

For veterans, U.S. adds insult to injury

*They had me standing on the front line,
But now I stand at the back of the line,*

*When it comes to gettin' ahead,
— Stevie Wonder, "Front Line"*

By Bill Glovin

Irwin Cooper of Fair Lawn, who served in World War II, is typical of the 30,000 U.S. veterans a year who find out the hard way that veterans don't have the same rights as the rest of us.

I first heard of Mr. C's problem while I was youngster growing up next door to him. Before he'd entered the service, Cooper — whom the kids on our block affectionately called Mr. C — played basketball for City College of New York. Twenty years later, he would still coax the neighborhood kids into playing a half-court game at the playground.

While Mr. C still had a good eye and made the right passes, he couldn't bend. Every few minutes his back would stiffen, and he'd need to rest. His wife was so worried about him that she cornered me one day and made me promise that we wouldn't play with him anymore.

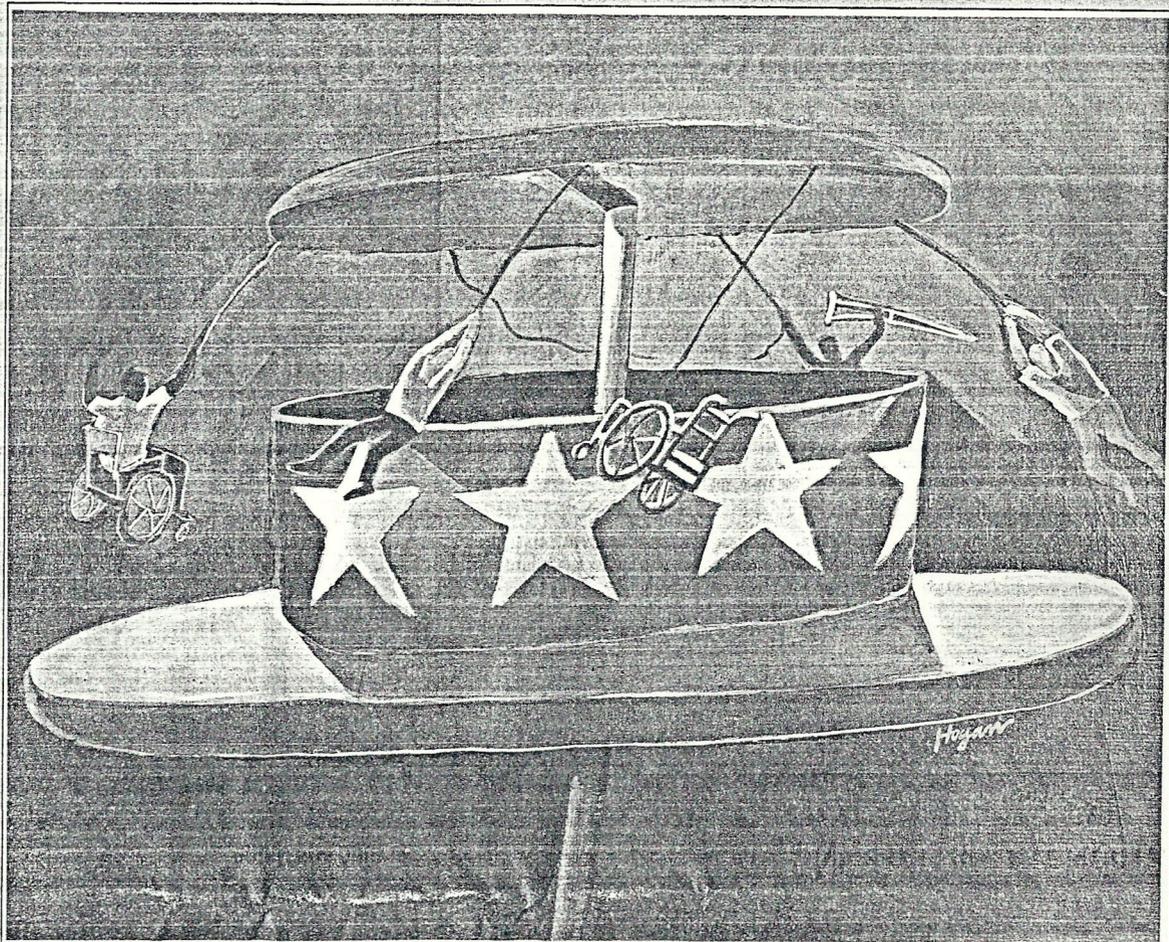
Mr. C didn't complain much about his back. Whenever one of us would ask about it, he'd mutter something about the trouble being service-related. He tried not to sound bitter, but I suspected he was. Years later he finally told me the story.

