

VETERANS' DILEMMA: NAVIGATING THE APPEALS SYSTEM FOR VETERANS CLAIMS

HEARING

BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND
MEMORIAL AFFAIRS

OF THE
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U.S. HOUSE OF REPRESENTATIVES

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VETERANS' DILEMMA: NAVIGATING THE APPEALS SYSTEM FOR VETERANS CLAIMS

Thursday, January 22, 2015

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL
AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 11:11 a.m., in Room 340, Cannon House Office Building, Hon. Jon Runyan [chairman of the subcommittee] presiding.

Present: Representatives Abraham, Lamborn, Zeldin, Costello, Bost, Titus, Brownley, and Ruiz.

Also Present: Representative O'Rourke.

OPENING STATEMENT OF CHAIRMAN RALPH ABRAHAM

Mr. ABRAHAM. Good morning, everyone. Thanks for being here and thanks for your patience.

This oversight hearing of the Subcommittee on Disability Assistance and Memorial Affairs will now come to order. I first want to take a moment to welcome the subcommittee members, those who are new to Congress, new to the committee, and also those who are returning to this committee.

It is a true honor to sit as your chairman of this subcommittee and I am also pleased to welcome my colleague, sitting ranking member, Ms. Dina Titus.

By way of short introduction, I am a licensed physician, A military veteran, pilot, farmer, former veterinarian, a husband, and proud father, and proud grandfather now. So I am so pleased to be here and be a representative of the Louisiana Fifth district.

I know that the Veterans' Affairs Committee has been vigilant in its oversight of the Department of Veterans Affairs and has been recognized for its ability to proceed in a largely bipartisan and reasonable manner to benefit our military veterans and certainly their families.

In recent years, terribly grey matters have been productively addressed, and I look forward to continuing that tradition with Ms. Titus and members of the subcommittee on issues that are critically important to our Nation and certainly to our veterans.

To that end, we are here today at the first DAMA subcommittee oversight hearing committee of the 114th Congress to examine the appeals process for veterans' disability claims within the Department. We will focus upon appeals, remands, the rate of remands and the lengthy delays that plague the system.

I am aware that the Department chose to prioritize certain initial claims in recent years, but I must say that when veterans in my District shared that they wait 6, 8 and even 10 years and more to resolve a meritorious appeal of service-connected disability claim, I find that more than just alarming, and certainly unacceptable.

I imagine that both members of the dais and witnesses at the table will agree with that assessment. These claims for service connected disability benefits need to be adjudicated and explained correctly the first time. And when the appellate review is needed, that process must be thorough, swift and very fair.

This issue cannot be minimized or ignored as the VBA has consistently reportedly increased figures on the number of appealed claims, which currently sits near 290,000. The Board of Veterans' Appeals reports an inventory of approximately 60,000 appeals and project explosive increases in coming years.

That means that over 350,000 appeals are currently stockpiled. Some have bounced back and forth in the process for again, well over a decade. And each stage of the appellate system constitute delays, and multiple years, it is not weeks or months, it is years.

So despite the existing statutory requirements, we now know that if the appeal claims are often placed on the back of the burner in favor of VA deciding initial claims as the VA reports that the notices of disagreement period can offer sometimes over 400 days.

The average length of time in the next step of the appeals process between the filing of the substantial appeal and the issuance of a board decision is 960 days.

By the VA's reported figures, nearly half of the BVA decisions result in remand, which often extend the veterans delay by additional years. Unfortunately, the delay alone is not the sole problem facing the veterans in the appellate system.

I understand just 2 months ago, the Court of Appeals for veterans' claims held the Secretary of Veterans Affairs in civil contempt, citing the Department's gross negligence in ignoring any veterans who repeatedly raised concern on an appeal that had been remanded to the Department. The court noted that the veterans were frustrated because the VA seemingly acts with little urgency on remanded claims.

As to this particular case, the court noted that the VA's inactions, "Conjured a vision of a drowning man, watched by a life-guard, in a nearby boat, equipped with life preservers and rescue ropes, who decides to do nothing, even though the drowning man is blowing a whistle and firing flares to call attention to his plight." That is pretty strong language, but ladies and gentlemen, we have real problems within the system.

I anticipate that our panelists this morning will provide helpful information on their respective roles as well as challenges to the existing process. From the Veterans Administration, including also the Appeals Management Center, and Board of Veterans' Appeals, veterans service organizations and attorney advocates, I thank you all for coming today and I would like to briefly welcome our witnesses.

On the first panel we have Ms. Beth McCoy, Deputy Under Secretary of Field Operations. Thank you for being here on behalf of

the Veterans Benefits Administration who is accompanied by Mr. Ronald Burke, Director of the Appeals Management Center and the National Capital Region's Benefits Office. Also on the panel is Ms. Laura Eskenazi, the executive in charge and vice chairman of the Board of Veterans' Appeals.

And after we conclude with panel one, we will see seat a second panel consisting of Mr. Gerald Manar, Deputy Director of National Veterans Service, Veterans of Foreign Affairs; Mr. Zachary Hearn, Deputy Director for Claims, Veterans Affairs and Rehabilitation Division within The American Legion; Ms. Diane Boyd Rauber, Associate General Counsel for Appeals with Paralyzed Veterans of America. Mr. Paul Varela, Assistant National Legislative Director of Disabled American Veterans; and Mr. James Vale, Director of the Veterans Benefit Program of Vietnam Veterans of America.

Then panel 3 will include Mr. Barton Stitchman, Joint Executive Director of the National Veterans Legal Services Program; Mr. Kenneth Carpenter, founding member of the National Organization of Veterans Advocates.

With those introductions complete, I also thank the member who is not on this committee but who has expressed an interest in today's hearing's topic, I would like to ask unanimous consent that Representative O'Rourke be allowed to participate in today's hearing.

Hearing no objection, so ordered.

Thank you all for being with us again today, and I now yield to our ranking member for her opening statement.

[THE PREPARED STATEMENT OF CHAIRMAN RALPH ABRAHAM APPEARS IN THE APPENDIX]

OPENING STATEMENT OF RANKING MEMBER DINA TITUS

Ms. TITUS. Thank you, Mr. Chairman. I want to congratulate you on your recent election to represent Louisiana's Fifth Congressional District, and also on your appointment to the chair this very important committee.

I was fortunate to have a very productive relationship with the former chairman, Mr. Runyan. And I look forward to continuing this committee's tradition of working in a bipartisan fashion to be sure that we provide the benefits that all our veterans deserve.

I am excited to be the ranking member of this subcommittee, and I look forward to the work we have outlined and are going to be undertaking in this Congress.

As many of you in this room know, the problems with the appeals process is a recurring topic in this subcommittee. Since joining the subcommittee 2 years ago, I have been concerned about the looming backlog of appeals at the VA. Almost 2 years ago, in June of 2013, our subcommittee met, and I raised the concerns that we are trading a claims backlog for an appeals backlog. Trading the devil for the witch, so to speak. As we clean up the claims, are we going then to create a problem with appeals?

My statement then is equally applicable today. I warned at that time of an impending appeals tsunami and the need to have a plan to address the anticipated growth in the number of appeals.

While the VA and the VBA have increased their output, all the metrics continue to show that the problem is growing. And vet-

erans in Nevada and across the country are waiting far too long for a VA decision.

As you heard the chairman, who gave some pretty compelling statistics, it is just taking too long. Nationally the average length of time to receive a decision from the VBA in 2013 was 1,255 days. That is nearly, 3½ years, 3½ years. That is way too long.

In Nevada, there are close to 1,400 appeals waiting to be adjudicated. And when a veteran comes to my office to say what has happened to my appeal, it is not very encouraging to go tell him, we don't know and it is going to take 3 years before we find out. That is just not acceptable.

I am concerned that as we address this problem, we haven't been provided with a detailed plan of how we are going to address it in an overall fashion. We are once again receiving piecemeal recommendations instead of a comprehensive plan. I think we need to take action so we don't get too far behind and we are not having this exact same hearing 2 years from now.

In Congress here, we need to work collaboratively with the VA and with the VSOs to come up with that plan and create a system that will deal with these appeals in a timely fashion. But we need also to ensure that while we are doing that we are giving them a full and careful evaluation, we are not just rushing through the process.

In the 113th Congress, I highlighted a need to form a task force that would include the key stakeholders, would meet, have a hands-on approach, and come up with such a plan they could present to us. I appreciated at that time Chairman Miller's support for the idea and it eventually did pass the House.

Today, I plan to reintroduce that same legislation and I would welcome members of this committee to join me as cosponsors.

It is unfortunate that we have lost two years during this time when we could have had a comprehensive plan completed, and then we would be ready to meet the challenge as opposed to talking again about what we might need to do.

Now, I understand that the VA has conducted a study to better understand the appeals process from the veteran's standpoint and I look forward to having you all share that with me and the members of this committee and the chairman especially.

To me, the situation is really clear too many veterans have waited too long to have their appeals evaluated. It is up to us to try to work with the VA to improve that system and improve it fast. We need a better plan and I think that commission will help us get there. We need ideas from the experts so we can get to work.

Another idea our subcommittee should explore is one that has been proposed by Mr. O'Rourke and Mr. Cook. And I am glad Mr. O'Rourke is here to create a fully developed appeal, similar to the fully developed claims initiative that has been so popular, so I hope we will hear more about that.

Again, thank you, Mr. Chairman. I look forward to working with you and I am glad we are starting off early on this issue.

[THE PREPARED STATEMENT OF RANKING MEMBER DINA TITUS APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you very much.

Are there any other members who would like to make an opening statement?

I would like to welcome our first panel seated at the witness table, good afternoon. We are going to first hear from Ms. McCoy and then we will hear from Ms. Eskenazi.

STATEMENT OF BETH MCCOY

Ms. MCCOY. Mr. Chairman, ranking member, members of the subcommittee. Thank you for the opportunity to discuss VA's commitment to reducing the pending inventory of appeals and increasing efficiency within the process.

The VA has made significant progress, 60 percent reduction in 22 months, on its goal to eliminate its disability claims backlog, which is any rating claim that is pending more than 125 days, and improve the quality of its decisions on claims.

VBA set a record production in fiscal year 2014 over 1.3 million claims completed without sacrificing quality, which at the claim level is at 91 percent now, compared to 83 percent in 2011. Looking at quality down at the medical issue level, the accuracy is at 96 percent.

Amidst VA's record-breaking production we remain committed to making the appellate process more timely and efficient for our Nation's veterans and their families.

With this increased rating production, VA's volume of appeals has grown proportionately. Historically, the rate of appeal has remained steady over about the last 20 years, regardless of production or quality. VA's historical administrative appeal rate has remained constant at about 10 to 11 percent of all claimants filing a notice of disagreement or what we call an NOD. And about 4 to 5 percent then completing an appeal to the Board of Veterans' Appeals.

These statistics indicate that veterans tend to exercise their right to appeal at the prevailing rate regardless of the nature of VBA's initial decision. This data also reflects there is no correlation between accuracy of the initial claims decisions and the rates of appeal.

In fiscal year 2014, VBA received 145,000 NODs, which equates to about 11 percent of the claims decided by VBA that year.

The majority of the appellate process is conducted at VBA's regional offices before the case is transferred to the Board for a final agency decision. Each regional office is required to review the appellant's claim file, many of them are multi-volume files, and obtain or make substantial effort to obtain all the evidence that is relevant to the case.

Due to the open record for appeals, appellants can submit new evidence or make new arguments at any time resulting in many cycles of additional development.

During the review, the RO will also grant additional benefits as warranted along the way, allowing veterans to receive compensation benefits more quickly.

It should be noted that approximately 72 percent of appeals are from veterans who are already in receipt of compensation benefits. VBA also oversees the Appeals Management Center, or the AMC, in Washington, DC, which was established in 2003. It is a central-

ized resource for processing of appeals remanded by the Board for additional development, about two-thirds of which are due to additional evidence received after they have been certified to the Board.

VBA allocates significant resources to appeals in its regional offices, about 950 full-time employees right now, and at the AMC, about 191 full-time employees.

Members of the appeals teams in the regional offices and AMC are dedicated to working appeals only during normal business hours, and have been completing disability compensation claims during overtime hours.

In fiscal year 2014, VBA took almost 182,000 appeal actions, an increase of 13.4 percent from the prior year. VBA is also redesigning the manner in which employees are evaluated. We have launched a performance standard work group comprised of our leaders, union leaders and employees to do the work. To fundamentally change performance standards of claims processors from task-oriented points to a system that is one focused on veteran outcomes. The effort also includes input from others outside of VA on how performance is measured in other agencies and in the private sector.

Just as we have transformed the rating claims process, we are looking also to transform the appeal process, using employee training, tools, streamlining processes and implementing modern technology. It is not something we can do ourselves, we count on working with Congress, the veterans service organizations and other stakeholders to explore long-term legislative solutions that provide veterans the timely and meaningfully right of appeal that they deserve.

This concludes my remarks. I will be happy to address any questions you have.

[THE PREPARED STATEMENT OF MS. MCCOY APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you.

Ms. Eskenazi, you are now recognized for 5 minutes.

STATEMENT OF LAURA H. ESKENAZI

Ms. ESKENAZI. Thank you. Good morning, Chairman Abraham, Ranking Member Titus and subcommittee members. My name is Laura Eskenazi. I am the vice chairman and executive in charge of the Board of Veterans' Appeals. As you noted with me from the Veterans' Benefits Administration is Beth McCoy, Deputy Under Secretary for Field Operations, and Ronald Burke, Director of the Appeals Management Center.

Thank you for inviting us here today to discuss VA's commitment to providing veterans with timely and quality appeals decisions. We are here today representing the dedicated hardworking employees at VA, many of whom are veterans or family members of veterans.

Working closely with Secretary McDonald, all of us are deeply committed to increasing efficiencies that we may provide our Nation's veterans with the outstanding service they deserve.

The VA appeals process is very different from any other appeals process. It is not one in which a single appeals office in VA assesses whether to affirm or reverse a prior decision. The responsi-

bility for processing appeals in VA is shared between the Veterans Benefits Administration and the Board of Veterans' Appeals, which is why you see both offices represented at the table today.

The VA appeals process is complex. It has multiple stages, it is non-linear. The process is heavily set in law with a continuous open record that welcomes submission of new evidence and new arguments from the veteran at any time.

As a result of this open record framework, the matter on appeal often no longer resembles the initial claim. Moreover, the open record often requires VBA to cycle back to an earlier step in the process as opposed to advancing to a final Board decision. This is required to comply with the legal requirements set forth in statute and binding case law to provide the veteran with the right to one review on appeal to the Secretary.

Throughout an appeal, the VA has the duty to assist the veteran in establishing his or her appeal by ensuring that the record of evidence is complete, and current for purposes of adjudication.

Given that nearly all appeals involved medical disability determinations, and that medical conditions evolve, appeals are frequently sent back or remanded to gather new evidence, and issue a new decision on that new evidence, which the veteran can then appeal back to the Board.

The landscape of the veterans appeals process changed in 1988 with the establishment of the United States Court of Appeals for veterans claims. As a result of the legal complexity that has developed with court review, it has become increasingly challenging for VA to complete an appeal by reaching a final decision. Simply put, the current design of the appeals process is incompatible with timely final appeals decisions. We have seen the remand rate from the Board rise steadily over the years since judicial review from a low of 23 percent in fiscal year 1990, to over 45 percent in the last 3 fiscal years.

During the past year, VA has actively participated in collaborative discussions with the veterans service organizations on ideas for reform. One concept that gained traction was to provide veterans with a choice of a different, more streamline avenue of appeal. This voluntary choice is the core principle of what has been referred to as the fully developed appeal, or FDA.

While the FDA would not be a silver bullet, it would offer a more efficient finality-driven approach, and perhaps serve as a model for other streamlining ideas.

In conclusion, veterans are waiting too long for final appeals decisions under the current legal framework. We are very thankful for the work by Congress, this committee, and other stakeholders, including the veterans service organizations, to explore long-term solutions to provide veterans with the timely appeals process they deserve.

Thank you. I would be happy to answer any questions from the committee.

[THE PREPARED STATEMENT OF MS. ESKENAZI APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Ms. Eskenazi.

I will begin the questioning and then we will recognize the ranking member and other members of our panel, several come to mind.

I have got a figure here, and you can tell me how accurate it is, I am told it is accurate. It goes from 2012 to 2014, it is from the Department of Veterans Affairs, it says "59 percent of all Board decisions contain at least one claim that required additional development." Would you agree or disagree with that premise?

Ms. ESKENAZI. That sounds accurate.

Mr. ABRAHAM. You stated in your remarks that this is a different process, it is non-linear. And the general broad question is why is it different from any other appeals process? And why is it non-linear?

Ms. ESKENAZI. I am happy to answer that. In most appeals processes, you have a decision that is made, and then when someone, appeals it goes to an appellate tribunal who looks at the initial decision based on the record that existed at that point in time and decides whether to affirm the decision, saying it was appropriate, or to reverse the decision, saying was wrong under the law.

In this system it is very different. We have a system that has been built up over decades since World War I, and has many layers designed in the statute, initial appeals decisions, and some cases that come all the way to my office, the Board of Veterans Appeals, but not all. And cases that do come to the Board, the Board's standard of review is what is considered de novo. In other words, the Board takes a fresh look at everything and is not saying whether the first decision was necessarily right or wrong, it is just a new decision.

Mr. ABRAHAM. I understand that.

Ms. ESKENAZI. The other key aspect, if I may just continue, is that open record. We are not just looking at a frozen record, we are constantly getting new evidence.

Mr. ABRAHAM. It would seem that if this has been in place for decades as you say, it agreeably has not worked at any level that certainly we can move to change the non-linear process to something more applicable to modern technology, to do a much better job.

Ms. ESKENAZI. Great comment. As I said in my opening statement, everything changed with the creation of the judicial review, the United States Court of Appeals for Veterans Claims.

Mr. ABRAHAM. 1988.

Ms. ESKENAZI. Yes, 1988 the court was established. You took an already multilayered process that made sense when it ended in the agency and then added another layer of review which has contributed to the churning that we see in the process.

Mr. ABRAHAM. Another question here, what percentage of cases in the Board's inventory are those which have been returned from either the AMC or regional office following a BVA remand order?

Ms. ESKENAZI. On an annual basis, the Board last year, for example, fiscal year 2014, we remanded about 45 percent of the cases that we decided. We decided 55,000 decisions which was the most ever for the Board since the court was created. Generally, about 75 percent of cases that are remanded returns to the Board. When a case is remanded, BVA obtains the additional evidence and they issue a new decision. So some appeals are granted at that point and do not return to the Board.

Mr. ABRAHAM. How many come back from the AMC?

Ms. ESKENAZI. About 75 percent of remands are returned to the Board.

Mr. ABRAHAM. Okay.

What subset of these cases have already been subject to two or more BVA remand orders?

Ms. ESKENAZI. It is common that the cases are remanded more than one time, sometimes for the same matter, sometimes for things that have changed in the interim. Sometimes for changes in the law that have taken place in the interim. So it is very common that cases are remanded more than once.

Mr. ABRAHAM. You mentioned the VDA, a newer process, that is coming online. Where do we stand there?

Ms. ESKENAZI. I am sorry?

Mr. ABRAHAM. The VBMS.

Ms. ESKENAZI. Yes, VBMS is essentially a electronic claims file, so for as long as the Department has done these cases they have been in paper form, some of them quite voluminous. Several years ago we moved towards the electronic claims folder, which is the Veterans Benefits Management System. For claims processing, it is more than just a record, it is a very robust database that performs its—a lot of functions that were previously manually done.

Mr. ABRAHAM. How effective is that VBMS for the VBA?

Ms. ESKENAZI. For the Board we are users the VBMS, instead of looking at files in paper, we will look at files on the computer screen, but at this point, that is what we are using it for, for the Board, is simply viewing the records of evidence.

Mr. ABRAHAM. Okay.

Ms. Titus.

Ms. TITUS. Thank you, Mr. Chairman, Ms. McCoy, I would just ask you what the VA has done in terms of planning to address this problem that we know is coming, who has been involved in that planning? Have you looked at the need for more staffing or other resources? And what about alternatives like prioritizing appeals?

Ms. MCCOY. Thanks for that question, ma'am. We have looked at this with all of our partners, with the Board of Veterans' Appeals, with the veteran service organizations, with congressional support, looking at all the sort of opportunities that we can find to make this process better for veterans and their families.

I would say that we are in the process right now of adding about 300 full-time employees in VBA, which by the beginning of fiscal year 2016 we will then add that number to our appeals cadre across the country. So that we have added some full-time employees, but we are also looking at efficiencies that will be gained with the electronic record in VBMS. Right now on the rating side we have about 94 percent of our ratings pending claims are electronic claims in VBMS. And that number is growing as far as the appeals every day.

Ms. TITUS. Could you address the issue just metioned, about the appeals that are remanded. And what are some of the causes for those remands, both internally and externally? I know you said a number of them are caused by external problems.

Ms. MCCOY. Absolutely. There are a lot of due process protections built into the appeals process. We make a decision an initial decision on a case. I mentioned in my opening statement about 72

percent of appellants are receiving compensation, and about 56 percent of them are receiving 50 percent or more in evaluations. So it is important for us to focus on that initial rating claim to get those benefits in folks' hands. It is equally important to focus on appeals.

We receive a notice of disagreement in an informal appeal, and we take action on that. That can include a step—we issue a statement of a case. We may also grant a benefit at that point and issue another rating decisions.

If the appellant decides to make a formal appeal and file a form 9, then we can have additional statements to the case. There are decision review officer hearings before and after that certification. There are multiple stages in the appeal process to make sure the veteran has their day in court, they are allowed to be heard, that we make sure we gather all of the evidence. And because some of these appeals do pend over a period of time, conditions do worsen. I do want to emphasize that when we see a worsening, when we obtain additional evidence that warrants additional benefits, we pay those benefits right away.

Ms. TITUS. I would ask Ms. Eskenazi to kind of address that issue of the 72 percent of the claims who are already receiving some kind of benefits. If that is the case and they are already getting something, does it makes sense to prioritize appeals?

Ms. ESKENAZI. Well, though they are receiving some degree of benefits, they have a right to continue to pursue all types of benefits. I mean, even veterans receiving 100 percent disability compensation can still continue appeals. So grade of payment does not have any affect on the appeal.

In terms of prioritizing, you know, certainly under the law currently in existence again rate of payment does not stop the right to appeal.

We have many cases in the system in which veterans are receiving payment at 100 percent and they still continue appeals, and that is certainly their right to do so.

Ms. TITUS. Is there any system that makes sense as a way to prioritize?

Ms. ESKENAZI. I am sorry?

Ms. TITUS. Is there any kind of system that you can think of that would make sense for prioritizing claims?

Ms. ESKENAZI. Well, the question really becomes what do veterans believe would be fair for them, because although they may be receiving a high benefit on one disability, many strongly feel that they should also receive that same rating for other disabilities. And they have that right under this very due process system that we have.

Ms. TITUS. I know that the claims process has undergone some changes where you can fast track smaller claims, you have whole approaches to some, different kind of priorities. I just wonder if we can do that in the appeals process.

Ms. ESKENAZI. At the Board of Veterans' Appeals we are required to decide appeals in the order in which they are placed in the docket. So that is a very strict priority order. We do not have the ability to decide appeals outside of that strict order.

So for example, remanding claims, they save their place in line. When remands come back to the Board, they are naturally older and they go right to the front of the line. As the Board continues to have more remanded cases and those come back, it becomes more challenging to reach those newer appeals because we have to do the older ones first.

Ms. TITUS. And since it is always open, is there any definition of backlog?

Ms. ESKENAZI. We talk in terms of inventory, there are so many stages in the appeals process and many appeals resolve at the early stages, and many appeals continue through all the stages. And even preparing for this hearing, we are were asked to look at the 10 oldest appeals at the Board and at that point in time, and we have some appeals that have started in the late 1980s again around the time the court was created.

They look very different today than they looked when they were first decided, but it is very exemplary of the veterans right to keep on pursuing. And VA's duty is to assist the veteran in trying to establish whatever claim it is that they are seeking. That is also part of the reason that we have the remand rate is to try and get that additional evidence to try to substantiate the benefit rather than simply just denying it.

Ms. TITUS. Thank you, Mr. Chairman.

Mr. ABRAHAM. Thank you, Ms. Titus.

Mr. Lamborn, I recognize you for questioning.

Mr. LAMBORN. Thank you, Mr. Chairman, Chairman Abraham and Ranking Member Titus, congratulations to both of you for your appointments, I look forward to working with you and helping you in this important subcommittee.

Ms. ESKENAZI. I hear from my Colorado Springs constituents that it typically takes 5 years from when they request a hearing to when a hearing takes place. For fiscal year 2014, the Denver regional office received 420 hearing slots, but there were 2,200 veterans awaiting a hearing. For this year it is projected to be 450 hearing slots, but 2,100 veterans awaiting hearings, and that math doesn't work.

I know you touched on this already, but tell us what I can tell the people like Richard—I won't mention his last name for privacy reasons—he has been waiting 3 years to await a decision. So what can I tell my veterans that you are doing to help this backlog?

Ms. ESKENAZI. Thank you. Yes, for hearings there is quite a wait time and it varies throughout the country, depending on the location. One thing that the Board is doing more of is offering video hearings. Historically, and hearings are optional in appeals, veterans do not have to elect a hearing with a Board judge because you need their appeal. And we are trying to do more education on that, to ensure that those who do request a hearing understand that it is certainly not required, it is their option.

We have a few types of hearings that we offer. Historically, one of our 65 veterans' law judges will travel around the country to regional offices to sit for a week face to face with about 45 veterans and conduct a hearing in their appeal.

We also offer hearings at central office here in Washington, D.C. and some veterans do elect that option. In recent years, we have

been increasing the amount of hearings that we offer through video teleconference technology. That certainly is a much more efficient time——

Mr. LAMBORN. Anything else besides the video conferencing?

Ms. ESKENAZI. For the hearing options?

Mr. LAMBORN. Yes.

Ms. ESKENAZI. Certainly. What we are also informing veterans is they can also submit their arguments in writing, and what they would tell the judge, they can put them in writing and send it to the judge again, that would move their case along a little faster. But certainly, hearings are an area that we need to achieve more efficiencies.

Mr. LAMBORN. Now, as you know we have added a lot of staff in Congress during the years I have been serving. And we have added incentives, financial incentives, to employees in the VA to do a faster and better job. Of course, we don't want to sacrifice either one of those, speed and accuracy. How are those incentives working, in your opinion?

Ms. ESKENAZI. The board is very grateful for the increased resources we have received over the past 2 fiscal years. It has allowed us to hire over 150 new attorneys, which are so essential to adjudicate these appeals.

As a result, the Board increased its output to, last year, 55,532 appeals, which is the most in the history of the Board since the court review was established. So we have taken a 20 percent increase in staffing and increased our output at the Board by 30 percent. So we are very grateful for those staffing efficiencies.

Mr. LAMBORN. And the incentives, are they helping the process as well, the financial incentives, bonuses, overtime, et cetera?

Ms. ESKENAZI. The board provides some financial incentives to some of our staff to reward a job well done. We are more focused on providing timely quality decisions irrespective of that sort of——

Mr. LAMBORN. Thank you. My last question, within VBA, which Senior Executive Services, SES employees have their performance measured to include this important matter of appeals?

Ms. ESKENAZI. For VBA, I will defer to Ms. McCoy.

Ms. MCCOY. Sir, in all of our performance standards for our senior executives in the field, so for instance, the regional office directors, appeals is one element of many, many elements that are factored into their final performance evaluation.

Mr. LAMBORN. It is one measurement that you take, or one metric——

Ms. MCCOY. Yes, it is.

Mr. LAMBORN [continuing]. For evaluating performance?

Ms. MCCOY. It is.

Mr. LAMBORN. Could myself, and the staff, and the chairman see these standards, please? We would like to see them in writing.

Ms. MCCOY. We will work with our legislative offices to answer that.

Mr. LAMBORN. Okay, thank you so much. I will take that for the record. Thank you so much.

I yield back, Mr. Chairman.

Mr. ABRAHAM. Thank you very much. Mr. Ruiz.

Mr. RUIZ. Thank you very much, Mr. Chairman, and ranking member for holding this meeting, this hearing. This is very important to the veterans throughout our districts and throughout our country.

I am proud to represent the eastern portion of the Riverside County which has the ninth largest veteran population in the country. More than 50,000 veterans reside in my District alone. I am honored to once again represent them on this subcommittee where we will work together and shine a light on problems in the VA and provide veterans the benefits they have earned.

Today we are focused on ensuring that veterans have the chance to appeal decisions on their benefit claims, which for many will mean the difference between access to benefits and even life and death.

As today's panelists have testified, the number of appeals pending already approaches 3,000,000 and is only expected to grow in coming years. As Representative Titus mentioned, because we improved the claims backlog with the sheer number 10 percent naturally will be appealed. The appeals claims will go up as well. So we can count on and need to be prepared to remedy that as soon as possible.

We have made a commitment to caring for our veterans, and we owe them an answer on appeals for that care in a timely and accurate fashion. Especially when more than a quarter of veteran appeals are successful, when a decision is finally issued. So that's one out of four get those decisions reversed, and get the benefit, and the claims, and the help that they need.

