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REVIEW OF VETERANS' DISABILITY COMPENSATION: WHAT CHANGES ARE NEEDED TO IMPROVE THE APPEALS PROCESS?

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

FEBRUARY 11, 2009

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REVIEW OF VETERANS' DISABILITY COMPENSATION: WHAT CHANGES ARE NEEDED TO IMPROVE THE APPEALS PROCESS?

WEDNESDAY, FEBRUARY 11, 2009

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room 418, Russell Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

Present: Senators Akaka, Tester, Begich, Burris, Burr, Isakson and Johanns.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, CHAIRMAN, U.S. SENATOR FROM HAWAII

Chairman AKAKA. This hearing will come to order.

Good morning, everyone. It is good to see all of you here this morning. I am pleased that all of you can join us today for a continuation of the hearings that we began last year to look at VA's disability compensation process.

Today's hearing will focus on improvements that can address delays in appeals.

During the last Congress, the Committee held four hearings concerning disability compensation: delays in claims processing; the work of the Veterans' Disability Benefits and Dole-Shalala Commissions; a review of the CNA Corporation and Institute of Medicine reports on disability compensation; and the relationship between compensation and rehabilitation for disabled veterans.

The goal of the Committee is to ensure that claims are adjudicated accurately, in a timely fashion, and as close to the veteran's home as possible. Everyone involved realizes that there is no quick fix to solving problems with disability claims, but the Committee, working with the Administration and with those who work with veterans, intends to do all it can to improve this situation.

Tackling the problems will require action on many fronts. At a very basic level, VA must get claims files organized. Last November I wrote then-Secretary Peake suggesting that the Department improve existing paper files. In response, VBA formed a working group to make improvements, and I really appreciate VA's prompt response to my request at that time.

Another facet of improving the claims and appellate process is greater use of technology. Moving to a paperless file system with electronic medical information must remain a top priority for VA.

VA and DOD must continue to build upon the collaboration we have seen in recent years, such as through the Disability Evaluation pilot program and the recent plan to expedite the claims of servicemembers seriously injured in combat.

The problems in VA's claims adjudication process affect appellate review. Also, problems in the appeals system can compound delays and lead to inadequate decisions. Once a claim has been appealed from an initial decision, many new concerns may arise.

As Judge Kasold notes in his testimony, judicial review has now been in place for 20 years. The time is ripe to see what is working, what improvements can be made, and to define the purpose and value of several levels of appellate review.

The Board of Veterans' Appeals is a part of VA. It reviews benefit claims and appeals, and also issues decisions on those appeals. The Board began and evolved when there was no judicial review. BVA was created in an attempt to provide independent reviews of VA decisions. Now that there is judicial review of VA decisions, we can begin to ask about the proper role of the Board.

The Court of Appeals for Veterans Claims is an independent judicial entity and, as such, must be accorded a greater degree of autonomy. At the same time, the Committee must be certain that the statutory authority for the Court is appropriate.

While there have been some positive steps in recent years, especially the addition of new staff at all levels, the progress is unsatisfactory. We are 20 years into the era of judicial review, and I know that it has made a great difference. At the same time, there have been consequences, most of which were not anticipated when the Court was established.

There are some very interesting and compelling suggestions that will be made in today's hearing, and I intend for the Committee to pursue them.

I reiterate that our goal is to provide veterans with accurate and timely resolutions to their cases. No idea is too bold. We must act quickly, yet responsibly, to address the current situation and to find solutions.

I, again, welcome everyone to today's hearing and look forward to a productive session here this morning.

Now I would like to call on Senator Isakson for any opening remarks he may have.

STATEMENT OF HON. JOHNNY ISAKSON,
U.S. SENATOR FROM GEORGIA

Senator ISAKSON. Thank you, Mr. Chairman. My remarks will be very brief, and I thank you very much for calling this timely hearing.

I had a veteran in my office this morning, a Purple Heart veteran, by the way, who had a 9:30 appointment. I told him I had to excuse myself and leave him with staff because I was going up to a hearing on the timely determination of disability claims for VA, where the final disposition of his 100 percent disability took 8 years.

So, since he was here today and since you called this timely session, I think it is important that we hear from the people at the Veterans Administration to address it.

Thank you very much, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Isakson.

Senator Tester.

STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA

Senator TESTER. I, too, want to thank you Chairman Akaka. I look forward to the testimony that will be presented at this hearing. I want to thank the witnesses for being here, of course, and to share their recommendations to address what I think is the single biggest challenge that faces the VA right now.

At every one of these hearings, I start by saying we have 100,000 veterans living in Montana. Over 11 percent of Montana's population have served in our military. And I say it every time because I am proud of it. I think the folks in Montana are proud to serve. They are proud to send their kids to service, and these great men and women form a core of American values in these Montana communities.

Everywhere I go in Montana, I hear about the great health care in the VA, but I also hear veterans tell me about how hard it is to get their foot through the door, and that is a reflection of the disability claims process. It takes too long, it is subject to too many errors, and it costs the veterans too much.

The mere fact that 70 percent of the BVA decisions appealed to the Court are sent back to the VA is astonishing. According to the Court, the most common error is a failure to sufficiently explain the basis for a decision. And how can the VA explain issuing ratings that it cannot support?

It is a waste of time. It is a waste of money. And, it is a waste of resources.

This Committee has provided more resources to the VA to begin to correct this funding and staffing deficiency, and I want to make sure that the money is actually for the good purpose of serving our veterans.

I believe that as we continue to wage two wars, the demand is going to increase on the entire system, from the individual claims processor working at the RO at Ft. Harrison, all the way up to the Court of Appeals. So we need to get it right, and we need to get it right fast.

I want you to know that you have my ear. You can count on me as an ally, and I am listening. I am listening for viable, commonsense recommendations that reduce waste, improve care and save the lives of our veterans.

Our veterans do not have months or years to wait for a decision about their health care from the VA. They need it right now.

I want to thank the witnesses for being here. It means that you and your organizations want to be a part of the solution. So I want to thank you for your willingness to roll up your sleeves and get after it.

I am interested in hearing from the panel about what they see the VA doing with that money and what else needs to be done to fix the mess we are in.

The folks who have been in service to our country deserve nothing less than full, fair hearings before our government, and when we do not give them that, we fail them.

So, with that, I want to thank you, Mr. Chairman. I look forward to the hearing.

Chairman AKAKA. Thank you very much, Senator Tester.

I now turn to Senator Johanns for his opening statement.

STATEMENT OF HON. MIKE JOHANNS, U.S. SENATOR FROM NEBRASKA

Senator JOHANNS. Mr. Chairman, I also say thank you for putting this hearing together.

I am, as many of you know, very new to the Committee. And I will say that one of the things when I talk to my veterans in Nebraska, the first thing they say is, "We are so happy you are on the Committee." But then they almost always raise appeals processing as the second issue.

Here is what I am interested in hearing about, and again part of what I am asking the witnesses to do is give me a little education when you testify. I am just wondering if there is, for lack of better terminology, a triage system in place for these disability claims.

For example, it occurs to me that some claims would just be clear, that they are just a matter of moving through the process quickly, and getting to a result just simply because the disabilities lead to a conclusion under any reasonable definition. I wonder if we have the kind of system that would move these veterans through the process lickety-split.

And then, of course, there are other cases that maybe require more time, more information from the doctor, and those go into a separate determination.

So, again, Mr. Chairman, I really thank you for this.

Help me get educated here; help me understand what you are trying to do to deal with this system—and count me in—in terms of trying to figure out a way to solve the problem.

Chairman AKAKA. Let me call on Senator Begich.

STATEMENT OF HON. MARK BEGICH, U.S. SENATOR FROM ALASKA

Senator BEGICH. Thank you, Mr. Chairman, and thank you very much for holding this hearing. I will be very brief. Again, I thank you all for being here.

What I am looking for is a three-stage approach in what would be those realistic short-term ideas that we can move forward on, and then the mid- and long-term—knowing that we sometimes have great, grandiose ideas to try to solve it all in one fell swoop. That is not practical. But how do we step through it?

Coming from a State like Senator Tester's where a large percentage—11 percent—of our State's population are veterans, this is an issue of great concern for me. So, I am looking forward to your comments but also just very practical approaches and realistic resources that are going to be necessary for the short-term as well as long-term.

So, thank you very much for being here.

Thank you, Mr. Chairman.

Chairman AKAKA. Senator Burr.

Senator BURR. Aloha, Mr. Chairman.

STATEMENT OF HON. RICHARD BURR, RANKING MEMBER, U.S. SENATOR FROM NORTH CAROLINA

Senator BURR. My apologies for my tardiness. I am going to ask that my opening statement be part of the record.

I am anxious to hear those individuals who are here to testify, and I thank you for calling this hearing.

[The prepared statement of Senator Burr follows:]

PREPARED STATEMENT OF HON. RICHARD BURR, RANKING MEMBER, U.S. SENATOR FROM NORTH CAROLINA

Good morning, Mr. Chairman, and welcome to our witnesses. Mr. Chairman, I appreciate you calling this important hearing to discuss how we can reduce the delays that too many of our Nation's veterans and their families face in trying to access veterans' benefits.

For those who have served and sacrificed on behalf of our Nation, they deserve prompt and just responses when they request benefits from the Department of Veterans Affairs. But, unfortunately, it can take months and even years for some veterans to get final answers to their requests. In fact, I hear from veterans in North Carolina about how long it takes to get a decision on their claims.

For starters, it takes an average of about 6 months for a VA regional office to make an initial decision on a claim for benefits. And that's just the beginning of the delays and frustrations if a veteran appeals that decision. That process could include reviews by the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims.

I know the Board and Court have been making efforts to get decisions to veterans faster. Both were able to reduce their backlogs of appeals last year. I also recognize that there may be many reasons for why the appeals process takes so long, including errors in development of the case and steps Congress built into the process. But, whatever the reasons, it's clear that the appeals process takes far too long, and it's not acceptable.

After starting an appeal, it takes on average almost 1,100 days before a veteran will get a decision from the Board of Veterans' Appeals. If the veteran then appeals to the Court of Appeals for Veterans Claims, he or she may wait 14 months for the Court to rule. In total, that's over four and a half years after the veteran first applies for benefits!

On top of that, veterans may face much longer delays if their cases have to be remanded or sent back by the Board or by the Court. And some have their appeals languish even longer because their cases are remanded on multiple occasions.

Given all this, it's understandable why many veterans, including veterans back in North Carolina, are extremely frustrated by this long appeals process. That's why it's so important that we figure out how we can help veterans get final decisions on their claims faster and without unnecessary frustration.

I appreciate the willingness of our witnesses, including Judge Kasold and Chairman Terry, to share with the Committee their views on how this process could be improved. I hope today we will have a constructive discussion that will serve as the foundation for much-needed and long-overdue improvements.

Again, Mr. Chairman, I want to thank you for holding this important hearing. I look forward to working with you and others on the Committee to promote an appeals system that will serve our veterans better.

I thank the Chair.

Chairman AKAKA. Thank you.

Senator Burris.

STATEMENT OF HON. ROLAND W. BURRIS, U.S. SENATOR FROM ILLINOIS

Senator BURRIS. Mr. Chairman, I will put my opening statement in the record because I have to make another markup over at another committee, but I will be back.

So, I do want to make sure that we are taking care of veterans. That is key.

Thank you, Mr. Chairman.

[The prepared statement of Senator Burris follows:]

PREPARED STATEMENT OF HON. ROLAND W. BURRIS, U.S. SENATOR FROM ILLINOIS

Thank you Chairman Akaka for holding this hearing on an issue that is of great importance to our Nation's veterans.

Today we gather to discuss improvements that can be made to mitigate the delay in processing appeals. Our veterans deserve no less than to have their appeals determined in a timely and accurate manner. As a new Member on this Committee, I am beginning to hear from veterans in Illinois about issues surrounding appeals processing at the Board and Court, and claims' adjudication at the Regional Office level.

I hope that today I can learn as much as I can about these issues.

Specifically, witnesses have been asked for legislative or policy recommendations that may help expedite the timeliness of appeals without sacrificing accuracy. I am particularly pleased that veterans' advocates are present to share their perspective on the process and ideas for reform. Indeed I hope that this hearing will be a starting point for dialog and action to address this problem.

I thank all of our witnesses for all that they do to help veterans. I look forward to today's testimony.

Chairman AKAKA. Thank you very much, Senator Burris.

I want to welcome our first panel of witnesses to today's hearing. I appreciate your being here this morning and look forward to your testimony.

First, I welcome the Honorable Bruce E. Kasold, a Judge of the U.S. Court of Appeals for Veterans Claims. The Court is part of the Judicial Branch of government and fully independent of VA. I appreciate your participation today so that the Committee might hear the Court's views as part of our oversight of the appellate process.

I also welcome James P. Terry, the Chairman of the Board of Veterans' Appeals of the Department of Veterans Affairs.

And I thank you both for joining us today. Your full statements will appear in the record.

Judge Kasold, will you please begin with your testimony?

STATEMENT OF THE HONORABLE BRUCE E. KASOLD, JUDGE, UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Judge KASOLD. Thank you, Mr. Chairman, and aloha.

Chairman AKAKA. Aloha.

Judge KASOLD. Members of the Committee, I have a prepared statement, and I present it to the Committee for the record. My comments now will be brief.

Our Chief Judge Greene sends his personal regrets that he could not be here today. But on his behalf and that of my colleagues, we appreciate the Committee's continued interest and oversight into the administrative functioning of the Court and the administrative process from which we receive appeals.

It is also a personal honor to be present here today.

As noted in my statement for the record, the Court recently recognized the 20th year of the passage of the legislation that created the Court, and this coming Fall we will celebrate the 20th year of the actual convening of the Court.

I look forward to addressing any questions you might have.

[The prepared statement of Judge Kasold follows:]

PREPARED STATEMENT OF HON. BRUCE E. KASOLD, JUDGE,
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Mr. Chairman and Members of the Committee: Thank you for allowing the U.S. Court of Appeals for Veterans Claims' (the Court) the opportunity to provide testimony today. I am here as the designee of the Court's Chief Judge, William P. Greene, Jr., who is unable to attend the hearing.

As a prelude, I would be remiss if I did not note for the record that the Court passed a milestone this past November 18, which marked the 20th year since its creation when President Ronald Reagan signed into law the Veterans' Judicial Review Act of 1988 (VJRA). The Court actually convened with three judges on October 16, 1989, and we look forward to celebrating next Fall, the 20th year of judicial access for veterans and their families.

According to your January 22, 2009, invitation letter, the hearing "will focus on improvements that can be made to mitigate the delay in processing appeals." More specifically, the Committee has requested whether we have any legislative or policy recommendations that might help expedite the timeliness of appeals, and any perspectives we have on the relationship between the Board and the Court.

I. AN ADMINISTRATIVE AND JUDICIAL APPELLATE PROCESS

As you are aware, the appellate process for those with claims for veterans benefits has two distinct fora: administrative and judicial. Within VA, a Regional Office generally processes the claim and renders the first decision. When a claimant is dissatisfied with that decision, he or she has the right to appeal to the Board. The Board reviews the claim de novo; that is, it reviews the claim without any deference given to the initial decision. The Board ultimately renders the final decision for the Secretary. If the claimant is dissatisfied with the Board decision, he or she may seek reconsideration by the Board, or, appeal to the Court.

Throughout the proceedings below, the claimant and the Secretary should be working together to maximize the claimant's benefits, if any are warranted under the statutes and regulations governing benefits. The Secretary has an affirmative duty to assist the veteran in gathering evidence, which includes, inter alia, liberally reading the scope of his claim, gathering evidence, advising the claimant what is needed to substantiate the claim, and providing a medical examination when needed.

When an appeal is taken to the Court, the claimant enters the judicial arena. In the Federal judicial system, the parties are viewed equally, and the claimant, now the appellant, generally has the burden of demonstrating that the Board decision is either clearly erroneous, or that there is some procedural error that has been prejudicial to the claimant. If dissatisfied with a decision from the Court, an appellant has the right to appeal to the U.S. Court of Appeals for the Federal Circuit, although that Court's jurisdiction generally is limited to questions of law, and most appeals are dismissed for lack of jurisdiction. Upon dissatisfaction with the results from the Federal Circuit, appellants may seek certiorari at the Supreme Court. Over our twenty-year existence, the Supreme Court has taken less than a handful of cases involving VA benefits claims.

A. The Judicial Appeal Process

Within our Court, I am pleased to report that we are operating on all cylinders. In contrast to the dynamics experienced over the past five years, which saw the Court (1) reduced at one point to only three active judges taking a full case-load, and two active judges nearing senior status and not taking new cases, (2) hampered with excessive turnover in leadership, and (3) experiencing anew the growing pains of a virtually re-established Court with the replacement of six judges in a two-year period, I am pleased to report that we now have a full complement of seven experienced, active judges. Moreover, under the capable leadership of our Chief Judge, we have, inter alia, an active recall-program for our senior judges, as well as a new mediation program and we now are in the process of fully implementing e-filing. Without doubt, our senior judges have, overall, significantly helped with the issuance of timely judicial decisions. Equally significant has been the implementation last Spring of an aggressive mediation program, which, to date, has succeeded in expediting a resolution in over 25% of the appeals filed, with the parties agreeing to a disposition that does not need judicial review; generally, the parties are agreeing to a remand for further adjudication below.

As always, the Court is looking for ways to ensure timely judicial review. The primary time-consuming process that warrants review is the time to prepare the record before the agency and the briefing process. Both are essential to a judicial process that is not only fair and just to both parties, but perceived to be fair and just by

the parties. On this issue I note that there are a significant number of requests for additional time to prepare the record before the agency or a brief. Both parties have time-management problems, but the Secretary has the greater number of requests for an extension of time. I am not familiar with the Secretary's internal operations, but I understand there is recognition that additional staffing might be warranted, and I suspect it might be the most significant factor in helping to reduce the number of requests for additional time in which to prepare the record or required briefs.

Viewing the judicial appeal process overall, and particularly in context of twenty-years of the development of Veterans law, it appears time to seriously consider the added value of the unique, additional right of the parties to seek review by another Federal appellate court. The majority of cases appealed to the Federal Circuit generally are dismissed for lack of jurisdiction—that is, they generally present no legal issue for review—or they are affirmed because the legal issue raised on appeal is well-settled. Appeals presenting a more novel or difficult issue can be more time consuming, and these appeals in particular can generate significant delays in the processing of claims below and appeals at the U.S. Court of Appeals for Veterans Claims. Moreover, a party dissatisfied with the decision might seek certiorari at the Supreme Court, with a resultant, further delay in the processing of other cases and appeals involving the same issue.