In the Navy Mr. C came down with a severe back-related arthritic condition known as Marie-Strumpell disease.

During his service, Mr. C's base newspaper reported that he was the high scorer on his basketball team. Then he got sick. His brother Sidney recalls:

"The day he was discharged, I went down to meet him, and I carried his duffle bag home, because he was in so much pain."

Mr. C went to the Veteran's Administration for help. VA doctors said that before they could treat him, he'd have to file a claim. The agency provided



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medical treatment while the claim was pending, but it didn't help much. He remembers one doctor trying to stretch his leg above his head and suggesting that Mr. C was faking his screams of agony. Soon after, he was turned down for benefits.

Mr. C appealed the decision to the VA every few years. Before one appeal, a VA general practitioner didn't bother taking X-rays and completed the exam in less than two minutes. Four times the VA turned him down without giving a reason.

In 1974 the Freedom of Information Act gave Mr. C access to his service record, but he was on the brink of giving up. In 1977 Sidney finally persuaded

him to take advantage of his new rights and look at his file.

It showed a number of blatant mistakes and inaccuracies, including evidence that the VA had turned down his claim without ever obtaining his service medical record to learn that he'd been treated at his base at least 20 times. He also saw that a hearing he'd asked to attend occurred without his presence, and another hearing had never taken place, because the veteran-organization representative who was supposed to act as counsel decided that it wasn't necessary.

In 1979 the Board of Veteran's Appeals (BVA) in Washington, an arm of the VA and the final arbiter of such cases, admitted that the VA regional office in New York had made wrong decisions in Mr. C's case. But he was also startled to hear that the board would only grant benefits from that point on, refusing to pay from the time of the original claim — 33 years before.

Mr. C appealed to the BVA again, and contrary to VA policy, several of the

same people who judged the case the first time heard it again.

Mr. C thought about suing the VA, but he discovered that he couldn't. Veterans, he was told, aren't entitled to have their cases heard before an impartial jury in a court of law. A regulation known as Title 38 says that the VA's determinations of benefits are final and not subject to review outside the agency. And if he wanted to hire an attorney to appeal the decision before the BVA, he was prohibited by law from paying an attorney more than \$10.

After years of haggling, Mr. C had reached the end of the line. Throughout the process he was made to feel like a beggar and a liar and that the VA was his enemy. Worse yet, he reasoned, was an outright denial of his and all veterans' constitutional rights.

Judicial review, which is as fundamental to our system as the Bill of Rights, even protects most illegal aliens and convicted felons by assuring them a day in court.

But Congress eliminated judicial review for veterans after the Civil War for what was then a good reason. Because the Constitution didn't provide any kind of compensation structure for servicemen, many of whom were returning from the war with debilitating

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injuries, the lawmakers felt that veterans should be treated specially. Congress decided to keep the courts out of the process. As a result, veterans and their dependents were prohibited from suing the government.

Congress also felt that greedy law-

yers would charge Civil War veterans exorbitant fees to help them collect their new federal benefits, so it added the section prohibiting veterans from paying an attorney more than \$10 to represent them before the government. This 19th Century provision was recently upheld by the U.S. Supreme Court.

Through the years the original premise has come to be known in federal law as Title 38, which specifically deals with veterans. It embodies the idea that the VA and veteran are not adversaries. But this little-known law has made them enemies.

An example of how Title 38 works is the case surrounding Agent Orange, the herbicide used during the Vietnam war. From the beginning the VA adamantly opposed contentions that exposure to the defoliant caused cancer and other health problems. It kept stalling a congressionally mandated study and openly ignored scientific evidence. Particularly disturbing was the publication by the

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VA of an Agent Orange Program Guide, which was distributed to all VA regional offices as the criteria for deciding cases.

According to the National Veterans Law Center in Washington, the guide was drafted without the participation of the Environmental Protection Agency or any other government with experts on the effects of toxic herbicides on humans. The law center says that no member of the Vietnam veterans' community was consulted before the development of the VA's position.