That is why I am reintroducing the Veterans Access to Speedy Review Act. My bill addresses the inaccessible appeals bills backlog by increasing the use of video conferencing, as you mentioned, during an appeals hearing as a substitute for requiring the veterans to attend in person. This is evidence-based policy and I will give some evidence behind how that works.

My legislation will guarantee veterans the option of video teleconferencing, guarantee them the option of video teleconferencing for hearings before the Board of Veteran Appeals to allow a hearing at the earliest possible date. In 2013, on average, video conference hearings were held 110 days sooner than in-person hearings. It works.

Should any veteran prefer an in-person hearing, my bill ensures that person will have the final say on the manner of hearing for their appeal. This simple improvement will increase flexibility to relieve the physical and financial burdens on veterans who must travel to appear at appeal hearings in person. It will also streamline the review process to decrease wait times and save taxpayers money. The VA testified that this bill will make processing claims more efficient and eliminate substantial travel costs to our veterans and the VA system.

This bill is a commonsense, cost neutral solution which is why it passed the full Veterans Affairs Committee by a bipartisan voice vote last Congress. So I urge my fellow subcommittee members to support this bill and start bringing veterans their earned benefits as soon as possible.

So to the panelists, and to my colleagues, with that in mind would you support the increased use of veterans requested teleconferencing by the Board of Veterans' Appeals? First, to my colleagues, if you do so, would you kindly consider being original cosponsors before I reintroduce this bill? To my Republican colleagues as well. And now to the panelists, can you describe how this has actually produced the results and how veterans have utilized this veteran processing tool and option?

Ms. ESKENAZI. Certainly, I am happy to address that topic. I have described the types of hearings that the Board offers, and historically it has been the face-to-face, in-person hearing. We have had some success increasing video hearings, but under the law, we have to wait for the veterans to request the video hearing. And if we had the option to default the scheduling or a video, then certainly still welcome and allow the face-to-face for those who really want that option. It would just gain some efficiencies from a logistical standpoint.

The face-to-face, in-person hearings require finding a judge who travels to areas as far as Manila. And obviously—we have 65 judges right now and they also work intensively on signing decisions. So you can schedule more video hearings without the barriers of the travel. So that can lend to those efficiencies in the time saved that you referenced.

Mr. RUIZ. How have the veterans responded to that opportunity?

Ms. ESKENAZI. We have had a really successful increased rate of video hearings. And with the new technology it has been very helpful. When we started this back in the 1990s, the technology was not too great, all tube televisions and clunky recorders, but everything is state-of-the-art technology, digital recording. And in fact, we don't see any difference in the outcomes of appeals where there is hearings by video, versus hearings face to face. The outcomes have no statistical difference.

Mr. RUIZ. Thank you very much, my time is up. All of my colleagues will receive a copy of the bill that I will introduce, and hopefully you all will consider being original cosponsors. Thank you.

Mr. ABRAHAM. Mr. Costello.

Mr. COSTELLO. Thank you. My question is for Ms. Eskenazi, and ultimately, the question is going to be how and what stakeholder support do we need in order to transform the appeals process with legislative reform. I thought that you laid out very well for me what the Veterans Traditional Review Act in 1988 did to complicate—it is not to suggest that we shouldn't have that law—but to complicate the synchronizing that with the way you go about developing a claim and handling it judicially. All within the context of have an open record. I can appreciate the need for an open record. We are dealing with veterans, we are not dealing with a land use hearing or a criminal matter where you have your day in court, if you didn't make your argument, you are done.

Here I think, particularly with new evidence possibly coming about or a claim not being fully ripe when the claim is made, but still the need to get that claim in the pipeline because you need the care or the benefit.

I can also appreciate from the remand perspective that two-thirds of the reason for a remand is because of additional evidence or due to a change in circumstances after the claim arose, so I can understand that. Clearly, though, there is a problem with the remand process here and how that keeps claims in the system for a very, very long time.

It seems to me that there needs to be a remand reform element to how we address this legislatively. It needs to be fair to veterans. It also needs to enable you to streamline this process so that when a veteran is submitting a claim, either as much of that claim comes about or every alternative theory or justification in an argument that can be made is made at that time. But share with me, as you talk about clearly being a stakeholder in this from a legislative reform perspective, what we can do to help reduce the number of remands, either on the way in the door by making the claims easier to process, or if more evidence is needed and that is why it is being remanded, isn't there a way to maybe short circuit the time lag on the remand in order to get that evidence back in the door? What are your thoughts? How do we make it a more streamline process?

Ms. ESKENAZI. Great question and great summary of the constraints that exist in the process today.

One thing I would note is we are very thankful for the support that was given to the Camp Lejeune Act recently which provided that for evidence that the veteran or the veteran's representative submit with the VA form 9, that is the formal appeal stage, that evidence may come straight to the Board and be reviewed without having to send it back for another decision. Now, that is for appeals filed February 2013 and later, which the Board is not quite working that time frame yet, but that will certainly help in the future.

This is a process, because as I indicated, we are dealing with medical conditions and medical conditions evolve, time is somewhat the enemy. And so, we need to keep things moving along at a steady pace so that decisions can be made without lengthy lapses of time that allows for conditions to change. Because it is not only the submission of evidence from the veterans or new arguments, but like I mentioned, VA has an obligation under the duty to assist to ensure that we have everything.

Another interesting constraint in the system is at the point of the Board hearing where the judge meets with the veteran, it is at a point that is supposed to be the end of the process. Yet, it is a conversation that takes place where oftentimes new things are illuminated and that contributes to having to send that back.

Mr. COSTELLO. How much or how often or is it feasible at that point in time, before a decision is rendered, knowing that there may not be the type of evidence needed to justify the claim, but perhaps also knowing that that evidence may exist or that the claimant should go out and obtain that evidence?

What I fear is that, okay, you don't have the evidence denied. And then you are in the pipeline up the chain, which just becomes more frustrating rather than holding back and maybe rescheduling the hearing. Does that happen? Is there more robust activity that could happen at the lower adjudicatory level so that it doesn't end up knowingly getting or predictably getting remanded.

Ms. ESKENAZI. Certainly. And many appeals do resolve at those initial stages in the Department. So after the notice of disagreement is received by VA and certainly if the veteran meets with the decision review officer, a large number of appeals are resolved at those early stages.

For ones that continue through and particularly come all the way to the Board, it is really a variety of reasons that lead to the need for a remand at that point. Some of it is changing conditions, some of it is just new allegations, some of it is changes in interpretations of the law that the court issues in the meantime. All that drives the remand cycle. But again, it is in an effort to try and help substantiate that claim as opposed to denying it and perhaps short-cutting a due process matter.

Mr. COSTELLO. And so do you feel that from a legislative perspective, reforms can be made in order to streamline the process or do you feel that that process can be resolved within your department?

Ms. ESKENAZI. I think that legislative reform is absolutely needed. And as I indicated in my opening statement, there has been a lot of discussion about different ways to streamline the processing steps in the Department, not to shortcut a benefit for the veteran, but to achieve the same results that we are receiving today, just with less steps in the process so we can move things along in a more timely fashion. That is part of, again, the FDA. I know Congressman O'Rourke has that bill or the express bill, or Express Appeals Act in the FDA, that the VSOs have been working on. I do think that there is some value in considering those options.

Mr. COSTELLO. Thank you.

Mr. ABRAHAM. Ms. Brownley.

Ms. BROWNLEY. Thank you, Mr. Chairman.

I wanted to ask about the money morning workload report, which is helpful with regards to our oversight and tracking of the current claims. And I am wondering if there could be a creation similarly for the appeals process.

I understand that it is different, the open record framework that you have been speaking about, but I think it is important to have that kind of transparency and our ability to be able to oversee and track that we are improving and improving—excuse me, the appeals process as a tool.

Ms. MCCOY. Thank you for that question. We do have some information on the Monday morning workload report relative to appeals. I think that Laura and the Board also provided annual chairman's report that gives quite a bit of information, but we certainly would engage in the discussion for how we can add more information and be more transparent.

Ms. BROWNLEY. Well, I would very much appreciate that, if you are willing to commit to it, because I think an annual report is one thing, but to have that sort of weekly update so that we can track it, I think, is also helpful and important.

I wanted to also direct some questioning around the Veterans Benefit Management System and wanted to get a response from you to talk about how if there is any progress towards planning for an IT interface with that system so that we can better address our appeals? And are you doing something and if so, where are we in that process?

Ms. MCCOY. Absolutely. When we launched the Veterans Benefits Management System, our electronic paperless processing system, just in the past couple of years, in that timeframe we have more than 1 billion scanned images in VBMS currently. I mentioned earlier we have more than 94 percent of our pending rating workload in VBMS.

Mr. Burke at the Appeals Management Center has about 97 percent of the remands are paperless as well and we are growing in the number of notice of disagreement appeals at that stage and the form 9 appeals at that stage. It is about 50 percent at the NOD stage, the appeals are paperless, and about one-third are paperless at the form 9 stage.

So we are working there to get more paperless and appeals as well. We find great efficiencies in a paperless system. In particular in appeals in our history have had great, I call competition for the claims folder. So if there was the one paper claims folder at the medical center for an examination, we would have to wait if something else came in.

If it was at the Board of Veterans' Appeals, we would have to wait for that file to come back before we could take action on maybe a new claim. So with that one paper claims folder, we all wanted to have our hands on at the same time. We are able to do that in the Veterans Benefits Management System, so that is a big plus.

As far as the functionality for workload management, we have more and more of that functionality being built in on the rating side, and also more and more automation than we have started to add and is additionally planned.

As far as the Board, we have been working with them, they are in the two systems working with VACOLS and using VBMS as access to view and read the file. We have, again, focused initially on the rating side to get started and we are looking to expand that on the appeals side.

Ms. BROWNLEY. And do you have any time frame on the appeals side when you might be fully up to speed or fully, you know, operational in terms of paperless?

Ms. ESKENAZI. I am happy to address that question. The board has been leading an effort of gathering what types of requirements. We had the assistance of a contractor in the fall looking at all portals in the department into the appeals process because the Board hears appeals not only from VBA; that is certainly the most, but we do receive appeals from NCA and VHA as well.

So we have a high-level plan to ensure that what is designed works for the entire enterprise, not just one part. And we are very hopeful. I mean, the 2016 budget is not set yet, but we are very hopeful that we will be able to move out with some funding on that planning.

Ms. BROWNLEY. So if the funding is there in 2016, you might be complete by 2016?

Mr. ESKENAZI. I don't know about complete but certainly in a more positive way forward.

Mr. BROWNLEY. Thank you.

Thank you, Mr. Chairman.

Mr. ABRAHAM. Mr. Bost.

Mr. BOST. I will yield.

Mr. ABRAHAM. Okay.

Mr. O'Rourke.

Mr. O'ROURKE. Mr. Chairman, Ranking Member Titus, thank you for allowing me to join you today in the hearing.

Ms. Eskenazi, I didn't fully catch what you said in your opening statement about a fully developed appeal. It seemed to diverge from your written testimony. Could you repeat that or expand upon what you said?

Ms. ESKENAZI. Certainly. What I referenced was the concept of providing veterans with a choice of a different type of appeals process, and that was the core concept that was discussed during the past year with the VSOs where you provide the veteran with notice at the time that they elect an appeal and allow them to go the traditional route that we have today or allow them to try a different route where the appeal would immediately come to the Board.

And you would have to give them the right type of explanation but allow them to make that informed decision and give them the opportunity to opt out as well. If they opted for that program and then later changed their mind, certainly they could slip back into the normal process. So that was the concept that was discussed, and I believe some of the VSOs will talk about it in more depth today, and it is just one of these ideas of how can we provide the same ultimate benefits to veterans with just a streamlined process.

Mr. O'ROURKE. The bill that we introduced last year and we are planning to reintroduce again in this session of Congress with Mr. Cook of California would essentially do that, give the veteran a choice. The VA would establish a pilot program. It would be an alternative. They would have to come with their appeal fully baked, ready to go, and would sacrifice the ability to add additional evidence. And for that, at least in our concept of this, you would cut two-thirds off the current wait times. You would get a much faster response.

You know, it still would be upwards of a year, which seems like a long time to me, but it is far better than two and a half or three years, which is the standard. And then to some of Mr. Costello's line of questioning, you would also eliminate the remands back to the regional offices, and BVA would retain jurisdiction.

I have personally no pride of ownership on this. If you all want to do it administratively, if somebody else has a better way to get there, I am interested to hear from DAV and others on their ideas about this. I will get behind that.

But let me ask you this; could you implement what you just described or what I just described administratively? Do you need Congress to do anything, or could you just do this yourself?

Ms. ESKENAZI. One of the biggest constraints for the Board in doing it without legislation is our requirement by law to decide cases in the order in which they are placed in the docket. So if we bypass those middle steps, but the case got to the Board only to then have to wait in line behind all the others, that is not really providing any real effective outcome for the veteran. It is almost a false promise, and that is very heavily set in statute.

Mr. O'ROURKE. That is the part that you need law to change, an act of Congress?

Ms. ESKENAZI. Yes. Absolutely.

Mr. O'ROURKE. So you are committed to the concept. You are supportive of that whether it comes through this bill or some other bill. Those parts of it that you could change and implement administratively, you are committing today to doing that, and those parts which I just understand to be that one that you just identified that require an act of Congress, you will help this committee in ensuring that we have the appropriate language to do that.

And we could get this done this session of Congress and have it running if we could get that bill to the floor this year, before the end of this year, before the end of 2015?

Ms. ESKENAZI. Certainly. Thank you so much for your support. We view this as a team effort. There is a lot of stakeholders, and we are all looking to do what is best for our veterans, so the team effort approach is the best approach. Thank you.

Mr. O'ROURKE. Great. Really pleased to hear that.

Thank you, Mr. Chairman.

Mr. ABRAHAM. Thank you.

I am going to open a second round of questioning. What needs to happen right now for the Board's computer system to better connect with the VBMS?

Ms. ESKENAZI. Thank you. So I presume you are referencing our database, which the acronym is VACOLS, Veterans Appeals Locator System—I forgot a word there. It is a database that we have had in place since the 1990s, and it is an Oracle database. It is very antiquated, and it is a workload tracking database. It does not contain the official record, but it is a workload management tool.

Mr. ABRAHAM. So you need a new software update?

Ms. ESKENAZI. Well, we really need everything to be merged into one database, whether it is somehow linked or subsumed. VBMS is the robust enterprise—

Mr. ABRAHAM. Who is running point on that? I mean, who is taking that by the horns, so to speak, and actually doing something today? Is anybody addressing that as we speak?

Ms. ESKENAZI. The board has been strongly advocating for this need, and everybody agrees with the concept. The initial focus of VBMS was to get it built up and running for the claims processing, and that is well on its way. But what we have seen is you really don't get to a point where you end that because there is always new programming features that are needed.

We have done an in-depth study, as I indicated, as to what we need for the appeals part of the process from an electronic standpoint. So as we receive the funding, which we are very hopeful to receive, we will be ready to go with a plan as opposed to just getting money and then having to create a plan. And obviously we will have to work with—it is a heavy process to work with IT programmers to ensure that they build exactly what is needed.

Mr. ABRAHAM. Is VBA supporting the Board in this endeavor?

Ms. MCCOY. I would like to answer that, sir. We are supportive of making sure that the Board has the appropriate functionality. It is a matter of we work with our VBMS Program Management Office, we work closely with IT, and we have a prioritization of things that, a long wish list of things that we would like to have built into VBMS. It is a matter of prioritization, and it is a matter of fitting

enough in each of our every-three-month releases so that we can have that functionality.

Mr. ABRAHAM. Okay. Why does VBA not have functionality now? Ms. McCoy. Either one.

Ms. MCCOY. I would say it is a matter of prioritization. We have right now in the middle of additional functionality, additional automation to support the rating side. It is in competition. It is high on the list, but there is not enough, I would call it room, in each of our releases to develop and release the functionality right now that we all want for the Board.

Mr. ABRAHAM. Okay. Laura, do you have anything to add?

Ms. ESKENAZI. Only that, you know, that is a huge priority for the Board for appeals. We are using VBMS as indicated to view the claims file. We really need to maximize the efficiencies from an IT standpoint removing manual processes where possible.

We know that VBMS can never replace people in terms of the adjudication process, the review by the attorney and the judge; but we know that there is a number of efficiencies that we can put in place to better manage work flow and to mitigate risk in tracking all of those appeals by using different databases.

Mr. ABRAHAM. Just one quick follow-up. I am certainly all for better efficiency. I actually read the appeals process four times last night trying to get the mechanics of it, and I was given this cartoon, and I use that very loosely because there is nothing funny about this process.

I see no time constraints. If a veteran, he or she brings a claim into a regional office, I see no time restraints that decision is made. I see no time restraints on the veteran's part of any time restraints. The only time constraints I see is when the veteran has to do a Form 9 or he has a certain amount of time to do a Letter of Disagreement, but there is no time constraints placed on the VA itself as far as getting the work done in an efficient manner. What are your thoughts on that?

Ms. ESKENAZI. That is an accurate observation, and certainly we have heard that from veterans before. We will give them periods of time to respond to documents or processes and—

Mr. ABRAHAM. What about giving the veterans, holding them on a time constraint also? Has that been discussed among you guys?

Ms. ESKENAZI. Certainly. I mean, the goal in the appeal is to make sure that we get it right. And oftentimes when additional evidence is needed, whether we have to go get a new examination or to seek Federal records perhaps from another agency, these things can take varying degrees of time. So—

Mr. ABRAHAM. Years evidently.

Ms. ESKENAZI. Yeah. Too long.

Mr. ABRAHAM. Too long. Okay, thank you.

Ms. Titus.

Ms. TITUS. Thank you.

I would just ask Ms. McCoy, you said you were hiring 300 new people. I wonder what kind of people they are, how you made this decision, if you are sending any of them to Nevada?

Ms. MCCOY. Great question. So the folks in our appeals teams are some of the most experienced individuals that we have, particularly our Decision Review Officers. They have the whole broad

spectrum of responsibilities on appeals, and they often do some of the training for others in the office, so it takes a long time to develop that experience level.

So this is kind of a two-step approach that we are taking. So this year currently, we are adding 300 individuals across the country to our Veterans Service centers, so bringing them in at the introductory levels and getting them trained so that we then will have them up to speed, and targeting the beginning of fiscal year 2016, we can then promote those 300 FTE slots into the appeals teams.

Ms. TITUS. And the Nevada part?

Ms. MCCOY. I would have to look on that, ma'am. There are some for Nevada.

Ms. TITUS. All right. Let me know.

Ms. MCCOY. Okay.

Ms. TITUS. Thank you, Mr. Chair.

Mr. ABRAHAM. Mr. Zeldin.

Mr. ZELDIN. Mr. Abraham, I look forward to serving with you and Ms. Titus.

It is an important subcommittee. I represent the 1st Congressional District of New York. Suffolk County has the highest veterans population of any county in New York State, the second-highest population of any county in the country. We are served by the VA in Northport.

I was serving in the State Senate previously, and we received a lot of outreach from people who were so frustrated with the backlog of the Federal system. They were reaching out to their State Senator, their councilmen, their county legislator, whoever could possibly help them. I am honored to serve on this committee and this subcommittee, and I appreciate you being here and anything that you can possibly do to help reduce that backlog. My office, we are looking to be partners with you with the challenges that you face.

And thanks again for yielding.

Mr. ABRAHAM. Thank you.

Mr. Bost.

Mr. BOST. Thank you, Mr. Chairman.

I sit here quietly, and I have tried as a state legislator to help, as was spoken a while ago, our veterans. And when you see the amount of bureaucracy they have to deal with, and I understand as I listened to everyone that we are trying to reduce and get that opportunity so they can receive benefits quicker.

Just listening from this panel, and that is why I passed, Mr. Chairman, on asking a while ago, we can't even figure out what the amount of, level of bureaucracy that we have to climb through, through your agency as elected officials. How devastating is that to our veterans as they try to move through this process? I see that you are trying, and I am glad to hear on the computer system and that we are trying to update that.

Is it our fault as Congress over the years that we created this, in your opinion? Or is it the fault of the agency in the case that they themselves have created intergovernmental rules that make it so difficult? I know we, you know, are going to try to answer, ask questions that go on the record, but this is the type things that my constituents want to know.

How do we straighten it out? How do we lighten it up? These people have served us. They have claims. They need the process to move fairly quickly, and we are talking three years, five years, ten years. You work with it every day. How do we lighten it up, speed it up, and how do we work with you to achieve that?

Ms. ESKENAZI. Great observation, and certainly one that we share in terms of trying to explain this very dense process to veterans who many of which just want a decision.

One thing to keep in mind is this process, as convoluted as it may appear, it is in an effort to constantly provide veterans more opportunities. It is never to say no. It is so much due process that it is an approach that is driven to constantly look for that piece of evidence, hear that next contention, add on that next claim perhaps the downstream element, and keep trying to help the veteran get to the point where they feel satisfied with the decision that they have.

And it is somewhat subjective for the veteran as to when that point arrives. Some veterans are satisfied early in the process. Other veterans, such as the ten oldest appeals we submitted to this committee, have been pursuing claims appeals that have evolved since the late 1980s.

And on the one hand that is a very unique feature in offering so much due process to not say no, that it is again it is a paternalistic type of a process. The consequence, the flip to that, though, is the time that is involved. And it is counterintuitive to someone to explain that when they ask the simple question how long does it take, and when will I get my answer?

And when you have a process that is designed with so many stages and so many points that we welcome new evidence, we look for new evidence, we look for new arguments, and that may be required to cycle back, it is just those two principles kind of conflict against each other.

So then the question can then become, well how can we still provide those same outcomes for our Nation's veterans with a process perhaps a little more streamlined. And as we know, the core of this process was designed after World War I, and there has been many changes in the law over the time but usually adding more process. And when the Court was created, it was another layer of review added on top.

And veterans are receiving more benefits than ever as a result of this process, so how can we get those same outcomes with perhaps just a more streamlined set of steps. And that is why the concepts that are imbedded in the idea of the fully developed appeal, the Express Appeals Act, those types of concepts are worth pursuing if we can get stakeholder agreement to see if that can be one avenue to offer more of a streamlined process.

Mr. BOST. Thank you.

Mr. ABRAHAM. Ladies and gentlemen, thank you for being here. We appreciate your presence. You are now excused, and we will pause just for a minute while we seat the second committee. Thank you.

On this second committee, we are going to get as much of it done as we can before we have to recess for voting, so we are going to move along very efficiently.

Welcome, everyone. Mr. Manar, you are recognized to present the testimony of Veterans of Foreign Wars for five minutes.

STATEMENT OF GERALD T. MANAR

Mr. MANAR. Thank you.

Chairman Abraham, Ranking Member Titus, and members of the subcommittee, thank you for the opportunity to present to you the views of the 1.9 million members of the Veterans of Foreign Wars of the United States and its auxiliaries on this important topic.

I would like to talk about some of the issues facing VA and the Board of Veterans Appeals, as well as suggestions for addressing some of those problems. The VA says that it made over 1.3 million decisions in compensation and pension disability claims in 2014, which is over 150,000 more decisions than ever before. At a 10 percent appeal rate, VBA would be expected to receive approximately 130,000 notices of disagreement based on those decisions, roughly 13,000 more than in the previous year. Sadly, those appeals will be in line behind the nearly 300,000 appeals VA currently has. These appeals affect real veterans and their families.

Mr. Chairman, there are over 4,900 appeals pending in the New Orleans regional office. Nevada has 1,400 appeals pending, while California has 16,500 appeals awaiting action in their three regional offices. As bad as these numbers are, they pale in comparison to the over 25,000 appeals pending in Florida. If past is prologue, those appeals may wait over three years before VA transfers them to the Board of Veterans Appeals.

There are several reasons why the appeals workload has grown from 130,000 in 2004 to about 300,000 today. With the advent of judicial review in 1988, a significant number of decisions by the courts have forced the VA to more closely follow the letter of the law and regulations. On several occasions VA has been forced to re-adjudicate thousands of decisions, increasing work in both regional offices and the Board of Veterans Appeals.

Finally, many court decisions required veteran law judges to write clearer, more comprehensive decisions for appellants. These are all good things. However, much work had to be redone, and decisions today may take somewhat longer to write, reducing production at the Board of Veterans Appeals.

With the creation of the Secretary's twin goals of no claim older than 125 days and quality at a 98 percent level, VBA has focused with military-style precision on reducing the disability claim backlog. Appeals team personnel, including decision review officers, were frequently directed to process other work. As a consequence, appeals grew from 255,000 at the beginning of 2014 to close to 300,000 today.

It is time for VA to declare victory and start processing the rest of its work. What actions can be taken to stop the increase and start driving down the appeals workload? There are no magic bullets to solving this problem. Solutions must be crafted with this injunction in mind, that any solution that helps VA process more appeals cannot be done at the expense of veterans and the rights they currently enjoy. That is what makes this really hard work, finding solutions that allow VA to process appeals faster without hurting the due process rights of veterans and their families.

We make five specific recommendations in our written testimony. These recommendations include an increase in BVA and VBA staffing, release of the Statement of the Case within 30 days of receipt of a Notice of Disagreement where there is no additional evidence submitted, eliminate the new material evidence requirement to reopen a claim, and reenergize the decision review officer position to make it more effective in reducing appeals.

Finally, building on the ideas of a committee member, service organizations and representatives from the VA worked together last year to explore and expand on a fully developed appeal initiative. The idea is to fast track certain appeals to the BVA following a waiver of existing rights by claimants. While we support the FDA concept, there are hurdles which need to be overcome before the idea is ready for testing.

The most significant problem involves the waiver of rights by claimants. In order to be effective, any waiver must be based on a clear understanding of the decision made by VA. As we describe in our written testimony, it is our belief that the notices provided by VA to many claimants simply do not give them the information they need to understand the reasons for the decision. Many notice letters fail to detail specific evidence used in making the decision.

Further, many decisions offer only conclusions as a substitute for analysis of the evidence and reasons and basis for the decision. As a consequence, claimants don't have enough information to decide whether the decision was most likely correct, what the evidence showed, and what evidence is needed to obtain a different result. Without this information, many claimants do not have enough information to knowingly waive the procedural rights they have under the current appeals process.

In conclusion, we applaud the VA and members of this committee and the VSO community for working together to find solutions to reduce the appeals backlog. However, the key to making any FDA initiative work are two factors. The claimant must have access to all the evidence considered by VA in making its decision, and the claimant must be fully informed of the reasons and basis for each decision made by the VA.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you or the committee members may have.

[THE PREPARED STATEMENT OF MR. MANAR APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you. Mr. Hearn, you have five minutes.

STATEMENT OF ZACHARY HEARN

Mr. HEARN. Thank you. 1,461 days, this is the number of days in a standard four-year armed services enlistment. 1,937 days, this is the average number of days a veteran will wait to have a claim adjudicated from initial filing through the various stages of appeals. It is staggering that a veteran may have to wait longer to have a claim properly adjudicated than they may have served through their service contract.

Good afternoon, Chairman Abraham, Ranking Member Titus, and members of the committee. On behalf of National Commander Helm and the 2.4 million members that comprise the Nation's largest wartime veterans' service organization, the American Legion is

eager to share our research and the firsthand experience regarding the appeals process.

As you know from my written testimony, the American Legion has more than 3,000 accredited service officers assisting more than 700,000 veterans nationwide. Just over a year ago the American Legion testified regarding VA's accuracy in adjudication based upon the American Legion's Regional Office Action Review Program and challenged VA's accuracy statistics.

Understanding the importance of accuracy is critical to fixing the appeals process. When VA fails to accurately adjudicate claims from the beginning, veterans are forced into the far lengthier and more complicated appeals process. Completing claims accurately the first time is the very simple answer to eliminating large volumes of claims in the appeals system.

VA identifies a backlog claim as a claim that has not been adjudicated within 125 days. VA does not consider appealed claims as backlogged. They merely refer to them as an inventory. But let's be clear. For the nearly 290,000 veterans awaiting adjudication of their appeals, a figure larger than the population of Cincinnati, they consider their claims backlogged.

Nearly 75 percent of claims presented at the Board of Veterans Appeals are found to either have been inappropriately denied at the regional office or inadequately developed and prematurely denied. VA can correct this by starting at the regional office. Too often claims remanded by BVA are remanded for improper development and for failing to follow their legally mandated duty to assist. Often American Legion national appeals representatives will note VA did not offer consideration regarding if a condition manifested secondary or was aggravated by a previously service-connected condition.

If VA examiners were compelled to consider if conditions manifested in ways other than directly related to service, many remands for examinations would be eliminated. The American Legion's ROAR trips have repeatedly noted this in our written reports. While VA asserts it does not place a higher priority on the amount of claims adjudicated, its current work credit structure does not address accuracy in its metric, which rewards speed over quality.

In the past year, the American Legion established Veteran Crisis Command Centers at various locations throughout the country resulting in the awarding of nearly \$1 million in retroactive benefits. These events allowed veterans to gain instant personalized access to Legion and VA personnel. In nearly every location, we came across veterans with claims that had errors in their adjudication.

