Department of Veterans Affairs

Memorandum

Date: December 14, 2000 VAOPGCPREC 10-2000

From: General Counsel (023)

Subj: Jurisdiction of the Board of Veterans' Appeals in Consideration of Per Diem Payments to a State Home

To: Chairman, Board of Veterans' Appeals (011D)

QUESTION PRESENTED:

Does the Board of Veterans' Appeals (the Board) have jurisdiction to consider an appeal by a State home disputing a decision by the Secretary of the United States Department of Veterans Affairs (Secretary) that the State home is not eligible for per diem payments from the Department of Veterans Affairs (VA)?

DISCUSSION:

1. You have requested an opinion whether the Board has jurisdiction to decide an appeal from the Utah State Veterans Home (Utah State home). The Utah State home seeks to appeal a decision by the Secretary that the home did not meet VA's nursing home standards, is not recognized by VA and therefore, is not eligible for VA per diem payments. In order to determine this jurisdictional question, we must first consider the nature of the Utah State home's appeal in light of the applicable VA statutes governing appellate rights.

2. The jurisdiction of the Board is set forth in section 7104 of title 38, United States Code. Section 7104 states:

> All questions in a matter, which under section 511(a) of this title is subject to a decision by the Secretary, shall be subject to one review on appeal to the Secretary, the Board shall make Final decisions on such appeals.

38 U.S.C. § 7104. 38 U.S.C. § 511 provides for the finality of VA administrative decisions by limiting judicial review of certain of the Secretary's decisions. The Board makes final decisions on such appeals to the Secretary. In other words, if a matter is subject to a final decision by the Secretary pursuant to section 511(a), then the matter is within the jurisdiction of the Board. Therefore, the question of whether the jurisdiction of the Board extends to this appeal is contingent on whether the Secretary's decision is this matter falls within the limitation on judicial review set forth in 38 U.S.C. § 511(a).

3. 3 In order to resolve this issue, we must consider the scope and legislative history of the section 511(a) limitation on judicial review, and its relationship to the Board's jurisdiction. As discussed below, we conclude that the language of section 511(a), as well as the case law interpreting that section and its predecessors, supports a conclusion that the limitation on review applies to the Secretary's decision on the issues of recognition and per diem payments to a State home. Thus, this matter falls within the statutory jurisdiction of the Board.

Background Facts

VA State Home Program

4. VA assists states in constructing medical facilities for the care of veterans under a grant program authorized by 38 U.S.C. § § 8131-8137. Under this program, VA pays up to 65 percent of the cost of construction of State homes. *Id*. § 8135(a)(1). To receive a grant, a state must provide VA with reasonable assurance that it will provide adequate financial support for the maintenance and operation of the home when complete. See *Id.* § 8135(a)(6).

5. VA also assists states in operating State homes by making grants to states for each day states furnish care to an eligible veteran. 38 U.S.C. § § 101(19), 1741(a)(1)(B). For each day a qualified State home provides care to an eligible veteran, VA pays per diem at a rate that VA sets each year. The per diem rate cannot be more than one-half the cost of the veterans' care in the State home. *Id.* § 1741(a)(2).

6. By law, VA cannot pay per diem to a State home unless the home meets the standards prescribed by the Secretary and is recognized by VA. 38 U.S.C. § 1742; 38 C.F.R. §§ 17.190, 17.193 (1999). Prior to February 7, 2000, VA standards for nursing home care in State homes were set forth in 38 C.F.R. § 17.190(a)-(d) and Veterans Health Administration Manual M-5, Part VIII, Chapter 2. VA standards for nursing home care after February 7, 2000, are set forth at 38 C.F.R. §§ 51.1 – 51.210 (2000). VA determines whether a State home meets VA standards by conducting inspections. 38 U.S.C. § 1742(a); meets VA standards in order for it to be recognized. Prior to February 7, 2000, only the Secretary of Veterans Affairs had authority to recognize new State homes. 38 C.F.R. § 17.190 (1999). On February 7, 2000, the Secretary delegated the authority to recognize new State homes to the Under Secretary for Health. 65 Fed. Reg. 962-997 (January 6, 2000).