Some 15,000 veterans and their dependents were outraged by the VA's decision not to pay claims. But they couldn't sue the government. Instead they sued the chemical companies, despite the fact that the government determined Agent Orange specifications and how and where it would be applied.

Judge Jack B. Weinstein, who heard the case in a Brooklyn federal court, said that although the Agent Orange case presented special circumstances, his hands were tied by Title 38. He criticized the government's detached attitude, saying that the decision "may be cruel to the veterans who served their country and feel that the government has turned its back on them in this litigation."

With the court's help, the chemical companies and the veterans settled the case by creating a controversial \$150-million fund. The government insists that there's no medical evidence to support 70 percent of the health claims, hasn't contributed a nickel to the fund. A chemical company's lawsuit against the government is still pending.

Here's how the VA system works: A veteran files a claim with a regional office, which rules on its merits. If a veteran wishes to challenge the decision, he may appeal it to the BVA, a board of 50 presidential appointees.

To help the veteran through the process, veteran organizations such as the American Legion, Veterans of Foreign Wars, and Disabled American Veterans provide representatives without charge. Some of these representatives are inexperienced volunteers.

"The VA doesn't want the veteran to have an attorney, yet the VA is honeycombed with attorneys," says Sidney Cooper. "You write a letter,

and it takes four months to get a response. Sometimes they don't answer your questions. Other times they cite regulations, which they refuse to furnish despite repeated requests."

The lack of legal advice may be a reason why veterans, who are entitled to a personal hearing during the process, rarely ask for one. Documents obtained under the Freedom of Information Act showed that in a review of 36,000 cases filed before March 1983, 96 percent of the veterans who filed appeals did not request a personal hearing.

A 1981 internal memorandum sent by a top VA official in California to regional adjudication-section chiefs noted that although regulations permit "a hearing any time on any issue, we don't have the resources to operate this way."

The VA's internal court doesn't have the authority to conduct an independent review of agency policies. It cannot question precedent opinions or ask whether the regulations it's enforcing are legal. The VA subpoena witnesses, but the veteran can't. Veterans aren't allowed to cross-examine witnesses or confront the evidence - they're only permitted to listen and answer questions.

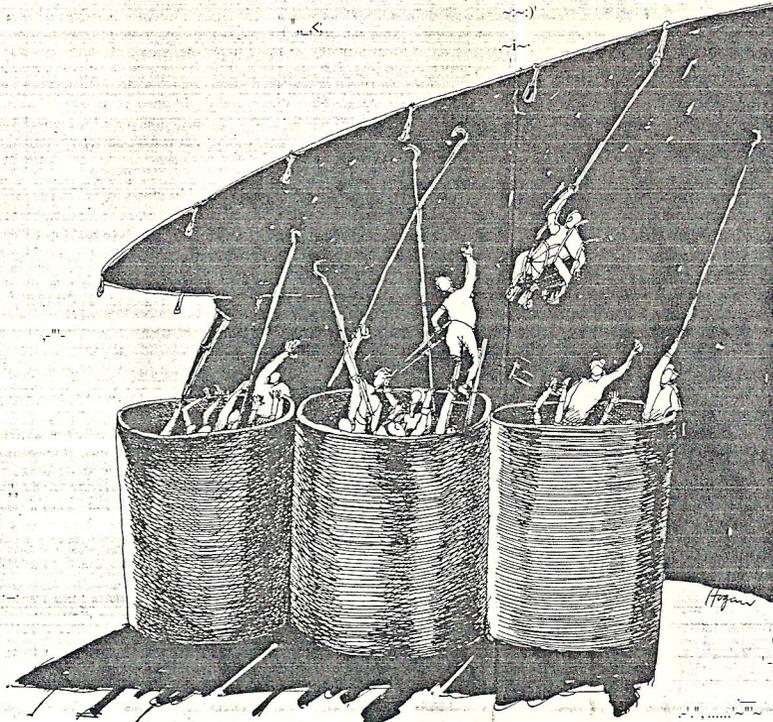
"The complete lack of independent review of VA policies and procedures has produced unfair decisions regarding the payment of benefits," writes Rep. Tom Daschle, D-S.D., in the University of Notre Dame law journal "A total disregard of scientific and medical opinions unsupported by VA positions has subjected countless sick and dying veterans to needless suffering."