There would appear to be little added-value to the current judicial process which not only permits, but requires an appeal to the Federal Circuit, before an appellant dissatisfied with a decision from the U.S. Court of Appeals for Veterans Claims might seek certiorari from the Supreme Court. Regarding the value of multiple layers of appellate review I am reminded of the wisdom of Supreme Court Justice Robert H. Jackson, who observed:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Brown v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring.).

Is the time right to evaluate the need for the unique, additional appellate review provided by the Federal Circuit? I suggest it is worthy of consideration, and I note that although direct certiorari review by the Supreme Court initially was not provided for the other two Article I appellate courts—the U.S. Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), and the District of Columbia Court of Appeals—over time, as those courts matured and developed a seasoned body of case law, such review was provided. Moreover, when such review was provided for the D.C. Circuit Court of Appeals, the intermediate review previously provided by the U.S. Court of Appeals for the District of Columbia was eliminated.

Eliminating the added intermediate appellate review currently extant with judicial appeals involving veterans benefits will reduce the time involved in the judicial appeal process. I know some will object to losing that unique, additional bite at the apple, but it has been my observation that the few significant cases that the Federal Circuit viewed differently than our Court did, generally have come down fairly equally, with the Secretary or the appellant being satisfied in one case only to be dissatisfied in another. Given Justice Jackson's observation, and the fact that we now have a seasoned body of case law, it appears timely to bring the judicial appeals process provided for review of claims for veterans benefits in line with the overall Federal judicial appeals process.

B. The Administrative Appeal Process

When he spoke at the Court's Eighth Judicial Conference in April 2004 about the relationship between the Court and VA, Professor Richard J. Pierce, Jr., Administrative Law Professor at the George Washington University Law School, cautioned that:

> "Reviewing courts have important roles in the decisionmaking process, but they are narrowly confined roles. The relationship is definitely not that of a partnership or a hierarchical relationship in which the court can tell the agency what to do."

Professor Pierce went on to state that in situations where the reviewing court specializes in the subject matter that it reviews, such as here, the reviewing court must work hard to resist the temptation to fall into a partnership-type mentality with the agency, and must remember that "agencies are autonomous entities that are enti-

tled to respect and deference from the courts." (Pierce quoting *Vermont Yankee Nuclear Power Corp.* v. *NRD*, 439 U.S. 961 (1978). In sum, the Court sits in a judicial role and lacks the day-to-day administrative claims processing experience that might enlighten one on ways to improve on the timeliness of processing claims below.

Nevertheless, we have some general observations, although I note that the Chairman of the Board generally has recognized these problem areas already, as stated in his annual report to Congress. Any observations of problem areas must take into consideration the gravamen of the situation. It is my understanding that in the past couple of years, the Secretary has processed and rendered an initial decision in hundreds of thousands of claims annually, with around 40,000 being appealed to the Board. About 15% of these decisions are appealed to our Court, but it is my understanding that a good number of the Board decisions involve a remand for continued adjudication by the regional office. This general fact presents two areas for discussion.

1. Appeal of Board Decisions

Of those Board decisions appealed to the Court, about 70% are remanded for further adjudication. The most common error is the failure to sufficiently explain the basis for a decision. The Board is statutorily required to explain its decision, and our case law requires an explanation that discusses the material and relevant evidence and explains the basis for the decision so that it permits the appellant to understand the precise reason for the decision as well as permits judicial review.

It is important to understand the impact of this requirement. Under our case law, except in very limited circumstances, an appeal is not remanded for the sole purpose of requiring the Board to explain its decision, which likely could be done in relatively short order, as evidence is not further developed. Rather, a remand from our Court also permits the appellant a new opportunity to further develop the claim. He or she might gather new evidence, request the Secretary to assist in gathering records, and even present a basis for an initial or new medical examination to be given. This development takes time, particularly given the fact that the claim had been denied on the facts previously developed. Since this involves the development of a claim for veterans benefits, as opposed to an added judicial review of a completed record, this second chance to develop the claim seems consistent with our Nation's commitment to seeing that those entitled to veterans benefits receive those benefits. The time added to processing the claim seems justified, although efforts should certainly be undertaken—and continued—to reduce the need for the Board remand in the first instance.

Another large number of cases are remanded because the development below was inadequate. A medical exam was not provided, or records were not obtained, or a hearing officer failed to inform a claimant of a reasonably raised, undeveloped issue with the claim. Should these be properly done in the first instance? Certainly. But here, we cross the threshold into management and resources, and I defer to the Secretary and Chairman of the Board for their insight on this. Suffice it to say, human error is the sustaining basis for the creation and continuation of appellate courts, including the U.S. Court of Appeals for Veterans Claims.

About a quarter of the cases appealed to the Court are affirmed. This often ends the matter, although a dissatisfied party has a right to appeal to the Federal Circuit, delaying the time in which resolution is final. Less than 5% of the appeals to the U.S. Court of Appeals for Veterans Claims involve an outright reversal of the Board. No doubt appellants would like to see that higher, but I note that the high remand rate can often result in an award, and it is an award based on the proper development of the facts (improperly done initially), or renewed development of the facts (generated by the claimant in conjunction with a remand based on a faulty explanation of a Board decision).

2. Remand of Claims by the Board

Pursuant to statute, and consistent with general appellate review, the Court does not review a decision of the Board that has remanded a claim for further development. There has been no suggestion that I know of to change this, but for the record, we perceive that doing so would only delay processing further with no benefit to anyone.

Nevertheless, we are cognizant of the high number of remands generated by the Board. This appears consistent with their mandate, which includes de novo review of the claim—that is a complete review of the matter without any deference to the initial decisionmaker, as well as application of the benefit of the doubt and the duty to assist. As I understand it only a small percentage of the hundreds of thousands of claims adjudicated by the Secretary are appealed to the Board. Nevertheless, a

high number of remands suggests a high degree of error in those claims appealed to the Board, and this would appear to be an area that might be improved. As noted above, however, we cross into the administration and management of the claims process, where we defer to the Secretary, the Board Chairman, and the oversight provided by Congress and the President.

II. RELATIONSHIP BETWEEN THE COURT AND THE BOARD

As indicated previously, the Board sits atop the administrative adjudication of claims for veterans benefits. It is an independent body within VA and it conducts de novo review of the claims it reviews, although it is required to apply the Secretary's regulations and policies, and opinions of the General Counsel. Under these parameters, the Board ultimately renders the final decision for the Secretary on the initial decisions of the Secretary under laws that affect the provision of veterans benefits.

Once the Board renders its final decision on a matter, it may be appealed to the Court. Only a dissatisfied claimant may appeal. The Secretary is not permitted to initiate an appeal; however, once an appeal is initiated, he may defend the decision of the Board, although he is not required to do so. Indeed, the Secretary frequently suggests to the Court that there is Board error and that remand is appropriate, and the high success rate in our mediation process indicates the Secretary's cooperation with the mediation process.

When appealing to the Court, the claimant transitions from the veteran-friendly administrative process, where the Secretary has a duty to assist and apply the benefit of the doubt, to the traditional adversarial, judicial, appellate process, where both parties are equal and expected to present their positions to the Court for judicial decision (or mediation).

Unlike the Board, the Court generally does not conduct de novo review, except when questions of law are presented. Thus, the facts are developed below and weighed below with application of the benefit of the doubt. On appeal to the Court, the facts found by the Board (which may differ from those found by the Regional Office, particularly since they are reviewed by the Board de novo) are reviewed for clear error. Consequently, consistent with general Federal appellate review, a degree of deference is given to Agency fact-finding. In contrast, but also consistent with general Federal appellate review, questions of law are reviewed without deference. Also consistent with general Federal appellate review, the appellant generally has the burden of demonstrating error.

By statute, the Court is permitted to render single-judge decisions. Given the fact that a claim on appeal to the Court has undergone at least two reviews below, with fact-development available at each stage, the nature of an appeal frequently presents no new issue of law, and involves only a review of the facts and application of the law. The single-judge authority permits a case to be reviewed and a decision rendered, and written, more timely than a panel case can be issued. To ensure uniformity and soundness of decision, however, each single-judge decision is circulated for review by all active judges. Further, a party dissatisfied with the decision has a right to request reconsideration by the single judge and/or panel review which generates a panel decision that either finds no basis for full-panel review and lets the single- judge decision stand, or conducts a full review of the appeal, de novo to the single-judge decision. A single-judge decision is binding with regard to the appeal considered but it has no binding effect on other cases being processed below—this is because it generally is fact specific or involves an already accepted application of law.

Those appeals presenting novel questions of law or reasonably debatable questions of fact or law are reviewed by panel or the full-court. Over the past couple of years, the Court has averaged about 65 appeals that are sent to panel for initial decision or decided by the full-court. Full-court and panel decisions have full precedential effect and are binding on the Secretary and the Board, as well as future decisions of the Court when issued by a single judge or another panel.

Judicial review by a specialized Court, as is the U.S. Court of Appeals for Veterans Claims—limited to review of final Board decisions and ancillary matters—might be viewed as twofold. It provides judicial review for the individual claimant; that is review that is wholly independent of the executive or legislative branch and administrative pressures that might be presented outside the context of legislation. Within our Nation and set of values, this is a sacred right, and one for which our veterans fought many years to achieve. But there is a second aspect to limited jurisdictional review by a specialized court. Judicial decisions that have precedential value (our panel and full-court decisions) are binding on the Agency, and can help establish uniformity in the adjudication of matters within the Agency. Compliance

is enforced not only by the Secretary and the Board, but by the uniform application of law and subsequent decisions of the Court.

With rare exception, we perceive no bad faith or gross negligence in the processing and adjudication of claims below. From our perspective, an enormous number of claims are processed and adjudicated by the Secretary and the Board. Judicial review helps to ensure mistakes are corrected. Efforts should indeed be taken to reduce the number of errors made, particularly the repetitive errors, but the overall review structure between the Court and the Board is sound.

It strongly appears that at least for the present and near future the number of claims filed below will remain increasingly high, which likely will keep appeals to the Board and the Court increasingly high. Congress has authorized two new judges and, I understand, additional staffing below. At this time, we perceive no need for any significant additional increase in staffing for the Court. I defer to the Secretary and the Board with regard to their operations.

III. CONCLUSION

At his nomination hearing before the Senate Judiciary Committee in September 2005, now Chief Justice John Roberts compared the work of a Supreme Court justice to that of a baseball umpire and said: "I will remember that it's my job to call balls or strikes, and not to pitch or bat." Although my colleagues at the U.S. Court of Appeals for Veterans Claims and I do not equate ourselves to the Chief Justice, we certainly heed his counsel. Thus, I assure this Committee that each judge on the Court strives to live up to the oath that we took when we were appointed to the bench—to administer justice and to faithfully and impartially discharge and perform the duties incumbent upon us as judges of a court of law. We appreciate the opportunity to engage in dialog aimed at strengthening and improving the veterans benefits adjudication system as a whole. However, we recognize that it is the legislative branch of government that must take the steps necessary to create the laws and the framework which the Executive branch is charged to administer, and it is our responsibility to provide judicial review. On behalf of the judges of the Court, I thank you for the Committee's efforts in this regard, and for your invitation to share our views on this subject.

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO HON. BRUCE E. KASOLD, JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Question 1. You provided testimony that 70 percent of cases that reach the Court are remanded. Can you please explain how you arrived at that number?

Response. In fiscal year (FY) 2008, the Court issued a total of 3,542 merits decisions, of which 2,787 involved a remand, which is 78%. In FY 2007, 65% of the merits decisions involved a remand. In FY 2006, it was 76%. In FY 2005, it was 73%. So, in general, about 70% (actually 73% over the four years noted) of the Court's merits decisions involve a remand.

We maintain statistics on subcategories, which might have been part of the confusion expressed by the Board Chairman at the hearing. For example, 1,625 appeals decided in FY 2008 involved only an ordered remand (the vast majority are the result of joint motions for remand); 559 appeals involved a reversal, vacatur or set aside, in addition to a remand; and 603 involved a partial affirmance or dismissal, along with a partial reversal, vacatur, or set aside, and a remand.

Question 2. What percentage of cases that reach the Court are never seen by a judge?

Response. We do not track how many cases are never seen by a judge. However, we do track how many appeals are filed each year and how many merits decisions are rendered each year by judges. In FY 2008, 4,033 appeals and 95 petitions were filed and judges issued 1,457 merits decisions and 78 decisions on petitions. For FY 2007, there were 4,549 appeals and 97 petitions filed, and 1,779 appeals and 92 petitions decided that year by judges. Also, there are a number of appeals that are dismissed for lack of jurisdiction; in FY 2008 there were 369 cases dismissed for lack of jurisdiction and for FY 2007 there were 317. In addition to making final determinations in appeals, judges also review and act on a variety of motions related to cases pending before the Court, many of which are resolved short of a merits decision that is rendered by a judge.

Question 3. What percentage of cases that reach the Court are remanded because the development below was inadequate?

Response. We do not classify remands based on subject matter, however, the vast majority of remands are based on inadequate development or failure of the Board to provide an adequate statement of reasons or bases for its decision.

It is important to note that, as an appellate Court, our general statutory charge is to review a Board decision for error, both procedural and on the merits. Most errors identified in Board decisions are procedural, and most require remand because the error is potentially prejudicial to the appellant and/or the record is not fully developed. However, a remand does not necessarily result in an award of benefits because once the error is corrected, and any additional evidence is developed or otherwise gathered so that a fair decision can be rendered without prejudice to the appellant, the end result may yet be that the claim is not supported by the evidence and is denied. Judicial appellate review helps ensure that errors are corrected, but ultimately every claim must stand on its own set of facts.

Question 4. What percentage of cases that reach the Court are reversed?

Response. We do not keep statistics on what percentage of cases involve only a reversal. Rather, as noted above, we track the overall number of appeals that involve a reversal or a vacatur (or set aside—they are the same), and a remand, of which we had 559 in FY 2008. We also track the overall number of appeals that involve one or more of these actions, along with a partial affirmance or dismissal, of which there were 603 in FY 2008.

However, I can state that outright reversal and award of benefits is infrequent. As explained in previous testimony by our Chief Judge, this is because Board errors frequently are procedural and/or the record often is not fully developed. Decisions that are vacated may include a reversal of a finding of fact by the Board, but remand is nevertheless warranted because the reversed fact does not necessarily mean that an award is warranted.

For example, a reversal of the Board's finding that a medical exam was adequate generally means that a new exam must be obtained. Similarly, a reversal of the Board's finding that the duty to assist had been satisfied because the Secretary failed to secure certain records, generally means that the records have to be obtained. In each case, the matter has to be readjudicated.

Question 5. What percentage of appeals to the Federal Circuit are dismissed for lack of jurisdiction?

Response. We do not keep statistics on determinations by the Federal Circuit, and we were unable to find any information on their web site regarding the number of cases they dismiss for lack of jurisdiction. In FY 2008, 158 decision of the Court were appealed to the Federal Circuit. In FY 2007, it was 314; in FY 2006, it was 382, and in FY 2005 it was 186.

Question 6. In how many cases involving VA benefits cases has the Supreme Court granted certiorari?

Response. The Supreme Court has granted certiorari in four cases involving VA benefits: *Brown* v. *Gardner*, 513 U.S. 115 (1994); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); and *Peake* v. *Sanders*, 487 F.3d 881 (Fed. Cir. 2007), cert. granted, (U.S. June 16, 2008) (No. 07–1209) (consolidated with *Peake* v. *Simmons*, 487 F.3d 892 (Fed. Cir. 2007).

Question 7. Mr. Stichman's testimony states that the high error rate that exists in BVA decisionmaking is one reason for delay in the appeals process because it requires veterans to appeal to the Court to correct these errors, which then may lead to remand. How do you respond?

Response. As I understand it, the Board decides over 40,000 administrative appeals every year, and only about 11% are appealed to the Court. However, a significant number of the decisions that are appealed to and reviewed by the Court do contain error.

Question 8. According to Mr. Baker's testimony, VA is less than helpful in the mediation process at the Court. From the Court's perspective, has VA been cooperative?

Response. It is not clear if Mr. Baker's comments were made in relation to the Court's new mediation process or our former, less formal conferencing method. As I noted in my testimony, we modified our mediation process last year based on comments received from the parties, which generally were presented at our judicial conferences. Since the inception of our revised mediation process, approximately 58% of the appeals where a mediation conference has been scheduled ultimately result in the parties reaching an agreement on a disposition. That outcome suggests that the new mediation program works reasonably well, evidencing good faith on the part of both parties.

Question 9. What is the Court's target date for full implementation of e-filing?

Response. I am pleased to state that it is already in effect, and has been since October 14, 2008, for all represented parties. Our implementation followed an 11 month Pilot Program that required the electronic filing of all applications for attorney fees and expenses filed pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2414(d). As expected with such a significant change in processing, we have expended considerable effort over the past five months training our employees and members of the Court's Bar on the e-filing system. The Court continues to review the system in order to make whatever changes might be necessary to further improve the e-filing process.

Currently we allow e-filing by pro se appellants only upon Court approval. We are monitoring this, although we do not anticipate requiring e-filing for pro se appellants.

Question 10. How is success of the mediation process calculated?

Response. One measure of success can be calculated from the number of cases that are resolved through mediation. As noted in response to Question 8 above, 58% of the cases sent through our revised mediation process have been resolved by that process. Because some appeals resolve before the mediation process would begin and because the Court only directs mediation where an appellant is represented by an attorney, about 25% of the total number of appeals filed at the Court are resolved through mediation.

A second measure of success is the fine tuning of issues that can result from the mediation process, even when there is no resolution. We have not figured out how to capture this in a statistical format, but it does appear that the briefing of the issues is improving.

Do you know what percentage of cases that are remanded through mediation return to the Court?

No, we do not keep any such statistics. Moreover, it would be difficult to meaningfully track because, when a claim is remanded, the claimant not only has a right to submit additional information that can resolve the issue that had been on appeal, he or she also has a right to raise new issues. For example, on remand, the higher rating sought on appeal might be awarded, but the claimant might then believe the newly submitted evidence supports an even higher rating or a different effective date, which then results in another appeal to the Court, but on a different set of facts and arguments.

Question 11. What is the percentage of cases for which VA asks for an extension of time?

Response. Last year the Secretary submitted 12,404 requests for extensions of time and the appellants submitted 3,441 requests. However, we do not track the number of extensions per case, and some cases may involve no requests for extension, while others involve multiple requests. Unquestionably, requests for extensions are made in a significant number of the appeals and add to the processing time.

Why do you think VA has a large number of requests for extensions of time before the Court?

We do not track the reasons for the requests, but it is fair to state that most of them are attributed to workload considerations and difficulty in obtaining and copying the claims file. Resources and training generally are at the root of such problems, but I defer to the Secretary on this matter.