The Utah State Veterans Home

7. VA made a grant to the State of Utah to construct the Utah State Home in Salt Lake City. In April 1998, Quality Health Care, Inc. (QHC), a Utah corporation entered into a contract with the Utah Department of Health to manage and operate the Utah State Home in Salt Lake City. Before the first patients were

admitted to the new nursing home, the Utah Department of Health requested that VA recognize the newly constructed home as a State home. On May 18-27, 1998, a team from the Salt Lake City, Utah, VA Medical Center (VAMC) inspected the 80-bed nursing home. There were no veterans residing in the home on those dates. The team found that the home complied with 84 percent of the VA standards and did not comply with the rest. Although the VAMC Director recommended that the Secretary of Veterans Affairs recognize the home for purposes of receiving VA per diem payments, this recommendation was not processed because the May 1998 inspection report showed that the home did not meet all VA standards. 38 C.F.R. § 17.193. On May 28,1998, the Utah State Home admitted its first patient.

8. On July 16, 1998, VA's Office of Inspector General (OIG) received a hotline call (Control Number 8HL-650) from an employee at the Utah State Home. The hotline call made allegations of poor quality of care, mismanagement of resources, patient abuse, and/or negligent patient care at the Utah State Home. The OIG asked the Veterans Health Administration to investigate. On September 25 and 28, 1998, a team from Salt Lake City, Utah VAMC investigated the OIG hotline call allegations at the Utah State Home. On October 20, 1998, the Salt Lake City, Utah VAMC Director conveyed a report of the investigation to the OIG. The report reviewed the allegations of the hotline call and recommended that the State take 25 actions to improve patient care and the overall operations of the Utah State Home.

9. On October 5, 1998, the Utah Department of Health again requested that VA recognize the home so that the State could receive VA per diem payments. On October 22, 1998, VA replied that VA could not pay per diem to the State until the home met VA standards and that VA would again inspect the home in November 1998.

10. On November 12 and 13, 1998, a VAMC team inspected the Utah State Home and found that the home complied with only 64 percent of the VA standards. Based on this inspection, the VAMC Director recommended against recognizing the home. In a letter dated December 22, 1998, VA wrote to remind the State that it must meet VA standards to receive per diem payments.

11. On January 29, 1999, a VAMC team inspected the Utah State Home and found that the home met all VA standards. The VAMC Director recommended recognizing the home. On May 13, 1999, the Secretary of Veterans Affairs recognized the Utah State Home and determined that VA should pay per diem retroactive to January 29, 1999, the date of inspection.

12. On June 26 and 28, 1999, a VA team inspected the Utah State Home and determined that the home failed to meet 27 percent of VA standards. In a letter dated September 15, 1999, the Secretary informed the Utah Department of Health that VA would immediately stop paying per diem for care provided in the

home. On November 5, 1999, a VA inspection team determined that the home met VA standards. The Secretary thus reinstated payments to the home retroactive to the date of the November 1999 inspection.

13. On June 30, 1999, the Utah Department of Health filed a "notice of disagreement" with VA regarding the decision not to pay per diem for care in the home prior to January 29, 1999. See 38 U.S.C. § 7105; 38 C.F.R. § 20.201 (1999). In a letter dated August 20, 1999, VA provided the Department of Health with a Statement of the Case as required by law when a notice of disagreement is filed. 38 U.S.C. § 7105; 38 C.F.R. § 19.29 (1999). At the request of the State, VA provided the Department of Health with a Supplementary Statement of the Case in a letter dated February 17, 2000. See C.F.R. § 19.31 (1999).[1] it provided to veterans in the Home have unjustly enriched VA. Moreover, QHC

Section 511(a)

14. Section 511(a) is the latest in a long series of statutory provisions that purport to limit judicial review of VA decisions.[2] The most recent version was reiterated in the Veterans' Judicial Review Act – Veterans' Benefits Improvement Act of 1988, Pub. L. No, 100-687, 102 Stat. 4105 (1988) (VJRA). Section 511(a) states:

> The Secretary shall decided all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans of the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and ma not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

The only exceptions to this provision that are relevant here involve matters that may be appealed to the United States Court of Appeals for Veterans Claims (CAVC). 38 U.S.C. § 511(b).[3] The jurisdiction of the CAVC is limited, by statute, to the review of decisions by the Board. 38 U.S.C. § 7252. And, as noted in paragraph 2, the Board's jurisdiction is limited to a final review of the Secretary's decisions under section 511(a).