Also under contention is an apparent quota system. From 1976 to 1980, for example, the success rate for the veteran appeals was consistently in the 12 percent range, while the success rate for administrative agency cases decided in court was roughly one in three.

"Many service officers are increasing the appeal rate of the denial of cases which they believe have considerable merit," said Ronald H. Chamberlain, director of the national legislative service for the VA, before the House Veterans Affairs committee.

The publicity generated by the Agent Orange case has helped mobilize veterans' groups, attorneys, and legislators in favor of revamping Title 38. It has also brought attention to other BVA cases such as these.

In the early Sixties an Air Force intelligence officer was used in an endurance experiment for the space



program. After being strapped to a tilt table four hours a day for about three months, he complained of light-headedness, nausea, and coldness in his extremities. In 1977 he was examined by a neurologist at Johns Hopkins University Hospital, who concluded that severe nerve damage was related to the experiment. The VA conducted its own examination, which, according to congressional testimony, lasted only 15 minutes and included no tests. The VA physician diagnosed the condition as being of undetermined origin, and the claim was denied.

In "You Can Fight City Hall and Win" author Thomas J. ezzi relates the case of Pvt. Leroy Bailey who was sleeping in Vietnam when a rocket tore through his tent and exploded in his face. After three years in a Chicago VA hospital, Bailey was discharged with part of his face missing. A private surgeon began a series of operations to reconstruct his face, so he could chew solid food

again. The first bill sent to the VA was returned with a note saying, "It is regretted that payments on the above cannot be approved, since the treatment was for a condition other than that of your service-related disability." Only a presidential Ytterby SSIO forced the VA to provide \$1 million.

A bill providing for judicial review of VA decisions and the right to pay reasonable attorney fees has passed the Senate three times without a dissenting vote. Each time, however, it has been held hostage by the House Veterans Affairs Committee.

In January the VA Administrative Procedures and Review Act was introduced by Sen. Gary Hart. "To insulate any agency from the scrutiny of the courts runs counter to some of our most cherished constitutional principles," Hart said. "In human terms, this denial of the due process of veterans has too often

resulted in hardship and disillusionment of those who have defended our country and are most deserving of the guarantees of our constitutional form of government."

Rep. Roontz said that the VA put enough pressure on the veterans for the organization to have traditional ways to recruit veterans as members.

Disabled American Veterans, which serves as counsel in 40 percent of the cases in front of the BVA, recommends formation of a single Court of Veteran's Appeals. The court would be entirely separate from the VA and deal exclusively in the review of claims that have gone all the way through the VA's appeal system. The organization insists that such a court is the only way to guarantee fair and equitable treatment of VA claims.

Meanwhile Title 38 cases are being heard in federal courts more frequently.

One case generating publicity in the Los Angeles area concerns the family of a Vietnam vet, Sgt. Robert J. Beck. The recipient of two Purple Hearts and three Bronze Stars, Beck committed suicide after the VA mistakenly cut off his disability benefits for a back injury without a hearing and demanded that he repay \$1.798 million.

Judy Beck, his widow, said her husband told her that she'd be better off financially with him dead. It made him feel like a sponge with me working and taking care of the home, and he would turn home around me at all, she said.

Beck's family went into federal court to seek \$8 million in damages against the VA. The suit charges that the DAV "recklessly reviewed, prepared, compiled, and filed the wrong requests" with the VA after Beck went to it for help.

A setback for veterans came last month when the Supreme Court voted 6-3 to overturn a ruling by San Francisco Federal Court Judge Manly H. Patel, who ordered the \$10 attorney-fee fund against the VA. The Supreme Court justices seemed at opposite ends of the spectrum on the issue. William H. Rehnquist, who ruled in favor of the \$10 limit, argued that a law that has been in effect over 120 years is entitled to more than the deference that judges should accord to all acts of Congress. But John Paul Stevens contended that the age of the statute cuts against it.

"It's an outrageous decision where politics seemed to be the major consideration," says Mr. C. "The Supreme Court decided it wouldn't matter. It's a sad day for veterans. It's the first time in 120 years that the importance of counsel."

"The VA's kangaroo court will continue to do all it can to make the veteran give up and go away. Sadly enough, most will. All the young people who grew up during Vietnam and watergate don't understand what it's like to be raised to love your country. It's a feeling that never leaves you. But the way my country treats veterans makes me ashamed of it."

Bill Glavin is assistant editor of New Jersey Business magazine.