests for formal legal advice, including interpretation of law or regulations, shall be made only by the Secretary, the Deputy Secretary, the Assistant Secretaries, the Deputy Assistant Secretaries, and the administration head or top staff office official having jurisdiction over the particular subject matter, or by a subordinate acting for any such official.").

[18] *Id.* § 14.507(a).

[19] *Id.* § 14.507(b).

[20] Paralyzed Veterans of Am. v. Sec'y of Veterans Affs., 308 F.3d 1262, 1265 (Fed. Cir. 2002) (rejecting argument that a precedential opinion is a "rule" requiring notice and comment procedures under the Administrative Procedure Act and upholding General Counsel precedential opinion as an "integral part of the Board's adjudicatory process."); Greer v. McDonough, 36 Vet. App. 220, 229 (2023) (noting that "the Board can request (through the Chairman) a precedent opinion from VA's General Counsel on a legal question.").

[21] 38 C.F.R. § 20.1303 ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided."); Bumpass v. McDonough, No. 19-8081, 2021 WL 4059693, at *2 (Vet. App. Sept. 7, 2021) (noting that "Board decisions are not precedential and are binding only with respect to a particular veteran's case."); Lynch v. Gober, 11 Vet. App. 22, 27 (1997) (recognizing nonbinding nature of Board decisions beyond the specific case at hand).

[22] *See, e.g. Lynch,* 11 Vet. App. at 27 ("The appellant's contention that the BVA in this case deviated from a clear pattern of BVA decisions that had recognized and applied a constructive-notice doctrine and that such a deviation would be arbitrary and capricious decision making is but another way of trying to import precedential value to nonprecedential BVA decisions, and must fail.").

[23] Hayre v. West, 188 F.3d 1327, 1333 (Fed. Cir. 1999) (noting that Congress has reinforced the "strongly and uniquely pro-claimant system of awarding benefits to veterans"), *overruled by* Cook v. Principi, 318 F.3d 1334 (Fed. Cir. 2002).

[24] 38 C.F.R. § 20.700 ("Hearings conducted by the Board are ex parte in nature and nonadversarial.").

[25] 38 U.S.C. § 5104A ("Any finding favorable to the claimant . . . shall be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.").

[26] *Id.* § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); Lynch v. McDonough, 21 F.4th 776, 781 (Fed. Cir. 2021) (holding that "a claimant is to receive the benefit of the doubt when there is an 'approximate balance,'" defined as a "nearly equal" amount, "of positive and negative evidence.").

[27] 38 U.S.C. § 7104; 38 C.F.R. § 20.904.

BVA decision at the CAVC.[28] Currently, there are no procedures in statute, regulation, or practice for aggregating claims pending before the BVA that present common issues of law or fact. With the context of the current BVA appeals process in mind, the following sections detail how other agencies have implemented aggregation procedures into their adjudicatory systems and how legal scholars and other commentators have addressed such procedures.

Aggregate Agency Adjudication: Potential Benefits and Drawbacks

Claim aggregation in the context of federal courts and executive agencies involves grouping together claims that have similar questions of law or fact for collective resolution of those claims or common issues within those claims.[29] Legal commenters have generally classified claim aggregation into two categories: *formal* aggregation and *informal* aggregation.[30] Formal aggregation of claims is when a single proceeding has the ability to bind other parties that may not be before the tribunal.[31] The class action lawsuit—where a single party represents the interests of a class of similarly situated claimants in a single action that is binding on all members of the class—is a well-documented example of formal aggregation.[32]

Informal aggregation, on the other hand, maintains separate, individual proceedings for each claimant and uses other mechanisms, such as placing similar cases on a specialized docket or assigning them all to the same judge or panel, to promote efficiency and consistency in adjudicatory outcomes across those claims.[33] The federal court system's procedures for multidistrict litigation (MDL) provide such an example.[34] In short, pursuant to MDL procedures, cases stemming from a common set of facts that are filed in numerous district courts are channeled to a single district court for coordinated or consolidated pretrial proceedings.[35] After such pretrial proceedings are concluded, the individual cases are remanded back to the original jurisdiction for trial.[36]

The purpose of implementing aggregation procedures is to efficiently handle large volumes of cases or claims in a consistent and equitable manner. Thus, courts and legal scholars have recognized that the

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[28] 38 U.S.C. § 5104C.

[29] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1646 (2017) [hereinafter *Inside the Agency Class Action*] (describing aggregation as "grouping together and resolving large groups of similar claims").

[30] *See, e.g., id.* at 1647; James Hannaway, *Codifying the Agency Class Action*, 87 GEO. WASH. L. REV. 1451, 1456 (2019) (distinguishing formal binding aggregation procedures from informal aggregation procedures that are "less binding on absent parties"). Some texts refer to informal aggregation as *administrative* aggregation. *See, e.g.*, Fabrizio Cafaggi, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, 21 LOY. CONSUMER L. REV. 496, 502 (2009).

[31] *Inside the Agency Class Action*, *supra* note 29, at 1647.

[32] *Id.* Other examples of formal aggregation include "lawsuits by and against organizations in bankruptcy, trustee actions commenced on behalf of many beneficiaries, statistical sampling and extrapolation, and *parens patriae* actions by state attorneys general." *Id.* (footnotes omitted).

[33] *Id.* at 1647–48.

[34] 28 U.S.C. § 1407; *see also* CRS In Focus IF11976, *Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases*, by Joanna R. Lampe.

[35] The MDL statute provides that the judicial panel on multidistrict litigation, a panel of seven federal judges, may transfer pending "civil actions involving one or more common questions of fact" to a district court for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Such pretrial proceedings include "conducting documentary discovery, establishing document depositories, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set for in the court's pretrial orders" Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014).

[36] 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

potential benefits of claim aggregation include: (1) judicial efficiency and (2) consistent legal outcomes for similarly situated claimants. In another view, implementation of aggregation policies also includes potential risks, as aggregation might strain an agency's adjudicatory resources and may raise fairness concerns for absent claimants that may be bound decisions in a class action.