Fortunately through the joint efforts of the American Legion and VA, we are able to correct these errors. However, for these veterans the years of suffering and the impact it had on their employment and their families cannot be restored simply through the disbursement of a retroactive payment.

Today if a claim is remanded by a BVA judge, the instructions are forwarded to the Appeals Management Center to have requisite development conducted. These remands, or returned claims, come with clear and distinct instructions from the judge, yet the American Legion consistently sees cases remanded multiple times despite having clear instructions provided by that BVA judge. This is

what is known as the hamster wheel of remands where a veteran remains in adjudication purgatory while waiting for VA to conduct proper development and finally render a decision.

The most common questions we get from veterans are why does it take so long? Why can't VA get it right the first time? Or are they just waiting for me to die? Often you can hear the pain in their voice. As an advocate, it kills me to constantly hear their frustration and desperation. This is what veterans face, an adjudication process that rewards the quick and not the accurate, an appellate process that repeatedly notes errors in development, and adjudication that may cause years of hardship for our Nation's veterans.

During a testimony last summer, former Ranking Member Michaud stated, "There should not be a victory lap taken by VA if they eliminate the backlog of claims meanwhile having an abundance of appeals in inventory." The American Legion wholeheartedly agrees. The greatest impact on the appeals process would be eliminating the need to appeal in the first place. VA needs to eliminate the current work credit structure that places a greater emphasis on quantity of claimed adjudicated rather than the quality of those adjudications.

An increased emphasis on training and the manner that the training is delivered to its adjudicators needs to happen now. As VA works to eliminate the backlog, we need to ensure that they are not moved from a backlog claim to a backlogged appeal. Most importantly, we need to ensure that our veterans finally begin receiving the benefits and services they have earned through their dedicated service.

Again, on behalf of our National Commander Michael Helm and the 2.4 million members of the American Legion, we thank the committee for inviting us to speak today, and I will be happy to answer any questions the committee may have.

[THE PREPARED STATEMENT OF MR. HEARN APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Hearn. Ms. Rauber.

STATEMENT OF DIANE BOYD RAUBER

Ms. RAUBER. Chairman Abraham, Ranking Member Titus, and members of the subcommittee, Paralyzed Veterans of America would like to thank you for the opportunity to offer testimony regarding the appeals process. There are many problems contributing to delayed appeals which has become more apparent with VA's focus on reducing the claims backlog. A major cause of delay is the high number of remanded appeals.

Approximately 45 percent of appeals are remanded often due to an order for a new VA medical examination. This action occurs even when favorable private medical evidence or opinions from VA treating physicians are in the record.

In PVA cases the record often includes extensive medical information from a Spinal Cord Injury Center physician who has specialized expertise and an intimate knowledge of the veteran's medical condition. Too often for PVA members, the opinion of a C & P examiner who reviews the file and sees the veteran once is

weighed more heavily than the opinions of the Spinal Cord Injury Center experts.

When unnecessary resources are used to seek medical information already in VA's possession, not only is the veteran's individual appeal delayed, the overall process slows. At times these requests are also in conflict with the benefit-of-the-doubt doctrine which requires the VA and the Board to grant a claim when there is a proximate balance of positive and negative evidence.

When an appeal is remanded, it typically returns to VBA jurisdiction through the Appeals Management Center. It is at this step where appeals tend to stall and be subject to multiple remands because the AMC or regional office fails to ensure the Board's specific orders are fulfilled. For example, the Board may order a new examination by a medical specialist which is instead completed by a nurse practitioner, or the Board poses specific questions for response from the examiner which are not fully completed, or the VA fails to follow VHA procedures for scheduling the examination, resulting in the veteran missing it. These are just a few examples, but when the AMC fails to ensure compliance with the Board's orders, the appeal must be remanded again, adding significant delay before the veteran receives a final board decision.

Remanded appeals can take a year or more to complete. If 45 of every 100 decisions are remanded, it stands to reason that the number of appeals will only increase as each remanded appeal that is not granted in full must return to the Board for further review while original appeals continue to be certified to the Board. New original appeals linger while older remanded appeals with earlier docket dates are decided.

A greater reliance on private medical evidence or VA treating medical evidence and more consistent application of the benefit-of-the-doubt doctrine could reduce remands. A review of examination scheduling procedures would also be helpful, as would a review of AMC training, procedures, quality review, and accountability, to ensure proper handling of remands.

Furthermore, when the Board determines a veteran is entitled to advancement on the docket due to age, financial hardship, or serious illness, that designation should be honored and enforced on remand.

There are other ideas to reduce delay. PVA has partnered with other VSOs as well as VBA and Board Administration in a working group on how an expedited appeals pilot program might allow certain appeals to be decided in a more timely fashion.

It is the intent of PVA with VSO partners to support the introduction of bipartisan legislation to implement such a pilot program. In addition, PVA continues to support the strengthening of the DRO program and requiring DROs to work solely on appeals where their expertise can be of best use.

As has been discussed by several of the other panel members, an unexpected challenge has occurred in the area of technological improvement. PVA supported VA's adoption of VBMS. Unfortunately VBMS lacks appeals-friendly features to allow it to be efficient. We are pleased that the Board's administration has included VSOs in meetings to collaborate on ideas to improve VBMS specifically for appeals work. However, adequate funds must be ensured so the

Board can accelerate VBMS improvements and continue to engage VSOs in that process.

Finally, Mr. Chairman, when a claimant files a meritless appeal or compels a representative to do so, that appeal clogs the system and draws resources away from legitimate appeals. Since 2012, PVA has required clients to sign a notice of limitation when they execute their power of attorney to acknowledge we will not appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal in keeping with VA regulations.

To help a veteran make the most informed decision regarding the merits of an appeal, the VA should provide improved case-specific notice of the initial rating decision.

Mr. Chairman, we would like to thank you once again for allowing us to address this truly important issue, and we look forward to working with you in the 114th Congress.

I would be pleased to take questions.

[THE PREPARED STATEMENT OF MS. RAUBER APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Ms. Rauber. We are going to take a recess and go vote. We will be right back. Mr. Varela, you can continue for 5 minutes, please.

STATEMENT OF PAUL R. VARELA

Mr. VARELA. Good afternoon, Chairman Abraham, Ranking Member Titus, and members of this subcommittee. DAV appreciates being invited to testify today to discuss the challenges facing the 360,000-plus veterans, dependents, and survivors with pending appeals. Over 95 percent of these pending appeals pertain to disability compensation benefits. Our written testimony today provides the subcommittee with a number of recommendations; however, my oral statement will focus on just a few.

First, VBA and the Board require adequate resources to process appeals. While, this is not the only solution, it is certainly part of it. It is estimated that VBA's total appeals inventory is roughly 360,000, of which roughly 65,000 are within the jurisdiction of the Board, and roughly 32,000 of these appeals are within the Board's physical possession. It is no understatement to say the appeals inventory is too large and this number continues to climb every day.

The fact that appeals keep rising suggests a mismatch in manpower needed to process the appeals at both the Board and regional office level. Also contributing to the growth of appeals has been VBA's reliance on the appellate workforce to process claims for disability compensation. VBA also relies on the appellate workforce in order to meet their 2015 goals of no claim pending over 125 days with 98 percent accuracy. This practice diverts personnel to focus on claims processing. VBA utilizes all available resources to achieve their 2015 goal, which contributed to a drastic increase in pending appeals.

Second, VBA's Decision Review Officer Program must be strengthened as it is one of the most critical and indispensable procedures available to appellants within the current appeals processing model. While an appellant elects the DRO option, it affords the option to resolve issues locally at the regional office level. For those appellants represented by DAV, our national service officers

have direct access to decision review officers and often work with them to identify potential solutions to resolve appeals.

Given the critical nature of the DRO process, it must be strengthened and resourced adequately. Furthermore, the appellate workforce must focus their efforts on the appeal inventory and not repurpose to work claim-related initiatives. Unfortunately, VBA traded one backlog for another due to their all-hands-on-deck approach to realize the 2015 goals.

Third, Congress, VA, and stakeholders must look at innovative reforms to improve the appeals process. One innovation has become known as the fully-developed appeals pilot program. There is no one solution to remedy the problems facing veterans, dependents, and survivors within the appeals process. DAV, working together with Congress, stakeholders, VBA, and the Board believe that a good solution exists to offer relief for some with appeals. The FDA pilot program is meant to share some of the similarities and build upon the successes of the fully-developed claims program.

The FDA pilot would offer potential appellants a third option if they choose to file an appeal. They could choose the traditional appeals process. They could choose the decision review officer review process, or the FDA process. In the pilot FDA, an appellant would elect to forego several procedural steps within the current standard appeal processing model.

Some components of an FDA election trades the issuance of a statement of the case and hearings for quicker review of the record by the Board, allows an appellant to supply any additional evidence at the time of the election, allows for an opt-out option at any time up to the Board's ruling on the appeal, would preserve all due-process rights under the current appeal processing model if removed from the FDA, and has the potential to save roughly 1,000 days of appeal processing time.

An FDA election is not for everyone. It is not the cure-all to end-all. It gives some appellants another option by offering a safe bypass around some regional office processing requirements. It not only benefits veterans, their dependents and survivors directly by saving them up to 1,000 days of processing time, but would also relieve some of the pressure at the regional office level by diverting FDAs directly to the Board.

The FDA is still imperfect, but we continue to reach out to Congress and other stakeholders to assure that we arrive at a balanced, reasonable, and safe conclusion. We do want to acknowledge the efforts of Congressman O'Rourke, Congressman Cook, and their staffs for their work in the 113th Congress on the Express Appeals Act, which shares many similarities with the FDA proposal.

Finally, we also want to thank the subcommittee and your staffs for the willingness to listen to our input, recommendations, and concerns, and look forward to working together with you to approve the appeals process, for veterans, their dependents, and survivors, now and into the future.

Mr. Chairman, Ranking Member Titus, and members of this subcommittee, thank you for allowing DAV to testify at today's hearing. I am prepared to answer any questions you or the subcommittee may have.

[THE PREPARED STATEMENT OF MR. VARELA APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Varela.

Mr. Vale from the Vietnam Veterans of America. 5 minutes, please.

STATEMENT OF JIM VALE

Mr. VALE. Good afternoon, Chairman Abraham, Ranking Member Titus, and distinguished members of the subcommittee. Vietnam Veterans of America thanks you for the opportunity to present our views today. The real question that should be asked is why would we keep a claims system going that is wrong 70 percent of the time? VA-arranged decisions contain too many errors and Board decisions are too inconsistent. Any lasting solution needs to address these problems.

It is a well-established principle that VA's mission is to provide benefits to veterans and their families in a non-adversarial, pro-claimant system. When Congress enacted judicial review for veterans' claims in 1988, it did so with the clear intent to ensure a beneficial, non-adversarial system of veterans' benefits. We support modernizing the VA system so that all veterans receive more timely and accurate adjudication of their claims and appeals. And we support improving the efficiency of the claims adjudication and appeals process. Nonetheless, these changes cannot come at the expense of abandoning due process and other major aspects of the pro-claimant system designed by Congress.

VA's motto is "To care for him who shall have borne the battle and for his widow and his orphan." In practice, however, it appears the mission for some VA bureaucrats is to limit the government's liability to our Nation's veterans by formalizing the claims and appeals process to the point where benefits are unfairly restricted. As General Bradley, VA's first administrator, said in 1946, "We are dealing with veterans, not procedures; with their problems, not ours."

Veterans should not have to give up any of their rights in order for VA to process their claims and appeals more quickly. In the past, some VBA executives have even gone as far as to suggest reducing the notice of disagreement period from 1 year to just 60 days, change the standard review at the Board from de novo to appellate review, close the record at the Board and eliminate all decision review officer positions. Yet, none of these suggestions actually benefits veterans, but it does make the VA's job easier.

Vietnam Veterans of America has put forth eleven suggestions in our testimony that will move forward to fixing the VA system. You each have a copy of those items. The crutch of the problem here is VA has an inadequate number of staff to deal with its enormous backlog of claims and appeals and they work in a flawed work credit system that favors quality over quantity. Therefore, we suggest fixing the work credit system.

BVA's supervisors and employees need to stop gaming the work credit system. It shouldn't be easier and quicker to deny a claim than to grant one. VA still has to fulfill its statutory duty to assist. There should be no work credit awarded for taking shortcuts. If a

claim is denied, no work credit should be awarded until the duty to assist is fulfilled.

Next, VA should increase the number of staff. VBA needs more raters and DROs, and the Board of Veterans' Appeals needs more veteran law judges. For example, let's look at the Waco regional office. They only have eight DROs, yet they have over 18,700 appeals. That is 2,300 appeals per DRO. That is the highest DRO workload in the country. Put in another way, they have eight DROs trying to do the work of 30. The national average is 640 appeals per DRO.

Mr. Chairman, would it surprise you that Waco makes up 15 to 20 percent of all of our appeals at the Board of Veterans' Appeals? The board has 65 veteran law judges. In contrast, the Social Security Administration has over 500. Clearly, the Board needs more veteran law judges as its appeals backlog continues to climb. An even better solution is a round table discussion or discussions among VSOs, members of this committee, and VA representatives to resolve these issues.

In closing, the war against Japan lasted 1,347 days. In 2013, it took VA an average of 1,603 days to issue a final agency decision on remanded veteran appeals. Mr. Chairman, the appeal should not last longer than the largest war our nation has ever fought.

Thank you for the opportunity to present our views today, and I should be glad to answer any questions you may have.

[THE PREPARED STATEMENT OF MR. VALE APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Vale. I will agree with that statement that you made about the appeals taking longer than the war.

I will begin the questioning and this will be addressed to each of you. What I am hearing from the previous panel and certainly this panel, whether it is the AMC spot, the BVA, at each step of the process, there seems to be a log jam. Certain of you see it in one spot, certain in others, where the primary problem is, but evidently every step of the ladder is a major stepping in hindrance.

So my question is to each of you—I will start with the organizations: Give me, we will say two of your solutions that you would implement now to help get this ball rolling very quickly.

Mr. VARELA. I will take that question.

Mr. ABRAHAM. And we want a brief description from every one of them, just a minute.

Mr. VARELA. Okay. All the way from the Board of Veterans' Appeals to the Appeals Management Center to every regional office, not only do they require the resources, which is manpower, to do the lifting, the heavy lifting right now, they also need to be focused on appellate work. When you divert the appellate workforce, which is marginal at best, to address all the appeals that are pending, what can we expect? We can expect a spike and an increase in the inventory. To constantly move them around and to constantly shift them around, we ignore the appeals, and that is just very harmful and detrimental to those in the pipeline.

The other would be to continue working on the FDA proposal, which has been mentioned several times during our discussion, with Congress bipartisan support and stakeholder input to insure that we arrive at a good and safe conclusion on that proposal.

Mr. ABRAHAM. Ms. Rauber.

Ms. RAUBER. I think we would agree to continue to work towards the fully-developed appeals process, and I also think the other thing is really getting down to figuring out a way for the Appeals Management Center's feet to be held to the fire in enforcing the orders of the Board, because we are just seeing too many cases that come back two, three, four times that we are briefing and presenting to the Board where the AMC has not complied with what the Board is telling them to do.

Mr. ABRAHAM. Mr. Hearn.

Mr. HEARN. I think that there is an interesting point. Repeatedly, VA will say that a certain percentage of claims are appealed, and they will use that as kind of their focus point. And it is true, but you have to remember, those are just a certain percentage of claims that a veteran elects to appeal. That doesn't necessarily reflect the level of quality of adjudication. If you look at the Appeals Management Center, where all of these claims are subject to Board review following their adjudication, you see that it doesn't stand up to the fire, that more and more of these claims are remanded.

Now, if these raters are trained by the same people that are being trained by—of the raters out in the field, then it only stands to reason that you have got a bigger issue here than you would like. So the first thing is, that you need to make sure that the proper level of development is occurring at the regional office because this will stave off the need for the appeals. And until you can accomplish that, I think we are just going to be chasing our tails, is really what happens.

The other thing is to get rid of this work credit system. Because, going back to high school economics, I remember the teacher said, "people respond to incentives predictably." Well, if you have created a work credit system where you are focusing on quantity versus quality then it is only natural that you are going to focus on pumping out as many adjudications as possible and not necessarily doing it in the most accurate manner.

Mr. ABRAHAM. Thank you.

Mr. Manar.

Mr. MANAR. As I mentioned in my testimony, Secretary Shinseki, with the best of intentions, established goals which, at least initially and in informal conversations, he acknowledged were goals that were probably not achievable but certainly would help focus the Veterans Benefits Administration to begin to work more and more disability claims.

However, over the years, those goals became set in concrete and VBA only talks about its backlog, its workload in terms of disability claims, not the appeals, not the dependency claims that 4 years ago sat at 40,000 pending at any one time. Today, there are over 200,000 pending at any one time, simply because they have changed a work process to allow them to process disability claims more quickly. Everything they have done has been worshipping at the feet of this God of these twin goals. As I said, declare victory. Let's move on from that. Let's work on all the work.

Resources, I agree. Both the BVA and VBA need to be appropriately resourced for the work that they have got today. I understand that it costs money, but at the same time, Congress can deal

with reduced workloads and deal with the staffing issues in the outyears. The problem is now, and you can begin to solve it by throwing—I hate to say that, but throwing more people at the problem.

The other thing is the quality of decisions. Many veterans appeal because they don't understand what was decided. They are not told that they are missing one piece of evidence that could make the difference between getting the benefit they seek and not, and as a consequence, they appeal because they are looking for more information, or perhaps somebody who is a little bit friendlier who can grant where it has been previously denied.

Now, many of these appellants learn through the long, arduous appeals process what was missing. But if they had that information at the beginning, then fewer of them would appeal. They would simply go out and get that piece of evidence they need. So those are the three things that I think are important.

Thank you.

Mr. ABRAHAM. Thank you.

Mr. Vale.

Mr. VALE. Mr. Chairman, the VA never seems to have enough time to do the job right the first time, but has plenty of time to do the job wrong over and over again. With inadequate resources, VA is having to rob Peter to pay Paul. Veterans' benefits are a cost to war, and VA needs more resources because of the mismatch between supply and demand. The VA needs more staff to accomplish its mission. And also, the work credit system needs to be fixed. We always hear about raters being fired for not meeting their quotas, but we never heard of a rater being fired for poor quality. And so you have an agency that is underfunded with the work credit system that incentivizes quantity over quality and that needs to be stopped.

And lastly, something else that would be, as far as the appeals, it is best to prevent an appeal. It is best to resolve at the lowest level possible. And as a service officer, I have prevented a lot of appeals at the regional office by being able to go directly to the rater, correct the problem without even having to go into the appeals process. And I am concerned that is going to be taken away from us with a national work queue, which is in my statement.

Thank you.

Mr. ABRAHAM. All right. Thank you, all. You guys are down in the trenches and you understand or know where the problems lie, so that is why I asked the question. Thank you very much.

Ms. Titus.

Ms. TITUS. Thank you. As I listen to you, I have heard Ms. Boyd Rauber say we need a pilot program for expedited appeals; Mr. Varela talked about the need to develop the full FDA; all of you say we need more staff and resources, hopefully those 300 people will help a little bit; and all of you say we need to reward staff for quality and not just quantity.

I think I agree with all of that. I think those are good recommendations, and I want to work with you on them because I think they fit right in with the proposal I made at the very beginning that we need a serious commission to come with us, with

these things spelled out, showing how we can implement them so this committee can then take action and not just keep talking.

And so I look forward to working with you to see if we can't meld all these things and come with a hard set of specific recommendations so we can move forward. And I appreciate it.

Thank you, Mr. Chairman.

Mr. ABRAHAM. I am going to go back to a second round of questions, just you and I, it looks like.

This goes back to each member of the panel here. Tell me whether or not, explain to the committee whether you believe that a veteran who receives an initial decision by the VA is provided with adequate information to fully understand the decision made by the VA. And therefore may knowledgeably decide whether or not to file an appeal. And I think some of you actually answered this but I want to hit it one more time. Just briefly. Time is short. But give me a good answer, a fair, an honest answer.

Mr. MANAR. I have been fortunate, with some of my friends on our legislative staff, to meet with committee staff members over the last couple of months, and one of the things that was mentioned at one of these earlier meetings was that your staff had just come back from a regional office when they looked at letters to veterans about the decisions in their cases and they were incomprehensible.

Now, there are some letters that VA pumps out through this simplified notification letter process that are numbers-driven and can be understood; but where any kind of analysis of the evidence is required, any kind of discussion, it is largely absent. And it has consequences. Claimants just don't know the reason why the decision was being made in their case. The reason could have been perfectly valid but they are not being told what it is.

Mr. Abraham. Mr. Hearn.

Mr. HEARN. Mr. Manar, he hit the nail on the head. The problem with the VA letters is it doesn't explain exactly what is going on. Veterans do not realize the three criteria to meet service connection. They don't realize you need an incident in service, current diagnosis, and a nexus statement linking the current condition to the incident. And so if you deny it, and nobody is talking about why exactly it is being denied or the letter doesn't clearly describe that.

And then to enter this fully-developed appeals process, you are kind of going down a dangerous path, that until VA provides a proper letter of notification, we are not doing any veterans any favors because they don't understand exactly what they are appealing. It would be the equivalent if you were in second grade and you were taking a test on fractions, never taught about fractions and then you fail the test and the next day you take fractions again, nobody taught you about fractions and you fail it again. Well, there is no wonder why you fail them, because you were never being taught.

So you need to understand exactly what is going on here, and until that issue is addressed then I am afraid we are just going to keep going back and going through this cycle all over again.

Mr. Abraham. Ms. Rauber.

Ms. RAUBER. And I think that is something that all of us have discussed in the various working group meetings that they have

had, that there definitely is a need for more case-specific notice for a veteran, because as the others have said, you know, a veteran not only doesn't understand what the basis might be for an appeal, but he or she also wouldn't understand if maybe there is not a basis for an appeal. And I think for them to truly understand what the right road is to go down, they need to have case-specific notice.

Mr. Abraham. Mr. Varela.

Mr. VARELA. Dr. Abraham, DAV and our independent budget partners, since the inception of the simplified notification letters, which is really what we are talking about today, have taken issue with those letters. And we believe that they need to be improved. There is certainly room for improvement there. What we would really like to see is VBA sit down with us in a working group and listen to what we have to say, take what we have to say to heart and listen to our recommendations to hopefully, without legislation, improve these letters.

To legislate better letter writing is going to be very difficult, and then to legislate it in a way that is understandable for the one-point-something million claimants that are filing claims that is going to be even more difficult, that everybody has that same level of understanding. We agree, they need to be improved, and we really want to work with VBA to see those improvements come to fruition.

Mr. Abraham. Mr. Vale.

Mr. VALE. Mr. Chairman, the simplified notification letter does not provide an adequate reasoning basis for a veteran to make a decision. And when they presented this to us, we told them this is a bad idea. The abbreviation for simplified notification level is SNL, similar to Saturday Night Live, but we told them it is still not ready for prime time. It doesn't provide an adequate reasoning basis. And on top of this, now they have introduced this new NOD form and they are calling veterans, if you want help with your appeal, check the box here and some VA will call you. And also they ask the veteran to ask what they think the percentage disability should be and we are opposed to that. But again, the simplified notification letters are inadequate, and they need to be improved.

Mr. ABRAHAM. Okay. Thank you.

Ms. Titus, do you have anything else?

Ms. TITUS. I would just say as you work to improve the letters sent to veterans, be sure that there is an element of standardization because we have seen one region vary from another quite often. We want to be sure that everybody improves the letter writing, not just one particular office or a couple here, and a couple there.

Mr. ABRAHAM. Well, we certainly thank you for helping our veterans. Continue to do so, please. You are excused.

We will pause just for a minute while we seat this third panel.

Welcome, gentlemen. So we have Mr. Barton Stichman of the National Veterans Legal Service Program; and Mr. Kenneth Carpenter of the National Organization of Veterans' Advocates.

Mr. Stichman, you are first recognized for 5 minutes, sir.

STATEMENT OF BARTON F. STICHMAN

Mr. STICHMAN. Thank you, Mr. Chairman, ranking member, and other members of this committee for the opportunity for the National Veterans Legal Services Program to address the appellate claims adjudication process. VA can do much to eliminate the disfunction that currently exists in the appellate claims adjudication system, but Congress can and should play a role in eliminating the disfunction that currently exists. NVLSP urges Congress to adopt five legislative solutions, which I think meet the answer to the questions that the chairman asked the last panel.

First, authorize the BVA to develop evidence itself without having to remand to the AMC or regional office. 15 years ago, then-Secretary of Veterans' Affairs, Anthony Principi, decided a partial solution to the hamster wheel phenomenon was to amend VA regulations to allow the BVA to develop additional evidence itself without remanding to the RO in a case in which the Board determined that a final decision could not be issued because additional development was necessary.

Forcing the BVA to remand to the AMC or the local ROs lengthens the adjudicatory process because the BVA does not have direct authority over the AMC and RO, meaning the BVA cannot control whether the AMC or RO provides expeditious treatment or properly complies with the remand instructions. Allowing BVA development without a remand to the AMC or RO further streamlines the appellate process by eliminating the need for the RO or AMC to review the record and prepare a written supplemental statement of the case before the case is returned to the BVA for another decision.

Second, provide the veterans organizations with the right to petition the VA General Counsel for a binding precedent opinion on the proper interpretation of a statute or regulation. This would address the lack of clear rules and precedents that burden the system now. By providing stakeholders, the veteran service organization, with the right to petition the VAGC to adopt a particular interpretation of the statutes or regulations that are supported by the petitioning VSO, the GC will be required to issue an opinion binding on the ROs and the BVA. Currently, the VA General Counsel has the authority to issue these binding precedent opinions on its own, but this authority is seldom utilized.

Three, authorize the Court of Appeals for Veterans Claims to certify a case as a class action on behalf of similarly-situated VA claimants, require the VA to put a moratorium on the claims of all similarly-situated claimants while the case in court is pending; and once the court finally decides the case, require the VA to apply the decision to all pending claims that were subject to the moratorium. This streamlines the adjudicatory process for similarly-situated cases.

Four, prohibit the regional offices and the BVA in a case in which there is positive evidence supporting the award of benefits from developing negative evidence against the claim unless the RO or BVA first explains in writing why the existing evidence is not sufficient to award benefits.

One reason for the existence of the hamster wheel phenomenon is that in a case in which the veteran submits adequate positive

evidence in support of a claim, the BVA, or even the RO, sometimes does not simply award the benefits sought. Instead, the agency extends the life of the claim by remanding to obtain yet another medical opinion from a VHA physician. Veterans advocates call this longstanding VA practice developing to deny. In addition to fostering the hamster wheel phenomenon, the practice is inconsistent with the pro-claimant adjudicatory process and the statutory benefit-of-the-doubt rule.

Five, require the VBA to change its work credit system for VA adjudicators so that raters do not get work credit for denying a claim without first obtaining the evidence needed to comply with the VA duty to assist.

I see my time is up, and I will be happy to answer any questions you may have.

[THE PREPARED STATEMENT OF MR. STICHMAN APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Stichman. Mr. Carpenter, you have 5 minutes there.

STATEMENT OF KENNETH M. CARPENTER

Mr. CARPENTER. Thank you, Mr. Chairman. The National Organization of Veterans Advocates wants to thank this committee for offering us this opportunity to offer testimony on these very important issues. I have been assisting veterans and their families with VA appeals for more than 30 years. I began doing appeals prior to judicial review. And prior to judicial review, although the appeal process was lengthy, it is, in retrospect, reasonable by comparison to what has occurred since judicial review.

It is easy to blame judicial review, but judicial review is not responsible for the backlog in the largely-accumulated delays in processing appeals. NOVA has three specific recommendations: The first recommendation would require a major statutory change; the second and third recommendations, we do not believe would require a major statutory change, but we do believe it would be significant.

First, NOVA recommends the amending of 7105, which is the statutory provision that concerns the appeal process. We recommend the elimination of both the statement of case and the substantive appeal. These requirements are simply no longer needed. They had merit and reason in the prior-to-judicial-review environment. The elimination of these two currently required processes would cut by significant time period the delays inherent in this process. The requirement for a statement of case and a substantive appeal, in fact, now contribute to the delays, as is verified by the statistics.

Second, if the committee and Congress are not willing to amend 7105 with such a major change, 7105 at least needs to be amended to explicitly require the certification of an appeal and the transfer of that appeal to the Board within 60 days. The chairman mentioned in earlier questioning the observation that the VA has very few, if any, time limits imposed upon them by Congress. This is an implementation, this is a recommendation that will impose a specific timeframe.

The current delays in getting appeals physically from the regional offices to the Board is taking too long because the regional office controls the certification of the appeal. Congress needs to tell the regional offices by statute, in no uncertain terms, that within 60 days of the receipt of the substantive appeal, that the appeal will be certified and it will be transferred to the Board.

Now, one of the potential consequences of this is that currently of the 70,000 appeals that the Board has, only half of them are physically before the Board, because the other half have not been transferred to the Board. This is going to put the burden of the appeal process where it belongs, with the appeal. The agency, by not certifying appeals, by not physically moving those claims to the Board, is contributing to this backlog, again, as the statistics clearly demonstrate.