How would you suggest reducing that?

We are hopeful that electronic filing will speed-up matters. It is our understanding that the Secretary is moving to electronic records that should help with tracking, copying, shipping, and storing VA claims files, which, in turn, should reduce the need for additional time in locating and copying the file as the record is prepared for an appeal. If staffing and training are issues—and I defer to the Secretary and Board Chairman on this, but it does appear that they might be—then additional staffing and training should help reduce the need for more extensions.

Question 12. Does the Court track how many cases are remanded more than once? If yes, does the Court track why these cases are remanded more than once?

Response. No. Please see response to Question 10.

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY HON. RICHARD BURR TO HON. WILLIAM P. GREENE, JR., CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Question 1. Would you please provide a list of the positions that would be filled during fiscal year 2010 with the requested level of funding?

Response. The Court's staff level for fiscal year 2010 increases from 112 to 124 full-time employees. This increase contemplates the possible creation of two additional judicial chambers, effective December 31, 2009, as authorized by Congress. Each chambers would have six employees: One Judge, one confidential assistant or secretary, and four judicial law clerks.

Question 2. According to your budget request, the Court of Appeals for Veterans Claims (CAVC) and the General Services Administration are in the process of identifying additional space that could be used to accommodate two additional judicial chambers.

A. What is the status of that effort?

Response. In January 2009, the Court sent a letter to our General Services Administration (GSA) Customer Service Manager formalizing our request for additional space. The Court has met several times with GSA representatives to confirm our continuing need for our current space as well as space for two additionally authorized Judges and chambers staff. Because there is no available space in the building where the Court is currently housed, GSA has created a needs assessment and has promised to meet with Court representatives shortly. The Court and GSA have designated what is described as a "restricted delineated area" for the additional space needs, which would be proximate to the existing Court location. We anticipate that to keep all of the Judges located at the existing Court location, one of the Court's operations or administrative divisions would be relocated to this yet-to-be-identified new location.

B. How much of the requested funds would be used to rent this additional space?

Response. In November 2008, the Court requested that GSA provide an estimate of rental costs, renovation/construction costs, and moving costs for relocating some of the Court's staff and accommodating two possible new Judges and their chambers. GSA estimated these costs as follows:

(1) Rental and associated GSA add-ons	$1,036,058.72
(2) Reimbursable work agreement for construction	726,470.15
(3) Moving Costs	250,000.00
TOTAL	$2,012,528.87

Question 3. In recent years, the CAVC has taken several measures to help deal with record levels of incoming cases, such as recalling retired judges and implementing a mediation program.

A. What is the status of these efforts and what impact have they had on the ability of the CAVC to provide timely decisions to veterans.

Response. The Court's new mediation program has been extremely successful in bringing the parties together and facilitating mutually agreed upon case resolution. The new program requirements assure that counsel for the appellant and counsel for VA enter negotiations prepared to discuss specific issues and that each has the authority to bind their client. Since the inception of the Court's revised mediation process, approximately 58% of the appeals where a mediation conference has been scheduled ultimately result in the parties reaching an agreement on a disposition. The Court is also hopeful that our new Case Management/Electronic Case Filing System (CM/ECF), and concerted efforts by all parties to reduce the motions for extensions of time, will further assist us in handling expeditiously our growing caseload.

Further, because of the rising numbers of appeals to the Court, there has been a need over the past three years to recall Judges who have retired from active service. This effort is ongoing. These Judges have performed substantial service and have assisted us in deciding cases and acting on the many motions and procedural matters that come before the Court. Their contribution has impacted favorably on the ability of the active Judges to manage a heavy chambers caseload.

B. Do you anticipate continuing these efforts during fiscal year 2010? If so, would you please provide, to the extent possible, a summary of the funding and staffing that would be necessary to continue these efforts?

Response. The Court's enhanced mediation program, CM/ECF, and our ongoing efforts to reduce the numbers of motions for extensions of time are all critical to our efforts and will continue with no additional costs or staffing anticipated. I will continue to monitor closely the Court's caseload and, at the appropriate time, determine whether there will be a need to recall retired Judges in fiscal year 2010. Crucial to that determination will be tracking those pending cases where development is nearing completion and referral to a Judge for decision is imminent. The only fund-

ing associated with recall is the per diem costs for those Judges who reside away from the National Capitol Region.

Question 4. As noted in your budget request, the CAVC received $7 million during fiscal year 2009 for the advanced planning and design of a courthouse.

A. What is the status of that effort?

Response. In April 2008, I forwarded to each Committee member a copy of the GSA follow-on feasibility study for a Veterans Courthouse and Justice Center. That study was ordered to determine the feasibility of the Court remaining at its current location, necessarily displacing other Federal tenants. The study concluded that to remain in the current location would be the most costly option, and that the preferred alternative would be to acquire Federal property for Federal construction of a build-to-suit Courthouse. Thus, I recommended that the Committee consider action to designate as the Courthouse site a Senate parking lot located at North Capitol Street and Massachusetts Avenue, and to pass legislation similar to that which authorized the Federal construction of the Thurgood Marshall/Administrative Office of the U.S. Courts Building. I have recently been informed by the Senate Rules Committee Chairman that the Capitol Complex Master Plan does not accommodate a Courthouse at that location, and I have not received any indication of the Committee's support of this site. Therefore, the Court is moving forward to work with GSA to identify other appropriate Federal properties, and we are pursuing in particular locations at 49 L Street, SE, and at 12th Street and Independence Avenue, SW.

B. Have any of those funds been expended? If so, for what purpose were the funds used?

Response. None of the $7 million has been expended. The Court is currently taking steps to transfer these funds to GSA for advanced planning and architectural design. We look forward to the Committee's support in obtaining the authorizations and funding for an appropriate location.

Question 5. In the CAVC's budget request for fiscal year 2009, you mentioned the possibility of appointing Magistrates to assist in handling the CAVC's caseload.

A. What is the status of any efforts to authorize or appoint Magistrates?

Response. No action has been taken to date to authorize or appoint Magistrates. The success of the Court's mediation program and the other innovations mentioned in response to Question 3 have afforded us substantial assistance in meeting the challenges of our formidable caseload. Therefore, we have not moved forward with any effort to add magistrates to the Court's staff. The potential need for magistrates will be reviewed annually before we prepare our budget submission.

B. How much, if any, of the funds requested for fiscal year 2010 would be used for this purpose?

Response. None.

Chairman AKAKA. Thank you very much.

Mr. Terry.

STATEMENT OF THE HONORABLE JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS

Mr. TERRY. Thank you, sir, and good morning. It is a pleasure to be here today on behalf of the Board of Veterans' Appeals to provide information to you and the Members of the Committee on the important issues that have been outlined in your letter of invitation.

Turning first to the initial issue, how to mitigate the delay in processing appeals through several targeted approaches, we look first to our effort to increase effective training at the Board, to establish meaningful performance goals—and by that I mean the performance goals for both our attorneys and our judges—and effective communication up and down the Department between our Board, BVA and VHA and, of course, to the extent consistent with our relative roles, with the Court.

In looking at our staffing, sir, it is important that we recognize the superb work of this Committee and also your House counter-

part in providing us with additional funding for staff hiring over the past 3 years, and we greatly appreciate that. It has been extremely significant. We have increased our FTE total from 434 to 487.

Certainly, in order to help new staff achieve their full potential, we have a comprehensive training plan in place, and that is one that is led by a group of mentors. Certainly, it develops young attorneys, and it enhances the judges' knowledge of substantive areas of law.

Along with training, of course, our rigorous performance goals further enhance our ability to serve our veterans in the most positive way possible.

As you are well aware from our annual report to this Committee, we have been increasing our productivity over the last 5 years. In the 4 years that I have been there, we have gone from 39,000 decisions issued to, last year, 43,757 decisions; and we have taken advantage of every communication opportunity to reach out to those who share our responsibility to deliver timely and accurate appellate decisions.

The Board fully supports—and it is important to know that—VA's goal of increasing the use of paperless claims in appeals processing. In fiscal year 2008 we rolled out our first complete start-to-finish paperless appeal process. And we are expanding that process with the help of BVA and actively preparing to provide timely service to these claims which are right now being processed through the Benefit Delivery and Discharge Program, which is a critical program for those folks coming back from both Iraq and Afghanistan. Their system is a paperless process right now. And that system is being integrated now through BVA and will be at the Board during the course of the next 2 years.

You asked us, finally, sir, to address legislative and policy recommendations which would be helpful. As a consequence of recent changes in the law that provide for increased opportunities for attorney representation, the time may be ripe, Mr. Chairman, for shortening statutory and regulatory response periods for purposes of expediting the processing of claims and appeals without—and I stress without—taking any rights or protections from the veteran.

This is at the heart of the Expedited Claims Adjudication Initiative, which I will address in a moment. It is important that we look at this, as well as enhanced videoconferencing, rather than sending travel boards to each of the regional offices. These are the types of things that can enhance and promote more expeditious processing of claims.

We certainly promote those, and we ask your support in giving us more flexibility in using more video hearings. We have certainly found, sir, that there is no difference whatsoever in the grant rate for someone who is in a room with a judge as opposed to watching the judge on television and the judge watching him from two big screens on different sides of the world. But it enhances our ability to get that case out more effectively and more timely.

In responding to your query concerning the relationship between BVA and the Court and whether it should be modified, I think it is important to note the high volume of cases before each body, and I think that the relative difference in case load is instructive. The

Court last year saw 4,446 cases. We saw more than 43,000—43,757, we decided. That is a significant difference, and the resources that are required are very different.

But it is important to note that we can best serve veterans when we eliminate avoidable remands, and we do that by taking due account of the rule of prejudicial error contained in 38 U.S.C. 7261.

As to material fact-finding made by the Board, appropriate consideration must be given to the deferential clearly erroneous standard of review provided in law. We have found that this deferential standard of review ensures that the responsibility for making the highly technical factual determinations required in adjudicating complex medical compensation cases is not removed from the statutorily-appointed fact-finder and transferred to a judicial body.

Finally, I would like to mention just for a moment the ECA. I mentioned to you that this is a pilot program. It began just a little bit more than a week ago, sir, on February 2.

This program offers accelerated claims and appeals processing for eligible claimants at four select regional offices, and these are Nashville, TN, Seattle, WA, Lincoln, NE, and Philadelphia, PA. We believe that this program will serve as an excellent role model for a systemwide expedited claims adjudication system after this trial period is concluded.

Thank you for the opportunity to testify this morning, Mr. Chairman.

Thank you, Members of the Committee, for the opportunity to be here and explain our programs. I would be delighted to answer any questions.

[The prepared statement of Mr. Terry follows:]

PREPARED STATEMENT OF JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Good morning, Mr. Chairman. It is a pleasure to be here today on behalf of the Board of Veterans' Appeals (BVA or Board) to provide information to you and the Members of the Committee on the important issues outlined in your letter of invitation. Those three major issues include (1) how best to mitigate the delay in processing appeals, (2) what legislative or policy recommendations concerning the processing of appeals we can share with the Committee, and (3) how we would describe the relationship of the Board with the U.S. Court of Appeals for Veterans Claims (CAVC or Court).

Turning to the first area, we attempt to mitigate the delay in processing appeals through several targeted approaches—staffing, training, performance goals, and communication. Key to meeting our staffing needs has been the critical assistance provided by Congress and the administration in providing additional funding for staff hiring over the past three years, which has greatly enhanced the Board's productivity. This has not only enabled the growth of our attorney staff, but has led to a commensurate increase in the professionalism of our administrative staff. In order to help new staff achieve their full potential, the Board has a comprehensive training program. Each new attorney is mentored by one of the Board's many experienced attorneys, and substantive legal, medical, and decision-writing training is provided for all attorneys in critical areas related to appeals adjudication. Along with training, the Board's performance goals further enhance our efficiency in decisionmaking. Each of our Veterans Law Judges and attorneys is expected to meet specific minimum standards of productivity and quality each year, and many usually far exceed these goals.

The Board continues to experience improved productivity by our attorneys and judges, and we expect to issue more than the 43,757 decisions we issued last year, which was more than 3,000 beyond the number of cases received. We take advantage of every communication opportunity to reach out to those who share our responsibility to deliver speedy and accurate appellate decisions to the veteran community. We have worked with your staff to clarify through legislation, such as that

passed last October, the best approach to notifying veterans of the information and evidence that is expected of them to help substantiate their claims. We are working with the regional offices through our travel board trips and videoconferencing to assist in the training of rating specialists and Decision Review Officers. We have regular meetings with other VA staff for purposes of sharing ideas on how to mitigate delays in the processing of claims and appeals.

The Board has fully supported VA's goal of increasing the use of paperless claims and appeals processing, and in Fiscal Year 2008 completed its first paperless appeal. As VA expands the paperless processing of Benefit Delivery at Discharge (BDD) claims, the Board is actively preparing to provide timely review of these claims if they mature into appeals. We are planning to train additional judges and attorneys to handle paperless appeals.

In considering legislative and policy recommendations, we must remember that the system of adjudicating claims and appeals is designed to give the benefit of the doubt to all veterans. This means that times allocated for submission of documents and moving to the next step in the claims and appeals process are elongated for the benefit of the veteran.

As a consequence of recent changes in the law that provide for increased opportunities for attorney representation at the regional office level, the time may be right for shortening certain statutory and regulatory response periods for purposes of expediting the processing of claims and appeals without taking away rights or protections from veterans. This is at the heart of the Expedited Claims Adjudication Initiative, which I will address in a moment.

Another change the Committee may want to consider is allowing the Board to determine whether a video-conference hearing vice an in-person Travel Board hearing could expedite resolution of veterans' appeals in appropriate circumstances. The success rate of appeals for veterans who choose video conference hearings is exactly the same as those who choose an in-person hearing before the Board. Changing the law to allow the Board to offer veterans the option of video-conference hearings would greatly enhance the use of the Board's resources and expedite the processing of appeals without affecting veterans' rights. More importantly, this change would benefit veterans who live in areas of the country where the volume of hearing requests does not warrant Board travel to a regional office to conduct hearings more than once or twice a year by enabling them to receive much more timely hearings. For the Board, not only could travel expenses be reduced, but decreasing the time Veterans Law Judges spend on travel boards would also yield additional time to devote to deciding other appeals.

In responding to your query concerning the relationship between the Board and the CAVC, a discussion of the volume of cases before each body is instructive. For example, the Board received more than 39,000 cases in 2008 and decided 43,757, making a significant dent in its backlog. The Court received 4,128 new cases in 2008, and decided 4,446, again making a significant impact on its backlog. Like the Department, the Court has been aided by the Committee's support for additional resources.

The Board is obligated to provide reasons or bases in support of all material findings of fact and conclusions in its decisions. (38 U.S.C. § 7104(d)) The Court is not permitted to substitute its judgment for that of the Board, even if the Court might not have reached the same factual determinations, if there is a "plausible" basis in the record for the Board to make such determinations. This deferential standard of review ensures that the Board's responsibility for evaluating the credibility, weight, and probative value of evidence necessary to make the highly technical factual determinations required in adjudicating complex medical compensation cases is not changed. Under no circumstances should it be switched from the statutorily appointed fact finder to an appellate court one step removed from the fact-finding process. When this standard of review is not properly applied, cases may be unnecessarily remanded for further amplification of the reasons and bases in support of the same decision previously reached.

Finally, I would like to update you on the Expedited Claims Adjudication Initiative (ECA). This initiative, published as a final rule in the Federal Register in November 2008, is a two-year pilot program that is scheduled to begin on February 2, 2009. The program offers accelerated claims and appeals processing for eligible claimants at four select VA Regional Offices: Nashville, Seattle, Lincoln, and Philadelphia. The goal of the initiative is to determine whether VA can expedite the claims and appeals process by obtaining waivers from claimants and their representatives of the generally unused portions of certain statutory and regulatory response periods, and by pre-screening cases at the Board to determine the adequacy of the record for appellate review.

Participation in this initiative will be strictly voluntary, and open to claimants in the jurisdictions of the four trial sites who are represented by a recognized Veterans Service Organization, attorney or agent at the time of electing to participate in the initiative. A claimant's decision to participate in the ECA can be withdrawn at any time, with no penalty, and if a claimant decides to withdraw the case will continue to be processed by the RO under normal procedures. We believe the ECA will serve as an excellent model for a system-wide expedited claims adjudication system after the trial period has concluded.

Thank you for listening this morning and I would be happy to answer any questions that you, Mr. Chairman, or the members, may have.

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Question 1. How does the Board measure quality in its decisionmaking?

Response. In order to measure the quality of its decisionmaking, the Board of Veterans' Appeals (Board) has established a Quality Review (QR) office. The QR staff is comprised of four staff attorneys who are competitively selected from the Board's counsel ranks, with one of the attorneys designated as the team leader. Counsel serve in the office for periods of 12 to 18 months. No Veterans Law Judges (VLJ) participate in the process in order to ensure the independence and integrity of the QR system, and to conform to generally accepted auditing principles. The four assigned Board counsel review and evaluate a random sample of signed but undispatched Board decisions. This process enables errors to be identified and corrected prior to dispatch, as well as to collect data used to measure the overall quality of the Board's decisions.

QR office reviews a statistically valid random sampling of decisions from each of the Board's four decision teams; 1 in every 20 (5 percent) of original appeals (appeals that have not yet been before the U.S. Court of Appeals for Veterans Claims (Court or CAVC)), and 1 in every 10 (10 percent) of Court remanded appeals. The data from these two samples are then combined into a single result using an appropriately weighted formula. Appeals are selected automatically by the Board's case tracking system.

The focus in the Board's QR process is not to "second guess" but rather to identify areas of strength and weakness, to identify trends in performance and variations in quality, to establish realistic goals for improvement, and to devise appropriate training to meet those goals. Quality is defined as a decision that (1) comports with existing legal authorities, (2) reflects sound legal research and analysis, (3) is supported by a plausible basis in the record, and (4) meets general requirements for good legal writing such that it clearly explains to the appellant the precise basis for the decision reached by the Board, as well as responds to all arguments advanced by the claimant.

Any deficiency identified in the quality of a Board decision is recorded as an "error." Errors may be substantive or non-substantive. A substantive error is a deficiency in a decision that would be expected to result in (1) a reversal by the CAVC, (2) a remand by the CAVC, or (3) a change in the outcome, including constituting a clear and unmistakable error (i.e., an outcome determinative error). This type of error counts against the Board's accuracy goal. A plausible difference of opinion as to the outcome of an appeal, differing interpretations of the law in the absence of controlling authority, and the assessment of the weight and credibility of evidence are matters related to the exercise of adjudicative judgment and ordinarily do not fall within the definition of substantive error.