One of the primary reasons cited for implementing claim aggregation is to promote adjudicatory efficiency. Traditional case-by-case adjudication of claims involving similar factual or legal questions requires adjudicators to decide those similar questions in each case.[37] Aggregation of claims, however, can potentially conserve adjudicatory resources by allowing for collective resolution of similar claims or issues. The Supreme Court has stated that a "principal purpose" of the class action is to promote "efficiency and economy of litigation."[38] Similarly, the judicial panel on MDL has a statutory mandate to transfer cases involving common questions of facts to a single district court "to promote . . . *efficient* conduct of such actions."[39]

Claim aggregation also can promote consistency in judicial outcomes for similarly situated claimants.[40] When multiple adjudicators hear individual claims without coordination or consolidation, there is potential for inconsistent outcomes despite the presence of common questions of law or fact.[41] By using methods such as channeling similar claims to a particular judge or panel, or by binding members of a class to a judgment reached in a class action, aggregate proceedings may provide for increased consistency in decisions for similarly situated claimants.[42]

On the other hand, aggregation procedures may also have limitations and potential drawbacks. Some note that certain aggregation devices can put a significant strain on an agency's adjudicatory resources.[43] As one federal court has observed, almost "all class action law suits involve complex issues, which are costly to resolve and often result in protracted proceedings."[44] At least one federal agency declined to adopt regulations to implement class action proceedings, in part because of the time, complexity, and expense associated with managing class actions.[45] This concern led ACUS to recommend that agencies implementing aggregate procedures ensure that their adjudicators have the necessary skill, resources, and time to manage the chosen procedures.[46]

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[37] *See, e.g.*, Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (noting that certifying a class action in the case would prevent the judicial system from "repeating, hundreds of times over" the same factual and legal inquiries in each individual trial).

[38] Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

[39] 28 U.S.C. § 1407(a) (emphasis added).

[40] Gunnells v. Healthplan Servs., 348 F.3d 417, 427 (4th Cir. 2003) (noting that "[c]lass certification . . . promotes consistency of results . . . .").

[41] *See, e.g.*, 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §10 (6th ed. 2023) ("Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[42] MICHAEL SANT'AMBROGIO & ADAM ZIMMERMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGGREGATE AGENCY ADJUDICATION FINAL REPORT 14 (2016) [hereinafter AGGREGATE AGENCY ADJUDICATION] ("At bottom, aggregate proceedings . . . seek consistency and distributive fairness—to treat like parties in a like manner.").

[43] *Id.* at 63 (noting that administrative judges within the EEOC "observed that class action proceedings [at the EEOC] involved substantial time and resources, sometimes requiring extensive motion practice and complex statistical proofs . . . .").

[44] Lachance v. Harrington, 965 F. Supp. 630, 645 (E.D. Pa. 1997).

[45] Commodity Futures Trading Commission, Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631, 9631 (Mar. 1, 1994) (to be codified at 17 C.F.R. pt. 12) (noting that agency adjudication is "designed for quick and inexpensive resolution of disputes whereas class action litigation must be conducted with formality and strict attention to procedural issues and is often lengthy" and concluding that the agency's "resources would be used more effectively elsewhere . . .").

[46] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 82 (noting that adjudicators should be "appropriately trained" and noting that "some agency adjudicators may simply lack the expertise or time to resolve complex multiparty disputes.").

Claim aggregation may also raise concerns related to fairness. In formal aggregation, such as a class action proceeding, absent class members (i.e., those who are not actively involved in the litigation) are bound by the result of the litigation even without participating in the proceeding.[47] Absent class members, therefore, depend on named plaintiffs to defend the rights of the class. If the class representative fails to zealously advocate on behalf of the class or puts their own interests ahead of the class as a whole, absent claimants may feel they have been treated unjustly.

Examples of Claim Aggregation in Federal Agencies and Article I Courts

Although aggregate litigation is quite prevalent in federal courts,[48] the practice of aggregating claims is not as widespread in the context of administrative adjudications.[49] Although one study found that seven agencies had rules in place permitting class actions, five of those agencies do not appear to have used those procedures.[50] That study found that only one federal agency, the Equal Employment Opportunity Commission (EEOC), frequently used class action procedures.[51] Slightly more agencies used procedural rules to consolidate proceedings.[52] The study's authors explained that a distinguishing feature was that the majority of these consolidations were for a small amount of parties or claims—unlike the large aggregate proceedings typical in federal courts.[53] Nonetheless, an ACUS report found that agencies employed both formal and informal procedures that aggregate claims or appeals to adjudicate large numbers of claims in an efficient and equitable manner.[54] Agencies have adopted aggregate procedures to fit their specific adjudicatory schemes. The following section provides examples of how agencies have pursued claim aggregation in various ways.

The EEOC provides an example of an agency implementing formal aggregation proceedings: the agency class action proceeding. Congress has charged the EEOC with enforcing employment anti-discrimination

[47] *In re* Veneman, 309 F.3d 789, 795 (D.C. Cir. 2002) ("Class certification affects the due process rights of absent class members to have their own day in court.").

[48] *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (noting that "MDL practice has become so pervasive as to be almost routine"); *see also* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire civil caseload.").

[49] *Inside the Agency Class Action*, *supra* note 29, at 1657 (describing the "virtual absence of aggregate practice from the administrative state").

[50] *Id.* at 1659 (noting that although the authors identified "seven agencies—the Board of Governors of the Federal Reserve, the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, the Corporation for National and Community Service, the EEOC, the Government Accountability Office Personnel Appeals Board, and the Merit System Protection Bureau" that have a rule permitting class actions, "five of the agencies did not have *any* reported decisions involving the rule's use").

[51] *Id.* at 1659. The study noted that two Article I courts, the Bankruptcy Courts and the Court of Federal Claims, also made frequent use of class action procedures. *Id.* The study predated the opinion in *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), holding that the CAVC has "authority to certify and adjudicate class action cases." To date, the CAVC has certified four classes.

[52] *Inside the Agency Class Action*, *supra* note 29, at 1659. The authors chose to define "frequent use" as an agency using the procedure more than 15 times since "they began including their decisions in electronic databases." *Id.* The eight agencies to have more than 15 reported cases indicating consolidation of more than one party were "the Department of Labor, the EEOC, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Merit System Protection Board, the Occupational Safety and Health Review Commission, [and] the Patent and Trademark Office." *Id.* at 1659 n.97. The authors identified the Bankruptcy Court, the Court of Federal Claims, and the Tax Court as other non-Article III tribunals that made "frequent use" of procedures to consolidate claims. *Id.*

[53] *Id.* at 1660 ("More importantly, most efforts to consolidate involved a very small number of cases—generally far fewer than the forty cases required to certify a class action or to justify multidistrict litigation in federal court.").