Third and finally, there are two statutory provisions that deal with remands and use ambiguous and unclear language for the handling of a remand from both court and the Board. And the statute uses the term "expeditiously handled." The fact is, unless this Congress by statute tells the agency what the expectation is, expeditious treatment is going to remain ambiguous. We recommend a 6-month action report if the remand has not been resolved within that time period. And after that date that written explanations every 6 months be provided for why there has been no resolution.

The removal of the ambiguity and the imposition of specific time frames, we believe, will clearly assist the problems that exist with remands because there is no clarity of Congress' expectation as to what the timeframe is to get a remand resolved. And if you don't tell them, then you have seen what is going to happen. They are simply going to be dealt with as the VA chooses to deal with them, which is not acceptable.

[THE PREPARED STATEMENT OF MR. CARPENTER APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Carpenter.

Ms. TITUS. Mr. Chairman, I am afraid I have to leave, but I would ask unanimous consent to allow you to continue the questioning, and I will get the information on my return.

Mr. ABRAHAM. Thank you. Hearing no objection, so ordered. Thank you so much for being here and for your very insightful questioning.

Ms. TITUS. Thank you, Mr. Chairman.

Mr. ABRAHAM. We appreciate you very much.

Mr. Stichman, in your written testimony, you noted that in the most recent version of the annual report of the chairman of the BVA, the average days pending between the fine of a notice of disagreement, which begins the appeals process, I understand, and an initial decision of the BVA was 3 years and 5 months. However, you state that the time it takes for a final decision to be made on a claim is often much, much longer. Explain the difference there, please, sir.

Mr. STICHMAN. The 3 years and 5 months is the average according to the fiscal year 2013 report by the BVA chairman from the filing of the NOD to the Board decision. But as we have heard today, the Board decision often does not finally decide the claim.

45 percent of those appeals result in a remand, so the claim is going to continue on from there. It takes another year at the AMC, more years if it is remanded to the regional office.

And then the AMC or regional office has to review the evidence obtained and prepare a new decision and then 75 percent of them, which aren't granted, are returned to the Board, then the Board has to re-decide the case. The board may remand again, we have heard, because the regional office or the AMC didn't fully comply with the instructions of the Board. That is why we recommend that the BVA be in charge of development as Secretary Principi envisioned 15 years ago, so the BVA can ensure right away that the remand instructions are followed.

Mr. ABRAHAM. Thank you.

Mr. Carpenter, this question will be for you, and thank you for your testimony. You have argued that the appeals system is struggling due to the high volume of cases remanded by the Board to the AMC and RO, which, as we just said, has been consistently around 40 percent for decades now. As you note, the Board is essentially required to remand the appeal if the case is not fully and sympathetically developed as required by Congress intent and enacted in the judicial review in 1988.

I do find it troubling that the VA in 40 percent of the cases does not meet Congress' intent regarding the treatment of veterans and their benefits. Could you discuss this a little further, as far as the arguments concerned?

Mr. CARPENTER. There are really two components: The first, and it was mentioned in the earlier panel by the Veterans Service Organization, primarily by Vietnam Veterans of America, that the claim is simply not fully and sympathetically developed to its optimum before the VA makes a decision on the merits.

Mr. ABRAHAM. So does that go back to the initial VA claim at the regional office?

Mr. CARPENTER. Absolutely, and that is where the problem begins. The decision gets made and the statistics clearly demonstrate that the claim was not fully developed because it has to be sent back for another exam or for the obtaining of other records for the obtaining of additional evidence from other governmental entities and all of that should have been done before the decision was made in the first place. That is the first part of it.

The second part of what we have recommended is that, frankly, you have to put some teeth into the remand statute. Expeditious treatment is, frankly, nonspecific. No one at the VA has ever defined what that means. Therefore, they do it when they do it. Congress needs to clarify that they mean expeditious treatment is something within a reasonable time that you will specify. If you specify that time, then that gives a target for them to work towards and they currently do not have a target.

The clock doesn't start running on them, and veterans and their representatives are simply helpless because there isn't a remedy available judicially except to wait for that decision, because we can't go back to court until a sufficient amount of time, which has been interpreted in the court's decisions before the veterans' court to be at least a year waiting on that development. And there shouldn't be a full year granted.

The chairman made a reference to the sanctions that were taken earlier against the Secretary, and what happened in that case was is that the VA simply lost it. If they don't have a specific tracking mechanism by a specific target date by statute, then that is what is going to happen in this clearly overloaded system is that cases are going to get lost.

Mr. ABRAHAM. Thank you, gentlemen. That is going to be the end of questioning. You are excused. We certainly appreciate your presence here.

So the testimony today heard, it raises many additional questions, and I look forward to addressing these in future meetings, certainly addressing it with the Department itself. My colleagues on the committee, we will get together and talk it out very frankly, and the stakeholders who took the time to present their concern today and to those who assist the veterans on the veterans day-to-day, a very heartfelt thanks from me and, I assure you, the rest of the committee members.

So, again, thanks everybody for being here. As initially noted, the complete written statement of today's witnesses will be entered into the hearing record. I ask unanimous consent that all members have 5 legislative days to revise and extend their remarks and to include extraneous material. Hearing no objection, so ordered. We are adjourned.

[Whereupon, at 2:08 p.m., the subcommittee was adjourned.]

APPENDIX

1

**OPENING STATEMENT
OF
SUBCOMMITTEE RANKING MEMBER DINA TITUS**

**House Committee on Veterans' Affairs
Disability Assistance & Memorial Affairs Subcommittee Hearing on
"Veterans' Dilemma: Navigating the
Appeals System for Veterans Claims"**

**January 22, 2015, 10:30 AM
340 Cannon House Office Building**

Thank you, Mr. Chairman. I want to congratulate you on your recent election to serve Louisiana's Fifth Congressional District and to head this Subcommittee. I was fortunate to have a very productive partnership with Chairman Runyan, and I hope we can carry on this committee's long tradition of working in a bipartisan way on behalf of our nation's heroes.

I am excited to once again be the Ranking Member of this subcommittee and working to ensure that all veterans have access to the benefits they have earned in a timely fashion.

Today's hearing on appeals is a recurring topic for this subcommittee. Since joining this subcommittee two years ago, I have been very concerned about a looming backlog of appeals at the VA. Almost two years ago, in June of 2013, our Subcommittee met and I raised my concerns that we were trading a claims backlog for an appeals backlog.

My statement then is equally applicable today. I warned of an impending appeals tsunami and the need for a plan to address their anticipated growth. While VA and BVA have increased their output, all metrics continue to show that the problem is growing, and veterans in Nevada and across the country are waiting far too long for a VA decision. Nationally, the average length of time to receive a decision on an appeal that went to BVA in FY 2013 was 1,255 days—nearly three and a half years. That is far too long.

In Nevada, there are close to 1,400 appeals waiting to be adjudicated. When a veteran asks my office for help appealing their claim, it is difficult to explain that the process could take more than three years.

I am very concerned that we have not been provided with a detailed plan from the VA as to how they will address this pressing issue. We are once again receiving piecemeal recommendations instead of a comprehensive plan to attack this looming backlog head on.

We need to take action now so that we're not having this same hearing again in two years. Here in Congress, we need to work collaboratively with the VA and the VSO's to create a system that allows appeals to be completed in a timely fashion while ensuring that veterans' claims are fully evaluated.

In the 113th Congress, I highlighted the need to form a task force that included key stakeholders and encouraged an all-hands-on-deck approach to create a solution to this program. I appreciate Chairman Miller's support for this idea which ultimately passed the House.

Today, I will introduce this legislation, and would encourage other Members of our subcommittee to join me as cosponsors.

I am disappointed that we have lost two years during which a comprehensive plan could have been completed and steps taken to meet this challenge.

I understand that the VA has conducted a study to better understand the appeals process from the veterans' standpoint and I ask that these findings be shared with me, and the Chairman.

To me the situation is clear. Too many veterans have waited too long to have their appeals evaluated the system must be improved, and fast. We need a better plan and a commission will help us get there. We need ideas from experts and for solutions to be implemented quickly.

One idea our subcommittee should explore has been proposed by Mr. O'Rourke and Mr. Cook to create a "fully developed appeal" similar to the fully developed claims initiative that has been so popular for benefits claims.

Mr. Chairman, I look forward to working with you on this issue and others that will come before our subcommittee. I yield back.

**STATEMENT OF
MS. LAURA H. ESKENAZI
EXECUTIVE IN CHARGE
VICE CHAIRMAN
BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS (VA)
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
January 22, 2015**

Good morning, Mr. Chairman, Ranking Member, and Members of the Subcommittee, thank you for providing me the opportunity to discuss VA's commitment to providing all Veterans, their families, and Survivors with timely and accurate decisions on their appeals. I am accompanied today by Beth McCoy, Deputy Under Secretary for Field Operations in the Veterans Benefits Administration (VBA).

The VA appeals process is unique from other standard appeals processes across Federal and judicial systems. Governing law, codified in statute and developed over nearly a century, establishes multiple steps of de novo review with a continuous open record, such that a Veteran, Survivor, or other Appellant can submit new evidence or make new arguments at any time. As a result, an appeal does not simply progress from start to end but may involve many cycles of additional development and

adjudication as the evidentiary record and the theories of entitlement evolve. VA recognizes that under the framework established by current law, which has been built up over many decades, Veterans are waiting too long for final resolution of appeals.

The VA appeals process divides responsibility between VBA and the Board of Veterans' Appeals (Board). The current appeals process provides Appellants with multiple reviews in VBA and one or more at the Board depending upon the submission of new medical evidence or whether the Board determines that it is necessary to remand the matter to VBA. In addition to the VA claims appeals process, claimants have had the right to judicial review of VA's decisions on their claims since the 1988 enactment of the Veterans' Judicial Review Act (VJRA), Public Law 100-687, which established the United States Court of Appeals for Veterans Claims (CAVC). Since that time, if an Appellant is dissatisfied with a final Board decision on a claim, the Appellant may appeal to the CAVC within 120 days of the date of the Board's decision. Further, limited review is available in the United States Court of Appeals for the Federal Circuit and United States Supreme Court. The 1988 legislation placed judicial review on top of the multiple layers of the VA appeals process that had evolved since World War I.

Judicial review of VA's decisions has had both positive and negative effects for VA and claimants. Judicial review has been beneficial for Veterans by providing them with their "day in court." It has also created a forum for debating the interpretation of Veterans' benefits law and the validity of VA's regulations, resulting in a significant body of case law on Veterans' benefits issues. Judicial review has also significantly complicated

VA's administration of its benefits programs, resulting in significant delays in adjudicating the initial claim and the appeal processes. The processes that were developed in the decades after World War I were not designed to be compatible with judicial review. As a result, the interpretation of statutes and regulations that often date to World War I or World War II has led to many unexpected results that have been difficult to integrate into the decades of procedures that have accumulated. Specifically, the applicable law as developed primarily by precedential CAVC and Federal Circuit decisions is constantly increasing in complexity. As a result of this legal complexity and the open record, it has become increasingly challenging to "complete" an appeal or to reach a final decision in an appeal. Rather, it is more common that appeals will remain in the VA appeals process for lengthy timeframes.

Appeals are initiated at the agency of original jurisdiction (AOJ), and nearly all (approximately 97 percent in Fiscal Year (FY) 2014) appeals considered by the Board arise out of claims for disability compensation that were decided by VBA. A claimant may initiate VA's administrative appeal process by filing a notice of disagreement (NOD) with VBA regarding a specific VBA decision, and the claimant has one year from the date that VA issued the decision to file an NOD. When VBA receives an NOD, it initiates a fresh review and undertakes any necessary development of additional evidence in an attempt to resolve the disagreement. If VBA's further action regarding the appealed claim does not resolve the disagreement, it must issue a statement of the case (SOC), which must include a summary of the evidence, citation to pertinent laws and regulations, a discussion regarding how VBA applied the law to the

facts of the claim, a decision on each issue in the claim, and a summary of the reasons for the decision on each issue. Claimants may then file a substantive appeal within 60 days of the date VBA issued the SOC or within one year of the date of VBA's initial decision, whichever is later. The filing of a substantive appeal completes the formal appeal, enabling certification and transfer of jurisdiction to the Board.

VBA's decisions are subject to one de novo review on appeal to the Board. Upon completion of the VBA appeals process, and when the appeal is transferred and docketed by the Board, a Board Veterans Law Judge (VLJ) will review the entire record on the claim, without any deference to a prior VBA decision. The Board will either issue a decision granting or denying the benefit or will remand the claim back to VBA for additional action. Almost two-thirds of the decisions that are remanded to VBA are a result of additional evidence or information becoming available, or a change in circumstances that arose after the claim was certified to the Board. Claimants may submit additional evidence at any time during the process, regardless of whether the appeal is at VBA or the Board. This submission of additional evidence and other inherent delays in the multi-step, open-record appeal process often cause the Board to remand the claim to VBA for a new examination or a search for previously unidentified records, which causes further "churning" of the claim. Furthermore, if the Board identifies an error in evidence gathering, the case must be returned to VBA to repeat the development and adjudication process before being returned to the Board.

Looking back over FY 2010 through 2014, VBA completed more than one million claims annually, with 1.3 million claims completed in FY 2014 alone, which reflects a record level of production. In FY 2014, VBA received 137,766 NODs, which equates to approximately 10 percent of the claims decided by VBA that year, and 47,048 appeals continued through VBA's portion of the administrative appeal process and were certified, transferred, and docketed to the Board for adjudication. In FY 2014, the Board issued decisions in 55,532 appeals for waiting Veterans and their families, which represent an increase of over 13,622 decisions issued by the Board during FY 2013, at which time the Board issued 41,910 decisions. In FY 2014, the Board's 64 VLJs personally interacted with nearly 11,000 Veterans by holding hearings, either held face-to-face at a VA facility, in-person at the Board's offices, or through video teleconference (VTC) between the Board and a VA facility. Most VLJs travel to at least two Regional Offices (ROs) each year to conduct one week of hearings at each site (known as "Travel Board" hearings), in addition to holding a large number of VTC hearings and VA Central Office hearings.

In July 2003, VBA created its Appeals Management Center (AMC) for the purpose of consolidating remands from the Board at a single office for more efficient and consistent processing. The AMC has authority to develop additional evidence regarding remanded claims and issue new decisions. If the AMC is unable to issue a full grant of benefits, it will issue a supplemental SOC and recertify the appeal to the Board for continuation of the administrative appeal process. Currently, the AMC processes approximately 90 percent of the Board's remands to VBA. VBA's ROs

process the remaining remands, including remands in claims where the appellant has asked for a hearing or a private attorney represents the claimant.

The current VA appeal process provides appellants with multiple reviews in VBA and one or more at the Board depending upon the submission of new evidence or whether the Board determines that it is necessary to remand the matter to VBA. Although VA has allocated significant resources to the appeals workload, the multi-step, open-record appeal process set out in current law precludes the efficient delivery of benefits to all Veterans. Further, the longer an appeal takes, the more likely it is that the claimed disability will change, resulting in the need for additional medical and other evidence and further processing delays. As a result, the length of the process is driven by how many cycles and readjudications are triggered.

Each year since 1996, the volume of NODs received by VBA equated to 9-15 percent of the total claims VBA completed in those years, with the annual average holding steady between 11-12 percent, irrespective of quality rates or other factors, such as economics, over that time frame. During the same period, the Board received new appeals averaging approximately 4-5 percent of all claims completed by VBA in a year. Data indicates that 72 percent of all appeals are from Veterans who are already receiving VA disability compensation, with approximately 56 percent of appellants having a disability rating of 50 percent or higher.

VA has a large inventory of pending appeals (approximately 383,000), in part because VBA received and completed more claims, with over 1.3 million claims decided in FY 2014. Although the rate of appeal has held steady over many years, and in fact was as low as 10 percent in FY 2013 and 2014, the numerical volume of appeals has grown proportionate to VA's increase in rating decision production. For example, in FY 2013, VBA completed 1.17 million claims, and appeals were initiated in 10 percent, or 118,053, of those claims decisions. In FY 2014, VBA completed 1.3 million claims, and appeals were initiated in 10 percent, or 138,000 of those claims decisions. So even with a steady appeal rate of 10 percent, as VBA completes more claims, the volume of appeals proportionately increases.

To address the appeals workload, VBA allocates significant resources to appeals in its ROs (950 employees) and at the AMC (191 employees). The Board currently has 640 employees processing appeals, up from 532 employees in FY 2013, including a substantial growth in the Board's attorney staff. With this 20-percent increase in staffing, the Board was able to increase its output by 32.5 percent, going from 41,910 decisions in FY 2013 to 55,532 decisions in FY 2014.

Meanwhile, VBA's quality assurance statistics, using a process validated by the Institute for Defense Analyses, reveal that accuracy at the claim level and medical-issue level has improved and remains high at the initial decision point (91 percent and 96 percent, respectively). The Board's decision quality rate for FY 2014 was 94.7 percent, which exceeded the Board's goal of 92 percent. The Board developed and refined its methodology for measuring its quality in partnership with the General

Accounting Office in 2002 and the renamed Government Accountability Office in 2005. Also, as noted above, VA's historical administrative appeal rate has remained constant, with approximately 11-12 percent of all claimants filing an NOD and 4-5 percent completing an appeal to the Board. These statistics indicate that Veterans tend to exercise their rights of appeal at the prevailing rate regardless of the nature of VBA's initial decision. The data continues to reflect that there is no correlation between the accuracy of initial claims decisions and rates of appeal.

Unlike a traditional appellate body, the Board does not reverse or affirm VBA decisions. Rather, the Board undertakes a fresh look at all of the evidence of record -- including evidence that has been added since initial adjudication by VBA. As a result, the evidentiary record before the Board is often very different than that which was before the initial VBA decision maker. It is important to note that remands often are due to the submission of evidence that was not available at the time of VBA's initial decision or evidence that has become out-of-date in the appeal process. We believe that VA's growing inventory of pending appeals is a product of the multi-step, open-record process established under current law.

VA has made significant progress on its goal to eliminate its disability claims backlog and improve the quality of its initial decisions on claims without seeking significant statutory changes. VBA's Transformation Plan focused on improving personnel performance, redesigning business processes, and replacing paperbound and manual systems with those that are digital and automated. VA is working to deploy

similar people, process, and technology innovations in the appeal process, but those innovations will not provide a real solution without stakeholder support. In this regard, the appeals problem is unique. Absent a comprehensive solution that considers the unique statutory procedures that govern VA's appellate system, VA will continue to use its resources as efficiently as possible to decide claims and process appeals.

As discussed above, current law requires that VA maintain a non-linear, multi-step, open-record, administrative appeal process, with jurisdiction over various steps in the process split between VBA and the Board. There is no bright line distinguishing the end of VBA's claim adjudication process from the beginning of the appeal process. Unlike a typical appeal process in which the appellate body reviews the same record as the initial decision maker, VA's administrative appeal process has an open record. Appellants, at no cost and without limitation, may submit additional evidence at any time during the pending appeal, regardless of whether the appeal is at VBA or the Board, and VBA must generally re-evaluate the claim based upon the new evidence. This feature prolongs the amount of time that Veterans must wait for their appeal to be decided and commits extensive resources to each appeal. As a result, Veterans who experience exceptional customer service in dealing with private and other public-sector organizations and receive their initial decisions from VBA in 125 days under the Transformation Plan will nonetheless endure an inefficient VA appeal process. The delays in a benefits system that delivers an initial decision within 125 days and an appellate decision on average in more than 1,000 days may outweigh any benefit to a multi-step, open-record system. Although some individual claimants may be

able to take advantage of the current legal framework, it comes at the cost of timely resolution of appeals for Veterans as a whole.

VA recognizes that under the framework established by current law, Veterans are waiting too long for final resolution of appeals. VA cannot fully transform the appeals process without stakeholder support and legislative reform. VA will continue to work with the Congress and other stakeholders, to include continuing a strong partnership with Veterans Service Organizations, to explore long-term solutions that provide Veterans the timely appeals process that they deserve.

Mr. Chairman, this concludes my testimony. Thank you for the opportunity to appear before you today. I would be pleased to address any questions you or other Members of the Subcommittee may have.

STATEMENT OF
GERALD T. MANAR, DEPUTY DIRECTOR
NATIONAL VETERANS SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY AND MEMORIAL AFFAIRS

WITH RESPECT TO

Veterans' Dilemma: Navigating the Appeals System for Veterans Claims

WASHINGTON, DC

JANUARY 22, 2015

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, I would like to thank you for the opportunity to testify today regarding the appeals process for veterans claims.

The Process

The Board of Veterans Appeals (BVA) has been in place since 1933 when the Veterans Administration (now the Department of Veterans Affairs) was created. While Congress has amended various processes within the BVA, the overall schema for appeals within VA has remained largely unchanged.¹

The claim and appeals process is designed to be non-adversarial. The government is required to assist claimants in the development of their claim, requesting evidence from both government and non-government sources and providing physical examinations in certain cases. The agency is restricted from actively pursuing evidence in order to deny a claim. A hearing may be requested at any time throughout the claim and appeals process. Claimants may be represented by accredited veterans' service organization personnel, claims agents and attorneys to help and guide them through this process. They may also represent themselves. Representatives have the right to review VA rating decisions prior to promulgation and to informally contest decisions thought to be in error.

¹ In 1988 Congress created the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims) in 1988. For the first time decisions of the Board of Veterans Appeals could be reviewed by a federal court on other than constitutional grounds. The impact of the CAVC on the VA, while significant, is not a subject of this paper.

- Notice of decision

“The entire thrust of the VA’s non-adversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step of the process.” *Thurber v. Brown*, 5 Vet. App. 119 (1993).

Claimants are provided a notice of the decision as well as a statement outlining their right to appeal that decision.²³ Claimants have one year from the date of the notice letter in which to submit a Notice of Disagreement to VA. Historically, VA accepted any written statement evidencing intent to file an appeal (e.g., “I disagree with your decision of...”). More recently, VA encourages claimants to submit their Notice of Disagreement (NOD) on a specific form. It is at this point that claimants have the ability to request a review by a Decision Review Officer.

- Two step appeals process

Note: Nearly all appeals involve decisions made in compensation and pension claims. The percent of appeals for other benefit programs (health care, loan guaranty, education and vocational rehabilitation) is quite small. As a consequence, this testimony focuses on appeals in compensation and pension claims.

NOD - Once a NOD is received, VA places it under electronic control. VA personnel are required to review the decision and correct any errors noted. If the decision is not changed the claimant is provided a Statement of the Case (SOC) which restates the decision, may (but rarely does) provide additional reasons for the decision, as well as a statement of the applicable laws and regulations used in evaluating the evidence and deciding the case. The purpose of the SOC is to provide claimants with sufficient information to understand the decision and the laws and regulations used in making that decision so that they have the information needed to decide whether to continue their appeal.

Evidence and Decision Review Officer Review

The claimant can submit additional evidence throughout the appeals process.

A claimant can ask for a review by the Decisions Review Officer (DRO) with submission of a NOD or shortly thereafter. A Decision Review Officer is a highly skilled individual who has the authority to hold a formal hearing with the claimant or an informal hearing with the claimant’s representative, conduct additional development and accept and review new evidence. The DRO makes a “de novo” review of the evidence of record and can grant part or all of the

² Notice requirements under 38 USC 5104 are discussed below.

³ The quality of notice letters is discussed below.

benefits sought on appeal by exercising “difference of opinion” authority or based on the evaluation of new evidence. Difference of opinion authority allows the DRO to change an unfavorable decision based on the same evidence already of record. The DRO position was created to resolve some appeals short of a decision by the BVA.⁴

Substantive Appeal - The claimant is provided a Substantive Appeal form (VA Form 9) with the SOC. The claimant then has 60 days, or any time remaining in the one year appeal period, whichever is longer, in which to submit the Form 9.

Once a Substantive Appeal (Form 9) is received the BVA is notified and the appeal is docketed with the Board. From that point forward, the appeal will be heard by the BVA unless the claimant receives a full grant of the benefits sought or the appeal is withdrawn.

- Board of Veterans Appeals

Any appeal docketed with the BVA will eventually be transferred to it unless the claimant is satisfied by a regional office decision or withdraws the appeal.

Claimants (now appellants) have the right to a hearing before a Veteran Law Judge (VLJ) before the case is decided. The BVA provides three different methods for a hearing:

- In person hearing at the BVA in Washington
- In person hearing at the regional office before a Travel section of the BVA
- Video conference hearing with a VLJ in Washington and the appellant at the regional office or, rarely, some other location.⁵

Evidence submitted after an appeal has been certified to the Board will be considered by the VLJ in the first instance unless the appellant requests the evidence be considered by the regional office.

The Board may grant in whole, grant in part, deny or remand any issue on appeal. Remands are referred back to the Veterans Benefits Administration for additional development and consideration. After development on remand, the appeal is returned to the BVA unless the full benefit can be granted.

⁴ In recent years VBA executives suggest that DRO's do not exercise their difference of opinion authority very often and have suggested eliminating this position.

⁵ Data provided by BVA shows that video conference hearings produce results statistically consistent with in-person hearings.

BVA Decisions – Decisions by the Board are final and cannot be reversed except for a finding of clear and unmistakable error. However, BVA decisions can be appealed to the Court of Appeals for Veterans Claims.

Data

In the most recent data available from the BVA shows the following:⁶

NOD's received in FY 2013	118,053
Form 9's received but not certified to the BVA	41,612
Cases received by the BVA	64,941
Decisions in 2013	41,910
Days pending NOD to SOC	295
SOC to receipt of Form 9	40
Form 9 to Certification to BVA	725
Received by BVA to decision	235
Average length of a remand	348
Grants by the BVA	26.2%
Remands by BVA	45.6%

We will discuss the data shown above in a moment. However, it is an incomplete picture and seriously understates the problem as it exists for VA.

Appeals, including NOD's, are controlled in the Veterans Appeal Control and Locator System (VACOLS). This system shows all appeals controlled by VA. VA reports the number of appeals pending in VACOLS for its various regional offices. The data shown in the next table paints a better picture of the breadth of the appeal problem at VA.

VACOLS data is summarized below:

Date	Claims pending in regional offices and the AMC
September 1, 2012 (beginning FY 2013)	255,861
August 31, 2013 (end FY 2013)	255,258
August 31, 2014 (end FY 2014)	280,029
January 3, 2015	288,290
• NOD's pending in VACOLS	194,112
• NOD's Ave days pending	407

This data shows that a quarter *million* appeals were pending in FY 2013. In contrast, total appeals controlled in VACOLS on January 2, 2012, was 130,001.

⁶ Board of Veterans Appeals Annual Report for FY 2013.
http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf

Discussion and analysis

VA reports that 10 to 11 percent of all VBA decisions are appealed each year.⁷ VA also says that it made over 1.3 million decisions in compensation and pension disability claims in FY 2014, which is over 150,000 more decisions than ever before.⁸ At a 10 percent appeal rate, VBA would expect to receive approximately 130,000 NOD's based on those decisions, roughly 13,000 more than in the previous year.

Every one of these NOD's require a SOC. However, once claimants receive the SOC, only about 50 percent, for whatever reason, submit a substantive appeal. Roughly half of all claimants do not continue their appeals.

It is therefore in the best interest of VA to process SOC's as quickly as possible. Even though some claimants have more than 60 days in which to submit a Substantive Appeal (Form 9), the average time it takes a claimant to decide to continue the appeal with the submission of the Form 9 is 40 days. The faster VBA processes SOC's the less time claimants have to submit additional evidence (which must be considered before issuing a SOC). Therefore, it is in the best interests of VBA to issue SOC's as quickly as it can. Why doesn't it do so?

It is our opinion that the appeals function in VA regional offices is still critically understaffed. The data shows that it took VBA 295 days, on average, to issue a SOC and another 725 days from receipt of the Form 9 to certification to the BVA. That means that the average appeal spent an average of 2.8 years in regional offices before the BVA received it. Nearly all of that time was spent waiting for an employee to take the next step.

It is clear that despite substantial increases in VBA staffing over the past 5 years, it is evident that this increased workforce has been focused on increasing decisions in disability claims. VBA has neglected large segments of other work in order to give the illusion that it is making progress on reducing its "workload" (self defined as disability compensation and pension claims) and its "backlog" (again, only disability compensation and pension claims). The data clearly shows that other pending work, principally but not solely, dependency claims and appeals, have skyrocketed in the last three years.⁹

Recommendation 1: Properly staff the appeals teams within regional offices

Recommendation 2: Release SOC's within 30 days of receipt of an NOD not accompanied by evidence.

⁷ <https://veterans.house.gov/witness-testimony/ms-laura-eskenazi-executive-in-charge-and-vice-chairman-board-of-veterans%E2%80%99-appeals>

⁸ <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2645>

⁹ Dependency claims increased from 90,125 on January 9, 2012 to 261,319 on January 10, 2015; this is a 190 percent increase. Over the same period, appeals in VACOLS increased from 253,672 to 288,290, a 9.7 percent increase. Monday Morning Workload Report, http://benefits.va.gov/REPORTS/detailed_claims_data.asp.