The critical areas where a deficiency in a decision would constitute a substantive error can be categorized as follows:

(1) Issues: Not all issues explicit or inferred from the record addressed; inaccurate issue(s) set forth on title page;

(2) Evidence (Findings of Fact): Pertinent or favorable evidence not accounted for; material finding not supported by evidence; material misstatement of fact;

(3) Application of Legal Authority (Conclusions of Law): Controlling case law, statute, regulation, VA General Counsel precedent opinion, or instruction of the Secretary misapplied or not applied;

(4) Reasons and Bases: Conclusory discussion or essential decisional elements not present; internal inconsistencies; relevant theory of entitlement not addressed; or failure to address an argument advanced by the claimant; and

(5) Due Process: Prejudicial failure of procedural due process; jurisdictional error; procedural deficiency related to representation, request for a hearing, or the submis-

sion and consideration of new evidence; failure to enforce compliance with remand directives; or noncompliance with the Veterans Claims Assistance Act of 2000 (VCAA) (e.g., failure of the duty to notify or the duty to assist).

While non-substantive errors do not count for purposes of calculating the Board's deficiency-free quality rate, the QR staff reviews decisions for non-substantive errors. A non-substantive error is a deficiency that would not be expected to result in a remand or reversal by the CAVC and is not otherwise outcome determinative, but nevertheless is something that should be corrected prior to the issuance of the decisions. Some examples of non-substantive errors include format errors; failure to comply with BVA Chairman's memoranda, directives or handbooks relating to internal procedure, format and style conventions; mistakes in reporting the claim number, docket number or service dates; patterns of misspellings or other typographical or grammatical errors, including the misspelling of the Veteran's name; misstatement of non-material facts; and discussions that, although legally correct, could be bolstered by citation to additional governing legal authority.

If a substantive error is identified during QR's review an "exception" memorandum is prepared and the case is forwarded to both the assigned VLJ and the Decision Team Deputy Vice Chairman (DVC) prior to dispatch. If the VLJ or DVC disagree with the assigned exception, they can appeal that determination to the Chief Counsel for Policy and Procedure for review and final determination. If the Chief Counsel agrees that the exception was charged in error, it is removed from the QR exception database. If not, the charged exception remains without any recourse for further appeal. As a matter of practice, very few charged exceptions are appealed, and even fewer are overturned.

The information that is collected from the review is tabulated to produce the Board's deficiency-free rate. While a case may contain more than one charged exception, the entire decision is considered to be in error for purposes of calculating the error rate based on the finding of only one substantive error. The Board's quality goal for fiscal year (FY) 2009 is 92 percent. As of January 30, 2009, the deficiency-free rate for this fiscal year is 94.4 percent for original appeals and 99.2 percent for Court-remanded appeals, for a weighted combined score—due to the differing percentages of each types of cases selected for review—of 95.2 percent.

The Board goes to great lengths to ensure that appeals are handled correctly the first time, including mentoring and developing new counsel and judges, periodic training for all professional staff on new and challenging areas of Veterans' law, and substantive training in both Veterans' law and legal writing. Additionally, the Board engages in cooperative training endeavors with the Office of General Counsel (OGC), the Veterans Benefits Administration (VBA), and the Veterans Health Administration (VHA) for purposes of improving the competence of adjudicators and medical clinicians throughout the Department of Veterans Affairs (VA) system. Finally, the Board tracks the reasons for each Court remand in order to identify any trends or problems that require correction by way of training.

Question 2. How does the Board calculate its error rate? Please provide appropriate documentation.

Response. In addition to the information provided above the following is noted.

The Government Accountability Office (GAO) report, *Veteran's Benefits: Quality Assurance for Disability Claims and Appeals Processing Can Be Further Improved*, GAO–02–806 (August 2002), found that the Board was understating the accuracy rate of its decisions because its accuracy calculations included certain deficiencies that were not "substantive". GAO recommended that the Board revise its quality assurance program so that the calculation of accuracy rates would take into account only substantive deficiencies. Following the issuance of this report, the Board took action to remove formatting errors (misspellings, incorrect claims number, etc.) from the accuracy calculation.

GAO in a follow up report, *VA Disability Benefits: Board of Veterans' Appeals Has Made Improvements in Quality Assurance*, but Challenges Remain for VA in Assuring Consistency, GAO–05–655T (May 2005), found the Board had not revised its formula for calculating accuracy rates in order to properly weight the combined quality review results into a single score for original Board decisions and cases remanded by the CAVC. Following the issuance of this report, the Board worked with GAO to modify the formula used to calculate its accuracy rate when combining the original and CAVC remand data. Making the correction to the formula for combining the original and CAVC remand QR case samples made only a very slight change (the deficiency free rate for a sample of data changed from an unweighted deficiency free rate of 92.797 percent to a weighted deficiency free rate of 92.708 percent).

Question 3. You provided testimony that the Court remanded 35 percent of cases that reached it last year. Was this calculation by calendar or fiscal year? Please provide appropriate documentation.

Response. The calculation, as provided by the CAVC FY 2008 annual report was for the fiscal year. A copy of CAVC's annual statistics is attached. The following numbers were reported FY 2008 CAVC annual report: 4446 cases decided in FY 2008 (which includes 62 petitions for extraordinary relief). Excluding the petitions for extraordinary relief, the CAVC decided 4384 appeals in FY 2008. Of those 4384 cases, 603 were affirmed or dismissed in part and reversed or vacated and remanded in part, and 559 were reversed or vacated and remanded. That represents 1162 decisions remanded (at least in part) by order of the CAVC. That translates into a remand rate for cases (of at least one issue in a multi-issue case) reviewed by a CAVC judge of 26.5 percent (1162 out of 4384). Among the 4384 cases reported as decided by the Court, 1625 were the subject of a joint or unopposed motion for remand of the parties that was not reviewed or ordered by a judge but was done under the authority of the Clerk of Court. The joint motions represent 37.1 percent of the Court's reported workload, (1625 out of 4384). The 35 percent referred to is these 1625 decisions, reported as "remanded" in the CAVC statistics.

Question 4. Do you agree that eliminating the Statement of the Case and making the Decision Review Officer review mandatory might alleviate some of the backlog of cases on appeal at the Board?

Response. VA's statutory requirement to issue a Statement of the Case (SOC) originated before Congress enacted what is now 38 U.S.C. § 5104(b) in 1989, which requires a regional office to provide the claimant with a statement of the reasons for a decision and a summary of the evidence considered by VA. Prior to this statute, regional office decisions routinely lacked specificity. Arguably, the information provided by the SOC may not only be unnecessary, but also may impact VBA's ability to process appeals expeditiously. The purpose of the SOC was to ensure that the claimant received proper notice of the bases for an adverse decision so that they could make an informed decision on whether to pursue the appeal to the Board and to assist in formulating such an appeal. If the information that is now contained in the SOC could be provided just as effectively in another vehicle, such as a rating decision, it seems that the purpose of the statute may be equally well served, and may expedite the process without compromising appellants' rights.

The necessity of issuing one or more Supplemental Statements of the Case (SSOC), covering evidence received after the issuance of the SOC, is a procedure required by VA regulations and, therefore, could be changed without legislative action. While the elimination of the SSOC would certainly save time, it would also eliminate an appellant's right to such notice. The decision as to where to strike a proper balance as to the advisability of such a change would be best made by VA after consultation with our stakeholders.

As far as instituting a mandatory review of all appeals by a local decision review officer (DRO), I am unsure how this would save time or reduce the number of appeals coming to the Board. Significant new resources would be required in order to implement this suggestion. While increased DRO review may resolve some additional appeals it would also add more time to an already lengthy process. As there is no disincentive for an appellant to pursue their appeal, an unfavorable DRO decision would likely have no effect on whether the appellant chooses to take his or her case to the Board. Hence, whether this change would have an ameliorative effect on the process is uncertain.

Question 5. Mr. Baker expresses the view that the Appeals Management Center is succeeding in resolving only a tiny fraction of VA's appellate workload, and that if remands were returned to Regional Offices rather than the AMC, local employees would inherently be held to higher accountability standards. What is your view on this point?

Response. The Appeals Management Center (AMC) was established solely to process appeals remanded from the Board. All staff members receive specialized training and are dedicated to processing these complex claims. One of the primary reasons for locating the AMC in Washington, DC, was to maintain a close physical proximity to the Board, which has improved communications and facilitated the identification and resolution of issues.

At the end of FY 2007, the AMC had 97 full-time employees. Staffing increased to 114 full time employees by the end of FY 2008. The AMC currently has 121 employees.

Appeals are remanded for a number of reasons, many which are not the result of incorrect or deficient processing at the regional offices. However, appeals that are remanded for reasons that should have been rectified prior to certification to the

Board are returned to the regional office. This policy of returning "avoidable remands" increases accountability by requiring claims prematurely certified to the Board to be corrected by the regional office.

VBA has established a performance management system that ensures accountability for performance. Regional office directors, as well as the AMC Director, are responsible for meeting monthly and annual performance targets specific to quality, timeliness, and completed claims. VBA has also established a national avoidable-remand-rate target for all regional offices. Standardized national performance plans ensure claims processors at all VBA facilities are accountable for individual performance.

Question 6. Mr. Stichman's testimony states that of the 23,178 Board decisions that the Court individually assessed between Fiscal Years 1995 and 2008, in 76.4 percent of them the Court set-aside the Board decision and either remanded the claim to the Board for further proceedings or ordered the Board to award the benefits it had previously denied. Are these figures accurate and what explains this record?

Response. The Board carefully examined the CAVC annual reports covering the period from FY 1998 through FY 2008, available on the CAVC's Web site. The annual reports for the years prior to 1998 are not posted on the Web site. According to the available reports, the total cases decided by CAVC for the period FY 1998 through FY 2008 amounts to more than 30,000 cases, which does not comport with the 23,178 figure for FY 1995 through FY 2008.

In reviewing the CAVA reports we found the FY 2008 CAVC report contained the following numbers: 4446 cases decided in FY 2008 (which includes 62 petitions for extraordinary relief). Excluding the petitions for extraordinary relief, the CAVC decided 4384 appeals in FY 2008. Of those 4384 cases, 603 were affirmed or dismissed in part and reversed or vacated and remanded in part, and 559 were reversed or vacated and remanded. That represents 1162 decisions (which include multi-issue cases with at least one remanded issue) remanded (at least in part) by order of the CAVC, translating into a remand rate of 26.5 percent (1162 out of 4384) for cases reviewed by a CAVC judge. Among the 4384 cases reported as decided by the Court, 1625 were the subject of a joint or unopposed motion for remand of the parties that was not reviewed or ordered by a judge but was done under the authority of the Clerk of Court. The joint motions represent 37.1 percent of the Court's reported workload (1625 out of 4384).

While some CAVC remands are the result of Board error, many are not. Outright reversals of Board decisions by the Court that result in an immediate award of benefits are very uncommon. For example, in FY 2008, the Board received only 14 pure reversals from the CAVC. Frequently, Court remands are based on changes in the law that occurred following the issuance of the Board's decision. Because of the pro-claimant approach in Veterans' benefits law, CAVC decisions are almost always applied retroactively to all cases currently pending before the Court. This often results in large numbers of remands for decisions which were correct under the law in effect at the time the Board made the decision. Some remands are generated because an issue is raised for the first time on appeal, and the CAVC will remand to ensure that administrative review is fully exhausted. Some remands occur for reasons unrelated to the merits of the Board's decision. Other remands are based on a difference in judgment between the reviewing judge at the CAVC and the deciding VLJ at the Board as to the interpretation of the law, whether the reasons or bases for the Board decision were adequately explained, or whether all due process was met. In addition, almost 60 percent of remands are never seen by a CAVC judge, but represent settlement actions by the parties involved in the case to dispose of the appeal, either in whole or in part. Additionally, given the delays in the system, the CAVC is reviewing BVA decisions that may have been issued several years ago, and therefore do not necessarily reflect the current level of quality in adjudication. Finally, it is important to note that many remands from the CAVC do not result in additional benefits being granted to the claimant and the correction to the Board's initial decision is simply a more complete explanation for the prior denial or the correction of a non-substantive procedural defect.

Question 7. Mr. Baker claims the Secretary's failure to admit error or agree to remand during the Court's mediation process or offer to settle many cases in which the Court requests oral argument adds to the backlog of the claims process rather than reducing it. Do you agree?

Response. The record shows that the opposite is true. For example, of the 4,446 decisions issued by the Court in FY 2008, 1,625 (37.1 percent) of them were decided as a result of a Joint Motion for Remand promulgated by the claimant or their representative with the acquiescence of the Secretary. Prior years have yielded similar

statistics (many cases were remanded in the years following the passage of the VCAA in 2000 due to multiple and at times conflicting court interpretations of the requirements of that Act that were issued following the date of the Board's decisions being reviewed) though the number in 2008 was the highest in many years. Some Joint Motions represent the Secretary's admission of error and agreement to remand, whereas others occur for reasons unrelated to the merits of the Board's decision.

It is important to note that when the Court allows a Joint Motion for Remand it is done with limited, if any, scrutiny by a Judge of the Court. In most cases, the appellant is given a false sense of hope that they have won the day without actually gaining any tangible VA benefit, monetary or otherwise. In turn, the Board and VBA adjudicators are left without the guidance that could have been gained had a Judge of the Court fully scrutinized the case and offered an opinion as to how the law should be applied.

Speaking directly to the value of the Court's mediation process, the concept of mediation can be helpful in a legal forum where a tangible benefit may be gained by both parties through compromise. In the case of a Veteran's disability claim, at least in theory, the tangible benefit to the Veteran could be the grant of service connection or of an increased disability rating, while the reciprocating benefit to the Government could be the contraction of the adjudication process. In reality, however, Veterans' benefits law does not lend itself so cleanly to such a process. In the case of a claim for VA benefits, either the evidence is in equipoise or approaching equipoise, thus allowing the grant of the benefit, or it is not. This is not to say that there is no room for discussions between the opposing parties before the Court that could potentially reduce the number of issues that need to be addressed, and in turn, the claims processing time. However, there is a legitimate question presented as to what the value is of having a mediation process as part of the Court's adversarial litigation process, especially given that the entire adjudication and appeals process before VA is informal and nonadversarial. One of the benefits of litigation is that it helps define and narrow the issues in dispute, something that oftentimes does not happen in a Joint Motion for Remand that results from the Court's mediation process. Accordingly, the effect of the mediation program in leading to Joint Motions for Remand is to increase the processing time, usually without the award of an actual benefit, thus adding to the claims backlog.

Question 8. Mr. Cohen's testimony makes the case that, when comparing BVA to the Social Security Administration, although Congress has provided more staffing to the Board in recent years, the Board still requires more staff attorneys and Veterans Law Judges. Do you agree?

Response. The Committee has been very supportive of the Board and its mission. Over the past 2 years, the Congress has increased our full time employee (FTE) allocation by 52, and the Secretary has increased our total VLJ authorization by 4, from 56 to 60. In the last fiscal year, for example, the Board issued a total of 43,757 decisions on appeal and VLJs heard a total of 10,562 hearings (the highest number ever). The number of cases decided on appeal exceeded the number of cases received on the Board's docket by more than 3,500. Our attorneys have more than succeeded in meeting their goals for productivity and many have significantly exceeded these goals. This has also been true of our VLJs. Equally important, the Board's cycle time, or the average time it takes to decide a case once it is received at the Board, subtracting the period of time the case is being reviewed by a VSO representative, now stands at 116 days, the lowest it has been in years. Our backlog of cases on appeal, now less than 16,000 in a total Veterans benefit system that adjudicates more than 850,000 claims a year, is the lowest it has been in the nearly 4 years. I believe, with the constraints of the Board's current physical plant and considering the Board's increased productivity, that the current complement of VLJs, staff attorneys and support personnel is adequate.

Question 9. Should veterans law judges be required to undergo annual recertification?

Response. VLJs, once appointed, are subject by statute to recertification based on performance, see 38 U.S.C. 7101A(c). Since 1995, we have evaluated our VLJs' performance annually and the determination whether to recertify each VLJ is made by a peer review panel that includes the Chairman. 38 U.S.C. § 7101A(a)(1) provides the manner in which VLJs are to be selected. The Chairman of the Board makes a recommendation of a prospective judge or judges to the Secretary. This recommendation is made based on the review and ranking of candidates by both a screening panel and an interview panel using competitive procedures to select the best qualified candidates. The Secretary then makes a selection for appointment from among those within the best qualified array, and transmits his selection to the

President for approval. Upon approval by the President, the selectee is appointed to the position of VLJ and is then sworn in by the Secretary.

Question 10. You mentioned performance goals as a way to mitigate delay. According to Mr. Baker's testimony, only .72 percent of cases are being reviewed under the current STAR system. Do you feel that is a good way to measure quality performance? Is there another method you are implementing to measure performance?

Response. VBA conducts national quality reviews of a statistically valid random sampling of work completed by regional offices through the systematic technical accuracy review (STAR) system. The STAR system is used by the VBA for purposes of reviewing the accuracy of its rating and non-rating related work across regional offices. VBA also requires quality reviews of a sampling of work completed by individual claims processors for performance evaluation purposes at all regional offices.

Although the Board does not use the STAR system the Board has its own quality review system. Under the Board's QR system, a randomly selected, statistically significant sampling of all Board decisions are reviewed by the Board's QR office before they are issued. Any deficiencies in quality noted are brought to the attention of the deciding VLJ for voluntary correction or explanation. The Board's decisional accuracy rate is calculated based upon the percentage of cases with errors that would be expected to result in a remand or reversal from the Court. Through the end of December 2008, the Board's overall accuracy rate for FY 2009 is 95.2 percent, comparable with the 94.8 percent error free decision rate for all of FY 2008.

Additionally, the Board has performance evaluation and goals systems that are used for purposes of assessing its professional staff and establishing performance goals in order to mitigate delay. Performance evaluation at the Board is based upon an assessment of each VLJ's or staff counsel's success in meeting or exceeding the established standards in a variety of job related elements. For both positions these include: legal writing and analysis, decision timeliness, and decision productivity, all of which are considered critical.

The draft decisions prepared by counsel is reviewed by a VLJ. The VLJ reviews the draft and then decides the appeal based on his or her careful review of the entire evidentiary record and applicable laws and regulations. The VLJ also evaluates the quality and timeliness of each draft decision submitted by counsel.

Question 11. Do you believe that there would be value in allowing counsel for veterans to contact BVA adjudicators on an informal basis in order to improve communication and possibly resolve procedural matters, clarify and narrow the issues on appeal, avoid needless remands and thus, speed the resolution of appeals and promote decision-making accuracy?