[54] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 32.

laws.[55] The Federal Sector of the EEOC is responsible for adjudicating complaints from federal employees against their employers.[56] The caseload of the EEOC's Federal Sector is significant; in FY2023, the Federal Sector resolved 8,669 hearing requests.[57] To assist with this workload, EEOC has implemented regulations that authorize EEOC adjudicators to certify classes and hear class actions filed against federal employers.[58]

The EEOC's class actions resemble class action procedures established for civil actions filed in federal court.[59] At the outset, a complainant may move for class certification on behalf of employees (or former employees) who have been "adversely affected by an agency personnel management policy" that discriminates against a protected class.[60] To certify a class, the administrative judge—like their counterparts in the federal judiciary—must determine that

> (i) the proposed class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent are typical of the claims of the class, and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.[61]

Once a class has been certified, the EEOC adjudicator has authority to manage the case in much the same manner as a federal judge: the administrative judge may conduct discovery, create subclasses, facilitate settlement, ensure proper representation of the class, and issue decisions on the claim.[62] Also, just as in federal court, the decisions of the administrative judge are "binding on all members of the class and the agency."[63] Using these procedures, the EEOC is able to adjudicate numerous claims from their docket simultaneously. The resulting judgments can be large—EEOC's *2023 Annual Performance Report* notes that in FY2023, EEOC secured "over $85 million in settlements of significant class action cases."[64]

The National Vaccine Injury Compensation Program (NVICP) provides another example of claim aggregation in a non-Article III tribunal." Congress established the NVICP through the National Childhood Vaccine Injury Act of 1986[65] to reduce the number of lawsuits filed against vaccine manufacturers and doctors.[66] The program is administered by the Department of Health and Human

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[55] The EEOC enforces, *inter alia*, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. *See* EEOC, 2023 ANNUAL PERFORMANCE REPORT (Feb. 23, 2024) [hereinafter 2023 EEOC ANNUAL PERFORMANCE REPORT], https://www.eeoc.gov/2023-annual-performance-report.

[56] 42 U.S.C. § 2000e-16(b). Although the EEOC has significant responsibilities with regard to the enforcement of anti-discrimination laws in the private sector, the scope of this written statement is limited to the EEOC's use of claim aggregation in agency adjudication, which only applies to claims against federal employers.

[57] *2023 EEOC Annual Performance Report*, *supra* note 55.

[58] 29 C.F.R § 1614.204. The EEOC has used its class action procedures—which generally follow Federal Rule of Civil Procedure 23—for more than 30 years. Michael Sant'Ambrogio & Adam Zimmerman, Admin. Conf. of the U.S., *Aggregate Agency Adjudication* 32 (2016).

[59] *Compare* Fed. R. Civ. P. 23 *with* 29 C.F.R § 1614.204.

[60] 29 C.F.R. § 1614.204.

[61] *Id.* § 1614.204(a)(2).

[62] *Id.* § 1614.204.

[63] *Id.* § 1614.204(j)(3). One significant difference between class actions in federal court and class actions at the EEOC is that although federal rules require class members to be given the opportunity to "opt out" of the class, there is no such option pursuant to the EEOC procedures. EEOC MANAGEMENT DIRECTIVE 110, ch. 8, § VI.C (Aug. 5, 2015), http://www.eeoc.gov/federal/directives/md110.cfm ("The class members may not 'opt out' of the defined class.").

[64] 2023 EEOC ANNUAL PERFORMANCE REPORT, *supra* note 55.

[65] 42 U.S.C. §§ 300aa-1 to -6.

[66] See AGGREGATE AGENCY ADJUDICATION, supra note 42, at 38; see also CRS In Focus IF12213, *The National Vaccine Injury Compensation Program and the Office of Special Masters*, by Hannah-Alise Rogers.

Services (HHS),[67] and the Office of Special Masters (OSM) in the U.S. Court of Federal Claims adjudicates claims under the program.[68] Pursuant to the statute, claimants alleging injury due to a vaccine may file a claim with OSM. Much like proceedings before the BVA, the proceedings are pro-claimant, at least when compared to pursuing a claim against a physician or vaccine manufacturer through tort, as a claimant only needs to show that the vaccine caused the injury to recover.[69] The claimant does not need to prove negligence or any other theory of tort liability.[70] Compensation is paid through a fund administered by HHS.[71] In some instances, a large amount of claims related to a particular vaccine may arise at one time, requiring resolution of similar questions concerning whether a particular vaccine can cause a particular injury or illness.[72] This process can strain the resources of the limited number of adjudicators at OSM.[73] In response, OSM developed an informal aggregation procedure known as an *omnibus proceeding*.[74]

The omnibus proceedings at OSM are not established in statute or regulation. Instead, the OSM relies on the broad discretion in its enabling statute to conduct hearings, require testimony, and obtain evidence "as may be reasonable and necessary."[75] In this manner, the OSM crafts ad hoc coordinating procedures on a case-by-case basis to reach a conclusion on a general question of causation—that is, can a specific vaccine cause a particular injury or illness?[76] Once that question is answered, the finding can be used separately in each individual case presenting the same issues.[77] In one example, a special master facing factually similar claims in 130 cases directed, *sua sponte*, attorneys for claimants to "form a steering committee to coordinate the presentation of expert evidence" to the OSM on the issue of causation.[78] After holding a hearing on general causation, the special master issued a "case management order requiring individual parties" to prove specific facts in their individual claims, consistent with the finding on general causation, to obtain compensation.[79] In another example, the OSM received more than 5,000 cases claiming that the measles, mumps, and rubella (MMR) vaccine caused autism in children.[80] In this instance, the OSM used a procedure similar to so-called "bell weather" cases in federal court.[81] The OSM conducted three test cases, each heard by a different special master, to answer the general causation question of whether the MMR vaccine could cause autism.[82] These decisions on the general question of causation were binding only on the individual claimants in those cases and "would help the remaining claimants evaluate the strength and merits of their claims in the vaccine program."[83] In this manner, OSM is able to coordinate proceedings informally to enable more efficient resolution of individual claims.