The Board of Veterans Appeals is likewise understaffed for the amount of work in the pipeline. While budget exigencies are real, it is nonetheless essential that BVA be staffed to meet not just existing workload but known work which is pending in regional offices. When VBA finally turns its attention to the nearly 300,000 appeals pending in its regional offices, BVA will be flooded with work it is not currently staffed to handle. There will come a time when both VBA and BVA will no longer have the work to support present and increased staffing; however, that point of time is in the future. It is the obligation of this Congress to address the staffing needs of VA today.

Recommendation 3: Properly staff the BVA in anticipation of the known workload in the VBA pipeline.

Recommendations 1 and 3, above, are actions Congress can and should take today to deal with the appeal workload currently at VA. Recommendation 2 is what VBA can do once it properly pluses-up staffing on appeals teams.

There are other things which can be done now to ensure that the appeals process works for both veterans and VA. It is the position of the Veterans of Foreign Wars that any initiative seeking to improve appeals processing in VBA or the BVA must be at least neutral to the rights veterans and other claimants currently enjoy. The VFW will oppose any efforts by VA or Congress to facilitate appeals processing at the expense of rights currently held by claimants. With that in mind, we believe the following actions can improve the appeals process, reduce appeals and speed up appeals processing.

Revitalize the Decision Review Officer

The Decision Review Officer (DRO) was created to ensure that claims which could be granted, in whole or in part, were granted in the regional office and not the BVA. DRO's are given the extraordinary authority, previously held only by the Director, Compensation Service, to reverse an earlier decision based on a difference of opinion. That is, looking at the same evidence used in denying a claim, a DRO has the authority, using his/her superior knowledge of the law and regulations, grant the benefit.

VBA executives state as recently as last fall that data shows that DRO's infrequently exercise difference of opinion authority; that grants almost always stem from the receipt of new evidence. As a consequence, they argue, this expanded authority is not necessary and any rating specialist can make these decisions. As a result, they argue, the position of DRO should be eliminated and the personnel used in other capacities.

Two things are at work here. First, over the past few years it has been common practice in regional offices to use appeals team personnel, including DRO's, to work non-appeals rating work. The Under Secretary for Benefits has stated that DRO's are no longer used for non-appeal work during regular hours. However, we continue to receive reports from our VFW service officers which indicate that, in at least some regional offices, DRO's are still diverted to rating non appeals work from time to time.

Further, there is no indication that any significant analysis has been done to identify those DRO's who are the high and low outliers when using difference of opinion authority. It is not just enough to remind DRO's that they have and can use this authority in appropriate cases. Those reluctant to use it must be trained and monitored to ensure they do use it. We have no doubt that the reversal of a decision by a DRO can be viewed by the original rater to be a criticism of their work. However, that should not inhibit a DRO from performing their job and granting benefits based on the evidence of record in appropriate cases. Remember, grants at the regional office level result in fewer appeals at the Board.

The DRO has the ability to ensure that appeals transferred to the BVA cannot be granted on the evidence in the file.

Recommendation 4: Evaluate the work quality of DROs

Using data, identify DRO's who are below the national average in grants of benefits using the difference of opinion authority given them. DRO's who consistently grant fewer claims on appeal should also be identified. These individuals should be given additional training. Further, their work should be reviewed to ensure they are granting every benefit allowed under the law.

New and Material Evidence

Once a claim is denied, it cannot be reopened without the submission of "new and material evidence".¹⁰ What this requirement does is create a threshold question which must be answered in the affirmative in order to reopen a claim: is the evidence submitted both new and material? If the evidence is new and material the rater moves on to consider the evidence based on the merits. However, negative decisions (the evidence is not new and material) can be appealed. A small but significant number of these appeals make their way to the BVA. Historically, BVA has sided with claimants in many of these cases. At that point, the claim goes back to the regional office where the now new and material evidence can be considered along with all the other evidence.

We believe that the revocation of the new and material requirement will eliminate this small segment of appeals. The additional burden on VBA will be minimal. Instead of deciding whether the evidence is new and material, the rater evaluates the evidence in relationship to the rest of the evidence and makes a decision on the merits. Presumably, the rating explains why the new evidence wasn't sufficient to change the decision and the claimant has the opportunity to pursue an appeal, not on a technicality (is the evidence "new and material") but, rather, on the merits.

¹⁰ (a) *General.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 CFR 3.156

Recommendation 5: Eliminate the requirement that new and material evidence be submitted in order to reopen a previously adjudicated claim.

Fully Developed Appeals; Fast Track Appeals

Over the past six months, Members of Congress, VA and VSO's have discussed implementing a new program where certain appeals could be expedited. This interesting idea, however, needs to be further developed.

The Fully Developed Appeals initiative (FDA) as it is currently envisioned, gives the claimant the choice to waive receipt of a Statement of the Case, Decision Review Officer review, a hearing before a BVA panel and other developmental and review opportunities currently extant in the VA appeals process. The claimant, at the Notice of Disagreement stage, would have a one-time opportunity to submit additional evidence and argument. In exchange for this waiver, the appeal would bypass all regional office activity and move directly to the BVA. This approach has the advantage of bypassing nearly three years of delay at the region office.

However, it must be recognized that a speedy decision by the BVA may not be advantageous to claimants. During that three year wait at a regional office claimants have an unlimited opportunity to submit additional evidence, undergo new treatment and examinations, produce fresh argument and in other ways help perfect the record prior to BVA review. Under law favorable to veterans, the record remains open and subject to amendment almost up to the point of decision by the BVA. In addition, the BVA has unrestricted authority to remand appeals to correct deficiencies in development by VA and to acquire new evidence.

The VSO stakeholders and VA representatives met numerous times. The discussions were substantive, thoughtful and constructive; they were rarely acrimonious. Together the participants refined an outline of a plan which addressed most of the concerns such an initiative raises. While consensus on the outline was reached among participants, at least two issues remain.

Docket - Under the law currently in place, BVA must consider cases in docket order. The docket order is established upon receipt of a Substantive Appeal (Form 9). While it may take VBA another two years to physically transfer the appeal to the BVA, when it arrives, if its docket date is ahead of other cases already at the BVA, those other cases must wait until the older docketed appeal is decided. This ensures that oldest appeals are always worked first. Except for a few special circumstance appeals, every appeal is worked in docket order.

Under a Fully Developed Appeal (FDA) initiative, Congress would have to authorize a change in the docket order to allow FDA appeals to be worked first. The VSO/VA workgroup concluded that a limit be set on the percent of FDA cases which could be worked first, thereby ensuring that work did not stop on older appeals. A few

stakeholders remain concerned that this remains unfair to veterans who have waited the longest.

Informed waiver - The key to making a FDA initiative work are two factors:

- The claimant must have access to all the evidence considered by VA in making its decision; and,
- The claimant must be fully informed of the reasons and bases for each decision made by VA.

Without the ability to see the evidence used in making a decision, and receipt of an explanation of the analysis, reasons and bases for the decision, a claimant does not have the tools necessary to decide what evidence was used, how it was analyzed and why VA made its decision. Without this information, a claimant cannot knowledgeably waive his/her rights.

Laws and regulations already require VBA to provide a summary of the evidence and the reasons for the decision.¹¹ However, in recent years VBA has significantly restricted the amount of information it provides in decision letters to claimants. Starting with the Simplified Notification Letter initiative by VBA in 2012, VA worked to reduce most notice letters to pattern words and phrases instead of original claims specific content. In testimony before the House Veterans Affairs Committee at the time, the VFW protested this move in strong terms.¹² While VA made cosmetic changes, the Simplified Notification Letter and its progeny remain largely in place.

As a consequence, few claimants receive the information they need to understand fully decisions made by VA. The VFW continues to believe that most current notice letters are deficient and the VA must improve them in order to provide information adequate to allow claimants to understand what evidence was considered and how it was weighed, together with the reasons and bases for the decision.

The "summary of evidence" is simply a list of documents (e.g., service treatment records; treatment records from Dr. Jones). The "reasons for decision" in the notice letters are almost always simple conclusions that lack an adequate explanation of the evidence considered, how it was weighed and reasons for the decision.

¹¹ 38 USC 5104 "(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision.

(b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include

(1) a statement of the reasons for the decision, and

(2) a summary of the evidence considered by the Secretary.

¹² <http://veterans.house.gov/hearing/VBA%20claims>

We have several ideas for legislative changes which we will be happy to discuss with Committee staff.

Conclusion

Increased staffing for regional office appeals teams, as well as additional staff for the BVA are essential to improving the movement of appeals through the appeals process. VBA must ensure that appeals team personnel work only appeals during both regular work hours and overtime. Revitalization of the DRO program must be accomplished. DRO's can have a significant impact on the appeals backlog if they are properly trained AND monitored.

Some initiatives can be useful in reducing some appeals and speeding others. However, Congress must ensure that any changes to the current appeals process do not hurt veterans and other claimants. These men and women have sacrificed for our nation. Your predecessors constructed an appeal process which is favorable to veterans. Any move to speed processing through an abrogation of the rights veterans currently enjoy is a non-starter.

Mr. Chairman, this concludes my statement. I will be happy to answer any questions you or the committee members may have.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, VFW has not received any federal grants in Fiscal Year 2014, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.

STATEMENT
OF
ZACHARY HEARN
DEPUTY DIRECTOR FOR CLAIMS
VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
BEFORE THE
DISABILITY AND MEMORIAL AFFAIRS SUBCOMMITTEE OF THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

ON

“VETERANS’ DILEMNA: NAVIGATING THE APPEALS SYSTEM FOR VETERANS’
CLAIMS”

JANUARY 22, 2015

For the last half decade there has been a tremendous amount of focus on reducing the backlog of veterans’ claims. According to the Department of Veterans Affairs (VA) the backlog consists of claims pending longer than 125 days. Unfortunately, with such intense focus on a single topic, it is easy to lose sight of the big picture. When focus becomes narrow, what is not being seen?

According to VA¹ there are 519,530 claims awaiting adjudication of which 253,522 have been waiting longer than 125 days. That’s a little under 49 percent.

Within the same report, but less publicized is the fact that 288,290² additional claims have been appealed and are awaiting adjudication.

One hundred percent of those claims have been waiting longer than 125 days.

To understand the frustrations of veterans in the appeals process, you must first understand that every single one of these claims is backlogged. With appealed claims, you can no longer think in terms of how many days you’ve been waiting. Appealed claims are measured in terms of how many *years* the veteran has been waiting.

According to VA’s figures³, the average number of days to complete a claim is 179 days; the average number of days pending for a notice of disagreement is 407; the average number of days pending for Form 9s is 630; the average number of days pending for remands at the regional office is 550, and the average days pending at Appeals Management Center (AMC) is 171. Adding the average days together, the average veteran with a claim remanded by the Board of Veterans Appeals (BVA) would wait an average of 1,937 days or about five and 1/3 years. The

¹ VA Monday Morning Workload Report – January 5, 2015

² Ibid

³ Ibid

stated goal of 125 days to adjudicate a claim is only 6 percent of the time that the average veteran has to wait to have a claim move through the appellate process.

As the nation's largest wartime veterans' service organization, The American Legion devotes substantial resources to ensuring veterans get full, equitable due process when applying for benefits derived from their medical conditions incurred in service. The American Legion accredits over 3,000 professionally trained service officers nationwide to assist veterans through the initial claims and appeals process. The American Legion's team at the BVA represents well over 9,000 veterans annually and with a high degree of success.

It's not enough simply to rely on reports from the field. The American Legion also has a dedicated process for sending experts to VA Regional Offices (VAROs or ROs) across the country to conduct Regional Office Action Review (ROAR) visits. The ROAR visits combine reviewing recently adjudicated claims with interviews conducted with VA staff at all levels of RO operation. The recently adjudicated claims are provided to The American Legion by VA in each office, and represent a random sampling of claims of veterans represented by American Legion Powers of Attorney.

Furthermore, over the past year American Legion Veteran Crisis Command Centers (VCCC)s and Veteran Benefits Centers (VBC) have reached thousands of veterans in over a dozen cities, assisting veterans with their claims and helping veterans in need receive nearly \$1 million in retroactive benefits due to them⁴. However the impact of these VCCCs is better measured in the stories of the veterans struggling to navigate the claims and appeals system.

In August 2014, a VCCC was conducted in conjunction with The American Legion's National Convention in Charlotte, North Carolina. A female veteran sought our assistance associated with a sexual assault she suffered while enlisted in the Marine Corps. For years she suffered and was unable to get assistance for posttraumatic stress disorder (PTSD) associated with the assault. Beyond the psychological effects of the assault, she suffered physical conditions and required a walker for mobility.

Through spending an hour with American Legion accredited representatives that were working closely with VA personnel from the Winston-Salem VARO, she was granted service connection for her previous claims and the accompanying appeals. The veteran relayed overwhelming relief about *finally* being able to receive treatment through VA and to begin to close that chapter of her life.

At a VCCC in El Paso, Texas, one veteran had been attempting to receive disability benefits since 1970, but due to a lack of communication between VA and the veteran and inaccurately adjudicating the claim by VA, the veteran had been unable to receive benefits for over 40 years since filing the initial claim. This illustrates the long and tortuous nature of the appeals process.

The VCCCs also provided examples highlighting the close connection between homelessness and breakdowns in the claims adjudication process. Virtually all locations had stories of veterans suffering from homelessness or near homelessness. In Fayetteville, North Carolina, a

⁴ <http://www.legion.org/veteranshealthcare/225719/legion-benefits-centers-start-townhall-meeting>

veteran living in a car sought and received disability benefits. So pleased with the outcome, he returned to the Legion post hosting the event and announced to the other attendees that his bank account reflected an \$11,000 retroactive payment and was thrilled that he and his son could move out of his car and into a stable living environment.

When veterans struggle to navigate the claims and appeals system, this is the very real and visceral outcome. This is why it is critical to end the cycle of repetitive error and reform appeals by getting the claims done right the first time.

Throughout these efforts – whether through service officers, interviewing VA employees, working at the Board of Appeals, or helping veterans in VBCs across the country -- certain things have become quite clear about the claims process. Pressure and focus to produce quantity over quality leads to needless errors that could be corrected the first time around and would cut out years of delay; there is a disconnect between the VAROs and the BVA over the Duty to Assist required by law; and VARO employees in many offices have an improper understanding of the authorities granted to VA in the claims process, leading to a lack of decision making at the lower levels which could prevent years of waiting in delays.

American Legion employees represented over 9,100 veterans at the BVA between October 2013 and September 2014 (FY 2014). Approximately 75 percent of those claims were either granted outright to the veteran (28.1 percent) or remanded because the RO had not done their proper work (46.4 percent). Again, nearly three quarters of the claims at the Board of Appeals are erroneously adjudicated at the RO level, or inadequately developed and/or prematurely denied at the RO level.

For years VA has consistently stated that they do not place priority on quantity over quality when adjudicating claims, yet this is not borne out under close scrutiny. During routine ROAR visits over the past decade, American Legion staff trained to review claims note 40 percent or more of the claims reviewed are improperly or erroneously adjudicated according to American Legion analysis. While VA has claimed accuracy rates in the 90 percent range and higher, the Government Accountability Office found “VBA does not follow accepted statistical practices and thus generates imprecise accuracy data⁵.” Furthermore, the same report indicates VA has shifted to a new method for measuring accuracy that increases their accuracy numbers, but The American Legion disputes whether this really is reflecting the impact of errors on veterans’ claims. Under the new system, adopted in October of 2012, “a veteran could submit one claim seeking disability compensation for five disabling medical conditions. If VBA made an incorrect decision on one of those conditions, the claim would be counted as 80 percent accurate under the new issue-based measure⁶.” Under the old system, if VA made an error on the claim, the claim counted as being in error.

What the new accuracy system fails to reflect is the interconnected nature of many veterans’ disabilities. Veterans’ disabilities are often characterized by how they interact with one another, and disabilities caused or aggravated by other service connected disabilities can be service

⁵ Government Accountability Office report GAO 15-50 VETERANS’ DISABILITY BENEFITS Improvements Could Further Enhance Quality Assurance Efforts - NOV 2014

⁶ Ibid

connected themselves. If a veteran's damaged knees and hips lead to lower back problems, the veteran is entitled to have their back problems treated and compensated. Likewise if a veteran's diabetes caused by exposure to Agent Orange causes peripheral neuropathy to develop, the veteran is due treatment and compensation for that painful nerve disorder.

Under VA's new accounting system for errors, if VA erroneously denied service connection for diabetes, the error monitoring would not note how that impacted the claims for neuropathy, eye disorders, foot disorders and other problems common to those who suffer the effects of diabetes. In the interest of generating high accuracy numbers, the big picture of how veterans' lives are impacted by their disabilities is being lost.

But the accuracy numbers alone do not reflect the additional challenges. Interviewing VA employees during ROAR visits, the employees reflect that meeting their production numbers drives all work demands in the RO level. Employees are being rushed to complete these claims, and rushing through those claims leads to errors. When a veteran's claim is decided in error, it must be appealed. As noted earlier, when a claim goes to appeals status, the wait is no longer measured in hundreds of days, but in thousands.

If accuracy was truly equal to production numbers, these errors could be eliminated and the number of appeals could come down dramatically. It's all about getting it right the first time.

Not every error at the RO level is based on speed and accuracy. By examining thousands of claims at the Board of Appeals, The American Legion commonly sees errors regarding proper Duty to Assist that the Board must remand to the RO for proper development. The veterans' disability benefits process is intended to be non-adversarial. The VA is required to assist veterans with certain aspects of their claim, such as ensuring they receive medical exams to determine the nature and severity of their injuries. Common VA errors with Duty to Assist include failing to schedule compensation and pension exams, inadequate compensation and pension exams, failure to assign a proper rating to disabilities, and failure to consider conditions manifesting secondary to a previously service connected disability.

This failure to consider secondary service connected conditions is understandable in light of VA's accuracy numbers failing to recognize the interconnected nature of service connected disabilities. However, though it is understandable, it is not right, and it does not reflect the veterans' rights under the law.

Even more troubling is the cyclical nature of many of the remands. When a claim is remanded by the BVA, it is sent to the Appeals Management Center (AMC) to conduct the development the administrative law judge determined was necessary to adequately adjudicate the claim. Often, this involves scheduling another compensation and pension exam or requesting additional documentation be provided by the veteran or other federal government organizations. Despite the BVA judge providing clear instructions to AMC personnel, often times American Legion representatives note a failure to comply with the clear instructions and again the claim is remanded and this begins the hamster wheel of remands where a veteran remains in an adjudication purgatory until a final decision can be rendered by BVA.

Failure to comply with specific instruction from the Board of Appeals cannot be allowed to continue.

Beyond the error rate noted on American Legion ROAR visits and BVA grant/remand rates is the perception that BVA administrative law judges have authorities not granted to the VA adjudicators. Due to the VA health care scandal that broke in 2014, The American Legion established Veterans Crisis Command Centers to assist veterans that were not receiving their entitled benefits and health care. During one of the events, a veterans' service center manager stated that he could not approve a claim; however, a BVA judge may be able to approve it due to being a judge. Nowhere within the Code of Federal Regulations (CFR) or in case law does it state a BVA judge has additional authority over any other level of the claims process.

Furthermore, on ROAR visits when discussing decisions of the Court of Appeals for Veterans Claims (CAVC) and case law with VA adjudicators, American Legion personnel are routinely told "Oh, that's a court case, that's for the Board to figure out." This is inaccurate and deeply troubling. Precedential court decisions apply at all levels of the veterans' claims process, and must be integrated more effectively into training.

Some of these problems can be fixed with some simple changes. A renewed emphasis on attention to detail would help. Increased emphasis on training at all levels is essential. Ensuring the VA adjudicators understand the law and process at all levels can help.

The biggest impact on the appeals process would be working to eliminate appeals in the first place. This comes from getting the claims right the first time they cross the VA's desk. The American Legion believes a revision to the current work credit system would be instrumental in inculcating a "get it right the first time" culture within VA. The American Legion believes that the work credit system needs to be amended so adjudicators receive credit not only for the quantity of work, but also for the quality of work. By this, we would like to see a work credit system that adequately applies negative credit to work found to be in error, whether by decision overturned on appeal, through internal reviews within the VA, such as the Systematic Technical Accuracy Review, or by any other means that are applicable⁷.

If work is found to be in error, it needs to be taken out of the count of claims completed, because that claim has not been completed. By this simple adjustment to the work credit system, the focus of the workers, and the managers who drive them, is balanced. Sure speed remains important, as it should. However, if you start working so fast that you're missing details and getting the claims wrong, you don't deserve credit for that work.

Fixing the appeals process begins with adherence to strict standards for quality at all levels of the disability claims process. With so much attention this year devoted to monitoring whether VA will meet former Secretary Shinseki's stated goal of "no claim pending more than 125 days with 98 percent accuracy" it is important not to lose sight of the peripheral side effects of that goal. With so much effort directed at driving down the initial claims numbers, we must be vigilant to ensure they're not just being passed on into the appeals pile – and turning hundred day waits into thousand day waits.

⁷ American Legion Resolution 139: Revision of Work-Rate Standards for Department of Veterans Affairs Adjudicators – AUG 2014

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**STATEMENT OF DIANE BOYD RAUBER
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PARALYZED VETERANS OF AMERICA
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
CONCERNING
NAVIGATING THE APPEALS SYSTEM FOR VETERANS CLAIMS**

JANUARY 22, 2015

Chairman Abraham and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our testimony regarding the veterans' dilemma of navigating the appeals system for veterans' claims within the Department of Veterans Affairs (VA). PVA would also like to take this opportunity to congratulate you Mr. Chairman as you assume the leadership of this critical Subcommittee. PVA looks forward to a productive relationship during the 114th Congress.

Paralyzed Veterans of America was founded in 1946 by a small group of returning World War II veterans, all of whom had experienced catastrophic spinal cord injury and who were consigned to various military hospitals throughout the country. Realizing that neither the medical profession nor government had ever confronted the needs of such a population, these returning veterans decided to become their own advocates and to do

so through a national organization. To achieve its goal over the years, PVA has established ongoing programs of research, sports, advocacy, barrier-free design and access, and a program of service representation to secure our members' and other veterans' benefits. In fact, PVA has a highly trained force of over 70 service officers who spend 2 years in specialized training under supervision, to develop veterans' claims both for our own members and non-member clients. In addition, since September 2011, PVA has maintained a national Appeals Office staffed by attorneys and legal interns to address the ongoing, and increasing, appeals challenges faced by veterans seeking to have their claims adjudicated.

There are many problems with the VA appeals process. Some are very straight forward, while others are intransigent and self-defeating. These problems have become even more obvious with VA's singular focus these last few years on reducing the claims backlog. Unfortunately, it is PVA's opinion that the Veterans Benefits Administration (VBA) has simply moved these claims downstream and into the appeals process to manipulate the numbers and feign success on initial claims decisions.

One of the largest issues facing the Board of Veterans' Appeals (Board) is the high volume of remanded appeals. In FY 2014, the Board decided 55,531 appeals. Of those decisions, 25,574 (45.5 percent) had one or more remanded issues. Common reasons for remands include obtaining a new VA examination or opinion and seeking additional service treatment records or updated medical records. One reason so many of these appeals are remanded is due to the Veterans Benefits Administration (VBA) and the Board's predilection for favoring VA examinations over most others. These entities often require a VA examination, often from a Compensation and Pension (C & P) examiner or nurse practitioner, before rendering a decision. This action occurs even when favorable private medical evidence, treatment notes, or opinions from VA treating physicians are in the record. In PVA member cases, the record often includes extensive medical information from a Spinal Cord Injury (SCI) center physician who has specialized expertise and an intimate knowledge of our member client's medical condition. Too often, the opinion of a C & P examiner, who only examines the veteran

once and is also tasked with reviewing a voluminous claims file prior to the examination, will be weighed more heavily than the SCI center experts who regularly treat the veteran.

PVA has testified on this issue on numerous occasions. Not only do additional requests for VA examinations and opinions delay the veteran's individual appeal, it slows down the overall claims process when unnecessary resources are used to seek medical information the VA already has in its possession. *Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009) ("the duty to gather evidence sufficient to render a decision is not a license to continue gathering evidence in the hopes of finding evidence against the claim"). At times, these requests are also in conflict with the "benefit-of-the-doubt" doctrine. According to *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990) and numerous other cases decided by the U.S. Court of Appeals for Veterans Claims, "the preponderance of evidence must be against the claim for benefits to be denied." Where there is an approximate balance of positive and negative evidence, the benefit of the doubt must be given to the veteran. More cases could be resolved favorably if this doctrine were applied correctly by VA.

In addition, when an appeal is remanded, it typically returns to VBA jurisdiction through the Appeals Management Center (AMC), a separate entity where assigned VBA staff members are tasked to remedy flaws in claims development identified by the Board. It is at this step where many appeals idle on a procedural "hamster wheel" due to a failure to comply with the remand order. In too many cases, the AMC fails to ensure the specific orders defined by the Veterans Law Judge (VLJ) in his or her opinion are followed and completed.

Some specific examples of defective remands which frequently are not corrected by the AMC prior to the return of the appeal to the Board include the following:

- The VLJ specifies the new examination be conducted by a medical specialist, such as a neurological or orthopedist. This order instead is fulfilled by a nurse practitioner or general practitioner.
- The VLJ specifies certain questions be answered by the examiner, which are not satisfactorily completed.
- The AMC/VA fails to follow Veterans Health Administration (VHA) procedure for scheduling a VA examination, which includes the obligation to contact the veteran by phone.
- The AMC/VA fails to complete all necessary actions to ensure all relevant service treatment and VA medical records are associated with the file.

This failure to ensure compliance results in a premature return of the appeal to the Board, and an automatic request by the representative for another remand under U.S. Court of Appeals for Veterans Claims precedent. A remand confers on a veteran, "as a matter of law, a right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Furthermore, the Secretary has a "concomitant duty to ensure compliance with the terms of the remand" and "the Board itself errs in failing to ensure compliance." As a result, it is not uncommon for remanded appeals to be remanded more than one time, in some instances multiple times, adding significant delay before the veteran receives a final decision from the Board.

Remanded appeals often take a year or more to process through the system and return to the Board. If 45 of every 100 decisions are remanded each year for one or more issues to be further developed and readjudicated, it stands to reason that the number of appeals will only increase, as each of those 45 appeals must return to the Board at a later date for further review and adjudication while original appeals are continuing to be certified to the Board. Those original appeals linger while the older remanded appeals with earlier docket dates must be decided.

There are some solutions to these challenges. As PVA has testified, a greater reliance on private medical evidence or VA treating medical professional evidence and more

consistent application of benefit-of-the-doubt doctrine could greatly reduce remands. A review of examination scheduling procedures to reduce the numbers of remands related to inadequate notice would also be helpful, as would a review of AMC training, procedures, quality review, and accountability to ensure a consistent and proper handling of appeals. When the Board determines a veteran is entitled to advancement on the docket due to age, financial hardship, or serious illness, that designation should be honored and enforced on remand. PVA has participated with its VSO partners, as well as VBA and Board administration, in a working group on how an expedited appeals pilot program might allow certain appeals to be decided in a more timely fashion. It is the intent of PVA and our VSO partners to support the introduction of bipartisan legislation to expedite appeals, which will subsequently free up resources to avoid the coming increased appeals backlog.

Another problem for VA appeals has been the improper utilization of Decision Review Officers (DRO). For multiple reasons, VA is using DROs to handle initial claims adjudication instead of *de novo* review of appeals. Since it is always preferable to have a claim resolved at the local level, PVA has consistently supported the strengthening of the DRO program and requiring DROs to work on appeals where their expertise can be of the best use. The DRO program allows for another *de novo* review of a veteran's claim. The veteran can also have an informal hearing at this level, which may allow for resolution of the appeal before it is certified to the Board. It is critical that the DRO program be continued and expanded if possible, and that DROs, as the more experienced VA personnel, only work on appeals and not initial claims adjudication.

Another source of delay for veterans, and one that could be easily corrected, is that there is no direct avenue for substitution when a case is already pending at the Board. In 2008, Congress passed legislation that allows a person eligible to receive accrued benefits due to a claimant at the time of his or her death to file to substitute in the appeal within a year of death. Regulations implemented by the Secretary require the eligible person to file to substitute at the agency of original jurisdiction. If the appeal is already at the Board for any step in the process when the veteran dies, it will be

dismissed by the VLJ for lack of jurisdiction. The appeal virtually stops in its tracks until the eligible individual files to substitute, at which time the appeal must come back to the Board to complete the process. This should be a simple fix by implementing procedures so an eligible party can substitute when the case is at the Board to save time and continue the appeal in a timely fashion. This would not only speed up this appeal, but would help reduce the appeals backlog with a common sense change.