15. The CAVC has held that the jurisdiction of the Board is based on whether the appeal involves a matter that, by statute, is within the Secretary's discretion. In *Werden v. West*, the Court stated:

> If a decision is committed by statute to the Secretary's discretion, and where by statute or regulation there exists a judicially manageable standard limiting the Secretary's discretion, the Board must review the

> Secretary's decision that it was made within the statutory regulatory confines….[4]

Werden v. West, 13 Vet. App. 463, 467 (2000).[5]

16. When Congress enacted the VJRA in 1988, establishing the CAVC as the exclusive forum for most claims involving VA benefits, it clearly expressed its intent that section 511(a) be read very broadly to bar District Court review of such claims.[6] The VJRA was only the last in a long history of congressional amendments to broaden the scope of this section to eliminate the bases used by District Courts to accept jurisdiction.[7] In its report on the VJRA, the House Committee on Veterans' Affairs discussed two such cases, *Traynor v. Turnage*, 485 U.S. 535 (1988) and *Johnson v. Robison*, 415 U..S. 361 (1974). The House Committee criticized *Traynor* as "endors[ing] judicial scrutiny of individual benefit determinations" and "hav[ing] little regard for the eroding effect that [such] decisions…have on the independence of the executive branch." H.R. Rep. No. 100-963, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803. The Committee further stated that, while it "believes that *Johnson v. Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster, the reasoning of that case has taken the courts further into individual decision-making than Congress heretofore intended." *Id.* at 22, *reprinted in* 1988 U.S.C.C.A.N. at 5803.

17. The VJRA amended what was then section 211(a) to prohibit review of VA decisions "under a law that ***affects*** the provision of benefits by the [Secretary of Veterans Affairs] to veterans," whereas it had previously prohibited review of VA decisions "under any law administered by the Veterans' Administration providing benefits for veterans." VJRA, § 101, 102 Stat, at 4105 (emphasis added). The purpose of that amendment was to "broaden the scope of section 211." H.R. Rep. No. 100-963 at 27, *reprinted in* 1988 U.S.C.C.A.N. at 5809. This change clearly broadened the scope of the statute to encompass VA decisions under laws that do not provide a benefit directly to veterans, but which affect VA's actions in providing benefits to veterans.

18. The United States Court of Appeals for the Second Circuit had discussed the effect of the VJRA in providing, for the first time, judicial review of veterans' benefit decisions in the CAVC and, on appeal, in the United States Court of Appeals for the Federal Circuit, while at the same time broadening the statutory prohibition on judicial review in other courts. *Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992). In *Larrabee*, the court stated:

> By providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe the statute as barring judicial review of substantial statutory and constitutional claims, while maintaining uniformity by establishing an exclusive mechanism for appellate review of decisions of the Secretary.

Id. (citations omitted). The court then concluded that, "[a]lthough district courts continue to have 'jurisdiction to hear *facial* challenges of legislation affecting veterans' benefits,' other constitutional and statutory claims must be pursued within the appellate mill Congress established in the VJRA." *Id*. (citation omitted); *see also Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute (citations omitted)").

Application of Section 511(a) to this Case

19. Keeping in mind that section 511 must be interpreted broadly, we next apply section 511 to the Secretary's decision regarding the Utah State Home. Section 511(a) states that the limitation on judicial review applies to all of the Secretary's decisions on questions of law and fact necessary to a decision under a law that affects the provision of benefits by the secretary to veterans. The Secretary's decisions regarding the Utah State Home were made pursuant to 38 U.S.C. §§ 1741-1743. These decisions clearly involve questions of law and fact pertaining to a VA statute. The more difficult questions are whether they are decisions under a law that affects the provision of *benefits*, and whether this provision of benefits is made by the Secretary *to veterans*.