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[67] 42 U.S.C. § 300aa-10.

[68] *Id.* § 300aa-12.

[69] *Id.*

[70] *See id.*

[71] 42 U.S.C. § 300aa-12.

[72] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 39–40.

[73] *See id.* at 39–40.

[74] *See id.* at 40.

[75] 29 U.S.C. § 300aa-12(d)(3)(B).

[76] *See* AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 41.

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *Id.*

[81] *See id.* at 43–44.

[82] *Id.*

[83] *See id.* 41.

Although technically not an example of an aggregation mechanism, it may be instructive to consider that the ACUS report on aggregation explained that implementing precedential decisions and *stare decisis* (a system requiring adjudicators to follow the rulings of prior decisions) at an agency can potentially improve efficiency and consistency in the same manner as aggregation.[84] This result would be because adjudicators would not need to reexamine legal and factual questions already answered in previous decisions. Thus, just like the benefits of aggregation, there is no need to reconsider the same questions "hundreds of times over."[85] At the same time, ACUS cautioned that, especially for agencies with large volumes of cases, it may be difficult for adjudicators to work efficiently with precedential decisions. ACUS explained that adjudicators might not be able to identify and apply precedential decisions or "issue well-reasoned, precedential decisions" when there is a considerable volume of cases to adjudicate.[86] Further, it could potentially make adjudication more complex for claimants' representatives, as those representatives may be required to "find relevant precedents, interpret their significance, and advocate [for] their application."[87] Therefore, there are, just as with claim aggregation, potential benefits and drawbacks associated with implementing a *stare decisis* structure.

Agency Authority to Aggregate Claims

As illustrated above, federal agencies have established procedures for aggregating similar claims, both formally and informally, that are before agency adjudicators.[88] For at least some of these agencies, including the EEOC and NVICP, the agencies' enabling statutes do not provide express authority for the agencies to aggregate claims for adjudication. Instead, agencies employing these practices may rely on their general authority to establish rules and procedures to manage their adjudication dockets and implement the regulatory program.

This posture reflects the general principle that agencies are, absent statutory direction otherwise, generally free to implement their own procedures governing adjudications so long as those procedures comport with the Due Process Clause's requirements.[89] The Supreme Court has expressed that courts should not interfere with an agency's decision regarding how it implements adjudications. In *Pension Benefit Guarantee Corp. v. LTV Corp.*, the Supreme Court held that courts are not permitted to impose additional procedural requirements on agency adjudications beyond what has been imposed by statute.[90] Further, in *Federal Communication Commission (FCC) v. Pottsville Broadcasting, Co.*, the Court has held that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[91] In that case, the Court upheld the FCC's authority to consolidate three adjudications on licensing into one hearing, absent specific statutory authority on consolidation.[92] The Court held that "questions of procedure" including "whether

[84] *Id.* at 69.

[85] Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986).

[86] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 69.

[87] *Id.* Most of the claimants in the AMA appeal process are not represented by attorneys before the BVA. EEOC, 2023 ANNUAL PERFORMANCE REPORT 35 (Feb. 23, 2024), https://www.eeoc.gov/2023-annual-performance-report ("[F]or the more than 160,000 Veterans with pending AMA system appeals at the Board, only about 0.5% of those Veterans are currently choosing to be represented by private attorneys and representatives.").

[88] *See, supra,* notes 47–82 and accompanying text.

[89] *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990).

[90] *Id.*

[91] FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940).

[92] *Id.* at 140.

applications should be heard contemporaneously or successively" are "left to the Commission's own devising."[93]

To date, there appear to be relatively few judicial opinions regarding an agency's authority to aggregate claims for adjudication absent specific statutory authorization. The limited opinions available appear to indicate that such aggregation may be permissible. As discussed above, the EEOC's organic statute is silent with regard to its authority to aggregate discrimination claims filed on behalf of federal employees. Instead, the EEOC relies on the general provision providing that "the [EEOC] shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."[94] The U.S. Postal Service challenged the EEOC class action procedures by seeking an opinion from the Department of Justice Office of Legal Council (OLC).[95] The OLC found the statute to be ambiguous with regard to the EEOC's authority to implement class action procedures and applied *Chevron* deference.[96] OLC opined that "the EEOC's class action regulations are not contrary" to its organic act.[97]

In the context of VA benefits appeals, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), in *Monk v. Shulkin*, held that the CAVC has authority to certify class actions.[98] Part of the court's reasoning reflects the above discussion. The court held that the CAVC's general authority to prescribe "rules of practice and procedure" grants it broad authority over the procedures governing CAVC proceedings; such authority includes the ability to certify "class actions or other methods of aggregation."[99] In addition, the court noted that Congress had not explicitly restricted the CAVC's authority to certify class actions.[100]

CAVC Class Actions

As discussed above, the CAVC, pursuant to the decision in *Monk*, has authority to certify class actions. To date, the CAVC has certified four classes. The CAVC has certified classes in the context of both petitions—procedural tools to compel agency action—and appeals of final BVA decisions. In 2020, the CAVC amended its *Rules of Practice and Procedure* and adopted Rules 22 and 23 governing the procedures related to class actions before the court.[101] These procedures, similar to the EEOC, largely mimic the rules governing class actions in federal court. However, the CAVC rules also require that the individual seeking class certification establish that a class action would be superior to a precedential decision.[102] The CAVC established this requirement in *Skaar v. Wilkie*, prior to its incorporation into the

[93] *Id.* at 138.

[94] 42 U.S.C. § 2000e-16(b).

[95] Executive Order No. 12,146 provides that OLC has the authority to resolve disputes between executive agencies. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

[96] Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 260–62 (2004), http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olcv028-p0254.pdf.

[97] *Id.* at 268.

[98] Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).

[99] *Id.* at 1319–20. The court also referenced the EEOC class action procedures in noting that other tribunals rely on their general authority to prescribe procedural rules governing adjudications to aggregate claims. *Id.*

[100] *See id.* at 1320–22. The court also held that the CAVC can rely on authority granted through the All Writs Act "to aggregate claims in aid of [its] jurisdiction. *Id.* at 1318–19.

[101] *In re* Rules of Practice and Procedure, U.S. Vet. App. Misc. Order No. 12-20 (Nov. 10, 2020).