An unexpected challenge has occurred in the area of technological improvement. PVA was very supportive of VA's adoption of the Veterans Benefits Management System (VBMS). This system has been helpful in allowing VA to act quickly on less complicated claims. While these are not claims normally filed by those with catastrophic disabilities, PVA has always supported timely resolution of less complicated cases to free up adjudicators to handle more complex claims. Unfortunately, in the appeals arena, VBMS lacks "appeals-friendly" features to allow it to be efficient. As more and more appeals at the Board are being worked in a "virtual" or paperless format, representatives must use the VBMS system to review and file their briefs on behalf of clients. The system lacks features that allow for easy review of the file, adding to the time needed to properly present a veteran's appeal. The Board's administration has included VSOs co-located at the Board in meetings to provide input on ideas to improve the system specifically for appeals work. We anticipate VSO suggestions will be included in future upgrades to improve VBMS for appeals work. But this will only occur if the Board is provided with adequate funds early enough in the development process to accelerate VBMS improvements and continues to engage VSOs in that process. If not, as the backlog of initial claims is reduced, the backlog will simply move into the appeals realm. This will lead to continued accusations of VA's inability to provide benefits in a timely manner and questions of why VA did not see the appeals backlog coming and work to improve its processes before it became a crisis.

Finally Mr. Chairman, it is not all a VA problem. As stated earlier, PVA has many service representatives and spends a great deal of time, funds, and effort on ensuring they accomplish their duties at a high level of effectiveness. However, it is important

that veterans and their representatives also share responsibility when appeals arrive at the Board without merit. A disability claim that is denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf, or compels an accredited representative to do so with no legal basis for appealing, that appeal clogs the system and draws resources away from legitimate appeals. The Board is bound by the law and is without authority to grant benefits on an equitable basis. *Harvey v. Brown*, 6 Vet.App. 416, 425 (1994); *see also* 38 U.S.C. § 503. Since 2012, PVA has taken steps to reduce frivolous appeals by having claimants sign a "Notice Concerning Limits on PVA Representation Before the Board of Veterans' Appeals" at the time they execute the Form 21-22 Power of Attorney (POA) form. PVA clients are notified at the time we accept POA that we do not guarantee we will appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal, in keeping with VA regulations. Furthermore, improved, case-specific notice of the initial decision should be provided to the veteran, so he or she can make a more informed decision regarding the merits of an appeal. PVA also takes issue with several provisions adopted by the VA in its new regulations governing standard claims and appeals forms. In particular, some of the new procedures appear to make it more difficult for the veteran's representative to obtain information regarding the claim and confer with the client to ensure effective representation.

Mr. Chairman, we would like to thank you once again for allowing us to address this truly important issue. The challenges faced by veterans who file claims for benefits from VA are often enormous. Over the last several years as so much attention has been paid to the backlog in claims, veterans appeals have grown significantly. Just moving the claims downstream, while patting themselves on the back for success in reducing the backlog, is a meaningless gesture by VA and a disservice to those who sacrificed so much for this nation. This is particularly true when considering those with catastrophic disabilities and complex claims.

I would be pleased to take any questions.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2014

No federal grants or contracts received.

Fiscal Year 2013

National Council on Disability — Contract for Services — \$35,000.

Disclosure of Foreign Payments

"Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies."

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She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney at the National Veterans Legal Services Project, representing veterans and their families before the Board and Court. She has presented at numerous veterans' law conferences, on topics including successful advocacy and military history research.

She also served as a consultant to the American Bar Association (ABA) Center on Children and the Law. In this capacity, she wrote and edited numerous ABA publications on an array of child welfare issues, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communications Disorders from Penn State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America. She is a member of the Maryland and District of Columbia Bar Associations, as well as a member of the National Organization of Veterans Advocates.



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**STATEMENT OF
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 COMMITTEE ON VETERANS' AFFAIRS
 SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES
 JANUARY 22, 2015**

Mr. Chairman and Members of the Subcommittee:

I am pleased to testify this morning on the challenges facing veterans when appealing claims decisions by the Veterans Benefits Administration (VBA), as well as the challenges both VBA and the Board of Veterans Appeals (BVA or Board) experience in trying to assure more timely and accurate decisions for veterans, their spouses and survivors. I look forward to working with you to examine the current systems and to improve the processes and outcomes for veterans.

As the nation's largest veterans service organization (VSO) comprised completely of wartime disabled veterans, DAV is leading the way in providing free assistance to veterans and their families in filing both claims for benefits as well as appeals for unfavorable decisions. In 100 offices throughout the United States and in Puerto Rico, DAV employs a corps of approximately 270 National Service Officers (NSOs) and 34 Transition Service Officers (TSOs) who counsel and represent veterans their dependents and survivors with claims for benefits from VA, DOD and other government agencies. All of our service officers are themselves wartime disabled veterans who have personally gone through the claims system as well as being thoroughly and continually trained on all of the laws, regulations and procedures of VA's entire adjudication process.

For thousands of veterans each year whose claims are not allowed, or who believe their rating or effective dates to be incorrect, our NSOs, along with a team of National Appeals Officers (NAOs), offer free assistance. DAV's NAOs have previously worked as NSOs to gain experience within VA Regional Offices (ROs) in providing both claims and appellate assistance at the local level. Our NAOs, who work directly inside the Board, provided representation in 29.2 percent of all appeals decided by BVA last year, a caseload of approximately 16,224 appeals. In 29.6 percent of the cases, involving 4,810 appellants represented by DAV, the claimants' appeals were allowed and the denial of benefits overturned. In addition, another 47 percent of the cases represented by the DAV last year resulted in remands, which provided the opportunity for additional consideration or development of evidence inadequately performed by the ROs for 7,534 claimants, many of who will ultimately have their appeals allowed as well. In total, approximately 76 percent of the appeals represented by DAV resulted in original decisions being overturned or remanded to ROs for additional development and re-adjudication.

Furthermore, for those denied by the Board, DAV works closely with two private law firms that have agreed to provide *pro bono* services to veterans pursuing their appeals beyond the Board. In 2014, these *pro bono* attorneys offered free representation before the United States Court of Appeals for Veterans' Claims in 2,086 denied appeals and provided representation in over 1,534 of those cases.

Mr. Chairman, as you know, the appeals process is directly related to, and in many ways part of, the claims process. As the volume of submitted and decided claims grows, so too does the volume of appeals of many of those decisions. According to recent VBA data, the number of appealed claims decisions, those for which a Notice of Disagreement (NOD) is filed, has been averaging around 11 to 12 percent of the total number of claims decisions issued. While not all of those will continue to the Board, there is a direct relationship between VBA's claims workload and BVA's appeals workload. Furthermore, the accuracy, timeliness, clarity and credibility of the claims decisions promulgated by VBA can have a direct relationship on the appeals rate. It is our view that veterans (and their representatives) who receive rating decisions in a reasonable and predictable timeframe with understandable and correct decisions are less likely to pursue appellate options. As we and others have said for years, the most important principle of claims processing, and therefore the key to appeals as well, is getting each claim done right the first time.

Over the past four years, VBA has concentrated the great majority of their efforts and targeted almost every available resource towards reducing the backlog of pending claims, all with the intent of reaching the goal set out by then-Secretary Shinseki in 2010 of having all claims completed in less than 125 days with a 98 percent accuracy rate. While it took a couple of years to develop and begin implementing its comprehensive transformation strategy, over the past two years VBA has made significant progress towards both their timeliness and quality goals. The total inventory of pending claims has come down by about 40% and the number in "backlog" status, those pending more than 125 days, has been reduced by 60% over that same period.

Though transformation initiatives such as the Fully Developed Claims (FDC) program have played a significant role in this productivity increase, the primary driver has been VBA's reliance on mandatory overtime for claims processors and the reassignment of other RO employees away from non-rating related work, including appeals, to direct claims processing work. VBA has also seen a slow, but steady rise in their accuracy rate thanks to a number of transformation initiatives, including Disability Benefit Questionnaires (DBQs), the Veterans Benefit Management System (VBMS), and the development of rules-based automation tools, such as IT-based rating calculators. By September 2014, the last month reported on VBA's Aspire webpage, the accuracy rate appeared to have leveled off at 90.4 percent, an increase over the past two years, but far from VA's 98 percent accuracy goal.

However, as VBA's pending inventory has come down, BVA's pending workload has risen almost commensurately. In part, this is a function of the volume of rating decisions issued resulting in a proportionately increasing number of appeals filed. However, it is also partially the result of VBA's "all-hands-on-deck" approach to reducing the claims backlog that has diverted RO employees whose primary function was to do appeals-related work to direct claims

work. In order to reach and then sustain VA's stated claims goals, it will be necessary to develop a system that does not rely on such reallocations of manpower.

APPEALS PROCESS OVERVIEW

The appeals process is a complicated multi-step and multi-path process that begins at the moment a claimant determines that they are not satisfied with their rating decision and want to make an appeal. Below is an overview of that process that starts at the RO and may ultimately wind its way to the Board.

1. In order to initiate an appeal of a VBA decision, a claimant must file a NOD within one year of receiving notice of their determination.
2. Once a NOD is filed, an appellant will be issued an Appeals Election Letter, which confirms VBA's receipt of the appeal, solicits information regarding the availability of additional evidence and offers the appellant two options relative to the processing of their appeal. The veteran may opt to have their appeal reviewed under the Traditional Appeals Process or reviewed under the Decision Review Officer (DRO) Post Determination Review Process. An appellant must make an appeals processing election within 60 days of receiving the Appeals Election Letter or it will default to the Traditional Process.
3. In most situations, based on our experience and judgment, but depending on the particulars of the appeal, DAV's NSOs will recommend their clients elect the local DRO review process. The DRO is a senior RO employee with the authority to reverse initial rating decisions, completely or in part, without any new or additional evidence. The DRO process is a *de novo* process, meaning they undertake an independent review of the claim being appealed, with no deference given to the rating board decision being challenged. A DRO has the authority to request medical exams or facilitate hearings to gather additional information from the appellant.
4. After a DRO performs their *de novo* review they may issue a new rating decision favorable to the veteran. However, if the DRO does not grant the benefits sought, or if the maximum evaluation is not authorized, an appellant will be issued a Statement of the Case (SOC).
5. For those who do not elect the DRO process, they will move directly to the SOC stage. On average, it can take up to two years from the time a NOD is received by VBA before an appellant receives a SOC, primarily due to a lack of adequate appellate personnel and the aforementioned practice of shifting existing DROs to rating-related activities.
6. Upon receiving a SOC, an appellant then has 60 days to file a VA Form 9 with the VBA if they want to pursue review by the BVA. Within the Form 9, an appellant can elect a hearing before the BVA at its headquarters in Washington, D.C.; a hearing at the nearest VARO before a traveling member of the Board; a hearing at the nearest RO via satellite teleconference; or the option for no hearing. A hearing election can add as much as two years to an appeal process.
7. Once the Form 9 is received by VBA, the appeal is considered formally filed to BVA and preserves a docket date for processing by the BVA. It then awaits review and certification by RO personnel (Form 8) before the case can be transferred to the BVA, which can take up to two years.

8. Once the appeal is transferred to the jurisdiction of BVA, it is issued a docket number using the Form 9 filing date to determine its place in line, at which point it has traditionally awaited physical transfer to the Board.
9. Once the appeal is physically received at the Board, it can take up to a year to issue a decision. If benefits are granted or previous VBA determinations upheld, the appeal is over, at least in terms of VBA's appeals process.
10. If issues are remanded, meaning that additional development must be undertaken by VBA before the Board can issue their final ruling, the appeal continues. The remand process can add years more to the total timeline of the appeal if benefits remain denied at the RO level and the appeal is then rerouted to the BVA for a second review and disposition. This remand process can be repeated multiple times, leaving some veterans' appeals churning for years.

VBA REQUIRES ADEQUATE RESOURCES TO PROCESS APPEALS

VBA has reported that they completed over 1.3 million claims in FY 2014, a record number. As mentioned above, this increase in claims decisions is likely to result in an ever larger number of appeals filed; if historical patterns hold, that would be on the order of 12 percent or around 150,000 in FY 2015. This will result in more work required by both VBA and the Board and thus require additional resources for both to manage this growing workload. While additional resources alone will neither eliminate the pending inventory of work nor solve future workload problems, based on data we have reviewed, both VBA and BVA will require additional resources as a major part of the solution.

In FY 2014, the Board increased its workforce by 20 percent and saw a 30 percent increase in productivity, resulting in 55,532 appeals dispositions, a record for the Board. BVA also conducted over 10,000 hearings, processed over 50,000 pieces of mail and answered more than 100,000 inquiries from veterans. However, despite these impressive numbers, the total pending inventory of appeals in various stages at both the Board and at VBA has grown to more than 360,000, the vast majority of which is at the RO level. The inventory at the local levels means that further appellate adjudication is required by RO personnel before an appeal can be certified as ready for review by the Board. These local adjudications could lead to the allowance of benefits sought on appeal, thus disposing of the appeal if the benefits sought have been granted, or further development necessitating the issuance of another determination if benefits sought remain denied. It is estimated that ROs traditionally dispose of 50 percent appeals and the remainder continue on to BVA. However, even with a significant number of those being resolved or discontinued at the VBA level and thus never making it to the Board, there is an increasing number of appeals in VBA's pipeline that will.

Currently, there are about 65,000 appeals in BVA's pending inventory, a little more than half are physically at the Board and the balance have been certified to BVA but not yet called up to the Board. In addition, there are almost 300,000 more appeals at various stages within VBA, the majority at the NOD stage and the balance at the SOC, Form 9, certification (Form 8) or remand stage, for a total of about 360,000 pending appeals. Another critical factor in the Board's workload is remands, which have typically been about 50 percent of their dispositions. Since these remands often return one or more times for further review by the Board, they begin to compound the Board future workload. Given the pending appeals inventory, the volume of

future workload from increased claims productivity, the compounding workload due to remands, the Board has set an aspirational goal of disposing of 100,000 appeals annually to manage its workload and address the backlog.

Based on historical data, the Board can typically produce about 90 appeals decisions per FTE. In FY 2010, BVA issued 49,127 decisions with 549 FTE, an average of 89 dispositions per FTE. In FY 2011, they issued 48,558 decisions with 535 FTE, an average of 90.8 dispositions per FTE. In FY 2012, the Board issued 44,330 decisions with 510 FTE, an average of 87 dispositions per FTE. In FY 2013, they issued 41,910 decisions with 532 FTE, an average of 78.8 dispositions per FTE. Finally, in FY 2014, BVA issued 55,532 decisions with 640 FTE, an average of 86.8 dispositions per FTE. In years with significant staffing increases in FTE, productivity often dips due to the time needed to train new Board attorneys before they become fully productive, estimated at about 18 months. However, even projecting for productivity increases due to increased efficiencies and other initiatives, BVA will need further increases in FTE to reach productivity levels necessary to adequately process their appeals workload in a sufficiently timely and accurate manner.

In the final FY 2015 appropriations bill approved in December, Congress recognized the need to supply BVA with additional resources by providing an additional \$5 million to hire additional staff. This will allow modest staffing increases; however further increases for FY 2016 will be needed. DAV, along with our partners in *The Independent Budget* (IB) is currently working on specific budgetary recommendations that will be released at the time of the Administration's budget presentation at the beginning of February. It is important to note that VBA will also require additional staff at the RO level to handle its portion of rising appeals-related work. Congress also recognized this need and appropriated VBA \$40 million over the Administration's FY 2015 request. The IB will also have specific budgetary recommendations for VBA in our FY 2016 Budget Report.

In addition, the Board also needs to complete IT upgrades to allow them to process appeals using the same type of modern, paperless, rules-based decision support programs that VBMS has provided to VBA's claims processing. Although the VBMS program has long been intended to include the full appeals process through the Board's work, funding to plan, develop and implement a VBMS solution has yet to be put forward in VA's budget requests. As such, the Board has been constrained within the VBMS processing platform because appeals processing is distinct and separate compared to claims processing.

BVA has begun to look at other solutions from other vendors; however, lacking funding they will continue to wait for this long overdue IT modernization, which limits their effectiveness and productivity. Congress must ensure that VBA allocates sufficient funding in FY 2016 to allow the Board to begin this necessary IT upgrade. The IB Budget Report in February will also provide more specific budgetary recommendations in this regard.

STRENGTHEN THE DRO PROGRAM

DAV believes that the DRO program is one of the most important elements of the appeals process, often providing positive outcomes for veterans more quickly and with less

burden on VBA. The ability to have local review also allows our NSOs to support the work of the DROs in sorting through the issues involved in the appeal, similar to the way our NSOs help reduce the claims workload on ROs by ensuring more complete and accurate claims are filed by the veterans we represent.

Unfortunately, as discussed above, as part of VBA's intense efforts to reduce the backlog of pending claims, over the past several years, and even before that, many ROs have diverted DROs from processing appeals to performing direct claims work. In fact, there have even been some discussions inside VBA about eliminating the DRO program altogether. Last year, DAV undertook an informal survey of a number of our NSO Supervisors to gather their observations of how often DROs were performing direct claims processing work. We found that in most ROs surveyed, a majority of DROs were working at least part of their time on claims work during their standard 8-hour work day, and that a majority were working a significant part of their time on claims during overtime, including mandatory overtime. We shared these findings with VBA leadership who had already begun and have continued to make efforts to ensure that DROs focus on appeals work. Over the past year, we have observed a marked decrease of DROs performing claims working during normal working hours, though there is still significant claims work being performed during overtime hours.

In addition to the problem of having appeals work pile up at ROs, having DROs perform claims work, particularly ratings, has secondary negative effects. First, it limits the number of DROs who can review appeals since they cannot review *de novo* an appeal that they helped to rate. Second, the fact that the original rating was adjudicated by a senior DRO may result in a higher standard being applied by a fellow DRO to overturn their colleague's decision. For both of these reasons, it is imperative that VA and Congress look for reasonable proposals and measures, such as strict reporting requirements, to ensure that DROs perform only appeals-related work.

CREATE A NEW FULLY DEVELOPED APPEAL PILOT PROGRAM

Given the complexity of and legal parameters of the appeals process, and the primary role that workload and proper resources will play, there are simply no magic bullet solutions to the appeals challenges. Instead, it will require a multipronged approach to make measurable and sustainable headway that must include reform, innovation and stakeholder collaboration. One such idea is the Fully Developed Appeals pilot proposal, which has widespread and growing support in the VSO stakeholder community as well as the full buy-in of both VBA and BVA leadership.

Mr. Chairman, last year, following roundtable discussions on appeals held in the House, the Senate and at DAV's offices, a core group of VSOs who perform significant appeals work agreed to work informally and collaboratively with both VBA and BVA officials to search for practical improvements to the appeals process. The goal of this group was to explore, analyze and develop consensus ideas on how to improve outcomes for veterans that could also free up VBA and/or BVA resources to further benefit the appeals process for all veterans. The core group would then seek further input and support from additional stakeholders while simultaneously reaching out to Congress to review any such proposals, particularly those that

required legislation. Among the ideas that the group focused on were strengthening the DRO program, improving claims decision letters and what has become the Fully Developed Appeals (FDA) pilot proposal.

The FDA program is modeled on the FDC process, in which veterans agree to undertake the development of private evidence in order to enter an expedited processing program of their claim. Similarly, to participate in the FDA program, appellants would agree to gather all the additional private evidence necessary for BVA to make their decision on the appeal, thus relieving both VBA and BVA of that workload. When an appellant elects the FDA program for their appeal, they would be required to submit all the private evidence they want considered at that time, and may not later submit additional private evidence; such supplemental submission would exclude them from the FDA program, with one limited exception. If the Board develops new federal records not part of the claims record, or orders new exams or independent medical opinions, the appellant will not only be given copies of the new evidence but will also have 45 days to submit additional evidence, including private evidence, pursuant to that newly developed evidence.

As part of the FDA program, the appellant would agree to an expedited process at VBA that eliminates the SOC, Form 9, any hearing and the Form 8 certification process. The elimination of these steps alone could save some veterans up to 1,000 days or more waiting for their appeals to be transferred from VBA to the Board. The veteran would retain the absolute right to withdraw from this program at any time prior to disposition by the Board, which would revert their appeal back to the standard appeal processing model, with the option of DRO review as well as both informal and formal hearing options. The FDA pilot program is not a replacement for either the DRO process or the traditional appeals process; it is another option – a fully voluntary one – that the veteran can withdraw from at any point.

However, for those veterans who, in consultation with any representatives they may have, determine that the best option is to have the Board review their appeal, and for which they are confident they have the ability to provide sufficient evidence and argument without hearings, the FDA process can save them significant time, plus save VBA and BVA significant processing work. As such, election of the FDA program could free additional resources at both the Board and VBA to increase productivity for processing traditional appeals and DRO reviews, thus benefiting all veterans. Furthermore, by testing this new model with congressionally mandated reporting requirements, Congress and VA could gain valuable insights on potential system-wide reforms that could bring additional efficiencies to the appeals process.

Mr. Chairman, we would be remiss if we did not acknowledge the efforts of Congressman O'Rourke, who introduced similar legislation last year, called the Express Appeals Act. We were pleased to provide our insights to his staff during the drafting of that legislation and greatly appreciate his continued leadership on this issue. That legislation played a role in spurring and guiding much of the initial discussion in our workgroup as we developed the FDA proposal. We also want to thank Congressman Cook, who is the lead cosponsor, for his leadership. Although there are some differences between their legislation and the FDA proposal, both were modeled on the Fully Developed Claims program and share most of the same goals and many of the same features. While there are still more details to work out and improvements

to be made, we look forward to working with this Subcommittee and all members of the House and Senate interested in moving forward with a Fully Developed Appeals pilot program.

IMPROVE RATING BOARD DECISION NOTIFICATION LETTERS

For a number of years, particularly since the inception of VBA's Simplified Notification Letter (SNL) process, DAV and many other VSOs have expressed concerns regarding whether these decisions contained substantive information for claimants to understand how VA arrived at its decision on a claim for benefits. Current regulations state that, "claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision."

This is codified in statute, title 38, United States Code, § 5104) which states, "(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision; (b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include, (1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary."

Rating Board Decision (RBD) notification letters are meant to advise claimants of VA's decision on the issues; whether benefits have been awarded, whether prior ratings have been increased or sustained, the evidence used in reaching the decision, and most critical of all, an explanation to the claimant as to how VBA arrived at its decision. It is the final element of the notification process that requires ongoing improvement.

Well formulated RBD notices should be composed to make it easy for average, non-legal experts to understand. Well written decisions can help to prevent unnecessary appeal filings if they fully explain the rationale for VBA's conclusions. When a veteran understands the legal basis for why the benefits they sought were not awarded and what would be required to obtain them, it allows them to make better decisions about which appeals option, if any, to pursue. More complete and clear decision letters provide veterans and their representatives a better understanding of what is needed to prevail in their appeal, regardless of which option they choose.

As such, we urge VBA to work with Congress and stakeholders to enhance RBD notification letters while preserving and enhancing to the extent possible, any efficiencies gained through automation.

REPLACING THE NEW AND MATERIAL EVIDENCE STANDARD

In order for a claimant to reopen a previously denied claim, more specifically, claims for initial entitlement to establish receipt of benefits, such as in cases of entitlement to service

connection and survivor benefits, new and material evidence must be presented, title 38, United States Code, § 5108. It is a two-part test that VBA must perform to reopen a claim: whether the claimant has supplied evidence that is new and whether it is material to the issue(s) at hand.

The theory behind this evidentiary standard was to prevent VBA from having to unnecessarily re-adjudicate previously denied claims when there is no evidence being presented that will change the decision. While we understand the intent of the new and material evidence standard, it does not function as intended because it fails to deter claimants from reapplying for benefits. Instead, it routinely requires VBA to expend resources to adjudicate the question of whether new and material evidence has been submitted, and only after that effort, does VBA consider whether the evidence changes the underlying rating decision. Moreover, if VBA rules that the submitted evidence is not "new and material," that decision can be appealed to the Board, necessitating further effort to make the procedural decision prior to a substantive decision on whether the evidence changes the underlying rating decision.

Congress could enact legislation that would change the new and material evidence standard to a new definition, or simply eliminate the requirement all together.

Rather than forcing appellants to wait up to three years or more for a BVA finding that "new and material" evidence has been received before considering it on its merits, this action would save claimants considerable claim and appeal processing time and permit VBA to adjudicate on the merits of the claim at the local level. It has the potential to eliminate multiple steps in a process that may involve both VBA and BVA before such substantive determinations are made.

CONCLUSION

Mr. Chairman, the only way to realistically improve the appeals process will be through a combination of resources, reform and innovation to ensure that veterans filing appeals receive timely and accurate appeals decisions. These solutions include providing VBA with adequate resources to manage the claims and appeal workload, maximizing local appeals resolution capacity, eliminating unnecessary impediments to appeals efficiency, and developing and testing new processes, such as the FDA proposal. DAV stands ready to work with you and all members of the Subcommittee in addressing these challenges with practical, commonsense improvements to the appeals process that first and foremost benefit the men and women who have served, their families and survivors.

Mr. Chairman, this concludes my testimony and I would be pleased to answer any questions you may have.

TESTIMONY
OF



JIM VALE, DIRECTOR
VETERANS BENEFITS PROGRAM
VIETNAM VETERANS OF AMERICA

FOR
THE SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
REGARDING
VETERANS DILEMMA: NAVIGATING THE APPEALS
SYSTEM FOR VETERANS CLAIMS

JANUARY 22, 2015

Vietnam Veterans of America

House Veteran Affairs Committee
Subcommittee on Disability
Assistance/Memorial Affairs
January 22, 2015

Good morning Chairman, Ranking Member and Members of the Subcommittee, Vietnam Veterans of America (VVA) thanks you for the opportunity to present our views regarding, “Veterans Dilemma: Navigating The Appeals System For Veterans Claims.”

STATEMENT

It is a well established principle that VA’s mission is to provide benefits to veterans and their families is a non-adversarial, pro-claimant system, as desired by Congress. When Congress enacted Judicial Review in 1988, it did so with the clear intent to ensure a beneficial non-adversarial system of veterans benefits. The legislative history specifies:

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95.¹ VVA supports modernizing the VA system so that all veterans receive more timely and accurate adjudications of their claims and appeals, and improving the efficiency of the claims adjudication and appeals process. Nonetheless, these changes cannot come at the expense of due process and

¹ See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating, in the context of statutory interpretation, “interpretive doubt is to be resolved in the veteran’s favor”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that “[t]his court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant” and describing “the historically non-adversarial system of awarding benefits to veterans”); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (describing “the pro-claimant environment created by the general VA statutory scheme”); *Moore v. West*, 13 Vet. App. 69, 74 (1999) (Steinberg, J., concurring) (describing “the pro-claimant nature of the VA adjudication process.”).

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abandoning major aspects of the “pro-claimant” system designed by Congress.

The VA’s motto is *“to care for him who shall have borne the battle and for his widow, and his orphan.”* In practice, however, it appears the mission for some VA bureaucrats is to limit the government’s liability to our nation’s veterans by formalizing the claims and appeals processes to the point where benefits are unfairly restricted.

Veterans should not have to give up any of their rights in order for VA to process their claims and appeals more quickly. In the past some VBA executives have gone as far to suggest reducing the Notice of Disagreement (NOD) period from 1 year to just 60 days, change the BVA standard of review from “De novo” to “Appellate” review, close the veteran’s record at the BVA, and eliminate the Decision Review Officer (DRO) program entirely. None of these suggestions actually benefits veterans, but they do help make VA’s job easier.

VVA has a better solution. In order to reduce the size of the appeals backlog and improve the VA appeals process, VVA suggests the following:

- I. Improve the Notice of Disagreement (NOD) Form
- II. Retain 38 C.F.R. § 3.157
- III. Fix the VBA Work Credit System
- IV. Improve Training of VBA Staff
- V. Continue VSO Access to VBA Raters and Coaches
- VI. Implement “Office Hours” at all VA Regional Offices
- VII. Expand the DRO Program (and fence off DROs)
- VIII. Increase the number of VLJs at the Board of Veterans Appeals
- IX. Make BVA Statistics More Transparent
- X. Modification to proposed Fully Developed Appeal (FDA) process
- XI. Appoint a candidate for BVA Board Chairman who can be confirmed by the Senate confirmation process

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I. IMPROVE THE NOTICE OF DISAGREEMENT (NOD) FORM

On October 31, 2013 the Veterans Benefits Administration (VBA) Compensation Service published in the Federal Register its proposed rule to RIN 2900-AO81—Standard Claims and Appeals Forms (see: http://www.va.gov/ORPM/docs/20131031_AO81_StandardClaimsandAppealsForms.pdf).

VA received sixty-four comments about this proposed rule change; most were negative (See: <http://www.regulations.gov/#!documentDetail;D=VA-2013-VBA-0022-0001>).

Unfortunately, VA ignored most of these comments. VA's final rule was published in the Federal Register on September 25, 2014 (See: http://www.va.gov/ORPM/docs/20140925_AO81_StandardClaimsandAppealsForms.pdf).

Although VVA is not opposed to the VA using standardized forms to obtain efficiency gains in claims and appeals processing, we are opposed to VA abridging veterans' rights in the name of efficiency.

VA's final rule to RIN 2900-AO81 mandates the use of the Notice of Disagreement (NOD) form (VA Form 21-0958). VVA is not opposed to the use of this form, but we object to some of the questions on it.

a) Box 13

In box 13 the VA asks the veteran:

"Would you like to receive a telephone call or email from a representative at your local regional office regarding your NOD?"

There is space to check "Yes" or "No." **Yet NOWHERE on the form or in the form instructions does the VA direct the veteran to contact his or her appointed VSO or attorney representative for help.**

Last year a veteran didn't talk to his VVA Service Officer and checked "Yes" to box 13 on the NOD form. Later, he received a phone call from his VA Regional Office. The VA employee provided incorrect information on what could be appealed, and convinced the veteran to drop his appeal.