Response. By statute, decisions of the Board shall be based on the entire record in the proceedings and upon consideration of all evidence and material of record and applicable provisions of law and regulation, 38 U.S.C. § 7104(a). The only provision of law that provides for a discussion about a particular case between a VLJ and a Veteran and their representative is the opportunity provided for a hearing before the Board, see 38 U.S.C. § 7107(b). Related to this provision, a pre-hearing conference may be arranged for limited purposes, such as clarifying the issues to be considered at a hearing on appeal, accepting new evidence, discussing the length of argument, or taking other steps to facilitate the scheduled hearing so that the hearing will be efficient and productive, see 38 CFR § 20.708.

The Board does not believe that there would be any value in allowing counsel for Veterans to contact VLJs on an informal basis to discuss aspects of a pending appeal before the Board. Such discussions would not be documented in the formal record, and thus, would not be subject to future review. Hearings are a unique forum for open discussion with a VLJ, and all parties are welcome to request a hearing in a case. Since the early 1990s, the Board's practice has been to transcribe all Board hearings and a copy of that transcript is associated with the Veteran's claims file, thus, making it a part of the permanent record. If the Board were to allow private counsel to contact VLJs directly regarding a particular case, there would be no objective documentation of that discussion, which could lead to questions down the road in terms of why a Judge took a particular action in a case. Additionally, all Veteran's representatives are welcome to present the Board with written submissions for a particular case. This is actually the most effective way that the Board can address the different arguments, because the arguments are documented in the record. Moreover, as a practical matter it would be potentially quite disruptive for VLJs (and for case management) if VLJs were to field phone calls from private counsel about cases that they may or may not currently have before them, especially given the large number of appeals handled by each VLJ per year that totals in the many hundreds or more. To the extent that representatives have questions about a case that are related to basic things such as verification of evidence submissions

at the Board, those questions can be easily handled by communication with Board administrative staff.

Question 12. As the result of the Court's electronic filing procedures, VA is now preparing a compact disc which contains all of the documents in the paper C-file. It does not make any sense that once a file is in an electronic format, to use the paper file for subsequent actions on the claim. Does VBA have a plan to use the electronic file to decide court remands?

Response. VA is moving forward with the development and use of an electronic claims file, and the Board fully supports VBA's paperless delivery of Veterans benefits initiative. In the current environment, however, the abandonment of the traditional paper claims file in subsequent actions on the claim in favor of the exclusive use of the compact disc prepared for Court purposes would not be useful. The Court considers its appeals based upon a record that has been closed after the issuance of the Board's decision under consideration. By definition, a "closed record" accepts no further evidence. However, documents are being added to the administrative record throughout the time from the Board's decision until the case is decided at the CAVC—often years. If the Court remands the case, the record before the Board is reopened to permit submission of additional evidence generally in the form of paper documents, which would be added to the existing claims file. Hence, the disc prepared by OGC contains only a snapshot of the record at a certain point in time, and it constitutes an incomplete copy of the full record. In contrast to the electronic filing procedures used at the Court, the system under development does not contemplate the use of compact discs. Rather, in the VBA's paperless initiative, the Veteran's claim file will reside in a web-based central server that would allows for the multi-sourced submission and acceptance of evidence and the filing of all adjudication documents, with simultaneous access by multiple parties to the claims record. In 2008, the Board issued its first such paperless appeal decision using VBA's current document repository, Virtual VA. This year, we are in the process of working toward an expansion of that concept in conjunction with the VA wide initiative.

The Board is keeping in close communication with representatives from VBA's Office of Business Process Integration Office (OBPI), which is leading the effort to design and build a comprehensive paperless process. As VBA's paperless initiative expands, and new technologies and processes emerge, we are confident that we will proceed in lockstep with one another.

Question 13. You indicated your opposition to providing the Board with authority to issue precedential decisions because of the large volume of decisions. However such authority would not necessarily require that every decision of the Board be precedential. Most cases decided by the U.S. Court of Appeals for Veterans Claims are not precedential. In some cases, it appears that providing a precedential decision could have value in avoiding inconsistent adjudications.

An example of a case which might be appropriate for a Board precedential decision is case number 0420721, docket Number 03–05–747 where the Board found that Da Nang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. A map submitted by the veteran and his representative indicates that the harbor is nearly surrounded by land and that the entire harbor is located within the territorial boundaries of Vietnam . . . As such, given the location of the harbor is within the territorial boundaries of Vietnam . . . As such, given the location of the harbor as being surrounded by the land on three sides and the evidence that the harbor is within the territory of Vietnam, and resolving all doubt in the veteran's favor, the Board finds that Da Nang Harbor is an inland waterway for purpose of the regulation. While the legal import of the geography of the Da Nang Harbor is based upon a specific factual determination, it would not be expected to change significantly during the time relevant to any claim seeking service connection for a disability related to service on an in-land waterway of Vietnam during the Vietnam Era.

Please explain why the Board should not have authority to make such a determination as a precedential decision.

Response. There are several reasons why I believe it is inadvisable to provide the Board with the authority to issue precedential decisions, even in selected cases. Among these reasons is the enormous volume of decisions issued by the Board each year. Deciding which of these appeals would be appropriate for a precedential decision (and would therefore be sent to a panel for resolution) would involve prescreening all appeals—a process that would be extremely labor intensive and divert resources from deciding other appeals. In addition, most BVA decisions are highly fact specific. While there are exceptions, a broad series of cases with a static common fact pattern is a rarity. Most cases present varying and unique factual and forensic medical evidence, the need for individual credibility determinations, and

specific distinctions in the applicable law. Further, such a change is unnecessary, as the Board is already bound by a variety of other precedential authorities—the precedential decisions of our reviewing courts, the precedential opinions of the General Counsel and the Secretary's regulations. In this context, precedential decisions by the Board would likely be ephemeral in nature and, in my opinion, would further complicate, rather than simplify, the adjudication process.

The example that you provided, a Board decision holding that Da Nang Harbor was an inland waterway, was a very atypical decision. Our recent review revealed that only a handful of BVA decisions (i.e., 4 or 5), all issued several years ago and prior to the issuance of clear court precedent, reached such a conclusion. The overwhelming majority of Board decisions on that issue held otherwise. Hence, while these few decisions were not necessarily erroneous in the absence of clear regulatory guidance on the subject, they are not representative of the Board's approach to the issue. Under these circumstances, it would be highly unlikely that the example provided would be designated as a precedential decision, even if we had the authority to so. In my opinion, a policy decision of this nature and impact would most appropriately be made by means of a regulation promulgated by the Secretary defining what is considered to be an "inland waterway" in this context. The regulatory process would provide the opportunity for public comment and would also permit judicial review of the regulation, pursuant to the Administrative Procedures Act.

Question 14. Some of the common errors identified by Judge Kasold as resulting in remands from the Court are failure to obtain medical examinations and opinions and the failure to obtain documents and other evidence. During Committee oversight visits, a frequent finding is the failure of VA regional offices to obtain medical examinations and opinions before denying a claim for service connection. Does the statute need to be amended to require a medical examination or opinion before denying an original claim for service-connection? Please explain.

Response. Based on information obtained from Court remands, the Board's QR system, and VBA's STAR system, the Board agrees that the Department has been experiencing some challenges in applying the requirements of the VCAA and evolving case law in determining when a medical examination or opinion is required to be provided to a claimant for service connection claims. In deciding whether a medical examination or opinion must be provided, the Board is required to provide adequate reasons and bases in support of the determination made, see 38 U.S.C. § 7104(d)(1); see also *Duenas* v. *Principi*, 18 Vet. App. 512 (2004) (when deciding whether to provide a claimant with a medical examination, the Board is required to provide a written statement of the reasons or bases for its conclusion). This discussion must include consideration of the elements contained in 38 U.S.C. § 5103A(d) and 38 CFR § 3.159(c)(4)(i). In those cases where the Board makes a determination that a VA examination or opinion is not necessary to decide a service-connection claim, the Board's decision must include a discussion that fully sets forth the reasons and bases in support of the decision reached by the Board.

Under the VCAA, when a Veteran submits a substantially complete claim, VA is obligated to request not only a VA examination, but also a medical opinion, if either or both are required to fairly decide the claim. The test factors that are for consideration in determining whether an examination and/or opinion need to be obtained are as follows:

(1) Competent evidence of a current disability, or persistent or recurrent symptoms of a disability;

(2) Evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies;

(3) An indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Veteran's service or with another service-connected disability; and

(4) There is insufficient competent medical evidence already of record for the Secretary to make a decision on the claim.

38 U.S.C.A. § 5103A(d)(2), 38 CFR § 3.159(c)(4)(i).

In *McLendon* v. *Nicholson*, 20 Vet. App. 79 (2006), CAVC discussed the steps required to be taken in determining whether a VA examination is necessary prior to final adjudication of a claim. The Court in *McLendon* observed that the third prong, which requires that the evidence of record "indicates" that the claimed disability or symptoms "may be" associated with the Veteran's service or with another service-connected disability, has a low threshold. *McLendon*, 20 Vet. App. at 83. The types of evidence that "indicate" that a current disability "may be associated" with military service include things such as medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible

evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation. For example, a Veteran who was a paratrooper during Vietnam and has a current diagnosis of arthritis of the knees, which he indicates is due to multiple in-service jumps, is sufficient to meet the third prong.

Based on information derived from Court remands and the Board's QR database, the Board has identified a weakness in its decisionmaking concerning determinations, including defects in the explanations provided in support of such determinations, as to whether or not an examination or medical opinion is required to be provided, predominantly for service connection cases, for purposes of satisfying the VCAA duty to assist. In response, the Board has addressed this problem by way of targeted training, including QR Tips memoranda, Grand Rounds training for all VLJs and Board counsel, monthly topics training for Board counsel, new attorney training, and training for VHA compensation and pension examiners and VBA adjudicators. Additionally, the Board has held preliminary discussions with VBA during the past few months to develop a joint training video on the subject of medical examinations and opinions. The Board feels confident that all of these efforts are having a positive impact in making certain that VA fully complies with the requirements contained in existing law regarding the obtainment of medical examinations and opinions for service connection claims.

Also, VA can and does provide examinations when they would be helpful even if the provisions of section 5103A(d)(2) are not met. VBA, provided regular guidance to the regional offices concerning applying the duty to assist rules in regard to providing claimants with examinations.

Question 15. Should the statute be amended so that failure to provide a medical examination or opinion before denying a claim for service connection should be considered clear and unmistakable error? Please discuss the rationale for your response.

Response. Under longstanding and well-established law, a clear and unmistakable error (CUE) is a very specific and rare kind of error. It is a kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, with which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the agency, or the statutory and regulatory provisions extant at the time were incorrectly applied, see 38 CFR §20.1403; see also 38 U.S.C. §§5109A, 7111.

Because the review for CUE must generally be based on the record and the law that existed when the prior final decision being challenged was made, the Secretary's failure to fulfill the duty to assist, including providing a medical examination or requesting opinion is not a legal basis for finding CUE. This is so because an error must be undebatable and manifestly change the outcome of the decision that was made at the time for purposes of finding CUE. In that regard, an incomplete record is not an incorrect record as it is impossible to know what the results would have been from an examination or opinion that was not obtained years earlier.

If Congress were to amend the statutes so that failure to provide a medical examination or opinion before denying a claim for service connection could be considered CUE, it would both fundamentally change the meaning and concept of clear and unmistakable error and remove further any remaining concept of finality in VA claims and appeals adjudication. Moreover, even assuming that a determination was made that a medical examination or opinion should have been provided before making a rating determination or Board decision at some point in the past, a quandary would still be presented as to the impact of such error and whether it was outcome determinative. Without being able to go back in time to conduct an examination that could include a request for an opinion, the parties would only be left to speculate as to what the results of the examination and opinion would have been. Claims adjudications, however, are required to be based on evidence, and not speculation. Accordingly, for these reasons, changing the law to provide that failure to provide a medical examination or opinion before denying a claim for service connection should be considered CUE would not be good.

Question 16. You testified that the timeframe for filing an NOD should be reduced from 1 year to 6 months. Mr. Cohen criticized this idea and made the observation that this places a burden on the veteran while there are no time requirements imposed on the VA staff at any point in the claims process, even in the EAC Initiative. Where can time requirements be put in place for VA employees to process the claims?

Response. The requirements for filing a Notice of Disagreement (NOD) are quite straightforward. A NOD is a written communication from a claimant or their representative that expresses dissatisfaction or disagreement with an adjudicative de-

termination by the agency of original jurisdiction, see 38 CFR § 20.201. Typically, a brief statement from the appellant or their representative is sufficient.

Regarding the criticism that there are no time requirements imposed on VA staff at any point in the claims process, the Board believes that time limits on VA need to be carefully balanced with VA's duty to assist a claimant in obtaining evidence necessary to substantiate a claim for benefits, see 38 U.S.C. § 5103A. It is critical that all claims and appeals are processed with fully-developed records including all relevant evidence identified by the appellant and any necessary examination reports or medical opinions. In obtaining records from various government and private sources, VA often experiences delays in obtaining a response from those offices. As VA has no control over non-VA organizations it is simply not practicable to establish fixed periods of time within which VA must act.

Under the expedited claims adjudication initiative (ECA), there is a time limit placed on VA, see 38 CFR § 20.1504(b), VA is required to certify and transfer the appellate record to the Board within 30 days of receipt of the Substantive Appeal, or within 30 days of receipt of any additional submissions following the Substantive Appeal, but no later than 60 days from the date of filing the Substantive Appeal. Notably, upon drafting the final rules for the ECA, VA determined that a limited exception to the time period imposed upon VA in 38 CFR § 20.1504(b) was necessary to ensure fairness and full compliance with the duty to assist. This exception is for circumstances when, after issuance of the SOC, VA is put on notice of a change in circumstances, such as a worsening of the claimant's condition or the location of previously unobtained relevant evidence. In order to ensure full compliance with the duty to assist under the VCAA, see 38 U.S.C. § 5103A, VA may have an obligation to order a new examination for the claimant or to obtain copies of the relevant records. Due to the time required to schedule a new examination or obtain new records, these actions may make it challenging, if not impossible, for VA to comply within a strict time limit. Consequently, out of fairness to the claimant, an exception to the time period in the ECA for certification in 38 CFR § 20.1504(b) was created for circumstances in which VA is required under 38 U.S.C. § 5103A and 38 CFR § 3.159(c) to provide assistance in obtaining evidence after issuance of the SOC. Time limits on VA have the danger of chilling full development on a claim, should relevant information or evidence be particularly difficult to obtain, or should such information or evidence arrive late in the adjudication process.

Chairman AKAKA. Thank you very much, Mr. Terry, for your testimony.

Before I begin with questions, I would like to acknowledge the presence of Judge Alan G. Lance, Sr. in this room. Judge Lance is from the Court of Appeals for Veterans Claims.

Welcome. We are glad to have you here with us today.

Chairman Terry, the Board began and evolved in a time where there was no judicial review. We needed a way to provide independent review of decisions from regional offices, a simple check and balance system.

Now that the Court has been in existence for 20 years, what do you see as the current value of the Board and, most especially, the need for and value of a de novo review?

Mr. TERRY. Sir, as you know, the 57 regional offices hear about 840,000 cases each year. Of these 840,000 claims, 55 percent are older—are people who are already in the system—and 45 percent are people who are new in the system.

Of that number at the regional office level, they grant approximately 61 percent of those cases, or better than 500,000.

There are 300,000 that are denied for one reason or another. Of those 300,000, the pool of some 40-odd thousand cases comes to our Board.

So, about 12 percent of those that are denied at the regional office level come to our Board. That is a huge number of cases.

You have to remember we have the facility in our Board, with 60 judges and nearly 300 attorneys, to adjudicate timely and fairly, and we do. We have a cycle time right now of 116 days or between

3 and 4 months to adjudicate a case from the time it arrives on our doorstep. That does not include the time that the case is being reviewed by the Veterans Service Organization.

But that is, in effect, a very positive number when you consider that it was 154 days only 2 years ago. We are making tremendous strides to reduce that cycle time.

When you compare that to the Court cycle time of 444 days and you compare the fact that they dismiss a great percentage of their cases—so their actual time for those that they adjudicate is somewhat longer—I think it puts in perspective how well the Board is actually doing.

To get to your question of why it is critical that the Board function and improve its functioning, the number of cases alone would overwhelm the Court of Appeals for Veterans Claims. They receive, as I said, some 4,000 cases, and they adjudicated last year a number in excess of that which they actually received, and to their credit. But they would be overwhelmed by a system in which they had that many claims to adjudicate. So, just in numbers alone, there would be no way that one body of the presently structured Court could handle that number.

That doesn't mean they do not do an extremely fine job and aren't totally professional in what they do. We all concede that, sir.

Thank you.

Chairman AKAKA. Chairman Terry, I am very concerned that 70 percent of the cases appealed to the Court are remanded for further adjudication. How do you explain this very high remand rate?

Mr. TERRY. I thank you for asking that because I was quite concerned with the written testimony of Judge Kasold where he talked about a 70 percent remand rate. I have the Court's statistics from last year right in front of me. They decided 4,446 cases and remanded 1,625, which is 35 percent by anybody's calculation, not 70 percent.

When you take into account, sir—and I think this is critically important—that 60 percent of the remands coming out of the CAVC—60 percent—are never seen by a CAVC judge, but instead are the result of settlement actions as joint motions for remand by the parties before the Court. I think that is critically important.

Those 1,625 are not the subject of remands by the Court but are processes that are administrative in nature, agreed to by the parties. I think that needs to be kept forefront in the minds of the Members when you are considering this.

I have the statistics from the Court of Appeals for Veterans Claims for last year, and I would be glad to share that with the Committee if they would desire to see that.

Chairman AKAKA. Judge Kasold, will you please respond to that?

Judge KASOLD. Well, obviously, I will defer to Chairman Terry's numbers until we get back to the Court and I find out where the discrepancy is.

With regard to the number of appeals that are remanded, accepting the numbers presented by the Chairman—I have no reason to doubt them—I assume for now that there is a mistake in the numbers that we presented.

But, with regard to the numbers that he just mentioned, with regard to those that are remanded, based on a joint motion, the fact

of the matter is the joint remands came because there was an appeal to the Court; and then the claim had to be looked at more closely by the Secretary. And then the Secretary determined that in the Secretary's view the Board had made an error, and so a remand had been provided.

With regard to the 30-some odd percent versus the 70, we will get back with you, Mr. Chairman.

Chairman AKAKA. Thank you. Thank you very much.

Judge Kasold, you stated in your testimony that efforts should be taken to reduce the number of errors made, in particular, repetitive errors in cases appealed from the Board. Can you elaborate on what kind of repetitive errors the Court is seeing? What efforts would you recommend?