[102] R. Prac. & Proc. 22(a)(3) (requiring the Request for Class Certification and Class Action to "explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis").

Rules, holding that the court "will presume classes should not be certified because [its] ability to render binding precedential decisions ordinarily will be adequate."[103]

In the context of appeals, the Federal Circuit established that the CAVC's authority to certify a class is limited by the CAVC's jurisdiction. In *Skaar*, the CAVC had certified a class that included veterans "who had not received a Board decision and veterans who had not yet filed a claim."[104] However, the Federal Circuit stated that "[c]lass certification is merely a procedural tool" and cannot be used to assert authority over "claims it would otherwise lack."[105] Therefore, the CAVC is only permitted to certify classes containing individuals that have received a final BVA decision on a matter where the time to appeal has not lapsed. Although Congress has authority to confer supplemental jurisdiction on the court to enable them to exercise jurisdiction over other individuals, the Federal Circuit held that Congress had not done so.[106]

Veterans Appeals Efficiency Act of 2024

As discussed in the previous section, agencies may have power to implement aggregation procedures without explicit statutory instruction when they are provided broad authority to prescribe rules and regulations to set procedures for their adjudications. Therefore, the BVA arguably may already have the legal authority to implement aggregation procedures. VA appears to have broad authority to establish rules and procedures with regard to how it conducts its adjudications. For example, 38 U.S.C. § 501(a)(4) provides that the "Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department," including "the manner and form of adjudications and awards."[107] This provision is comparable to the statutory provisions that the EEOC relies on in implementing its aggregation procedures.[108] Further, there does not appear to be any statutory provision in the *U.S. Code* that explicitly *prohibits* the BVA from aggregating claims.

However, as noted above, the BVA is statutorily required to adjudicate cases in docket order for each docket.[109] This requirement, arguably, could prevent the BVA from advancing an appeal on a docket to aggregate multiple claims. Although there is an exception to permit advancement of a matter on a docket "if the case involves interpretation of law of general application affecting other claims,"[110] it is not entirely clear whether this exception is broad enough to permit the BVA from implementing aggregation procedures. While not explicit regarding aggregation, at least one CAVC opinion holds that the docket-order requirement was not intended to remove flexibility from the Board in how it hears appeals.[111] Nonetheless, the Veterans Appeals Efficiency Act of 2024, if enacted, would clearly provide the BVA the authority to aggregate similar claims.[112]

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[103] Skaar v. Wilkie, 32 Vet. App. 156, 196 (2019), *vacated and remanded sub nom*. Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022).

[104] Skaar v. McDonough, 48 F.4th 1323, 1332 (Fed. Cir. 2022).

[105] *Id.*

[106] *Id.* at 1334.

[107] 38 U.S.C. § 501(a)(4).

[108] *Compare id. with* 42 U.S.C. § 2000e-16(b).

[109] 38 U.S.C. § 7107 ("Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board.").

[110] *Id.* § 7107(b).

[111] Ramsey v. Nicholson, 20 Vet. App. 16, 34 (2006) ("We conclude that there is nothing in the legislative history that indicates a clear intent that section 7107 be read as an exclusive set of rules by which the Board must consider and decide cases. It is more reasonable to conclude that Congress did not intend to micromanage the Board . . . this history is instructive in that these concerns are better met when the Board is given some flexibility in managing the appeals.").

[112] Veterans Appeals Efficiency Act § 2(c)(1).

The proposed legislation would provide the BVA with broad authority to tailor such aggregation of claims. As illustrated by the examples above, agencies may tailor aggregate procedures to meet their specific needs and capabilities.[113] It may be that some or all of the specific aggregation models that other agencies employ are not appropriate for the types of appeals that the BVA adjudicates. More generally, these varying models illustrate that agencies have wide latitude to formulate policies and procedures governing the use of aggregate adjudication that best fit their own needs and capabilities. In its report, ACUS concluded that "Congress should continue to grant agencies broad discretion to develop procedures tailored to the cases and claims they adjudicate."[114] Providing broad discretion to implement such procedures could enable the BVA to select procedures that appropriately balance the potential benefits of claim aggregations, such as judicial efficiency and consistency, while guarding against the drawbacks of potential unfairness and overly burdensome proceedings.[115]

The proposed legislation also instructs VA to seek independent recommendations regarding the feasibility of authorizing the BVA to issue precedential decisions.[116] BVA decisions currently are not considered binding precedent.[117]

Limited Remands from the Court of Appeals for Veterans Claims

The Veterans Appeals Efficiency Act of 2024 would also address the CAVC's authority to issue limited remands of matters to the BVA. Specifically, the proposed legislation would clearly establish that the CAVC has the authority to remand a case to the BVA and retain jurisdiction over the appeal while the BVA addresses the CAVC's order.[118] The following sections provide an overview of limited remands[119] and discusses the history of the CAVC's caselaw with regard to its authority to issue such remands.

Overview of Limited Remands

When an appellate court determines that further proceedings are necessary to resolve a decision on appeal, the court may remand the case to the lower tribunal.[120] Federal courts have classified remands into two categories: *general* and *limited*.[121] "[I]n a general remand the appellate court returns the case to the [lower tribunal] for further proceedings consistent with the appellate court's decision, but consistency

[113] *See*, *supra* notes 47–82 and accompanying text.

[114] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 67.

[115] *See*, *supra* notes 36–46.

[116] Veterans Appeals Efficiency Act § 2(f)(1).

[117] 38 C.F.R. § 20.1303 ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided.")

[118] Veterans Appeals Efficiency Act § 2(f).

[119] For the purposes of this written statement, the term "limited remand" refers to a court remanding a matter to the lower tribunal while retaining jurisdiction over the case.

[120] For the Supreme Court and "any other [federal] court of appellate jurisdiction," 28 U.S.C. § 2106 provides that those courts "may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Accord* 38 U.S.C. § 7252(a) (authorizing the CAVC to "remand [a] matter, as appropriate"). Federal courts have interpreted § 2106 "to allow appellate courts the flexibility to adapt their mandates to the particular problem discerned on appeal and to provide an efficient and sensible solution." United States v. Garafano, 61 F.3d 113, 116 (1st Cir. 1995). Although this statute does not specifically authorize or define "limited remands," federal courts have established that the statute provides broad discretion to the courts to issue general or limited remands. In either case, the lower tribunal is required to conform with the articulated scope of the remand. United States v. Hicks, 146 F.3d 1198, 1200 (10th Cir. 1998).