20. Section 20.3 of title 38, Code of Federal Regulations, defines the term "benefit" as "any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans and their dependents and survivors." 38 C.F.R. § 20.3. The payment at issue in this case is described in section 1741(a)(1), which provides, in part: "The Secretary shall pay each State at the per diem rate …*for each veteran receiving* [domiciliary, nursing home, and hospital] *care* in a State home, if such veteran is eligible for such care in a Department facility." 38 U.S.C. § 1741(a)(1) (emphasis added). In other words, in order to avail himself or herself to care that is subsidized by VA per diem payments, a veteran must be eligible for such care in a VA facility. Moreover, States must request VA to determine each veteran's eligibility before the State may receive VA per diem payments. 38 U.S.C. § 1743; 38 C.F.R. § 17.198 (1999). Eligibility or entitlement to VA care is determined under VA laws. *See* 38 U.S.C. §§ 101, 1710, 5303-5303A. Therefore, the Secretary's decision regarding payment of per diem to the Utah State Home clearly affected a benefit for purposes of section 511.

21. Having established that per diem payments are benefits, the remaining question is whether a decision regarding the payment of these benefits to a State constitutes a decision that affects the provision of benefits *by the Secretary to veterans*. As noted earlier, section 1741 authorizes the Secretary to pay per

diem for veterans receiving care in a State home *if* the veteran is eligible for such care in a VA facility. 38 U.S.C. § 1741. During the period in question, the implementing regulation, at 38 C.F.R. § 17.198 (1999), stated that per diem payments "will be paid only for the care of veterans whose separate eligibility for hospital, domiciliary or nursing home care has been approved by the Department of Veterans Affairs." (The current regulation is at 38 C.F.R. § 51.40(a)(5) (2000)). State homes are required to complete an application for each veteran for the type of care to be provided. 38 U.S.C. § 1743; *see also* 38 C.F.R. § 51.40 (2000). In other words, these payments are directly tied to the care provided to particular veterans whose eligibility for care has been determined by VA under applicable VA statutes. Thus, while per diem is paid to State homes, it is provided for particular veterans.

22. Further, these payments to States also directly affect the care that veterans receive in State homes and veterans' ability to receive that care. By requiring State homes to meet VA standards to receive per diem payments and by authorizing VA to inspect State homes, the law ensures that State homes, which receive per diem payments, provide quality care. 38 U.S.C. § 1742; *see* 38 C.F.R. §51.1 (VA regulations implementing the laws governing per diem payments to States for nursing home care are intended to ensure that veterans receive high quality care.) To make up for the loss of these payments, a State might charge the veterans in its home more for their care or lower the quality of care that veterans receive in the home. Alternatively, a State might close its home resulting in veterans losing the opportunity to receive care there. Congress has recognized that per diem payments directly affect the care in State homes and veterans' ability to receive care in those homes. S. Rep. No. 94-1164, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2377, 2380, 2382 (describing how Congress increased per diem rates for nursing home care "to improve the quality and availability of nursing home care for elderly or disabled veterans."). In sum, veterans would be unable to receive the low-cost and quality care that they receive in State homes without these payments.

23. Decisions regarding per diem payments also substantially affect VA's provision of other VA benefits to veterans. For example, if veterans decline to or are unable to obtain nursing home, domiciliary, or hospital care in a State home due to a VA decision about the home's compliance with VA standards, many of these veterans will request this care directly from VA. As a result, VA may need to hire new employees or build new facilities to provide this care in VA facilities or contract with non-VA facilities for this care. Alternatively, VA decisions regarding whether State homes may receive per diem payments may result in fewer veterans requesting care from VA. As a result, a VA facility may not have enough patients to justify its continued operation. Veterans who decline to or cannot receive care at the State home may thus have to travel to another VA facility to receive VA care.

24. Congress has recognized that VA decisions regarding State homes impact VA benefit programs. For example, the law requires VA to consider the availability of VA beds when making decisions regarding the priority of State applications for VA construction grants that are awarded to States for constructing State homes. 38 U.S.C. § 8134(a)(3)(A). Under this law, VA will generally give a higher priority to applications to construct new beds from States on which VA relies heavily for providing the type of care in question to veterans. *See* H.R. Rep. No. 106-237 at 33 (1999). Moreover, the legislative history of the amendments in Public Law 106-117 to the law governing VA grants to States for State home construction indicates that Congress recognizes that States are "[p]erhaps the most important partners in VA's efforts to provide for the long-term needs of eligible veterans." *Id*. at 31. Finally, under the definition of benefit in 38 C.F.R. § 20.3, VA nursing home, domiciliary, and hospital care are clearly benefits provided by VA to veterans for purposes of section 511. *See* 38 U.S.C. § 1703, 1710, 1720. There is no doubt that a Secretarial decision regarding per diem payments directly affects the provision of VA benefits to veterans.

