VETTING THE APPELLATE STANDARD OF REVIEW: WHAT WAS, WHAT IS, AND WHAT SHOULD BE THE STANDARD OF REVIEW EMPLOYED BY THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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I. INTRODUCTION

In Padgett v. Nicholson,¹ the United States Court of Appeals for Veterans Claims² (CAVC) appeared to change the appellate court’s standard of review of findings of fact by the Board of Veterans’ Appeals³ (BVA) from a deferential review to what is, in essence, a de novo standard. The decision, which has since been withdrawn for procedural reasons, temporarily opened the flood gates to potential waste of judicial resources and mistaken final determinations. The Padgett decision redefined the court’s application of its “‘clearly erroneous’” standard of appellate review.⁴ Before Padgett, the court interpreted the clearly erroneous standard to mean that it should only overturn a finding of fact by the

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² Id. at 133.
³ Id. at 134.
⁴ Id. at 145.
BVA if the BVA’s finding of fact had “no plausible basis” in the record.\(^5\) Although the CAVC had long made mention of the “definite and firm conviction” criterion discussed below,\(^6\) the court had also made plain that the clearly erroneous standard of review “does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”\(^7\)

In refocusing the clearly erroneous standard, the Padgett court reemphasized the “‘definite and firm conviction’” criterion.\(^8\) The Padgett court defined the “‘definite and firm conviction’” criterion\(^9\) standard as “‘when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’”\(^10\) The “‘definite and firm conviction’” criterion requires the court to determine if the BVA has made a “mistake” in deciding a question of fact.\(^11\) The definite and firm conviction criterion also allows the court to disregard the BVA’s findings of fact in favor of the court’s, even where there is evidence to support the BVA’s determination.\(^12\) To determine that the BVA has made a “mistake” even when there is evidence to support the BVA’s determination, means that the CAVC can substitute its fact finding for the BVA’s fact finding.\(^13\) In other words, the “definite-and-firm conviction criterion,” although stated under the rubric of the “clearly erroneous” standard of appellate review, mandates that the court independently examine questions of fact and independently make findings of fact.\(^14\) This is in essence a de novo standard of review.

This article discusses the veterans’ claim adjudication process; the CAVC; the court’s prior standard of appellate review; the court’s temporary transition to a new standard; the new standard temporarily adopted; the problems with employing a de novo standard of review including its violation of the court’s statutory authority, the resulting strain the court’s new standard will place on its own resources and corresponding delay in deciding appeals; and the resulting strain on the BVA’s resources. This article advocates a reaffirmation of the “‘no plausible basis’” in the record interpretation of the clearly erroneous standard of review.\(^15\)

The Padgett court’s seemingly de novo standard of review of questions of fact is a major departure from the “clearly erroneous” standard it had previously employed. For example, in Booton v. Brown,\(^16\) the CAVC cited a decision of the United States Court of Appeals for the Seventh Circuit, that found that “‘[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. . . .’”\(^17\) As this article will discuss, the court’s potential new standard of review may create substantially adverse consequences. We, therefore, advocate that the court return to its previous long-standing interpretation and application of the “clearly erroneous” standard.

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5. Id. at 147.
6. Id. at 146 (emphasis omitted).
9. See id.
10. Id. at 146 (citations and emphasis omitted).
11. Id. at 146-47.
12. Id. at 147.
13. Id.
14. Id.
17. Id. at 372 (citing Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988) (emphasis added)).