[121] United States v. Richardson, 948 F.3d 733, 738 (6th Cir. 2020).

with that decision is the only limitation imposed by the appellate court."[122] In contrast, a limited remand from an appellate court specifically limits the issues to be addressed by the lower tribunal and creates a narrow framework within which the lower tribunal must operate.[123] A remand is presumed to be general, which is the most common form of remand,[124] unless the appellate court limits the lower tribunal's scope of inquiry in "unmistakable terms."[125]

Federal courts have further distinguished two different kinds of limited remands. In one form of limited remand, the appeals court returns the case to the lower tribunal with instructions to "make a ruling or other determination on a specific issue or issues *and do nothing else*."[126] The lower court, which is bound to follow the appellate court's mandate, is not permitted to address other issues during the remanded proceedings. In the other form of limited remand, which is the focus of this written statement, the appellate court seeks a ruling or advice on a specific issue from the lower tribunal but retains jurisdiction over the appeal while it awaits a response from the lower tribunal.[127] In these cases, the appellate court seeks discrete information from the lower tribunal necessary to reach a legal conclusion on a particular issue before the court.

CAVC's Jurisdiction and Authority to Issue Remands

Congress established the CAVC to provide judicial review of BVA decisions on VA benefits claims.[128] Pursuant to 38 U.S.C. § 7252, the court has exclusive jurisdiction to review BVA decisions.[129] Once the CAVC has jurisdiction over an appeal the court may "affirm, modify, or reverse a decision of the [BVA] *or . . . remand the matter*, as appropriate."[130] The CAVC will remand a case if it finds (1) that the BVA committed a prejudicial error on a claim and (2) that additional proceedings are necessary to properly resolve the matter.[131] The CAVC's review "shall be on the record of proceedings before the Secretary and the [BVA]."[132] Accordingly, the CAVC cannot base a decision on extra-record evidence, and the court must remand to the BVA if further development of a claim is necessary.[133]

[122] United States v. Simms, 721 F.3d 850, 852 (7th Cir. 2013); *see* United States v. Uriarte, 975 F.3d 596, 600 n.2 (7th Cir. 2020).

[123] *Richardson*, 948 F.3d at 738.

[124] *Simms*, 721 F.3d at 852.

[125] United States v. Davison, 832 F. App'x 408, 410 (6th Cir. 2020).

[126] *Simms*, 721 F.3d at 852 (emphasis added).

[127] *Id.*; *see also, e.g.*, United States v. Taylor, 509 F.3d 839, 845–46 (7th Cir. 2007) ("We simply need to learn the district court's assessment of the challenge in light the record made during voir dire. Therefore, we will retain jurisdiction over this case but remand to the district court for the limited purpose of supplementing the record with its findings about whether the government's stated reason for exercising a peremptory challenge against Watson is credible . . .").

[128] 38 U.S.C. § 7252(a) ("The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").

[129] *Id.*

[130] *Id.* (emphasis added).

[131] Tucker v. West, 11 Vet. App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

[132] 38 U.S.C. § 7252.

[133] Kyhn v. Shinseki, 716 F.3d 572, 576 (Fed. Cir. 2013); *see, e.g.*, Hensley v. West, 212 F.3d 1255, 1264 (Fed. Cir. 2000) (holding the CAVC lacked jurisdiction to engage in fact finding in the first instance and explaining that remand to the BVA was required if there was "insufficient factual development of the record").

CAVC Authority to Issue Limited Remands

The CAVC has held that its jurisdictional statute restricts the court's authority to issue limited remands. In the 1995 decision of *Cleary v. Brown*, the CAVC held that it is not permitted to retain jurisdiction over a case that has been remanded to the BVA for a new adjudication.[134] Since then, however, the court has distinguished its *Cleary* holding and found that it may issue limited remands in certain situations.[135] There is also some ambiguity as to whether the CAVC overruled *Cleary* in 2019 when it decided *Skaar v. Wilkie*.[136]

In *Cleary*, the CAVC found that its jurisdictional statute restricts its authority to issue limited remands.[137] In the original claim at issue, the appellant sought CAVC review of a BVA decision denying an increased rating for service-connected post-traumatic stress disorder (PTSD).[138] The court reversed the BVA's decision and remanded the claim for readjudication, adding that "[t]he Court retains jurisdiction."[139] On remand, VA ultimately awarded the claimant a 100% disability rating, and the claimant advised the CAVC that he would not be seeking further review of the claim. At that point, the CAVC entered judgment.[140] Later, the claimant filed a request under the Equal Access to Justice Act (EAJA)[141] for attorney fees related to the original PTSD claim, including fees for the attorney's work conducted after the CAVC remanded the claim to the BVA.[142] The CAVC denied the EAJA application with respect to the post-remand work, holding that the court "does not have the authority to retain general and continuing jurisdiction over a decision remanded to the BVA for a new adjudication."[143]

The CAVC determined that once the court remanded the claim for a new adjudication, it no longer had the statutory authority to retain jurisdiction over the matter. The CAVC reasoned that because its jurisdiction is limited to final BVA determinations, once it reversed the BVA decision and ordered a new adjudication, "there was nothing left to which [the CAVC's] 'jurisdiction to review decisions of the [BVA]' could attach."[144] The court emphasized that the new adjudication, while related to the previous decision, would be a *new* final decision that the CAVC could only review if the claimant properly filed a new notice of appeal to the court.[145] Retaining jurisdiction while the BVA conducted the new adjudication would be tantamount to supervising an ongoing adjudication—a power that the court held Congress did not grant to the CAVC.[146] The CAVC concluded that, "notwithstanding its language purporting to retain jurisdiction, the Court properly could not have retained jurisdiction over the reversed BVA decision while the matter was being readjudicated."[147] As a result, the "veteran's claim was exclusively before the BVA at the time of the postremand proceedings," not the CAVC.[148]

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[134] Cleary v. Brown, 8 Vet. App. 305 (1995).

[135] *See infra* notes 131–47 and accompanying text.