Judge KASOLD. Well, we see an awful lot of inadequate notice errors. We see an awful lot of reasons and bases errors, which is the explanation that is provided by the Board for their decision. We see a number of inadequate medical opinions that have been obtained, and we see inadequate effort taken to secure other evidence or documents. Those are the ones that we generally see that are the subject of a remand.

As to recommendations, I have to defer to the Chairman and the Secretary, because naturally, you would think it is due to a resource situation or a training situation. I believe the Chairman has indicated he is aware of that. As to any other specific recommendations, I think I would have to defer to the Chairman, who is on top of that.

Chairman AKAKA. Senator Burr.

Senator BURR. Thank you, Mr. Chairman.

Judge and Mr. Chairman, welcome.

I am going to try and look at this as a layman for just a second. One of the difficulties we have had in the past I think is accurate numbers, but I am going to assume the numbers I have are accurate for the purposes of this.

Fiscal year 2008, the VA regional offices received 891,000 and some change claims from veterans, the Board of Veterans' Appeals received 40,916 appeals and the Court of Appeals for Veterans' Claims received 4,128 appeals.

In fiscal year 2008, the VA regional offices decided 899,000 and some change, the Board of Veterans' Appeals, 43,757 and the Appeals Court, 4,446.

Now that shows we are actually processing more than we are receiving. That is a positive trend.

I have some questions about where we go from here, and the question I think at the heart of everybody is, how do we get rid of the backlog? Because, clearly, we have in place a structure that, under the number that come in, we can process back out in one of the three areas that number and possibly a little bit more. Now to get rid of the backlog, we are talking about years and years and years.

So, one of the things I will pursue with the Chairman is: is there a surge strategy that we can use that is short-term, that is targeted, and that is temporary, to dispose of the backlog in this system? Clearly, we have a structure right now that is able to handle

and process the number of new claims that are coming into the system, regardless of which area they come into.

Let me go specifically to some questions, though. In 2005, Chief Judge Kramer offered recommendations to this Committee on how to stop the "almost never-ending cycle of both the Board of Veterans' Appeals and Court-ordered remands," which in his view "clog the system and prevent timely justice for all claimants."

One, do either of you share Judge Kramer's view about remands clogging the system and do you have any specific recommendations to reduce the number of remands from either the Board or the Court? Judge?

Judge KASOLD. Yes and no is the answer, Senator.

The 800,000-some odd claims processed below have about a 5 percent appeal rate to the Board, which then have about a 10 or 15 percent appeal rate to the Court.

Again, I do not know and I cannot speak authoritatively to the processing at the Board and what might be needed at the Board for their particular decisions, but they process a significant number of decisions.

Within the Court, as you indicated, we are now processing claims as they come in, the appeals as they come in.

Our Chief Judge implemented last spring an aggressive mediation process which is having some favorable results. Taking rough numbers, half of the claims, actually more than that, come in pro se. But those that come in with attorneys go through the mediation process, and about half of those are being remanded without going through the judicial process.

Within the Court, I might add that you switch from an administrative process below where the veteran gets his de novo review by the regional office and a de novo review by the Board. He gets two absolute fresh looks down below. Whether that should be continued or not might have been raised by the Chairman's question; but certainly that is beneficial, I would think, to the veteran.

And that is non-adversarial. The Secretary is duty-bound to assist the veteran.

The Veteran then moves into the judicial arena—an adversarial arena. Now we have two parties. Yes, the veteran disagrees with the Board decision, but the Secretary most often agrees with it. Of course, given the number of settlements we get in mediation, the Secretary obviously disagrees with some of the Board decisions. Because of the appeal, the Secretary looks at the claim closer and may agree that it should be sent back.

When you get into the judicial arena, and now we have two parties, you have 60 days—actually that was in the past; just recently we changed it, trying to shorten it down—but you had 60 days to prepare a record, 30 days to respond to it and 30 days to then submit it to the Court. You have 120 days right there.

You then have 60 days for briefing for the appellant, 60 days for the Secretary and 30 days to respond.

This is traditional, normal appellate processing. You have 270 days in that process.

The Court has changed its rules to eliminate about 30 days of that processing associated with the record. I cannot say at this point that we have gotten the full benefit of that because there are

some changes being made at VA that are not fully implemented at this time, but we are working toward it. The copying of the record electronically, et cetera—they are adjusting for all of that.

But you cannot shorten the time much more because you have an adversarial system with two parties coming up and making a presentation.

Obviously, I am not the Chief, so I do not usually get into these numbers except in preparation for coming here, although I may have made a mistake on the information they gave me with regard to the 70 percent remand rate. Given the number if appeals that go to Court, our single judge decision process is very favorable to the time processing of these appeals and favorable to the veteran because the Court has taken the position that we will give an explanation for each decision.

We might have some discussion later about summary disposition, which is a yes or no decision. You win or lose with no explanation. That doesn't really help the veteran. It doesn't help the Board. It doesn't give them guidance with regard to why a decision was appealed. Yes, other appellate courts do it in a number of cases, but we haven't seen it to be appropriate with this type of case.

Anyway, those cases that present no new, novel issues, and those cases that present a fact scenario that is not reasonably debatable are decided by single judges, and those are most of our cases.

And most of those cases are being decided well within a 60-day period when they get to chambers. Some are in the 90-day period, and a few of them that are more complex go longer. Those that go to panel go longer. That is another issue. They present new, novel issues that will impact the entire system down below, et cetera.

But the actual processing—the judicial review processing—is taking from 60 to 90 days to process for most of the single judge cases. I know those numbers haven't been put together by the Court. It is something that I am going to recommend to the Chief Judge: that he presents back to the Committee, so that it can see that particular part of the judicial processing time.

You also have at the end of it—and these are all kept in the time processing at the Court—a process for reconsideration or panel request. It takes 21 to 51 days—51 days if you are overseas; 21 days though, generally. If you do not seek that, you then have 60 days before the mandate issues to take an appeal to the Federal Circuit.

If a party does seek a reconsideration by the single judge or a panel, that takes more time to process. I haven't seen those figures, but you can imagine there is additional briefing possibly, et cetera, on that.

Then you bring in judgment, and then you bring in mandate. If a party appeals to the Federal Circuit, all of that time is included in the 400-and-some days that you see accounted for in processing an appeal by the Court. It is kept on our records.

At the Federal Circuit, we just identified statistics for this past year. A hundred plus cases have been up there well over a thousand days. So, while they have an overall processing time that is less than that, which I believe has impacted our numbers, this past year in fact they had over 100 cases that they kept up there for over 1,000 days.

All that impacts our reported processing time. If you look at the actual judge's time that is put on these, you are getting a decision on most of them in 60 to 90 days. Of course our panel cases, as I indicated, take longer.

I do not think you can reduce very much the pre-decision processing and related time because you have an adversarial system and the briefing has to be done, et cetera.

The post-decision part, frankly, is a result of this dual, unusual judicial appellate review that we have within this system and something that I recommended in my written testimony be looked at.

This Court has been around for 20 years. There are two other Article 1 Courts. Both of them have cert directly to the Supreme Court. The Court of Appeals for D.C. did not originally. It went to the D.C. Federal Circuit Court, and then after time it was given cert to the Supreme Court. That will take out the back portion of all this numbered processing, and it has an effect downhill, if you will, because those that are decided on the merits by the Federal Circuit can have precedential effect that impacts an awful lot more cases.

So, it is very interesting to look at these numbers. Again, I will ask the Chief Judge to present them to the Committee because the actual judicial processing, I believe, is occurring at a normal pace. I think that reporting the appellate time at the end is unusual.

Senator BURR. Chairman Terry, did you have anything you would like to add to that question?

Mr. TERRY. Thank you, sir.

I agree with what Judge Kasold has said. The issues right now in terms of how cases are delayed are tied to a regulatory and statutory structure in terms of absolute guaranteed times to submit evidence and to provide an opportunity to submit all available information, and that is one of the areas that I think the Expedited Claims Adjudication Initiative will really help. If this, in fact, does provide a template for some changes in statutory and regulatory practice, I think it would be tremendously helpful.

We agree that certainly we look at changes in the law and the failure to exhaust administrative review and settlement action and failure to properly apply and consider prejudicial error standard as just other reasons why the remand problem exists and also why we have delays as a result of that remand problem.

Bringing down the remand rate both at the Court and from the Board is one of our principal and continuing endeavors, as it is at the Court. If we can bring down that remand rate, there is no question that we can improve the timeliness of our decisionmaking overall within the system.

Senator BURR. I thank you.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Burr.

Senator Begich.

Senator BEGICH. Thank you, Mr. Chairman.

As a new Member to the Committee, I will probably have some very naive questions. But to be very frank with you, as I am sitting here, watching you two, I am glad there is a chair between you. But I am not sure that is healthy, frankly. So I am one of these

that look at things that I am sure later I will be told by many different organizations: this is the way it is, this is the way it has been.

But I am trying to figure out—and I use my experience as a former mayor, a strong executive process—when people have an issue, we have a hearing officer. They make a decision, and then that is it. If they do not like it, they go to court, and that is it.

In the comments you made, the dual system has been around for a long time. I just want a very simple answer. I do not want an explanation. I do not want a defense of numbers and all that because numbers can go all kinds of ways.

The goal is to streamline the process, make it more effective, and benefits that are owed to veterans are paid for and dealt with. Is it time to take a real serious look and change the system and streamline it?

I will start over here with Mr. Terry.

Mr. TERRY. I think we have been in the process of streamlining the approach taken, and I think that is reflected in the number of cases and the error rate. For example, the number of cases reversed last year by the Court of Appeals for Veterans Claims of Board decisions were fourteen in number.

Senator BEGICH. Seven total out of how many, gross number?

Mr. TERRY. Well, they decided 4,446 or 14 pure reversals, and we can certainly get you those cases.

Senator BEGICH. You are arguing my comment here.

Mr. TERRY. But I think my concern is that we have a process where we have the opportunity to make decisions as provided by law presently, and the Court likewise follows the procedures that are set forth for the Court's determination. If we are both scrupulous in our attempts to do that, then the process works exceedingly well. And I think the Court and the Board are trying very, very hard to do that.

There is no question that at times there are differences of view of how the system can best be organized and managed. But at the same time, overall, despite your perception, I think we have an excellent relationship with the Court. And I think we have the ability—through our conferences, through training that we do within VA, and certainly the communications we have with the Court—to really make some inroads and improve it further.

But I think that is everybody's intent. I know it certainly is ours, and it certainly is the Court's. I know, talking to Judge Greene and Judge Kasold, all of whom we have known for years and years and years, having served in the military together. But I can tell you we have the greatest respect for the personnel on the Court, and I think they share that respect for us.

Sometimes there is a difference of view of how to get to Point B, but I think we are all working to get to Point B.

Senator BEGICH. Great.

Judge KASOLD. First, I apologize for any indication I gave that there was bad blood here. I was just surprised that the Board Chairman was surprised by my statement that we had a 70 percent remand rate. That is all, to be honest with you.

Senator BEGICH. OK. Good.

Judge KASOLD. If we are wrong, we will absolutely correct it.

Senator BEGICH. Good.

Judge KASOLD. Obviously, the answer is yes with regard to the judicial appellate system. We believe that 20 years of developed case law now allows this Court to proceed and allow a cert to go to the Supreme Court. Even the Chief Judge of the Federal Circuit, in talking to our Chief Judge—I am told because I didn't have that conversation but as it was relayed back to me—agrees that that judicial review is extra and not needed.

So, should a commission be put together, or whatever is done to review that particular aspect, yes, I think it is the appropriate time to do that.

And we have precedent in the D.C. Court of Appeals, which went through a very similar process, and the Court of Appeals for Armed Forces—which didn't have an intermediate court but had a tremendous habeas corpus route that was going on—now has direct cert to the Supreme Court to eliminate, to cut down on that. Both of those are the other two Article I appellate courts. So it does seem appropriate.

With regard to the Board, again, I have to defer to VA. But I would say, just looking at it from the outside and as an appellate judge, two de novo reviews below, the ability to gather evidence through that entire process, is of benefit to a veteran, it seems to me.

When you look at 800,000 claims being processed, I guess we have numbers of 600,000 being paid or whatever. I do not want to get into their numbers. I defer to other people.

Senator BEGICH. Right.

Judge KASOLD. But the point is, should it be looked at? Sure. There is nothing ever wrong with looking at a system. Moreover, the VA adjudicatory system does provide, it seems to me, two de novo reviews and the continuum of evidence-gathering. A lot of Board remands, for example, go down to the RO for additional evidence-gathering and are resolved at the RO.

A lot of times, you file an Notice of Disagreement (NOD)—which I do not know if the Secretary reports them as part of his statistics—but you file an NOD which begins the appellate process, and from that appellate process you get a statement of the case that explains what the issues are in the case, and then new evidence is submitted and an RO decision is rendered in that case. Again, I do not know if this is reflected in the Secretary's numbers or not, but it is a two de novo review with continuum of evidence processing down below.

Senator BEGICH. Is that because there is more discussion that causes that or is it because they have more time?

Judge KASOLD. Which?

Senator BEGICH. In other words, when more evidence is brought. I am trying to figure out what because the number you used. I want to make sure I get this right. You indicated seven cases last year.

Mr. TERRY. That is by the Court of Appeals for Veteran's Claims, pure reversals.

Senator BEGICH. Right. That is what I am talking about. So I am trying to figure out—the ones that you described that had been remanded back, is that because the time allotment gave more time

for the person to bring more evidence or is it that there was no evidence given at the front end that should have been and just was missed?

I am trying to figure out what caused——

Judge KASOLD. And the Chairman can talk about the difference between the RO and the Board, and I can give two cents on it, I guess.

The Board is independent. It renders the final decision of the Secretary. However, when you go to Court, the Secretary is represented by his own counsel. Counsel looks at these cases anew, and through the aggressive mediation process.

Senator BEGICH. You are looking at it.

Judge KASOLD. Counsel look at it from the side, if you will. Based on this fresh review of the case, the Secretary, through his counsel, might agree that there is Board error and that remand is warranted. Fifty percent of those that go through the mediation process, since we started in April, are being remanded without the actual judicial review.

If mediation does not resolve the matter, the briefing goes on—well, when you have attorneys involved. You may not have attorneys involved in all of these cases. The briefing helps identify the issues. That can help both in the mediation process and then in the judicial appeal process. Issues are identified that maybe the Secretary didn't agree to—his counsel didn't agree to.

But when they get before a Court, we say, yes, your reasons and bases are wrong. Yes, you should have gotten a medical statement. Yes, something along those lines.

With regard to an outright reversal, the facts have to be fully developed to give an outright reversal. So, if you are remanding because of the lack of a medical exam, because of a reasons and bases issue, because of inadequate notice that was provided to the veteran which caused inadequate development down below, your absolute actual reversals are going to be less.

There are more reversals on facts and things like that than were mentioned, but seven actual reversals, I suspect that is correct.

Senator BEGICH. Great.

I know my time is up, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Begich.

Chairman Terry?

Mr. TERRY. Sir.

Chairman AKAKA. At present, decisions by the Board are not precedential, meaning that regional offices are free to ignore decisions of the Board. Do you believe that this is an appropriate outcome?

Mr. TERRY. Let me explain, Mr. Chairman, why I believe that it is. When you render this many decisions per year, if they were to be published and circulated and bound and provided to each and every litigant's attorney practicing before either the Court or before our Board, it would be a system that would be simply unmanageable.

When you look at how precedential decision bodies work and how they publish decisions, and when you remember that each one of our cases are fact-specific in which the judge has to give the benefit of the doubt to the veteran, making that nuance in each case so

very different, under our law, both cases approaching equipoise and in equipoise have to be rendered in favor of the veteran, and we do so. If we were to try to capture that in precedential decisions, which are fact-specific, it would be a nearly impossible task, as well as daunting, with respect to the number of published decisions that we would have coming out each month.

For example, sir, in the last 4 weeks, our Board has rendered an average of one thousand decisions per week. That is a daunting number when you consider they are between 15 and 40 close-typed pages and specifically look at the facts and circumstances of that veteran's case and apply the law in a way which gives him the benefit or her the benefit of the doubt. If we were to try to make that a precedential system where you had head notes and you were trying to go back through 1,000 cases and ensure that the benefit of the doubt rule as applied in this case looked the same as applied in that case, you would really have an impossible and daunting task.

I think the Board is entirely consistent. We do training to ensure that our judges' decisions are consistent, but giving the opportunity for the judge to render the benefit of the doubt to the veteran is, I am sure, not something that can be carefully captured in precedential decisionmaking at this time.

Chairman AKAKA. Chairman Terry, what would happen if the time period for filing a notice of disagreement was reduced from 1 year to 180 days?

Mr. TERRY. Sir, we would certainly support that. We would support that. I know that many of our Veterans Service Organizations and, specifically DAV, have suggested that. We support them in every respect.

That is a basis for which the ECA was developed: trying to make the system fairer for our veterans by ensuring that they had all necessary time to submit information and evidence before our Board and before the regional offices, but, at the same time, ensuring that we are able to process their cases most fairly for them.

So, yes, sir, I certainly think that would be a tremendously beneficial process.

Chairman AKAKA. Chairman Terry, are there enough Veterans' Law Judges at the Board and can you please tell the Committee how performance of Veterans' Judges Law Judges are assessed?

Mr. TERRY. Sir, we have, I think, a very different review process than any other board of our kind. We have a peer review process. We have an evaluation process by our senior judges of each of the judges within the four teams each year. A panel sits and evaluates the error rate, the productivity, the care with which the judge performs, the leadership he provides or she provides over their teams each year. In fact, we certify to the Secretary each year each of the judges on the Board.

It is a complete review process, and certainly this is a process that we take great pride in, sir.

Chairman AKAKA. Are there enough Veterans' Law Judges at the Board?

Mr. TERRY. Sir, we have 60 judges. The Secretary gave us authorization to increase by four last year. We think that the judge number is right. We develop with our senior attorneys and use

them as acting judges on occasion, and this allows us to train our fine senior attorneys as judges.

I do not believe there is a lack of judges as expressed by the fact that we are certainly turning out more decisions than we have coming in right now.

Just for the record, sir, when I came in, the number of the backlog was about 24,000. It is now below 16,000 for the first time in 5 years, and we take great pride in that.

Chairman AKAKA. Senator Burr.

Senator BURR. Mr. Chairman, just one question.

Mr. Terry, you said in your testimony "the time might be ripe for shortening certain statutory and regulatory response periods for the purposes of expediting the processing of claims and appeals." Can you explain?