25. Finally, as noted above, State homes must submit claims to VA for the determination of eligibility of individual claimants for VA care before the homes can receive per diem payments. 38 U.S.C. §1743; 38 C.F.R. § 17.198 (1999). Such claims would plainly fall within the scope of the exclusive review provisions of sections 511(a) and 7104(a). Given the Congressional intent to provide an exclusive review procedure for VA determinations affecting veterans benefits, we believe it would be illogical to conclude that Congress intended that the forum for review of a VA determination concerning entitlement to per diem payments would differ depending upon the basis for VA's determination (i.e., whether VA's decision was based on a finding regarding a veteran's eligibility or a State home's compliance with VA standards).

Section 511 Covers Claims by Institutions

26. Courts have long held that the limitation on judicial review of VA decisions applies to institutional claims as well as claims by individual veterans. In *Brasier v. United States*, 223 F.2d 762 (8th Cir. 1955), *cert. denied*, 350 U.S. 913, *rehearing denied*, 350 U.S.943 (1985), the owner of a barber college appealed a judgment dismissing his complaint that his contractual privilege to train veterans was improperly terminated by the Veterans Administration. In affirming the dismissal of the claim, the court noted that "[t]he decision to terminate the plaintiff's contractual privilege to train veterans…was an administrative decision of the Administrator of Veterans' Affairs. As such it was final and conclusive and not subject to review." *Id.* at 765 (quoting *Lynch v. United States*, 292 U.S. 571, 577 (1934)0. The court concluded that "Congress has vested in the Veterans' Administration the exclusive right to determine the veterans who are eligible to [sic] the benefits of education and vocational rehabilitation provided by Congress; to designate the institutions and schools in which they may be trained; and to

withdraw veterans from any institution which can be, or is, no longer approved for their training." *Id.* at 766.

27. In *New York Technical Institute of Maryland, Inc. v, Limburg, et al.,* 87 F.Supp. 308 (D. Md. 1949), a district court concluded that the case presented an issue that was beyond the scope of judicial review, citing the limitation on judicial review that previously appeared in section 705 of title 38, United States Code. The court noted that the school had no greater rights on appeal than the veteran would have had. *Id.* at 312. *Fletcher v. Veterans Administration*, 103 F.Supp. 654 (E.D. Mich. 1952), also involved a dispute in a contract for training veterans. In this case, the court noted: "Congress has vested in the Veterans Administration the exclusive right to determine what disabled veterans are eligible for training, and in what institution, and also the right to withdraw such students. The exercise of this right is not reviewable by a court of the United States…." *Id.* at 655. The court noted that addressing the plaintiff's questions of law and fact "would require this Court to invade the exclusive province of the Veterans Administration, and since there is an express statutory prohibition regarding such action on the part of the courts, this Court is without jurisdiction to entertain such an action." *Id.* at 656; *see also Birmingham Business College v. Smith, United States Veterans Administration*, 140 F.Supp. 403 (N.D. Alabama 1956) (Concluding that 38 U.S.C. §§ 11a-2 and &05 bar judicial review of a VA decision to withdraw education and training allowances).

28. More recently, the United States Court of Veterans Appeals (now the CAVC) considered whether it had jurisdiction over a hospital's appeal of a Board of Veterans' Appeal decision. *St. Patrick Hospital v. Principi*, 4 Vet. App. 55 (1993). The hospital sought VA payment for medical care that it had provided to a veteran. VA has authority to pay hospitals for such care for veterans who meet the criteria in 38 U.S.C. § 1728 and 38 C.F.R. §§ 17.120-121. As do State homes, the hospital had the right to make a claim based on individual veterans' eligibility. 38 U.S.C. § 1728(b)(1) and 38 C.F.R. § 17.123. In its opinion, the court stated that it had jurisdiction over the claim because the matter being appealed was a Board decision. The court further considered the jurisdictional issue of whether the hospital could file a notice of appeal with the court. Under 38 U.S.C. § 7266, only "a person adversely affected" by a Board decision may appeal. The court found that the hospital was a person adversely affected and held that the hospital could appeal the Board's decision.