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be considered a full grant of benefits for this claim? If the answer is yes, then the veteran is being shortchanged by VA.

VVA believes the better way to reduce the appeals backlog is to follow the current law and rate a veteran based on the evidence of record, and not shortchange or bargain with the veteran. Even though VA officials state box 15 (c) is optional, VVA urges that it be removed from the NOD form. Until that happens, VVA recommends veterans write "MAX" rather than a numerical percentage.

c) Missed Opportunity- De Novo Election

The VBA missed an opportunity to shave two months off the processing time for veterans' appeals when the NOD form was developed. Currently, when a veteran submits an NOD, the VA regional office must respond by mailing a De novo review election letter, which asks the veteran if he or she wants the case reviewed by a Decision Review Officer (DRO). If that option had been added to the NOD form, election letters would no longer be necessary. VVA strongly urges the VA to add the De novo election to the NOD form.

Removal of block 15 (c) would provide the additional space needed to add the De novo review election to the NOD form.

II. RETAIN 38 C.F.R. § 3.157

Although the title of RIN 2900--AO81 is "Standard Claims," the scope of this regulation change goes well beyond just forms. It is an attempt to limit large retroactive awards in the guise of "efficiency."

In this regulation change VA is deleting 38 C.F.R. § 3.157, which provides that reports of examination or hospitalization can constitute informal claims to increase or reopen. VA's justification: *"The idea that certain records or statements themselves constitute constructive claims is inconsistent with the standardization and efficiency VA intends to accomplish with this final rule."*

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In practice, this will prevent veterans from being able to receive retroactive awards over a year where medical evidence is identified in the record that was missed as informal claims by prior VA adjudications. This change has absolutely nothing to do with standardized forms; it's all about VA limiting the government's liability to veterans by eliminating large retroactive awards won on appeal from informal claims.

If VA succeeds in eliminating 38 C.F.R. § 3.157 through its agency rule making process, then Congress should act immediately through legislation to require VA to accept reports of examination or hospitalization as informal claims.

III. FIX THE VBA WORK CREDIT SYSTEM

The manner in which VBA managers "grade" their raters still needs to be re-examined, inasmuch as the current work credit system puts a premium on volume and on an increase in speed, at the cost of not doing it right the first time. The result? An unacceptably high number of appeals due to adjudication mistakes caused by shortcuts and gaming of the VBA Work Credit System.

It shouldn't be easier and quicker to deny a claim than to grant a claim. VA still has to fulfill its statutory Duty To Assist (DTA).

What's the answer? VBA employees should not get work credit for taking shortcuts. For example, there should be no work credit granted for denying a claim without first getting the evidence needed to comply with the DTA (which will reduce the number of denials and therefore the number of appeals in the system).

VBA needs to include a quality component to the work credit system, and for each RVSR (rater), track the number of rating decisions that are successfully appealed. Raters who have a high rate of decisions overturned on appeal need to be retrained, reassigned, or terminated. VBA needs a revised standard for adjudication of claims that does not credit employees for speed and volume but rather on the efficiency and accuracy of the results of their adjudication.

IV. IMPROVE TRAINING OF VBA STAFF

Improved training will help reduce the number of appeals in the VA claims system. VBA's "one-sized fits all" training is not working. Although VBA has made great progress with the implementation of CHALLENGE training for new VSR and RVSR staff, it needs to continue to use and expand quality reviews in the field to identify and track training needs so mistakes can be used to create customized and personalized training for each employee involved in the adjudication process.

VVA supports and commends VBA's efforts to improve its training program. However, training is not only for new raters – and accredited veterans' representatives – it should also be required for all VBA employees and management involved on the benefits side of the administration. Just as VSRs, RVSRs, DROs, accredited service officers, and accredited attorneys must all undergo initial and recurring training and recertification, so should all VBA RO employees, including all supervisors, managers, and directors.

V. CONTINUE VSO ACCESS TO RATERS AND COACHES

VBA is in the process of developing a new "workflow" system called the **National Work Queue (NWQ)** to help even the workload across 58 Regional Offices as rating and appeals capacity is not uniform across the country- there are peaks and valleys in supply and demand. The NWQ will electronically redistribute claims to reach wherever the rating capacity is across all 58 ROs. VSOs have been advised by VA management that the NWQ will be expanded to include appeals later this year.

The problem with redistribution is that it divorces Veterans from their VSO. For example, not every VSO has staff at every RO, and VSOs could find themselves unable to dispute bad rating decisions for claims submitted at their local RO that are adjudicated at other ROs through the NWQ. If VBA does not provide sufficient functionality for VSOs to informally dispute bad rating decisions adjudicated at ROs where the VSO does not have staff, then the NWQ will result in *more* appeals being filed. NWQ should not be permitted to redistribute to an office not represented by the VSO.

Furthermore, if VSO physical access to raters and coaches is restricted or removed then bad rating decisions that would normally be resolved informally at the lowest level—with the rater or coach—will now have to be formally appealed. Simple adjudication mistakes that take just a few minutes for a rater or coach to correct will now take months or even years to overturn as the VSO will have no choice but to file an appeal.

VI. IMPLEMENT “OFFICE HOURS” AT EVERY RO

VBA should implement “office hours” at every RO so VSOs have a set time each day to informally meet with raters and coaches to raise their concerns and resolve their differences when there is a problem with a rating decision. For the raters, this would help reduce the amount of interruptions throughout the day from VSOs, and for the VSOs, time would be saved by not having to search for raters or coaches. This would be a win/win/win for the VA, VSO, and most importantly, the veteran.

VII. EXPAND THE DRO PROGRAM (AND FENCE OFF DROs)

VBA needs to expand its Decision Review Officer (DRO) program. VSOs have a lot of success getting appeals resolved at the DRO level in the appeals process. The case load for DROs is excessive, and is a significant contributing factor for some ROs taking up to 2 years to certify veterans’ appeals to the Board of Veterans Appeals (BVA). Currently, the national average for certification of appeals to the BVA is 629 days.

For example, the 16 DROs assigned to work appeals at the VA St. Petersburg office have a total backlog of 25,276 appeals, which is approximately 1,600 appeals per DRO. Veterans under VVA Power of Attorney (POA) in St. Petersburg are waiting 18 to 24 months on average for their appeals to be certified to the BVA. This is unconscionable. The ROs need to be staffed with sufficient DRO FTE to handle the size of their appeals backlog.

The form the veteran submits to appeal to the BVA is VA Form 9, but the certification process requires the DRO to sign VA Form 8 (see: <http://www.va.gov/vaforms/va/pdf/VA8.pdf>). The VA Form 8 is a checklist for the DRO to ensure all the steps have been followed. Many of these steps

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could be tracked in VACOLS (BVA's appeals tracking database), and an automated Form 8 could then be generated at a push of a button and electronically signed by the DRO. Then the electronic claims folder in VBMS could be reassigned to the BVA in a matter of seconds. VVA urges VBA to automate the Form 8 process. Veterans should not have to wait 2 years for their appeal to be certified.

Additionally, too many DRO personnel are reassigned by RO management to non-appeals team functions- e.g., quality reviews, training, and rating work. DROs who adjudicate initial claims are disqualified from being the DRO for these same claims if they later are appealed. This only exacerbates the excessive DRO case loads by reducing the number of eligible DROs who can work appeals. DROs need to be fenced off so they cannot be reassigned to non-DRO functions. Congressional action may be needed if VBA leadership refuses to take appropriate steps to fence off DROs.

Congress should legislatively mandate that VA retain the DRO program, and provide through appropriations additional funding to ensure VBA has the correct number of DRO FTE it needs at each RO to adequately process veterans' appeals.

VIII. INCREASE THE NUMBER OF VETERAN LAW JUDGES (VLJs) AT THE BOARD OF VETERANS APPEALS

Currently there are approximately 67 VLJs at the BVA. In comparison, the Social Security Administration has over 500 VLJs. Given the growing veterans appeals backlog, the current number of VLJs is inadequate. This is hurting veterans. For example, the Regional Office in San Juan, Puerto Rico has a BVA appeals backlog of approximately 2,700 appeals. Yet, BVA only sends a single VLJ for one week annually to San Juan to conduct about 30 travel board hearings. At this rate, it will take 90 years to clear out this backlog. Sadly, most of these veterans will die before they see a BVA Travel Board hearing.

More VLJs are needed at the BVA to provide for more Travel Board and Video Conference hearings. VVA urges Congress provide additional funding for more VLJs at the BVA.

IX. MAKE BVA STATISTICS MORE TRANSPARENT

In the BVA Board Chairman's Annual Report to Congress, the BVA reports only the most favorable outcomes of final BVA decisions. For example, a multi-issue appeal that has 1 issue granted, 1 issue remanded, and 1 issue denied is reported as a granted claim. The remanded and the denied issues do not get reported. Consequently, the data reported to Congress by BVA is skewed.

VA must be more transparent in its data reporting to all stakeholders. VBA quality statistics are reported as claim-based and issue based. VVA urges BVA do the same by reporting its appeals outcomes by claim and by issue.

In addition, the time an appeal is with a BVA Veteran Law Judge (VLJ) should be tracked and made available to VSOs, veterans, and to this committee, so VLJs can be held accountable in the event cases are held in chambers too long.

X. MODIFICATION TO PROPOSED FULLY DEVELOPED APPEAL (FDA) PROCESS

The proposed FDA process promises to deliver a quicker BVA decision to the veteran, but at the cost of waiving the De novo review, waiving the BVA hearing, and closing the record at the BVA. Veterans should not be required to waive due process rights in order to get a quicker decision. Here again, VA is attempting to implement change to make its job easier all at the expense of Veterans. If a veteran, after submitting a FDA, submits any evidence, he or she will be kicked out of the FDA program, and will go to the back of the line and start all over at the beginning of the traditional appeals process, and wait 3 years or longer for a BVA decision. Consequently, VVA is opposed to the FDA process in its current form.

FDA is claim-based, not issue-based. Veterans cannot split their appeal by issue. Modifications to the FDA, such as allowing veterans to participate in the FDA, by issue, rather than by claim, would make the FDA beneficial to more veterans since not every issue in every appeal is suitable for FDA placement.

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Once the NWQ is developed, VBA and BVA should have the capability to divide up appeals by issue. VVA suggests the FDA process can be enhanced by making it issue-based rather than claim-based.

**XI. APPOINT A CANDIDATE FOR BVA CHAIRMAN WHO CAN
BE CONFIRMED BY THE SENATE CONFIRMATION
PROCESS**

The BVA has been without a permanent Board Chairman now for the past 4 years. Veterans need a permanent Chairman who has the organization skills, leadership, and temperament to successfully lead the BVA for the next 6 years.

CONCLUSION

In closing, on behalf of VVA National President John Rowan and our National Officers and Board, I thank you for your leadership in holding this important hearing on this topic that is literally of vital interest to so many veterans, and should be of keen interest to all who care about our nation's veterans.

VVA supports modernizing the VA claims system and the use of standardized forms, but not to the point where VA benefits are unfairly restricted. Property rights are at stake here. VA officials continue to suggest "improvements" to the appeals process that only helps make VA's job easier, at the expense of harming veterans. Veterans' rights in the VA claims and appeals processes should not be abridged, curtailed or eliminated under the guise of "administrative efficiency."

We agree with General Omar Bradley, VA Administrator (1946), "*We are dealing with veterans, not procedures; with their problems, not ours.*"

I also thank you for the opportunity to speak to this issue on behalf of America's veterans and I will be happy to answer any questions you may have.

Vietnam Veterans of America

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January 22, 2015**James R. Vale, Esq.**

Mr. Jim Vale is the Director of Veterans Benefits Programs for Vietnam Veterans of America. He is a licensed attorney (State of Washington) and he won his first civil appeal case just one month after graduating law school. Today, he oversees VVA's network of over 900 service officers and six appellate attorneys- over the past four years veterans and dependents under the VVA POA have received over \$1.5 Billion in VA benefits.

Mr. Vale is a past-presenter at the National Organization of Veterans Advocates (NOVA), has written an article in the National Veterans Legal Services Program (NVLSP), *The Veterans Advocate*, and has a column in VVA's Magazine, *The Veteran*.

He is a former David Isbell Summer Law Clerk with the Veteran Pro Bono Consortium. He has been an accredited service officer since 2004 and has represented veterans for VA claims at the VA Seattle Regional Office and the Board of Veterans Appeals.

Mr. Vale is a disabled Navy Gulf War-era Veteran. After his military service he was employed as a Logistics Analyst on the engineering team that developed the maintenance and logistic programs for Air Force Two (C-32A), and the Navy C-40A Clipper. He earned his Bachelor of Science in Professional Aeronautics (BSPA), Master of Business Administration in Aviation (MBA) and Master of Aeronautical Science (MAS) from Embry-Riddle Aeronautical University, Master of Public Administration (MPA) and Education Specialist Degree (Ed. S.) from the University of Arizona, and Juris Doctorate (JD) from Seattle University School of Law. He is also a graduate of the VA Vocational Rehabilitation & Employment (VR & E) Program.

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**Vietnam Veterans of America
Funding Statement
January 22, 2015**

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c) (19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:

Executive Director for Policy and Government Affairs
Vietnam Veterans of America.
(301) 585-4000, extension 127

STATEMENT OF BARTON F. STICHMAN

JOINT EXECUTIVE DIRECTOR

NATIONAL VETERANS LEGAL SERVICES PROGRAM

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS

OF THE HOUSE COMMITTEE ON VETERANS AFFAIRS

January 22, 2015

EXECUTIVE SUMMARY

The backlog of claims appeals has been continually growing at the VA. The time it takes from the filing of the initial appeal document – the Notice of Disagreement (NOD) -- to the issuance of an initial Board of Veterans' Appeal (BVA) decision is exceedingly long -- 1,255 days in FY 2013 (that is, more than 3 years and 5 months) according to the BVA Chairman.

The time it takes for a final decision to be made on a claim is often much longer because the initial BVA decision often results in a remand of the case to the regional office. Over the last four fiscal years, more than **44%** of the appeals to the BVA have resulted in a BVA remand to the Appeals Management Center (AMC) or the RO for additional development. Moreover, the Court of Appeals for Veterans Claims has set aside and remanded **76%** of the BVA decisions that have been appealed by a VA claimant to the CAVC and over which the CAVC has had jurisdiction.

Part of the reason that the VA appeals process suffers from dysfunction is that there are relatively few objective precedents that guide the ROs and the BVA on the meaning of title 38 statutes and VA regulations. This lack of objective precedents makes it more difficult for claimants and their representatives to understand what type of evidence they should try to obtain to substantiate their claims; increases the time it takes for the adjudicator to reach a decision; and leads to inconsistent decision-making and a greater number of appeals by disappointed veterans.

NVLSF urges Congress to enact the following five reforms to help make the appellate system more efficient and just.

- Authorize BVA to Develop Evidence Itself Without Having to Remand to the AMC or Regional Office
- Provide Veterans Organizations with a Right to Petition the VA General Counsel for a Binding Precedent Opinion on the Proper Interpretation of a Statute or Regulation
- Authorize the Court of Appeals for Veterans Claims to (a) Certify a Case as a Class Action on behalf of Similarly Situated VA Claimants, (b) Require the VA to Stay Proceedings on the Claims of All Similarly Situated Claimants, and (c) Once the Court Finally Decides the Case, Require VA to Apply the Decision to all of the Pending Claims That Were Stayed
- Prohibit The ROs And BVA, In A Case In Which There Is Positive Evidence Supporting the Award Of Benefits, From Developing Negative Evidence Against The Claim Unless The RO or BVA First Explains In Writing Why The Existing Record Is Not Sufficient To Award Benefits
- Require VBA To Change Its Work Credit System for RO Adjudicators So That Raters Do Not Get Work Credit For Denying A Claim Without First Obtaining The Evidence Needed To Comply With The VA Duty To Assist

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the National Veterans Legal Services Program (NVLSP) on the challenges facing veterans in the appeals system for veterans claims.

NVLSP is a nonprofit veterans service organization that has been representing veterans since 1980. Over the years, NVLSP representation of veterans and their survivors before the VA regional offices, the Board of Veterans' Appeals and federal courts has resulted in VA payment of more than \$4.6 billion in retroactive disability and death compensation to hundreds of thousands of veterans and their survivors.

Since Congress created the U.S. Court of Appeals for Veterans Claims (CAVC) in 1988, NVLSP has represented more than 2,000 VA claimants before the Court. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, and in that Program, NVLSP recruits and trains volunteer lawyers to represent veterans who appeal to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications such as the annually updated, 1900-page Veterans Benefits Manual that has been distributed to thousands of veterans advocates to assist them in their representation of VA claimants.

My testimony today is informed by the frustration and disappointment in the claims appeals system experienced by many disabled veterans and their survivors. That system suffers from serious dysfunctions. As I describe below, there are numerous significant problems. NVLSP urges Congress to enact five legislative reforms that will help fix the current appellate system.

The Evidence of Dysfunction

A. The Slow Appellate Process

The backlog of appeals has been continually growing. VA's Monday Morning Workload Reports show that 267,107 appeals were pending one year ago, and as of January 12, 2015, the number of appeals had grown to 289,297. The time it takes from the filing of the initial appeal document – the Notice of Disagreement (NOD) -- to the issuance of a Board of Veterans' Appeal (BVA) decision is exceedingly long. According to the latest Annual Report of the Chairman of the BVA, the average time lapse between the filing of an NOD and an initial decision of the BVA was 1,255 days (that is, more than 3 years and 5 months). The time it takes for a final decision to be made on a claim is often much longer because, as discussed below, the initial BVA decision often results in a remand of the case to the regional office.

The initial part of this 1,255-day time lapse is the period from the filing of an NOD to VA preparation of a Statement of the Case (SOC). The latest (FY2013) Report of

the BVA Chairman states that the average delay from NOD to SOC was 295 days. The January 12, 2015 Monday Morning Workload Report states that the average delay from NOD to SOC has increased to 408 days.

But the largest part of the more than 1,255-day time lapse from NOD to initial BVA decision involves the warehousing of appeals at the VA regional offices after the veteran files the last document the veterans needs to file in order to get the appeal to the BVA – that is the Substantive Appeal (VA Form 9). The FY2013 Report of the BVA Chairman states that 725 days (nearly 2 years) is the average delay from the filing of the Form 9 to the date the regional office actually transfers the VA claims file to the BVA.

B. The Hamster Wheel

The foregoing delays are exacerbated by the fact that the initial BVA decision is often not the final decision on a veteran's appeal. For nearly a decade now, those who regularly represent disabled veterans before the VA and CAVC have been using an unflattering phrase to describe the system of justice that veterans face once they appeal a VA regional office decision denying a claim for service-connected disability benefits: "the Hamster Wheel". This phrase refers to the following common phenomenon:

The veteran's appeal to the BVA does not stop once the BVA issues its first decision. Instead, the BVA often remands the appeal back to the regional office to comply with the duty to assist. An additional delay occurs, which the FY2013 BVA Chairman Report states averages 348 days. The case is returned to the BVA, which sometimes remands the claim to the RO a second time because the RO did not comply with the remand instructions in BVA decision #1. Alternatively, the BVA's initial decision is to deny the claim and the veteran appeals to the CAVC. The CAVC finds that the BVA has erred in a prejudicial matter and remands the claim back to the BVA to correct the error, which often results in a subsequent remand by the BVA to the RO. The net result is that frustrated veterans have to wait many additional years – beyond the average 1,255-day delay before an initial BVA decision -- before receiving a final decision on their claims.

The statistics bear out this grim picture of the Hamster Wheel. Over the last four fiscal years, the percentage of appeals to the BVA that have resulted in a BVA remand to the Appeals Management Center (AMC) or the RO are **42.4%, 44.2%, 45.8%, and 45.6%**, respectively. Most of these remands are predicated on the existence of RO error. Since 1995, the Court of Appeals for Veterans Claims has set aside and remanded **76%** of the 42,305 BVA decisions that have been appealed by a VA claimant to the CAVC and over which the CAVC has had jurisdiction. Almost all of these Court remands result from a Court finding that the BVA decision contained one or more prejudicial errors.

The VA often tries to diminish how damning these statistics are by arguing that only a relatively small percentage of VA claimants appeal to the BVA and only a relatively small percentage of those receiving a BVA decision appeal to the CAVC. But

this argument fails to take into account the fact that there are a large percentage of errors in the decisions that are not appealed.

C. Inconsistent BVA and RO Decision-Making

Part of the reason that the VA appeals adjudication process suffers from dysfunction is that there are relatively few objective precedents that guide the ROs and the BVA on the meaning of title 38 statutes and VA regulations. One of the benefits envisioned by Congress in 1988 when it created a national court to oversee the VA adjudication process was that this national court would help make VA decision-making more consistent and fair by issuing precedential decisions guiding the ROs and the BVA on the meaning of the law. Unfortunately, over the last 26 years, the Court of Appeals for Veterans Claims has decided to denominate more than 90% of all of its decisions as nonprecedential. This leaves individual ROs and BVA judges with substantial discretion in interpreting statutes and regulations. Moreover, the regulations governing the BVA provide that every single one of the hundreds of thousands of decisions that are issued by the 65 individual BVA judges is nonprecedential.

When the law is not clear as to how it should apply to the facts of an individual case (as is often the case in the VA adjudicatory system), it tends to (a) make it more difficult for claimants and their representatives to understand what type of evidence they should try to obtain to substantiate their claims; (b) increase the time it takes for the adjudicator to reach a decision, (c) lead to inconsistent decision-making; and (d) lead to a greater number of appeals by disappointed veterans.

Legislative Solutions

In the past, some have advocated for a legislative reform in which an unrepresented veteran, or a represented veteran who does not necessarily have the express approval of his or her representative, can, once the RO initially denies the claim, give up the veteran's right to submit additional evidence and the right to a BVA or RO hearing in exchange for a speedy BVA decision. This reform has been dubbed the Fully Developed Appeal.

Given the alternative (that is, waiting 3½ to 8 years to obtain a final BVA decision on a claim), many unrepresented veterans would likely jump at the chance to give up their rights to submit additional evidence and a hearing in exchange for a speedy BVA decision. That many unrepresented veterans would likely choose this option does not necessarily make this reform a wise one. It is significant that the Fully Developed Appeal reform requires the veteran to choose whether to give up the right to submit additional evidence and have a hearing after receiving an initial RO denial that does not fully explain why the claim was denied and what evidence is missing – the type of explanation that would be in an adequate Statement of the Case. How the unrepresented veteran can make a knowing and intelligent decision to give up his rights at this point in the appellate process is not clear to NVLSP. NVLSP believes that there

are better legislative solutions for what ails the appellate claims system. NVLSP urges Congress to enact the following five reforms of that system.

- **Authorize BVA to Develop Evidence Itself Without Having to Remand to the AMC or Regional Office**

15 years ago, then Secretary of Veterans Affairs Anthony Principi designed an innovative way to diminish the hamster wheel phenomenon and streamline the VA appellate claims process. Then, as now, the Board of Veterans' Appeals determined in over 40% of the appeals it reviewed that the regional office had erred by not complying with the duty to assist the claimant in developing the evidence necessary to substantiate the claim or had erred in some other prejudicial way. As a result, the BVA had to remand the appeal to the regional office to fix the error, which lengthened by years the time it would take for the VA to issue a final decision. Moreover, the regional office (RO) would often fail to substantially comply with the Board's remand instructions and when the case was returned to the Board, the Board would have to remand the case to the regional office for a second time.

Then Secretary Principi decided that a partial solution to the hamster wheel phenomenon was to amend VA regulations to allow the BVA to develop additional evidence itself, without remanding to the RO, in a case in which the Board determined that a final decision could not be issued because additional development was necessary. Forcing the BVA to remand to the Appeals Management Center (AMC) or the local ROs lengthens the adjudicatory process because the BVA does not have direct authority over the AMC and RO – meaning the BVA cannot control whether the AMC or RO provides expeditious treatment or properly complies with the remand instructions. Allowing BVA development without a remand to the AMC or RO further streamlines the appellate process by eliminating the need for the AMC or RO to review the record and prepare a written supplemental statement of the case before the case is returned to the BVA for another decision. Thus, the duties of the AMC and RO adjudicators who decide cases remanded by the BVA could be transferred to help the ROs decide other cases – thereby decreasing the backlog.

Unfortunately, Secretary Principi did not have the right to make this change without Congressional action. In *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit held in 2003 that it was beyond the VA Secretary's statutory authority to use the scheme the VA Secretary initiated to streamline the BVA decision-making process. But Congress can and should intervene now by amending the law to allow the BVA to develop evidence itself without remanding to the AMC or RO.

- **Provide Veterans Organizations with a Right to Petition the VA General Counsel for a Binding Precedent Opinion on the Proper Interpretation of a Statute or Regulation**

As explained above, part of the reason that the VA appeals adjudication process suffers from dysfunction is that there are relatively few objective precedents that guide

the ROs and the BVA on the meaning of title 38 statutes and VA regulations. Justice is promoted by the existence of clear, specific rules.

NVLSP urges Congress to address this problem by adopting the following reform. Provide stakeholders – the veterans service organizations – with a right to petition the VA Office of General Counsel (VAOGC) to adopt a particular interpretation of Title 38 statutes or regulations supported by the petitioning VSO as a VAOGC Precedent Opinion that is binding on the ROs and BVA. Currently, the VAOGC has the authority to issue binding precedential opinions (38 U.S.C. § 7104(c) and 38 C.F.R. § 14.507) at its own discretion, but this authority is seldom utilized. For example, in 1989, VAOGC issued 20 precedential opinions; however, by 2012 it issued only three, and it didn't issue any precedent opinions in 2013.

The suggested legislation reform would require the VAOGC to respond to the petition by issuing a binding Precedent Opinion that addresses the validity of the proposed rule of law, and with a right of any VSO to obtain judicial review of that Precedent Opinion by appealing to the U.S. Court of Appeals for the Federal Circuit. Thus, every petition filed by the VSO would result in a precedent one way or the other. Either the VAOGC would issuing a binding Precedent Opinion agreeing with the interpretation proposed by the VSO, or the VAOGC would issue a binding Precedent Opinion stating that the interpretation proposed by the VSO was not an accurate interpretation of the law in whole or in part. Either way, the BVA and the ROs would be provided additional objective guidance on what the law requires.

- **Authorize the Court of Appeals for Veterans Claims to (a) Certify a Case as a Class Action on behalf of Similarly Situated VA Claimants, (b) Require the VA to Stay Proceedings on the Claims of All Similarly Situated Claimants, and (c) Once the Court Finally Decides the Case, Require VA to Apply the Decision to all of the Pending Claims That Were Stayed**

Another legislative proposal that would help decrease dysfunction within the appeals adjudicatory system involves the current inability of veterans or VSOs to bring a class action to ensure the cases of similarly situated VA claimants are all resolved speedily, at the same time, and in the same way. When Congress enacted the Veterans' Judicial Review Act of 1988 (VJRA), it inadvertently erected a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. *See, e.g., Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989); *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or VSO to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S.

Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (see Lefkowitz v. Derwinski, 1 Vet.App. 439 (1991), and the Federal Circuit has indicated the same. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

In those cases initiated in and certified by the Veterans Court as a class action, the proposed legislation would authorize the Court to establish a moratorium on VA decision-making at the RO and BVA level on the claims of all similarly situated VA claimants until the Court makes a final decision – thereby conserving the resources of the VA, veterans, and the veterans service organizations that represent them. During the two years it typically takes the CAVC to decide a precedential case, no similarly situated veteran would need to appeal his VA claim and no RO rater or BVA Judge would have to issue an SOC or decision on the claim of such a veteran. Once the Court's decision became final, the ROs and BVA would then decide the claims subject to the moratorium according to the ruling of the Court. Thus, this legislation would help ensure that the claims of similarly situated veterans are decided in a consistent manner.

- **Prohibit The ROs And BVA, In A Case In Which There Is Positive Evidence Supporting the Award Of Benefits, From Developing Negative Evidence Against The Claim Unless The RO or BVA First Explains In Writing Why The Existing Record Is Not Sufficient To Award Benefits**

One reason for the existence of the Hamster Wheel phenomenon is that in a case in which the veteran submits adequate positive medical evidence in support of the claim, the BVA sometimes does not simply award the benefits sought. Instead, the BVA extends the life of the claim by remanding the case to the RO to obtain yet another medical opinion from a VHA physician. Often the results of this remand is that a negative medical opinion is obtained, which then results in the agency denying a claim which should have been granted months or years earlier. The same scenario occurs at the RO level when the RO receives adequate positive medical evidence in support of the claim.

Veterans advocates call this longstanding VA practice “developing to deny”. In addition to fostering the Hamster Wheel phenomenon, this practice is inconsistent with the pro-claimant VA adjudicatory process and the statutory benefit of the doubt rule. Congress could and should take action to stop this unlawful practice by enacting legislation that would prohibit the BVA and ROs, in a case in which there is positive evidence supporting the award of the benefits sought, from developing additional evidence unless the BVA or RO first explains in writing why the existing record is not sufficient to award the benefits sought.