[136] Skaar v. Wilkie, 31 Vet. App. 16 (2019) (per curiam).

[137] *Cleary*, 8 Vet. App. at 307.

[138] *Id.* at 306.

[139] *Id.*

[140] *Id.* at 307. The entry of judgment "begins the 60-day time period for appealing [a CAVC decision] to the U.S. Court of Appeals for the Federal Circuit." U.S. VET. APP. R. 36(a).

[141] 28 U.S.C. § 2412(d).

[142] *Cleary*, 8 Vet. App. at 307.

[143] *Id.*

[144] *Id.* at 308.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

Since the CAVC's decision in *Cleary*, the court has distinguished that holding to find that it does have the authority to issue limited remands, at least in certain circumstances. For example, in *Mayfield v. Nicholson*, the CAVC issued a limited remand to the BVA to make a factual finding that was necessary for the CAVC to make a proper determination in the appeal.[149] The CAVC retained jurisdiction and allowed VA 60 days to make the factual finding based on information already in the record.[150] When remanding the case, the CAVC specified that "the [BVA] shall not take any further action beyond the response required by this order unless and until the Court relinquishes jurisdiction over the matter."[151] The court distinguished the situation in *Mayfield* from the situation in *Cleary*. In *Mayfield*, the CAVC only needed VA to make a factual finding based on the existing record for the court to reach a legal conclusion on the claim, whereas in *Cleary*, the court had reversed the BVA decision and ordered a completely new adjudication.[152] Therefore, the CAVC has found that it has authority to issue limited remands to the BVA if the court is seeking supplemental information from the factfinder to better understand the basis for the BVA's factual determinations.[153] Based on the historical record, however, it appears that this procedure is not a regular CAVC practice.[154]

In *Skaar*, the CAVC appears to have clarified that it is also permitted to issue limited remands when additional evidence—that is, evidence not already in the BVA record—is needed to make a decision on the appeal. In *Skaar*, the CAVC held that the BVA failed to address an argument raised by the claimant before the BVA.[155] The CAVC determined that the BVA needed to evaluate that portion of the claim to make a determination on the appeal. Instead of issuing a general remand, the CAVC issued a limited remand, retained jurisdiction over the matter, and ordered the BVA to accept additional evidence from the claimant, hold additional hearings, and provide a supplemental statement of reasons or bases[156] to the court, accompanied by supplemental briefing from VA.[157] The limited remand in *Skaar* appears to go beyond remanding for the BVA to make an additional factual finding or to supplement its statement of bases or reasons based on information already in the BVA record.[158] The CAVC, however, stated that its

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[149] Mayfield v. Nicholson, 20 Vet. App. 98, 99 (2006).

[150] *Id.*

[151] *Id.*

[152] *Id.*; *see also* Bonhomme v. Nicholson, 21 Vet. App. 40, 45 (2007) (explaining that in *Mayfield* the court "ordered a limited remand under that unique circumstance to permit the Board to make the necessary factual findings based on the evidence *then in the record*") (emphasis added).

[153] *See, e.g.*, Robinson v. Shulkin, No. 15-3549, 2017 WL 747939, at *1 (Vet. App. Feb. 27, 2017) ("[The CAVC] will remand this case for the limited purpose of obtaining a [BVA] decision addressing whether the submission that the appellant allegedly faxed to it on August 26, 2015, was before it when it issued the decision here on appeal."); Tagupa v. Gibson, No. 11-3575, 2014 WL 3632990, at *1-4 (Vet. App. June 18, 2014) (remanding for the Board to consider a document that the Secretary submitted to the Court during the pendency of the appeal); Spencer v. Shinseki, No. 11-3010, 2013 WL 1283462, at *6 (Vet. App. Mar. 29, 2013) (remanding for "the limited purpose of having the Board make a factual determination."); Sellers v. Shinseki, No. 08-1758, 2011 WL 2110038, at *2 (Vet. App. May 27, 2011) ("[T]he matter is remanded for a limited purpose . . . the Board shall determine whether (1) the purported June 2004 rating decision is authentic and (2) whether that decision was subjected to an invalid EAP.").

[154] A brief search for cases where the CAVC remanded a matter to the BVA but retained jurisdiction pending the BVA's compliance with the CAVC's order revealed a limited number of opinions. *See supra* note 153; *see also* Skaar v. Wilkie, 31 Vet. App. 16, 26 (Pietsch, J., dissenting) (noting that the limited remand authority described in *Mayfield* has only been exercised "a handful" of times).

[155] *Skaar*, 31 Vet. App. at 17.

[156] By statute, the BVA must provide "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 presented on the record." 38 U.S.C. § 7104(d)(1).

[157] *Skaar*, 31 Vet. App. at 18. The CAVC ordered that the claimant had 90 days to submit additional evidence to the BVA, stated that the claimant had a right to a BVA hearing, and required the BVA to provide a supplemental statement of reasons or bases within 30 days of receipt of the claimant's additional evidence. *Id.*

[158] *See Bonhomme*, 21 Vet. App. at 45 (explaining that in *Mayfield* the court "ordered a limited remand under that unique
(continued...)

opinion in *Skaar* was consistent with *Cleary*, explaining that "*Cleary* effectively stands for the proposition that decisionmaking should not simultaneously occur at both the [BVA] and the Court."[159] The court emphasized that, in *Skaar*, "the decision is still pending at the Court and what we require from the [BVA] is not a new decision, but a supplemental statement of reasons or bases pertaining to a claim it already decided."[160] Therefore, following *Skaar*, it appears that the CAVC has interpreted its statutory authority as permitting limited remands when the court has not vacated or reversed the BVA decision and ordered a new adjudication on the matter.[161]

Although the opinion in *Skaar*, as discussed above, can be read to distinguish *Cleary*, concurring and dissenting opinions indicate that there may be some confusion as to whether *Skaar* effectively overturned *Cleary*. The majority opinion provided that, "[t]o the extent *Cleary* could be read to prohibit the Court from *ever* retaining jurisdiction over a remand to the Board, we clarify that the Court may, in certain circumstances, retain jurisdiction over limited remands to the Board."[162] The court, however, declined to delineate the appropriate circumstances in which a limited remand can be used.[163] Given this lack of specificity as to the circumstances under which the court may exercise its authority, the scope of the court's power to issue limited remands is not entirely clear. One concurring opinion indicated that the majority's opinion amounted to an "unacknowledged overruling of *Cleary*."[164] Similarly, the dissent questioned whether the majority overturned *Cleary*: "If the majority's decision can be read to overturn *Cleary* in whole or in part, we do not believe that its analysis contains the reasoned justification necessary to do so."[165] However, it appears that *Cleary*, *Mayfield*, and *Skaar* may stand for the principle that the CAVC has the authority to issue limited remands *if* the court has not reversed or vacated the BVA's decision on appeal.[166]