Conclusion as to the Jurisdictional Question

29. On the basis of the statutory language of section 511(a), as well as the legislative history of the statute and the associated case law, we conclude that the Secretary's decision pertaining to the Utah State Home was a decision by the Secretary under section 511(a). The jurisdiction of the Board is defined by reference to section 511, as section 7104 states that all questions decided by the Secretary under section 511(a) are subject to one review on appeal to the

Secretary with final decision on such appeals made by the Board. Because we conclude that the Secretary's decision on this matter is a decision within the scope of section 511(a), we conclude that the Board has jurisdiction to consider this appeal.

Criteria for Evaluating Claims by States

30. In your request for our opinion, you also seek guidance regarding the criteria that the Board should use in reviewing an appeal of this nature. The applicable manuals and regulations are set forth, in detail, at the outset of this opinion. Briefly, the applicable law includes the statute and regulations authorizing VA to pay per diem to State homes that meet the standards prescribed by the Secretary and are recognized by the VA. 38 U.S.C. § 1742 and 38 C.F.R. §§ 17.190, 17.193 (1999). Prior to February 7, 2000, VA standards for nursing home care in State homes were set forth in 38 C.F.R. § 17.190(a)-(d) and Veterans Health Administration Manual M-5, Part VIII, Chapter 2. VA standards for nursing home care *after* February 7, 2000, are set forth in 38 C.F.R. Parts 51 and 58. The State of Utah has already received a statement of the case in this dispute. If the State elects to pursue this appeal, they will presumably allege specific errors in fact or law with regard to the Secretary's decision in this matter. You must consider these allegations of error in light of the statutes, regulations and manuals, referenced above.

31. We recognize that the bulk of the challenges to VA decision pertain to claims by individual veterans, and that the regulatory language describing the Board's jurisdiction and procedures were promulgated with individual claimants in mind. You may wish to consider promulgating new or revised regulations to more fully explain the process for appealing this type of decision.[8] The Office of

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[8] The U.S. Department of Health and Human Services (HHS) has such regulations. These regulations detail the process for the internal review of agency decision on whether a nursing home is eligible to receive Medicare funds. This situation is somewhat analogous to the instant case involving VA's per diem payments, as facilities that do not meet HHS' nursing home standards are not eligible to receive Federal Medicare payments. The regulations state that a nursing home provider who is dissatisfied with a determination to terminate its provider agreement is entitled to a hearing before an Administrative Law Judge. 42 C.F.R. §§ 498.5, 498.22(b). The provider may request a review of the decision by the Departmental Appeals Board, and also has a right to seek judicial review of the Board's decision. 42 C.F.R. § 498.22(c) (Unlike VA, HHS has a statute that specifically sets forth the right of a facility to appeal a decision on whether a nursing home can be a provider. 42 U.S.C. § 1395cc(h)). The regulations detail the process for conducting the hearing and for requesting

the General Counsel is available to work with the Board in promulgating such regulations.

HELD:

The Secretary's decision that the Utah State home does not meet VA's nursing home standards, is not recognized by VA and, therefore, is not eligible for VA per diem payments, is a decision that falls within the limitation on judicial review set forth in section 511(a). Pursuant to 38 U.S.C. § 7104, the jurisdiction of the Board extends to all questions decided by the Secretary under section 511(a). Therefore, the Board has jurisdiction to consider this appeal.