- **Require VBA To Change Its Work Credit System for RO Adjudicators So That Raters Do Not Get Work Credit For Denying A Claim Without First Obtaining The Evidence Needed To Comply With The VA Duty To Assist**

A major reason for the Hamster Wheel phenomenon involves the fact that the ROs often deny claims without first complying with the duty to assist the claiming by attempting to obtain the evidence necessary to substantiate the claim. The fact that the ROs often fail to take this required action is evident from the high rate at which the BVA remands appeals with instructions for the RO to comply with the duty to assist and the high rate at which the CAVC remands appeals to the BVA with instructions for it to remand the case to the RO to comply with the duty to assist.

Why do the ROs so often fail to comply with the duty to assist? The main culprit is not the lack of training – although that is part of the problem. The main reason is the work credit system used by VBA. The work credit system gives the RO adjudicator work credit – which supports promotions and bonuses – for making a decision on a claim **whether or not the adjudicator first attempts to obtain the evidence necessary to substantiate the claim.** Obviously, an adjudicator can accumulate more work credits by deciding claims quickly and prematurely without taking the time to obtain the evidence necessary to comply with the duty to assist. This is what often happens. Congress can and should act to help stop this practice by prohibiting VBA from giving an RO adjudicator work credit for denying a claim unless and until the RO makes an adequate attempt to comply with the duty to assist.

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Prepared Statement

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Before the

Committee on Veterans' Affairs

U. S. House of Representatives

Subcommittee on Disability Assistance and Memorial Affairs

"Veterans' Dilemma: Navigating the Appeals System for Veterans Claims"

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On behalf of the National Organization of Veterans' Advocates, Inc. (NOVA), I would like to thank the Subcommittee Chairman and Ranking Member for the opportunity to share our views and offer solutions for this hearing.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA's disability claims process. In 2000, the United States Court of Appeals for Veterans Claims recognized NOVA's work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

NOVA has a unique perspective based on more than 20 years of collective experience in representing veterans and their families in appealing decisions of the VA. NOVA hopes to assist the Committee in understanding the VA's troubled appeals process for veteran's claims, including the long ignored systemic problems that contribute to the backlog of appeals.

It would be helpful in NOVA's judgment to begin by reviewing the statistics which have been provided to Congress from both the Board of Veterans' Appeals and the United States Court of Veterans Claims. The statistics cited by NOVA have been obtained from the Board's website from the Chairman's Annual Reports to Congress at http://www.bva.va.gov/Chairman_Annual_Rpts.asp and the Court's website from the Court's Annual Reports from Congress at <http://www.uscourts.cavc.gov/report.php>. The Chairman's Annual Reports cover the period from 1991 to 2013. The Court's Annual Reports cover the period from 1998 to 2013. These reports objectively identify the number of decisions made by the VA which were annually remanded by the Board as well as the number of decisions made by the Board which were reversed or remanded by the Court to the Board.

Looking at the entire period, the average number of cases decided by the Board from 1991 through 2013 is 36,640. However, in the period from 2007 through 2013, the average number of cases decided by the Board has been increased to 45,227. The average number of cases remanded by the Board from 1991 through 2013 is 39.5%. In the period from 2007 through 2013, the average number of remand orders by the Board has increased to 41.1%, demonstrating that the Board has consistently been required to remand approximately 40% of the cases appealed to the Board. This means that when a case has been appealed to the Board, 4 out of every 10 cases must be returned to the VA for further development. In other words, the VA adjudication process consistently produces only 60% of the appealed cases ready for administrative appellate review and this has been the situation from 1992 through 2013. NOVA submits that this consistent result demonstrates that the VA is not fully and sympathetically developing cases before they were decided on the merits.

When Congress enacted Judicial Review in 1988, it did so with the clear intent to maintain a beneficial non-adversarial system of veterans benefits. The legislative history indicates:

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). Congress made clear its expectation that the VA would “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits.” The statistics from the Chairman of the Board of Veterans’ Appeals Annual Report confirms that this expectation has not been fully met by the VA as demonstrated by the VA’s appeal process which has been unable to “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits” in 4 out of every 10 cases appealed to the Board since 1992 through 2013. Based on these statistics, even though the Board is able to adjudicate 60% of the cases appealed, it is not able to adjudicate 40% because the VA failed to fully and correctly develop the claim to its optimum before deciding the claim on its merits. Therefore, the Board is only able to decide 6 out of every 10 cases because the other 4 cases must be remanded to the VA to undertake the development which should have been done before the VA decided the claim on its merits. The VA’s appeal process is not working because of the delays in deciding appeals, because the Board must remand to the VA for further development before remanded cases can be decided by the Board.

The VA’s failure to “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits” is also demonstrated by the statistics which have been annually reported by the United States Court of Appeals for Veterans Claims from 1998 through 2013 concerning cases appealed from the Board to the Court.

The average number of cases decided by the Court from 1998 through 2013 is 3,277. In the period from 2007 to 2013, the average number of cases decided by the Court has been 4,473. The average number of cases remanded by the Court to the Board from 1998 to 2013 is 1,887 remands per year, meaning that these cases must be readjudicated by the VA in whole or in part. This means that in more than 50% of the cases decided at Court the result is a remand for readjudication. In the period from 2007 to 2013, the average number of cases remanded per year was 2,551. The percentage of remands has remained the same – more than 50% of the cases decided at Court result in a remand for readjudication.

The average percentage of remands from the total number of cases decided by the Court annually from 1998 to 2013 is 56.9%. This means that of the total cases decided each year by the Court or by agreement with the VA more than one half are remanded. In the period from 2007 to 2013, the average percentage of remanded cases from the total number of cases decided by the Court

was 57.4%, demonstrating that as a percentage of the total number of cases decided by the Court annually, the percentage of cases remanded has been consistent. These statistics demonstrate that of the cases appealed from the Board to Court which are decided by the Court or resolved by agreement more than half of those cases are returned to the Board for further proceedings.

The statistics from both the Board and the Court confirm the VA's failure to "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" is the consistent reason for remands. The appeals process is not operating efficiently because at the Board 4 out of every 10 cases are remanded and at the Court more than 50% of the cases result in remands. These statistics clearly show that the VA's appeal process is significantly delayed because the VA does not in the first instance fully and sympathetically develop the claim.

According to the Annual Reports of the Chairman of the Board of Veterans' Appeals from 1992 to 2013, the total processing time for an appeal, meaning from the date of the VA's receipt of the notice of disagreement to the final Board decision including the average remand time factor, has increased from a low in 1992 of 519 days, which is approximately 1 year and 5 months, to a high of 1,698 days, which is more than 4 ½ years, in 2012. The average total processing time for an appeal for the period from 1992 to 2013 is 1,159 days, which is more than 3 years. Included in these statistics from the Board is an average remand time factor which was as low as 30 days in 1992 to a high of 539 days which is nearly 1 ½ years, in 2009. In fact, from 1992 through 2008, the highest average remand time factor reported by the Board was 190 days, a little more than 6 months, in 2006. For the period from 2009 to 2013, the average remand time factor reported by the Board was 450 days, which is approximately 1 year and 3 months.

A careful examination of the processing time statistics in the Chairman of the Board's Annual Report to Congress reveals that the choke point causing the delays in processing appeals occurs in the time interval between the VA's receipt of the substantive appeal to the certification of the appeal to the Board. The average time for this interval as reported is from a low in 1992 of 192 days or just more than 6 months to a high in 2002 and 2004 of 790 days or more than 2 years. The average time for this interval as reported from 1992 to 2013 was 548 days or approximately 18 months.

Following receipt of a timely substantive appeal, the agency of original jurisdiction will certify the case to the Board of Veterans' Appeals. Certification is accomplished by the completion of VA Form 8, "Certification of Appeal." The certification is used for administrative purposes and does not serve to either confer or deprive the Board of Veterans' Appeals of jurisdiction over an issue. See 38 C.F.R. § 19.35. The official docket date of a case before the Board is assigned when the case is physically received at the Board of Veterans' Appeals. Even though the docket date is still based on the date the appellant's substantive appeal (VA-9) was received by the VA, it is no longer assigned at the VA or at the time the signed VA-9 is received. Report of the Chairman, Board of Veterans' Appeals, Fiscal Year 2008 at 9. This delay is particularly troubling because the task of certifying an appeal and transferring the claims file to the Board is not a time-consuming process. All that is required by the VA is preparation of a VA Form 8, which merely lists the issues that have

been appealed, as well as the rating, appeal, and hearing history. Veterans Benefits Manual 2013 Edition, Part V, The VA Claims Adjudication Process, Chapter 13, Board of Veterans' Appeals, Section 13.7 Transfer of the VA claims file from the regional office to the Board. The "certification of appeal," or VA Form 8, is the VA prepared document identifying the claims that have been perfected for appeal. The VA prepares the form just before the transfer of the claimant's VA claims file to the Board of Veterans' Appeals in Washington, D.C. The form is not sent to the veteran or claimant, but it does become a permanent part of the VA claims file. Veterans Benefits Manual 2013 Edition, Part V, The VA Claims Adjudication Process, Chapter 13, Board of Veterans' Appeals, Section 13.9.3.1 The significance of VA Form 8.

It is difficult to understand why or how it could take the VA more than 30 days to complete a VA Form 8 when all that is required to complete this form is to list the issues that have been appealed, as well as the rating, appeal, and hearing history. Yet since 1992, according to the Chairman of the Board's Annual Report, it has taken the VA on average approximately 18 months to certify appeals to the Board and as long as more than 2 years. The appeals process is compromised when decisions on appeals are delayed.

NOVA has three suggestions to Congress concerning the systemic problems which contribute to the backlog in deciding appeals. First, NOVA recommends that Congress make a substantive statutory change by amending the provisions of 38 C.F.R. § 7105 by eliminating the redundant requirements of a statement of the case and a substantive appeal. Second, even if Congress does not amend § 7105 to eliminate the need for a statement of the case and a substantive appeal, Congress should amend § 7105 to require that the VA certify and transfer a claims file in an appeal to the Board no later than 60 days after the VA's receipt of a substantive appeal. Third, Congress should amend the provisions of 38 U.S.C. § 5109B and the provisions of 38 U.S.C. § 7112 in order to ensure expeditious treatment of remands from the Board and from the Court.

Why the provisions of 38 C.F.R. § 7105 should be amended to eliminate the need for a statement of the case and a substantive appeal.

As a result of judicial review, the need for a statement of the case and an affirming substantive appeal no longer exist. Prior to the enactment of judicial review, the Board of Veterans' Appeals was the only appellate review of VA decisions on benefits. With the enactment of the Veterans Judicial Review Act in 1988, the decisions of the VA are subject to review by the United States Court of Appeals for Veterans Claims and the decisions of that Court are reviewed by the United States Court of Appeals for the Federal Circuit.

The delay attendant with the VA's preparation of a statement of the case and the claimant's need to reaffirm the desire to appeal according to the 2012 GAO report adds 460 days from notice of disagreement to statement of case and 560 days from VA's receipt of the claimant's substantive appeal to the VA's certification of the appeal to the Board. Amending § 7105 would significantly decrease the appeal process timeframe by having a single process for initiating and completing an appeal. The goal should be to get a veteran or claimant's appeal to the Board as soon as possible.

An amendment to § 7105 would need to incorporate into the statutory scheme the current regulatory decision review process which affords a veteran or a claimant the option for a *de novo* review before a review by the Board. The statutory incorporation of the decision review process would permit the VA regional offices to identify and correct decisions before they were certified to the Board. This procedure allows for a critical second look at the VA's first decision before the appeal is certified to the Board. The individuals who are assigned to do such decision reviews are the VA's most experienced adjudicators. This current decision review process exists only by VA regulation and can be withdrawn at anytime. This process should be statutory because it is effective in getting a decision changed without the need for review by the Board.

Amending § 7105 to eliminate the need for a statement of the case and a substantive appeal would meaningfully expedite the VA's appeal process. The removal of the requirements for the preparation of a statement of the case and second appeal notice (substantive appeal) by the claimant will allow the VA to complete the appeal process in significantly less time. The decrease in the time required to obtain a decision from the Board on an appeal is of more benefit to veterans and claimants than the receipt of a statement of the case and the filing of a substantive appeal. With the advent of judicial review, the need for a statement of the case and the filing of a substantive appeal no longer exists. An amendment eliminating the need for a statement of the case and the filing of a substantive appeal will enhance the need for the VA to comply with the notice requirements of a detailed explanation of its decisions as contemplated by the provisions of 38 U.S.C. § 5104(a) and 38 C.F.R. § 3.103(b).

The current processing of appeals is impeded by required delays mandated by the current version of § 7105. These requirements unnecessarily delay the time it takes to obtain a final decision by the Board as well as to obtain judicial review of final Board decisions. The VA appeal process would be enhanced by streamlining the statutory appeal requirements proposed here by as much as 3 years.

Why the provisions of 38 C.F.R. § 7105 should be amended to explicitly require the VA to certify and transfer an appeal from the regional office to the Board.

Currently, there is no statutory timeframe for the VA to certify a completed appeal from the VA regional office and to transfer the claims file to the Board for consideration of an appeal. As a result, appeals are languishing at VA regional offices from a low average of 192 days to a high average of 790 days before an appeal is certified and transferred to the Board. We recommend that Congress should require by statute that VA regional offices certify and transfer all completed appeals to the Board of Veterans' Appeals within 60 days of the VA's receipt of a substantive appeal from the veteran or the claimant. This is a simple statutory fix which will ensure that after 60 days a completed appeal will be certified and transferred to the Board.

Additionally, this amendment would allow for better tracking of appeals because all appeals would be required by statute to be certified and transferred to the Board within 30 days of the

completion of the appeal by the veteran or claimant. This statutory change would also allow the Board to report to Congress on the number of appeals certified each year from the VA regional offices. This would result in a more accurate assessment of the number of appeals received by the Board annually.

A further benefit to veterans and other claimants appealing decisions of the VA would be the establishment of an indisputable right to the certification and transfer of a completed appeal to the Board. This would permit veterans and other claimants appealing decisions of the VA to initiate petitions for extraordinary relief with the United States Court of Appeals for Veterans Claims to compel the VA to certify and transfer a completed appeal to the Board after more than 60 days had lapsed following the completion of the appeal. A statutory mandate allows veterans and other claimants a means to compel the VA to act when the VA fails to act in accordance with law.

The need for amendments of the statutory provisions requiring expeditious treatment of remands.

In 2003, Congress enacted the provisions of 38 U.S.C. § 5109B and 38 U.S.C. § 7112. Section 5109B requires the VA to expedite the treatment of remands from the Board. Section 7112 requires the Board to expedite the treatment of remands from the Court. These statutes as currently written do not define the term “expeditious treatment.” The term “expeditious treatment” is ambiguous and unclear. Congress needs to provide a clear statutory expectation for what is meant by the “expeditious treatment” of remands. Without this clarity, the Board and the VA are under no clear statutory direction as to when a remand from the Board or the Court needs to be processed. Delays in the processing of remands would be significantly reduced by amending these statutes to provide specific expectations.

NOVA believes that Congress should consider specific amendments to these statutes as follows: First, Congress should provide in each statute that remanded cases should be addressed by special teams at the Board and the VA regional offices whose responsibility is to expedite the instructions in remanded cases. Second, Congress should provide in each statute that remanded cases should be addressed and resolved within 6 months of the date of the remand. Further, that in the event that a remand can not be resolved within 6 months of the date of the remand, the Board or the VA regional office will be required to inform the veteran and his or her representative of the reasons for the delay. Within that notification, the Board or the VA regional office should provide a timetable for the anticipated resolution of the remand not to exceed a second 6-month period.

NOVA appreciates that these recommendations may be perceived as micro management of the appeals process. However, requiring communication explaining the reasons for the delays in the resolution of cases remanded by both the Court and the Board will ensure that attention is in fact being given to remands. *Groves v. McDonald*, 2015 WL 128172, Vet.App., January 09, 2015 (NO. 14-0269)(addressing lack of agency action on remand, ordering the Secretary to pay sanctions in the form of reasonable expenses associated with the litigation). The current statute’s promise of

“expeditious treatment” of remands has been unfulfilled for more than a decade because of the lack of clarity in the meaning of the term “expeditious treatment.” It is evident to NOVA that without a clear and unambiguous expression of Congress’ intent, remands will continue to be delayed by the VA and the Board and result in continuing delays in processing appeals.

Third, Congress should require that the Chairman of the Board of Veterans’ Appeals include in his or her annual report to Congress the number of cases resolved by the Board on remand from the Court within 6 months; the number of cases resolved by the Board on remand from the Court in more than a year, 18 months, and 2 years or more with an explanation for why these remands were not resolved within 6 months. In addition, the Chairman of the Board should include in his or her annual report to Congress the number of cases resolved by the VA regional office on remand from the Board within 6 months, a timeline which NOVA believes is more acceptable under the statutes. The report should also include the number of cases resolved by the VA regional office on remand from the Board of a year, 18 months, and 2 years or more with an explanation for why these remands were not resolved within 6 months. Such reporting will give Congress the information necessary to assess whether remands are being expeditiously handled by the VA and the Board.

Current statutory mandate merely states: “The Secretary [and the Board] shall take such actions as may be necessary to provide for the expeditious treatment” The phrase “expeditious treatment” is ambiguous, yet the VA has made no effort to interpret this ambiguity in regulation. There must be accountability. Only clarity of the Congress’ expectations can resolve this ambiguity. Congress should resolve the ambiguity of the phrase “expeditious treatment” to ensure that both the Board and the VA regional offices are accountable. Accountability will only occur if Congress is willing to amend these statutes to make clear that resolving remands must be given priority over pending appeals.

Remands are a result of the VA’s failure to “fully and sympathetically develop the claim before deciding it on the merits.” Congress must reaffirm its commitment to veterans and their families that Congress expects the VA to get it right the first time. Getting VA decisions right the first time is possible only when the VA fully and sympathetically develops every claim to its optimum before deciding every claim on the merits. Eliminating or at least minimizing delays can be accomplished by the Congress’ adoption of NOVA recommendations.

NOVA hopes that these suggestions will be of assistance to this Committee and to Congress.

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He has been engaged in the private practice of law in Topeka, Kansas since 1973. Admitted to the following courts: Kansas Supreme Court, 1973; Federal District Court for the District of Kansas, 1973; 10th Circuit Court of Appeals, 1984; U. S. Court of Federal Claims, 1987; Federal Circuit Court of Appeals, 1989; Court of Appeals for Veterans Claims, 1990; United States Supreme Court, 1990. The practice of Veterans Law is the exclusive area of practiced by Carpenter, Chartered. He is a founding member of the National Organization of Veterans Advocates.

He is the President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, predominantly veterans with post traumatic stress disorder. The firm also specializes in cases involving total disability ratings and earlier effective dates. The firm also does requests for revisions based on allegations of clear and unmistakable error and survivor claims for dependents of veterans.



NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)
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“Veterans’ Dilemma: Navigating the Appeals System for Veterans Claims”
January 22, 2015

Executive Summary

The National Organization of Veterans’ Advocates, Inc. (NOVA) is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation’s military Veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA’s disability claims process. In 2000, the U.S. Court of Appeals for Veterans Claims recognized NOVA’s work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

Recommendations to Alleviate Systemic Problems in the VA’s Appeals Process

NOVA has three suggestions to Congress concerning the systemic problems which contribute to the backlog in deciding appeals:

- First, NOVA recommends that Congress make a substantive statutory change by amending the provisions of 38 C.F.R. § 7105 by eliminating the redundant requirements of a statement of the case and a substantive appeal.
- Second, even if Congress does not amend § 7105 to eliminate the need for a statement of the case and a substantive appeal, Congress should amend § 7105 to require that VA certify and transfer a claims file in an appeal to the Board of Veterans’ Appeals (the Board) no later than 60 days after the VA’s receipt of a substantive appeal.
- Third, Congress should amend the provisions of 38 U.S.C. § 5109B and the provisions of 38 U.S.C. § 7112 to ensure expeditious treatment of remands from the Board and from the U.S. Court of Appeals for Veterans Claims (the Court).

Statistics from both the Board and the Court confirm that the VA’s failure to “fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits” is the consistent reason for remands. The appeals process is not operating efficiently because at the Board, 4 out of every 10 cases are remanded and at the Court, more than 50 percent of the cases result in remands. These statistics clearly show that the VA’s appeal process is significantly delayed because VA does not fully and sympathetically develop the claim in the first instance.

Remands are a result of the VA's failure to "fully and sympathetically develop the claim before deciding it on the merits." Congress must reaffirm its commitment to Veterans and their families that Congress expects VA to get it right the first time. Getting VA decisions right the first time is possible only when VA fully and sympathetically develops every claim to its optimum before deciding every claim on the merits. Eliminating or at least minimizing delays can be accomplished by the Congress's adoption of NOVA recommendations.

Department of Veterans Affairs (VA)
Appeals Data Requested by
House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

Question 1: I ask that you provide certain information regarding the current status of the appeals inventory as of January 1, 2015. Please describe the inventory or time interval status in each of the following stages of the appeals process:

- Stage 1: Notice of Disagreement receipt to Statement of the Case issuance
- Stage 2: Statement of the Case issuance to Substantive Appeal (Form 9) receipt
- Stage 3: Substantive Appeal (Form 9) receipt to Certification of Appeal to the Board of Veterans Appeals (BVA)
- Stage 4: Receipt by BVA of Certified Appeal to BVA decision issuance
- Stage 5: Remand time factor for Appeals Management Center and the Regional Office

Within each of those stages, please provide the following data points:

- Total case inventory in the stage;
- Average number of days pending in the stage;
- Median number of days in the stage;
- Average number of days from Notice of Disagreement; and
- Median number of days from Notice of Disagreement.

Response: Please see the charts below with data as of January 1, 2015.

Stage 1: Notice of disagreement receipts to Statement of the Case (SOC) issuance

NOD Pending	Average Days from NOD	Median Days from NOD
195,226	405	330

Stage 2: SOC issuance to substantive appeal (Form 9 receipt).

SOC Pending	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
23,427	74	55	562	462

Stage 3: Form 9 receipt to certification of the appeal to the Board of Veterans' Appeals (BVA).

Form 9 Pending	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
60,990	630	435	1,166	1,113

**Department of Veterans Affairs (VA)
Appeals Data Requested by
House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Stage 4: Receipt by BVA of Certified Appeal to BVA decision issuance. Stage 4 represents a discreet universe of cases decided in the first quarter of fiscal year (FY) 2015 as defined by the Committee's request.

Board Decisions Issued in FY 2015 Q1	*Average Days in Stage 4	Median Days in Stage 4	Average Days from NOD	Median Days from NOD
13,253	294	158	1,896	1,747

*Average days in stage 4 is defined as physical receipt at the Board to Board decision issuance.

Stage 5: Remands at the Appeals Management Center (AMC) and regional offices (RO).

Remands Pending at the AMC and ROs	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
34,139	408	230	2,359	2,155

Remands are further broken down by:

- RO remands pending adjudicative action,
- RO Remands ready for Travel Board, and
- AMC remands pending

RO Remands Pending Adjudicative Action				
Pending Adjudicative Action of Cases	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
21,210	548	384	2,542	2,329

RO Remands Ready for Travel Board				
Ready for Travel Board	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
404	469	284	2,323	2100

Department of Veterans Affairs (VA)
Appeals Data Requested by
House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

AMC Remands Pending				
AMC Remands Pending	Average Days in Stage	Median Days in Stage	Average Days from NOD	Median Days from NOD
12,535	169	120	2,051	1,934

Question 2: I further ask that you provide certain information regarding the ten longest pending cases currently in the appeals process. For *each* of the ten longest currently pending appeals, please provide the following data points:

- Number of days the appeal spent in each of the same stages described above;
- The number of days the appeal has been pending since receipt of the Notice of Disagreement when it completed each stage;
- The number of days the appeal has been pending since receipt of the Notice of Disagreement when it completes each stage; and
- The total number of days the appeal has been pending since receipt of the notice of disagreement.

Response: Please see embedded spreadsheet below.



10 Top Appeals.xlsx

Question 3: Additionally, please provide certain information regarding the total number of remands for each of the past six fiscal years (i.e., FY 2009, FY 2010, FY 2011, FY 2012, FY 2013, and FY 2014). Please note the top five reasons necessitating remand by BVA.

Response: The total number of remands from the Board to the Agency of Original Jurisdiction (AOJ) for the past 6 fiscal years are as follows:

2014—25,277

2013—19,115

2012—20,299

2011—21,464

2010—20,829

2009—18,202

**Department of Veterans Affairs (VA)
Appeals Data Requested by
House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Below are the top five remand reasons from and from the Board to the AOJ for fiscal years 2009-2014:

Year	Reason
2014	VA medical records Nexus opinion Incomplete/inadequate findings Current findings (medical examination/opinion) Private medical records
Year	Reason
2013	VA medical records Nexus opinion Incomplete/inadequate findings Current findings (medical examination/opinion) Private medical records
Year	Reason
2012	VA medical records Current findings (medical examination/opinion) Incomplete/inadequate findings Private medical records No VA examination conducted
Year	Reason
2011	VA medical records Nexus opinion Current findings (medical examination/opinion) Incomplete/inadequate findings Private medical records
Year	Reason
2010	Nexus opinion VA medical records Current findings (medical examination/opinion) Incomplete/inadequate findings Private medical records
Year	Reason
2009	Nexus opinion Current findings (medical examination/opinion) Incomplete/inadequate findings Legally inadequate notice No VA examination conducted

**Department of Veterans Affairs (VA)
 Appeals Data Requested by
 House Committee on Veterans' Affairs
 Subcommittee on Disability Assistance and Memorial Affairs**

Question 3 continued: Total number of BVA decisions issued in which at least one claim contained therein was remanded for each of the past three fiscal years (i.e., Fiscal Year 2012, Fiscal Year 2013, and Fiscal Year 2014). Please also note the top five reasons necessitating remand by BVA.

Response:

	Total Decisions	Decisions w/Remanded Issues
FY 2012:	44,310	26,031
FY 2013:	41,917	24,173
FY 2014:	55,532	32,633

Top five reasons necessitating remand:

Medical Examination/Opinion (Incomplete/Inadequate findings)
 Medical Examination/Opinion Nexus Opinion
 Duty to Assist VA Medical Records
 Medical Examination/Opinion No VA exam conducted
 Due Process Noncompliance/Stegall

Board Docket No. 88-03-442

This case began as an appeal in January 1987, which was resolved in November 2011. Additional issues on appeal have been subsumed under the original docket number, which now involves 1 issue on appeal. Since January 1987, this appeal has addressed 6 issues.

The attached spreadsheet tracks the issue of entitlement to service connection for trauma to the left hand and wrist.

Regarding this docketed appeal, the Regional Office has issued 16 adjudications (to include 4 rating decisions, 2 Statements of the Case (SOCs), and 10 Supplemental Statements of the Case (SSOCs)); the Board has issued 10 decisions (including 7 remands to the Veterans Benefits Administration); and the Court of Appeals for Veterans Claims (CAVC or Court) has issued 1 decision.

The Veteran has been receiving a total disability rating based on individual unemployability (TDIU) since February 1, 1996 and is service-connected for five disabilities with a combined rating of 70% from May 13, 2004.

Stage	From	To	Days in Stage	Days Since NOD
2/92 NOD receipt to 3/92 SOC Issuance (STAGE 1)	2/14/1992	3/9/1992	24	24
3/92 SOC Issuance to 5/92 VA 9 receipt (STAGE 2)	3/9/1992	5/4/1992	56	80
5/92 VA 9 receipt to MISSING CERTIFICATION*** (STAGE 3)	5/4/1992	2/27/1993	299	379
2/93 Board Receipt	2/27/1993	2/27/1993	0	379
2/93 Board Receipt to 7/93 Board Remand (STAGE 4)	2/27/1993	7/13/1993	136	515
7/93 Board Remand to 9/94 Post-Remand Return* (STAGE 5)	7/13/1993	9/8/1994	422	937
9/94 Post-Remand Return to 5/95 Board Decision	9/8/1994	5/4/1995	238	1175
5/95 Board Decision to 8/96 CAVC Remand Mandate**	5/4/1995	8/13/1996	467	1642
8/96 CAVC Remand Mandate to 12/96 Board Remand	8/13/1996	12/19/1996	128	1770
12/96 Board Remand to 2/98 Grant at VBA	12/19/1996	2/19/1998	427	2197
2/98 Grant at VBA to 1/1/15 (Merged Appeals)****	2/19/1998	1/1/2015	6160	8357
Case 10				
Days in Each Jurisdiction (Approx.)			Total Days, NOD to Conclusion	
VBA	1228		2197	
Board	502		Total Days, NOD to 1/1/15	
Court	467			
			8357	

Original Issue Tracked: Service Connection for Tinnitus

*Board Remand to Post-Remand Return uses the time from the date of the Board Remand through the date the case returns to the Board.

**CAVC retains jurisdiction over the appeal until the date of the Court's Mandate.

***Using date of receipt at Board in lieu of certification for purposes of continuity and clarity.

****The original issue appealed was granted in 2/98; however, other issues, merged on appeal, have continued to the present under the same docket number.