You also raised a question about doing this without taking away rights or protections of the veterans. Explain how you shorten the periods and how you draw the distinction that you are not infringing?

Mr. TERRY. Certainly, sir.

In today's veterans' environment, nearly all our veterans or a great majority of them are represented by either veterans' service officers—very capable veterans' service officers—or by attorneys. In representing these clients, they are assisting our veterans along the path of making sure that all their evidence is submitted.

What we are simply suggesting is, as in the Expedited Claims Adjudication Initiative, when a veteran has an opportunity to submit all evidence he has indicated he possesses and indicates that to either the regional office or to our Board and then makes it possible for us to move forward to the next stage. What we are saying is if we institutionalize that to some degree, it may be helpful for those represented clients.

That is, if in fact they have submitted everything and indicate to the system that they have, then we should not have to wait for the entire year or 6 months. We should be able to move forward and process their case more expeditiously.

I think there are ways we can do that. The Expedited Claims Adjudication Initiative is a first step, and we certainly appreciate the support that we have gotten from the Committee on that initiative.

Senator BURR. Thank you.

Thank you, Mr. Chairman.

Chairman AKAKA. Senator Begich.

Senator BEGICH. If I can just follow up on the Chairman's question in regard to judge review, I think it is great how you do that, especially on an annual basis. Do you also do an analysis by judge of the levels of denials and of appeals?

Mr. TERRY. We do. We have. We catalogue each of the judge's decisionmaking exactly, and we ensure that it is within appropriate ranges. Yes, sir.

Senator BEGICH. I do not know if this is the right phrase, but after you have gone through the process of a kind of recertification or gone through the review, have you ever, the phrase I will use I guess is "decertify" the judge?

Mr. TERRY. I have been there 4 years, sir. We had one conditional recertification that I was involved in.

Senator BEGICH. So there is a process.

Mr. TERRY. Yes, absolutely.

Senator BEGICH. OK. Then I am curious. I think it was you that mentioned about the videoconferencing—that you would like more authority. Is there something legislatively that has to be done to give you that authority?

Mr. TERRY. There is, because guaranteed in law at this point there is an opportunity for an individual to have an in-person hearing with a judge, and that has been interpreted not to include a video hearing even though you can see the individual back and forth.

We would like the flexibility to do what is most expeditious for the veteran. They have the opportunity to appear before our Board. If it is going to be a travel board, that is fine, but if it is a case where it is most effective to have a video hearing and we have the resources available wherever the veteran is, with his representative, we would like to be able to do that. We would like to have that simple change.

Senator BEGICH. Yes, I would be very, very supportive of that. So, if there is anything——

Mr. TERRY. Thank you very much, sir.

Senator BEGICH. I think it is a great idea. I mean, we do it in Alaska with our judicial system. Because of the distance between here and Alaska, my six and one-half-year-old and I can talk through video every night. So if we can do it there, we can sure do it here.

The other question I would just be curious about relates to the judges that you have. You had mentioned you have about 60 judges. All positions filled?

Mr. TERRY. Yes, sir.

Senator BEGICH. Is there support staff that you have at a level that is filled or needed additional resources?

Mr. TERRY. Sir, we have been tremendously well supported by this Committee, and we feel we have the right mix at this point. I think that we are able. We were able to hire in the last 3 years between 434 and 487, and we are going to go to about 500 pursuant to allocations that are made by the Department for this year.

Therefore, I believe, sir, that we have the resources to really eat into that backlog and bring it down, I believe, to 10,000 before the end of this year.

Senator BEGICH. Great. So you have the support staff for the judges, which is critical.

Mr. TERRY. Yes, sir. Absolutely. Each of the judges is supported by 6 attorneys who write for the judge, and each of the attorneys is asked to provide 156 quality and timely drafts a year. Each of the judges is asked to sign 752 decisions a year. Last year, each of our line judges did far in excess of that, as did our attorneys.

Senator BEGICH. Great. Thank you very much.

Chairman AKAKA. Thank you very much, Senator Begich.

I want to thank this panel for your testimony and your responses. It will be helpful for the Committee. I want to wish you well. This panel is excused.

Judge KASOLD. Thank you very much, sir.

Mr. TERRY. Thank you, Mr. Chairman.

Chairman AKAKA. I want to now welcome our second panel of witnesses. They are here to share their thoughts on how the appeals process for disability compensation can be modified. I look forward to hearing your statements.

First, I welcome Kerry Baker who is the Assistant National Legislative Director for Disabled American Veterans. I also welcome Richard Cohen, the Executive Director of the National Organization of Veterans' Advocates, Inc. And I welcome Bart Stichman, the Joint Executive Director for the National Veterans Legal Services Program.

Thank you all for joining us today. Your full statements will appear in the record of the Committee.

Mr. Baker, will you please begin with your statement?

STATEMENT OF KERRY BAKER, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. BAKER. Thank you, Mr. Chairman and Members of the Committee. I am glad to be here today on behalf of the DAV.

As you know, the appeals process is extremely complex and extremely lengthy. The VA estimates that it will decide over 940,000 claims in 2009, which will likely generate as much as 132,000 appeals. This represents at least a 30 percent increase in appeals. Such an increase in appellate workload severely affects VA's ability to devote resources to initial claims processing.

Our recommendations are intended to simplify the process while preserving resources and reducing expenditures. Some of the recommendations contained herein may appear novel or controversial at first. They may even draw criticism. However, such responses would be misdirected.

These recommendations are carefully aimed at making efficient a rather inefficient process without sacrificing a single earned benefit. They include removing administrative burdens in the appeals process by: one, incorporating the appeal election letter into the notice of appellate rights that VA provides with initial rating decisions; and, two, eliminating to the extent feasible the requirement to issue supplemental statements of the case or SSOCs.

We also propose larger recommendations such as reducing the period in which an appeal can be initiated from 1 year to 6 months and disbanding the Appeals Management Center.

By including the appeal election letter along with a copy of a rating decision, which VA must already provide the veteran with appellate rights, the VA will no longer have to generate and mail approximately 100,000 letters annually.

Additionally, by no longer issuing SSOCs in most cases, the VA will reduce an extra 50,000 mailings. Some SSOCs are substantially complex and therefore time-consuming.

These two actions alone could save VA approximately 100,000 annual work hours. This may even be a conservative number. That amount of reduced work is equivalent to 625 VA employees working for 4 full weeks. That is significant, we believe.

The DAV also believes that the time has come to reduce the 1-year appellate period currently allowed for filing a timely NOD following the issuance of a rating decision from 1 year to 6 months. Reducing the appellate period from 1 year to 6 months would not

reduce veterans' benefits. Rather, it would further reform and streamline the actual administration of the claims process which includes appeals.

Finally, the DAV believes the AMC should be dissolved. Regional offices should be held accountable for their own mistakes. In fiscal year 2007, over 7,000 cases or nearly 20 percent of appeals reaching the Board cleared the local rating board and local appeals board with errors that were elementary in nature, errors that were either not detected or ignored. Such basic errors would not occur if RO personnel were held responsible for their own work.

Further, the AMC is succeeding at resolving less than 2.8 percent of VA's appellate workload. The AMC completed nearly 12,000 appeals in 2008—far less than the number received from the Board—out of which nearly 10,000 were returned to the Board, 89 were withdrawn and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions. That is a 25 percent error rate.

These reasons support the proposition to dissolve the AMC.

In closing, the VA will never be able to maximize its recent increases in staffing without making processes more efficient. If such changes are made, the VA will see vast improvements in its entire claims process that are essential to achieving the broader goals of prompt and accurate decisions on claims.

Likewise, only then, will the VA be able to incorporate training, quality assurance and accountability programs demanded by the veterans' community.

It has been a pleasure to appear before this honorable Committee today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF KERRY BAKER, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. Chairman and Members of the Committee: I am pleased to have this opportunity to appear before you on behalf of the Disabled American Veterans (DAV), to address problems and suggest solutions to the Department of Veterans Affairs (VA) disability claims process; specifically, the appeals process.

The appeals process is extremely complex and often not understood by many veterans, veterans' service representatives, or even VA employees. Numerous studies have been completed on timeliness of claims and appeals processing, yet the delays continue and the frustrations mount. Therefore, the following suggestions are intended to simplify the process by drastically reducing delays caused by superfluous procedures while simultaneously preserving governmental resources and reducing governmental expenditures.

As VBA renders more disability decisions, a natural outcome of that process is more appellate work from veterans and survivors who disagree with various parts of the decisions made in their case. In recent years, the appeal rate on disability determinations has climbed from an historical rate of approximately seven percent to a current rate that ranges from 11 to 14 percent. The 824,844 disability decisions in 2007 generated approximately 100,000 appeals. The VA estimates that the 942,700 projected completed disability decisions in 2009 will likely generate as much as 132,000 appeals. At the end of 2007, there were over 180,000 appeals pending in regional offices and the Appeals Management Center (AMC).

This increase in appellate workload seriously affects VA's ability to devote resources to initial and reopened claims processing. Appeals are one of the most challenging types of cases to process because of their complexity and the growing body of evidence that must be reviewed in order to process them. Likewise, the number of actions taken in response to VA's appellate workload has increased. In 2001, the

VA processed more than 47,600 statements of the case (SOCs) and supplemental statements of the case (SSOCs). In 2007, they processed over 130,000 SOCs and SSOCs.

THE APPEAL PROCESS AND THE BOARD OF VETERANS APPEALS

I. REMOVE PROCEDURAL ROADBLOCKS TO EFFICIENCY IN THE APPEALS PROCESS.

To begin the appeal process, an appellant files a written notice of disagreement (NOD) with the VA regional office (RO) that issued the disputed decision. For most cases, the appeal must be filed within one year from the date of the decision. After filing an initial NOD, the VA sends the appellant an appeal election form asking him/her to choose between a traditional appellate-review process by a rating veterans' service representative (RVSR) or a review by a decision review officer (DRO). DROs provide a de novo (brand new decision), review of an appellant's entire file, and they can hold a personal hearing with the appellant. DROs are authorized to grant contested benefits based on the same evidence that the initial rating board used. The VA provides the appellant 60 days to respond to the appeal election form. See 38 CFR § 3.2600 (2007).

Once the VA receives the appeal election form, the RVSR or DRO (as appropriate) issues an SOC explaining the reasons for continuing to deny the appellant's claim. A VA Form 9, or substantive appeal form, which is used to substantiate an appeal to the Board of Veterans Appeals ("Board" or "BVA") is attached to the SOC. The VA Form 9 must be filed within 60 days of the mailing of the SOC, or within one year from the date VA mailed its decision, whichever is later.

If the appellant submits new evidence or information with, or following, the substantive appeal, (or any time after the initial SOC while the appeal is active) such as records from recent medical treatment or evaluations, the local VA office prepares an SSOC, which is similar to the SOC, but addresses the new information or evidence submitted. The VA must then give the appellant an additional 60 days to respond (with any additional evidence, for example) following the issuance of an SSOC. If the appellant submits other evidence, regardless of its content, the VA must issue another SSOC and another 60 days must pass before the VA can send the appeal to the Board. In many cases, this process is repeated multiple times before a case reaches the Board. In many of those cases, the appellants are simply unaware that they are preventing their appeal from reaching the Board.

The VAROs are not supposed to submit a case to the Board before the RO has rendered a decision based on all evidence in the file, to include all new evidence. This restriction stems from 38 U.S.C.A. § 7104, which has been interpreted to mean that the Board is "primarily an appellate tribunal" and that consideration of additional evidence in the first instance would violate section 7104 and denies an appellant "one review on appeal—to the Secretary," 38 U.S.C.A. § 7104(a) (West 2002 & Supp. 2007); see *Disabled Am. Veterans* v. *Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003).

The foregoing procedures force the ROs to repeatedly issue SSOCs in many cases, which merely lengthens the appeal, frustrates the VA, and confuses the appellant. The problem does not end there. If an appellant submits new evidence once the case is at the Board, or if the RO submits a case to the Board with new evidence attached, the Board is prohibited from rendering a decision on the case and is forced to remand the appeal (usually to the Appeals Management Center (AMC)), if for no other reason but for VA to issue an SSOC.

Notwithstanding the above, an appellant can choose to waive the RO's jurisdiction of evidence received by VA after a case has been certified to the Board by submitting a written waiver of RO jurisdiction. In the case of an appeal before the VARO, this results in VA not having to issue an SSOC concerning the newly submitted evidence. In the case of an appeal before the Board, it results in not requiring the Board to remand the case solely for issuance of an SSOC.

The Board amended its regulations in 2004 so that it could solicit waivers directly from appellants in those cases where an appellant or representative submits evidence without a waiver. 38 CFR § 20.1304(c); see 69 Fed. Reg. 53,807 (Sept. 3, 2004). This has helped to avoid some unnecessary remands. The Board's remand rate decreased from 56.8% in fiscal year (FY) 2004, to 35.4% in FY 2007 due in part to these procedures. Nonetheless, the Board still remanded 1,162 cases solely to issue an SSOC. The frustrating reality of this situation is that issuing an SSOC may only consume one work hour from an experienced employee, but the case will nonetheless languish at the AMC for the next two years while the VA completes that one-hour's worth of work.

The statistical data for appeals in the VA represents a significant amount of its workload. Appellants filed 46,100 formal appeals (submission of VA Form 9) in FY 2006 compared with 32,600 formal appeals in FY 2000. The annual number of BVA decisions, however, has not increased. As a result, the number of cases pending at BVA at the end of FY 2006—40,265—was almost double the number at the end of FY 2000. These numbers are exclusive to appeals at the Board and do not include the substantial number of appeals processed by the appeals teams in VAROs and especially the AMC.

In FY 2007, the Board physically received 39,817 cases. Despite this number of cases making it to the Board, the VBA actually issued 51,600 SSOCs, a difference of 11,783.[1] As of May 2008, the VBA has already issued 38,634 SSOCs. Likewise, the Board has remanded an additional 1,162 cases solely for the issuance of an SSOC. This number does not include cases wherein the appellant responded to the Board's initiation of a request for waiver of RO jurisdiction, thereby eliminating the requirement for a remand for VBA to issue an SSOC.

The average number of days it took to resolve appeals, by either the Veterans Benefits Administration (VBA) or the Board, was 657 days in FY 2006.[2] This number, however, is very deceptive, as it represents many appeals resolved at the RO level very early into the process. The actual numbers show a picture much worse. According the FY 2007 *Report of the Chairman*, Board of Veterans' Appeals, a breakdown of processing time between steps in the appellate process is as follows:

- NOD to receipt of SOC—213 days—VARO;
- SOC issuance to receipt of VA Form 9—44 days—appellant;
- receipt of VA Form 9 to certification to the Board—531 days—VARO;
- receipt of certified appeal to Board decision—273 days—Board;

Total—1,061 days from NOD to Board decision—sadly, many are much longer.

The function that should conceivably take the least amount of time actually took the most amount of time—receipt of VA Form 9 to certification to the Board. The reason for this lengthy time VA spends on a relatively simple task is in part the result of issuing multiple SSOCs.

Congress has the chance to eliminate tens of thousands, and possibly far more than 100,000 hours annually from VA's workload, including the costs associated therewith. Such changes would also simplify an important part of the appeals process and can be made by minor statutory amendments, and potentially only regulatory amendments.

Recommendation:

Congress should amend 38 U.S.C. § 5104 (Decisions and Notices of Decisions) subsection (a), to eliminate the need to wait until after an appellant files an NOD in order to issue an appeal election letter. Such an amendment would further eliminate the requirement that VA allow an appellant 60 days to respond to such a letter, thereby shortening every appeal period by 60 days.

The provisions of the foregoing statute states, inter alia, that when VA notifies a claimant of a decision, "[t]he notice shall include an explanation of the procedure for obtaining review of the decision." 38 U.S.C.A. § 5104(a). This section could be amended to read: "The notice shall include an explanation of the procedure for obtaining review of the decision, to include any associated appeal election forms." The VA could then modify 38 CFR § 3.2600 accordingly.

Despite this suggested statutory amendment, a solid argument exists that supports a proposition that the VA can incorporate this recommendation by modifying its regulation. As indicated above, the law requires that VA, when issuing a decision, to notify a claimant of the "procedure for obtaining review" of the decision. The right to elect traditional appellate process or a post-decision review from a DRO is certainly part of the "procedure for obtaining review." See Id. We nonetheless suggest a statutory amendment to ensure compliance and to shield the Department from possible litigation, however unlikely.

The VA currently receives over 100,000 NODs annually. This minor change would eliminate 60 days of undue delay in every one of those appeals and eliminate VA's requirement to separately mail, in letter format, all 100,000 plus appeal election forms. This recommendation would have a tremendous effect on VA's appeals workload without the need to expend any governmental resources.

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[1] The number of SSOCs may exceed 51,600 because VA's appeals tracking system only records up to 5 SSOCs per case.

[2] Note: Appeals resolution time is a joint BVA-VBA measure of time from receipt of notice of disagreement by VBA to final decision by VBA or BVA. Remands are not considered to be final decisions in this measure. Also not included are cases returned as a result of a remand by the U.S. Court of Appeals for Veterans Claims.

Recommendation:

Amend 38 U.S.C.A. § 7104 in a manner that would specifically incorporate an automatic waiver of RO jurisdiction for any evidence received by the VA, to include the Board, after an appeal has been certified to the Board following submission of a VA Form 9, unless the appellant or his/her representative expressly chooses not to waive such jurisdiction. This type of amendment would eliminate the VA's requirement to issue an SSOC (currently well over 50,000 annually) every time an appellant submits additional evidence in the appellate stage. It would also prevent the Board from having to remand an appeal to the AMC solely for the issuance of an SSOC (currently well over 1,100 annually). Further, the substantial amount of time spent by the Board wherein it actively solicits waivers from possibly thousands of appellants each year would be eliminated.

One possible way for the VA to administer such a change is by a simple amendment to its VA Form 9. The amendment would merely require the appellant or his/her representative to specify whether additional evidence received at a later point is exempt from the waiver when such evidence is submitted. The notice should be clear that evidence received by VA without an express exemption will be forwarded directly to the Board for review.

Such an amendment should state that the statutory change applies "notwithstanding any other provision of law." This language would prevent any contradiction with other statutes and future confusion caused by any potential judicial review. This type of legislative change would reduce VA and BVA's workload by many thousands of hours while also reducing the appellate period in tens of thousands of cases by 60 days per SSOC. The VA could then utilize the resources freed by these changes to focus on other causes of delay in the claims process.

II. THE TIME HAS COME TO REDUCE THE APPELLATE PERIOD FROM ONE YEAR TO SIX MONTHS.

The DAV believes the time has come to reduce the one-year appellate period currently allowed for filing a timely NOD following the issuance of a rating decision from one year to six months. This subject has been the discussion topic in countless hallway and sidebar conversations for a considerable period of time. It is time these discussions be made public.