Leigh A. Bradley

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[1] The Utah Department of Health also filed a complaint in Utah State court against the QHC (a private corporation with which the State had contracted to administer the Utah State Home) and the Bank of Utah. On February 3, 2000, QHC filed a counterclaim alleging breach of contract, unjust enrichment, breach of covenant of good faith and fair dealing, quantum meruit, and a violation of the due process provisions of the 14th Amendment to the United States Constitution. On February 3, 2000, QHC also filed a third-party complaint against the United States Department of Veterans Affairs (VA) and Togo D. West, the Secretary of VA. QHC alleges that VA and the Secretary breached VA's statutory duty and contractual agreement with the State of Utah Department of Health (DOH) when VA did not pay per diem payments for the care of veterans in the Utah State Home. QHC further alleges that it was the third-party beneficiary of VA's statutory duty and contractual agreement, and the services and material that it provided to veterans in the Home have unjustly enriched VA. Moreover, QHC alleges that be referring patients from the VA Medical Center to the Home, VA accepted its services in furtherance of its statutory obligations and should pay for them (quantum meruit). QHC also demands an accounting of all monies received and disbursed by VA relating to the Home between December 31, 1997, and February 3, 2000. Finally, QHC alleges that VA violated the due process guarantees of the 5th Amendment of the Unite States Constitution by failing to notify them that the Home was not recognized for purposes of receiving VA per diem payments, by failing to provide it with an opportunity for a hearing on VA's decision to withhold recognition, by failing to provide it with a procedure for challenging VA's decision, and by acting arbitrarily and capriciously in withholding recognition.

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review by the Departmental Appeals Board, 42 C.F.R. §§ 498.40, *et seq.* and 498.80, *et seq.*

[2] The early predecessors to section 511(a) were more like a ban on judicial review, rather than a limitation on such review. The history of this section is discussed in detail in the legislative history of the Veterans' Judicial Review Act – Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988). The House Report notes that when the Administrative Procedures Act was passed in 1946m the Veterans Administration was effectively exempted from the requirements of the Act. The report quotes an early commentator, who stated that "the Veterans Administration stands in 'splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review.'" H.R. Report No. 100-963, *at* 10 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791.

[3] Other exceptions pertain to judicial review of rules and regulations, civil actions, claims or suits involving insurance, and housing and small business loans. 38 U.S.C. §§ 502, 1975, 1984 and Chapter 37.

[4] The *Werden* opinion also recognizes that for some decisions, there are no standards available to evaluate the Secretary's decision. The court notes that: "[w]here a decision is committed to the discretion of the Secretary and no manageable standards exist to evaluate that decision, the decision is committed to the Secretary's discretion absolutely, and the Board lacks jurisdiction to review such a decision. *Werden v. West*, 13 Vet. App. 463, 467 (2000). The instant case does not present such a situation. As noted in paragraph 6, there are numerous regulations and manual provisions addressing VA standards for evaluating State Homes.

[5] The *Werden* court noted that the Board relied on a General Counsel opinion in concluding that they had no jurisdiction to consider the appeal. *Werden v. West,* 13 Vet. App. 463, 467 (2000). Both the General Counsel opinion mentioned in the *Werden* case, as well as an earlier General Counsel opinion, suggest that questions coming before the Board must arise in the context of a veteran's claim for benefits. VAOPGCCONCL 3-95 (December 11, 1995); VAOPGCCONCL 1-97 (January 7, 1997). Although these General Counsel opinions accurately state that the Board lacks jurisdiction to review "day-to-day" decisions (such as appeals regarding medical determinations), we now conclude that their emphasis on whether the cases arise in the context of a veteran's claim for benefits is misplaced. While the *Werden* court affirmed the Board's finding on jurisdiction, they did no on a slightly different basis (*i.e.*, based on whether the decision is committed by statute to the Secretary's discretion rather than on whether the decision arises in the context of a veteran's claim for benefits). We conclude that the jurisdictional standard articulated in the *Werden* case represents the more reasoned standard.

[6] Congress recognized, however, that District Court review of facial challenges to the constitutionality of VA statutes would not be barred. See H.R. Rep. No. 100-963, at 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803.

[7] Cases leading up to the 1970 amendment include *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967) and *Wellman v. Whittier,* 259 F.2d 163 (D.C. Cir. 1958). The relevant legislative history of the 1970 amendment is discussed at H.R.Rep.

No. 91-1166 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3723, 3730-3731. Relevant cases leading up to the 1988 amendment include *Traynor v. Tumage*, 485 U.S. 535 (1988); *Johnson v. Robison*, 415 U.S. 361 (1974); *Greenwood v. United States*, 858 F.2d 1056 (5th Cir. 1988); and *Wayne State Univ. v. Cleland*, 590 F.2d 627 (6th Cir. 1978).