CAVC-Imposed Deadlines on BVA Action Following Limited Remand

When the CAVC exercises its authority to issue a limited remand, it often imposes a deadline by which the BVA must fulfill the required tasks. For example, in *Mayfield*, the CAVC ordered the BVA to provide the court with a supplemental statement of reasons or bases within 60 days of the order.[167] Similarly, in *Robinson v. Shulkin*, the CAVC imposed a 90-day deadline for the Secretary to forward to the court the required factual findings and statement of reasons or bases.[168] The order in *Skaar* set deadlines for both parties—the claimant had 90 days to submit additional evidence, and the BVA had 30 days thereafter to provide the court with its supplemental statement of reasons or bases.[169] This procedure contrasts with the court's practice when it issues a general remand. The court regularly declines to impose deadlines on BVA action when it issues a general remand, noting that remanded cases will require factual development and

circumstance to permit the Board to make the necessary factual findings based on the evidence *then in the record*") (emphasis added).

[159] *Skaar*, 31 Vet. App. at 19.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* ("We do not here attempt to lay out the circumstances in which we will employ such limited remands.").

[164] *Id.* at 21 (Shoelen, J., concurring).

[165] *Id.* at 28 (Pietsch, J., dissenting).

[166] *See* Cleary v. Brown, 8 Vet. App. 305, 307 (1995) (holding the CAVC "does not have the authority to retain general and continuing jurisdiction over a decision remanded to the BVA for a *new* adjudication") (emphasis added); *Skaar*, 31 Vet. App. at 19 ("[T]his particular case involves a situation where the Court does not need to vacate the Board decision on appeal.").

[167] Mayfield v. Nicholson, 20 Vet. App. 98, 99.

[168] Robinson v. Shulkin, No. 15-3549, 2017 WL 747939 at *1 (Vet. App. Feb. 27, 2017).

[169] *Skaar*, 31 Vet. App. at 18.

"[t]o impose an arbitrary date without the slightest clue as to whether such a date was either reasonable or appropriate would be wrong."[170] Instead, the court relies on the general statutory requirement to give all remanded claims "expeditious treatment."[171]

Veterans Appeals Efficiency Act of 2024

Congress has the authority to define the jurisdiction and authority of the CAVC through legislation[172] that may clarify (or remove) the CAVC's authority to issue limited remands to the BVA. As discussed above, the CAVC has determined that the court's authority to issue limited remands is circumscribed as compared to other federal courts.[173] Further, after *Skaar*, there is some ambiguity regarding the circumstances under which the court is permitted to issue a limited remand.[174] Legislative action could provide clarity to the CAVC judges that have grappled with whether they have the authority to use limited remands.

The Veterans Appeals Efficiency Act of 2024, if enacted, would clarify this authority through statute. The proposed legislation authorizes the CAVC to remand a matter to the BVA "for the limited purpose of ordering the Board to address a question of law or fact in a claim" when the CAVC finds that the BVA's decision failed to address (1) an issue raised by the claimant or (2) an issue reasonably raised by the record before the BVA.[175] This text appears to speak directly to the ambiguity presented by the CAVC's opinion in *Skaar*. If enacted, Congress would provide explicit authority for the CAVC to retain jurisdiction in the manner contemplated in *Skaar*. Further, the proposed legislation's provisions authorizing the CAVC to impose deadlines on the BVA to respond to the remand[176] appear to comport with how the CAVC has acted when it has exercised its authority to issue limited remands.

The proposed legislation arguably *requires* the CAVC to retain jurisdiction over any such claim remanded for this purpose. Although the proposed legislation states that it "may" issue a remand, the bill provides that the Court "shall" retain jurisdiction and stay the proceedings.[177] This mandatory language is distinct from the general discretion that Article III federal courts enjoy to craft remands pursuant to 28 U.S.C. § 2106. As stated above, federal courts have noted that the authority to issue remands under § 2106

[170] *See, e.g.*, Dambach v. Principi, 14 Vet. App. 307, 309 (2001).

[171] 38 U.S.C. § 5109B; *see also* Bruce v. Principi, 15 Vet. App. 27, 30 (2001) ("The Court notes that . . . the Board is required to provide for 'expeditious treatment' of claims remanded by the Court."); *Dambach*, 14 Vet. App. at 309 (noting that the BVA is required to give expeditious treatment to all remanded cases).

[172] *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("Courts created by statute can have no jurisdiction but such as the statute confers." (quoting Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850)); *Sheldon*, 49 U.S. at 448 ("Congress, having the power to establish the courts, must define their respective jurisdictions.").

[173] *Compare supra* note 1 and accompanying text *with supra* notes 134–66 and accompanying text.

[174] *See supra* notes 162–66 and accompanying text.

[175] Veterans Appeals Efficiency Act § 2(d).

[176] *Id.* ("In issuing a remand under paragraph (1), the Court may require the Board to issue a decision on the relevant question with a certain period of time prescribed by the Court.").

[177] *Id.* ("With respect to any matter remanded to the Board pursuant to paragraph (1), the Court shall—(A) retain jurisdiction over such matter; and (B) stay the proceedings of the Court on such matter until the date on which the Board issues the decision required by such remand.").

provides "appellate courts the flexibility to adapt their mandates to the particular problem discerned on appeal and to provide an efficient and sensible solution."[178]

Conclusion

The Veterans Appeals Efficiency Act of 2024 proposes to make numerous changes to VA tracking requirements, the authority of the BVA to aggregate claims, and to the jurisdiction of the CAVC. I appreciate the opportunity to testify on these matters before the Subcommittee and I look forward to answering any questions you may have.

Disclaimer

[178] United States v. Garafano, 61 F.3d 113, 116 (1st Cir. 1995).