President Hoover, under the authority of a July 3, 1930, Act of Congress, consolidated the Veterans' Bureau, the Bureau of Pensions, and the National Home for Disabled Volunteer Soldiers into a single government agency—the Veterans' Administration. This Act created the Board of Veterans' Appeals.

For over 100 years prior to this, disabled veterans seeking pensions had to navigate ever-changing bureaucracies. For years, many had to petition through a mix of Congress and what is now the Court of Federal Claims (i.e., The People's Court) just to be recognized as having veteran status.

From the U.S. Civil War up to 1988, a span of 125 years, there was no judicial recourse for veterans who were denied disability benefits. The Veterans Administration (formerly), was virtually the only administrative agency that operated free of judicial oversight.

Also throughout these years, the Executive could, and did, implement measures to repeal benefits anytime it felt justified. For example, President Franklin D. Roosevelt created "Special Boards of Review" in 1933, staffed by civilians that were not VA employees. These Boards sua sponte reviewed over 51,000 cases—only 43 percent of veterans whose cases where reviewed were allowed to keep their benefits.

Veterans stepped up pressure for judicial review after World War II. Those whose claims for benefits were denied by the Veterans Administration were afforded no independent review of decisions, Veterans were denied the right afforded to many other citizens to go to court and challenge similar agency decisions.

The status quo of no judicial review of veterans claims persisted until an influx of post-Vietnam claims in the 1970s and 80's directed the spotlight on an adjudication process in obvious need of reform. The House Committee on Veterans' Affairs consistently resisted efforts to alter the VA's unique status and noted that the Veterans Administration stood in "splendid isolation" as the single Federal administrative agency whose major functions were explicitly insulated from judicial review. (The Supreme Court was sure to remind all of the coldness of that term in a landmark decision.[3]) By now, history had proven that without proper oversight, those

[3] See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (holding that statutory interpretation, or "interpretative doubt" be resolved in a veteran's favor and further stating: "But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation . . ., the Government's position would suffer from the further factual embarrass-

wishing to cut veterans' benefits, whether couched in government reform or expressly decided by an Agency Board, while ignoring the suffering caused by their service-connected disabilities would do so without hesitation.

The Veterans' Judicial Review Act finally created a veterans' court under Article I of the Constitution on November 18, 1988. This Act of Congress, along with a multitude of other favorable pieces of legislation throughout the years, has solidified the VA into its current non-adversarial, veteran-friendly, pro-claimant system. Veterans and their dependents also have more avenues than ever before to choose from when seeking representation in the claims and appeal process. Veterans' organizations are also stronger than ever and stand ready to fight against any power that might try to reduce benefits.

It is for all of these reasons and many more, however, that reducing the appellate period from one year to 6 months would not reduce veterans' benefits. Such a time would also be consistent with other appellate periods. For example, an appellant currently has 60 days in which to file an appeal to the Court of Appeals for the Federal Circuit from the Court of Appeals for Veterans Claims, and 120 days to file an appeal to the Court of Appeals for Veterans Claims from the Board. It necessarily follows then that a fair period to file an NOD, which is the first step in initiating an appeal to the Board would be an additional 60 days, totaling 180 days, which is still an extremely long period by any appellate standards.

Recommendation:

Congress should decrease the period in which a VA claimant may submit a timely notice of disagreement to the VA following the issuance of a VA rating decision from one year to six months.

III. THE APPEALS MANAGEMENT CENTER PROMOTES AN ATMOSPHERE LOW IN ACCOUNTABILITY, HAS A POOR RECORD OF SUCCESS, AND SHOULD BE DISSOLVED.

Accountability is one key to quality, and therefore to timeliness as well. As it currently stands, almost everything in VBA is production driven. VA's quality assurance tool for compensation and pension claims is the Systematic Technical Accuracy Review (STAR) program. Under the STAR program, VA reviews a sampling of decisions from regional offices and bases its national accuracy measures on the percentage with errors that effect entitlement, benefit amount, and effective date.

According to VA's 2007 performance and accountability report, the STAR program reviewed 11,056 compensation and pension (C&P) cases in 2006 for improper payments. While this number appears significant, the total number of C&P cases available for review was 1,540,211. Therefore, the percentage of cases reviewed was approximately seven tenths of one percent, or 0.72 percent.

Another method of measuring error rates and assessing the need for more accountability is an analysis of the Board's Summary of Remands. Of importance is that its summary represents a statistically large and reliable sample of certain measurable trends. Review these examples in the context of the VA (1) deciding 700,000 to 800,000 cases per year; (2) receiving over 100,000 local appeals; and (3) submitting 40,000 appeals to the Board. The examples below are from FY 2007.

Remands resulted in 998 cases because no "notice" under 38 U.S.C.A. § 5103 was ever provided to the claimant. The remand rate was much higher for inadequate or incorrect notice; however, considering the confusing (and evolving) nature of the law concerning "notice," we can only fault the VA when it fails to provide any notice. This is literally one of the first steps in the claims process.

VA failed to make initial requests for SMRs in 667 cases and failed to make initial requests for personnel records in 578 cases. The number was higher for additional follow-up records requests following the first request. This number is disturbing because initially requesting a veteran's service records are the foundation to every compensation claim. It is claims development 101.

The Board remanded 2,594 cases for initial requests for VA medical records and 3,393 cases for additional requests for VA medical records. The disturbing factor here is that a VA employee can usually obtain VA medical records without ever leaving the confines of one's computer screen.

Another 2,461 cases were remanded because the claimant had requested a travel board hearing or video-conference hearing. Again, there is a disturbing factor here.

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ment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's 'splendid isolation.' (citation omitted). As the Court of Appeals for the Federal Circuit aptly stated: 'Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence' could not alone, therefore, enhance any claim to deference."

A checklist is utilized prior to sending an appeal to the Board that contains a section that specifically asked whether the claimant has asked for such a hearing.

The examples above totaled 7,298 cases, or nearly 20 percent of appeals reaching the Board, all of which cleared the local rating board and the local appeals board with errors that are elementary in nature. Yet, they were either not detected or they were ignored. Many more cases were returned for more complex errors. Nevertheless, for nearly a 20-percent error rate on such basic elements in the claims process passing through VBA's most senior of rating specialist and Decision Review Officers is simply unacceptable.

The problem with the VA's current system of accountability is that it does not matter if VBA employees ignored these errors because those that commit such errors are usually not held responsible. One may ask, "how does this apply to the appeals process?" Simple, with the advent of the AMC, local employees handling appealed cases have little incentive to concern themselves with issues relating to accountability because if the Board remands a case, then in all likelihood, the appeal will be sent to the AMC, not back to the local employee. Therefore, local employees realize they will most likely never see the case again.

Further, the AMC is essentially considered a failure throughout the veteran community, including VSOs and VA employees. Part of this failure is displayed in how and when appeals are resolved throughout the appellate process. As of the end of FY 2007, the Board had disposed of 24.5 percent of all appeals with an initial decision—21.7 percent were resolved at local offices prior to submission of a form 9, which usually means the appeal was granted—another 11.8 percent were resolved at local offices after receipt of a Form 9, which also usually means the appeal was granted. Approximately 35.5 percent of all Board decisions were remands; however, only 2.8 percent were resolved after a BVA remand.

As it pertains to the AMC, the 2.8 percent must shrink even further when realizing that some appeals are returned to the Agency of Original Jurisdiction, such as egregious errors and those represented by attorneys. Therefore, the AMC is succeeding in resolving less than 2.8 percent of VA's appellate workload. This begs the question of what exactly is the AMC doing?

The AMC received nearly 20,000 remands from the Board in FY 2008. By the end of FY 2008, the AMC had slightly over 21,000 remands on station. By the end of January 2009, they had approximately 22,600 remands on station. The AMC completed nearly 11,700 appeals, out of which 9,811 were returned to the Board, 89 were withdrawn, and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions. This means the AMC's error rate was higher than its grant rate. This record is not indicative of success.

If remands were returned to ROs rather than the AMC, local employees would inherently be held to higher accountability standards. Additionally, a large amount of resources, such as that utilized by the AMC, would no longer be wasted on such little output, such as the number of cased disposed after remand. Congress has already laid the path for this action—VA must now capitalize on the opportunity.

Congress recently enacted Public Law 110–389, the "Veterans' Benefits Improvement Act of 2008" (S. 3023). Section 226 of S. 3023 requires VA to conduct a study on the effectiveness of the current employee work-credit system and work-management system. In carrying out the study, VA is required to consider, amongst other things: (1) measures to improve the accountability, quality, and accuracy for processing claims for compensation and pension benefits; (2) accountability for claims adjudication outcomes; and (3) the quality of claims adjudicated.

The legislation requires the VA submit the report to Congress no later than October 31, 2009, which must include the components required to implement the updated system for evaluating employees of the Veterans Benefits Administration. No later than 210 days after the date on which the Secretary of Veterans Affairs (Secretary) must submit the report to Congress, the Secretary must establish an updated system for evaluating the performance and accountability of employees who are responsible for processing claims for compensation or pension benefits.

Congress and the Administration must not conduct the foregoing actions without including the appeals process—it is inextricably intertwined with the entire claims processing system. Section 226 of Pub. L. 110–389 may provide the perfect opportunity to dismantle the dysfunctional AMC, return appeals to local offices, and include the appellate process when enhancing VA's accountability as required by the Veterans' Benefits Improvement Act of 2008.

Further, this is an historic opportunity for the VA to implement a new methodology—a new philosophy—by developing a new system with a primary focus of quality through accountability, which must include the appellate process. Properly undertaken, the broad outcome would result in a new institutional mindset across the

VBA—one that focuses on the achievement of excellence—one that changes a mindset focused mostly on quantity-for-quantities-sake, to a focus of quality and excellence. Those who produce quality work are rewarded and those who do not are finally held accountable.

Recommendation:

When implementing the results of the Secretary's upcoming report required by section 226 of the foregoing Act of Congress, the Department must include the appellate process when seeking improvements in the claims process. In doing so, one important action with respect to the appellate process should be to dissolve the AMC and return remanded appeals to those responsible for causing the remand. The appellate process must further be included in an accountability program, in accordance with section 226, that will detect, track, and hold responsible those VA employees who commit errors while simultaneously providing employee motivation for the achievement of excellence.

THE COURT OF APPEAL FOR VETERANS CLAIMS

IV. THE VETERANS BENEFITS IMPROVEMENT ACT OF 2008

Last year Congress enacted S. 3023 into law, the "Veterans Benefits Improvement Act of 2008." In doing so, it wisely stipulated language in title VI, section 601, that authorizes a temporary expansion of judges at the Court and enhanced the Court's annual workload reporting requirements.

The DAV believes that the temporary increase of two new judges will prove beneficial in helping to control the Court's workload. In the light of the new reporting requirements stipulated under section 604 of the same legislation, Congress will be better situated to determine whether these new positions should be made permanent.

We also believe that once the Court submits its first report in accordance with the new reporting requirements, better judgments can then be made regarding large policy issues affecting the Court's workload and backlog. Such changes made too early could prove premature. We therefore limit our recommendations to those that follow.

V. ENSURE NEW JUDGES APPOINTED FROM THE FIELD OF VETERANS' ADVOCACY AND ARE EXPERIENCED IN VETERANS' LAW.

Whether Congress increases the number of judges on a permanent basis or not, the issue of judge's credentials is still of critical importance. As noted in the FY 2010 *Independent Budget*, Congress should ensure that any new judges appointed to the Court of Appeals for Veterans Claims are themselves a veteran's advocate and skilled in the practice of veterans' law.

The Court received well over 4,000 cases during FY 2008. According to the Court's annual report, the average number of days it took to dispose of cases was nearly 450. This period has steadily increased each year over the past four years despite the Court having recalled retired judges numerous times over the past two years specifically because of the backlog. Veterans' law is an extremely specialized area of the law that currently has fewer than 500 attorneys nationwide whose practices are primarily in veterans' law.

Significant knowledge and experience in this practice area would reduce the amount of time necessary to familiarize a new judge to the Court's practice, procedures, and body of law. A reduction in the time to acclimate would allow a new judge to begin a full caseload in a shorter period, thereby benefiting the veteran population. Congress should therefore consider appointing new judges to the Court from the selection pool of current veteran's law practitioners.

Recommendation:

Congress should ensure that any new judges appointed to the Court of Appeals for Veterans Claims are themselves a veteran's advocate and skilled in the practice of veterans' law. Congress should enact a joint resolution indicating that it is the sense of Congress that any new judges appointed to the Court of Appeals for Veterans Claims be selected from the knowledgeable pool of current veterans' law practitioners.

VI. THE NATION'S VETERANS HAVE EARNED THEIR OWN COURTHOUSE AND JUSTICE CENTER THAT IS WORTHY OF THEIR SACRIFICE.

Sincere consideration must be given to the location and setting of the Court. The DAV contends that the Court should be housed in its own dedicated building, de-

signed and constructed to its specific needs and befitting its authority, status, and function as an appellate court of the United States.

During the nearly two decades since the Court was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court without its own courthouse. The "Veterans'" Court should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States, and especially the degree of respect that those who have born the battle for this great Nation have earned.

Rather than being a tenant in a commercial office building, the Court should have its own dedicated building that meets its specific functional and security needs, projects the proper image, and allows the consolidation of VA general counsel staff, court practicing attorneys, and veteran's service organization representatives to the court in one place.

Recommendation:

The Court should have its own home, located in a dignified setting with distinctive architecture that communicates its judicial authority and stature as a judicial institution of the United States dedicated to those who served this country in uniform. Construction of a courthouse and justice center requires an appropriate site, authorizing legislation, and funding. Therefore, Congress should enact legislation and provide the funding necessary to construct a courthouse and justice center for the Court of Appeals for Veterans Claims.

VII. CONGRESS SHOULD REQUIRE THE COURT TO AMEND ITS RULES OF PRACTICE AND PROCEDURE TO PRESERVE ITS LIMITED RESOURCES.

Congress is aware that the number of cases appealed to the Court has increased significantly over the past several years. Nearly half of those cases are consistently remanded back to the Board of Veterans' Appeals.

The Court has attempted to increase its efficiency and preserve judicial resources through a mediation process, under Rule 33 of the Court's Rules of Practice and Procedure, to encourage parties to resolve issues before briefing is required. Despite this change to the Court's rules, the VA's General Counsel routinely fails to admit error or agree to remand at this early stage, yet later seeks a remand, thus utilizing more of the Court's resources and defeating the purpose of the program.

In the above practice, the VA usually commits to defend the Board's decision at the early stage in the process. Subsequently, when the VA's General Counsel reviews the appellant's brief, they then change their position, admit to error, and agree to or request a remand. Likewise, the VA agrees to settle many cases in which the Court requests oral argument, suggesting acknowledgment of an indefensible VA error through the Court proceedings. The VA's failure to admit error, to agree to remand, or to settle cases at an earlier stage of the Court's proceedings does not assist the Court or the veteran, it merely adds to the Court's backlog.

Recommendation:

Congress should enact a Judicial Resources Preservation Act. Such an Act could be codified in a note to section 7264. For example, the new section could state:

> (1) Under 38 U.S.C. § 7264(a), the Court shall prescribe amendments to Rule 33 of the Court's Rules of Practice and Procedure. These amendments shall require that:
>
> (a) If no agreement to remand has been reached before or during the Rule 33 conference, the Department, within 7 days after the Rule 33 conference, shall file a pleading with the Court and the appellant describing the bases upon which the Department remains opposed to remand;
>
> (b) If the Department of Veterans Affairs later determines a remand is necessary, it may only seek remand by joint agreement with the appellant;
>
> (c) No time shall be counted against the appellant where stays or extensions are necessary when the Department seeks a remand after the end of 7 days after the Rule 33 conference;
>
> (d) Where the Department seeks a remand after the end of 7 days after the Rule 33 conference, the Department waives any objection to and may not oppose any subsequent filing by appellant for Equal Access to Justice Act fees and costs under 28 U.S.C. 2412.
>
> (2) The Court may impose appropriate sanctions, including monetary sanctions, against the Department for failure to comply with these rules.

VIII. CONGRESS SHOULD ENFORCE THE BENEFIT-OF-THE-DOUBT RULE.

The Court upholds VA findings of "material fact" unless they are clearly erroneous, and has repeatedly held that when there is a "plausible basis" for the Board's factual finding, it is not clearly erroneous. Title 38, United States Code, section 5107(b) grants VA claimants a statutory right to the benefit of the doubt with respect to any benefit under laws administered by the Secretary of Veterans Affairs (Secretary) when there is an approximate balance of positive and negative evidence (relative equipoise) regarding any issue material to the determination of a matter.

Yet, the Court must usually affirm many BVA findings of fact when the record contains only minimal evidence necessary to show a "plausible basis" for such finding. This renders a claimant's statutory right to the benefit of the doubt meaningless because claims can be denied and the denial upheld when supported by far less than a preponderance of evidence. In other words, the weight of evidence for and against a claim can be equal, therefore invoking the equipoise standard; however, the Court must still uphold a denial based on weaker evidence if it finds plausibility despite the unfavorable evidence failing to equal the value of the favorable evidence. This effectively moots the benefits of the doubt. These actions render congressional intent under section 5107(b) meaningless.

To correct this situation, Congress amended the law with the enactment of the Veterans Benefits Improvement Act of 2002[4] to expressly require the Court to consider whether a finding of fact is consistent with the benefit-of-the doubt rule. The Court has not upheld the intended effect of section 401[5] of the Veterans Benefits Act of 2002. This is in part due to the Court's jurisprudence of reviewing the Board's application of section 5107(b) as a finding of fact. As long as that is the case, it is reviewed by the Court under the clearly erroneous standard, which invokes the plausible-basis standard by direction of higher courts' jurisprudence.

The Veterans Benefits Act section 401 amendment to section 7261(a)(4), directs the Court to "hold unlawful and set aside or reverse" any "finding of material fact adverse to the claimant . . . if the finding is clearly erroneous."[6] Furthermore, Congress added entirely new language to section 7261(b)(1) that mandates the Court to review the record of proceedings before the Secretary and the BVA pursuant to section 7252(b) of title 38 and "take due account of the Secretary's application of section 5107(b) of this title . . ."[7]

The Secretary's obligation under section 5107(b), as referred to in section 7261(b)(1), is as follows:

> (b) BENEFIT OF THE DOUBT—The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.[8]

Reading amended sections 7261(a)(4) and 7261(b)(1) together, which must be done in order to determine the effect of the Veterans Benefits Act section 401 amendments, reveals that the Court is now directed, as part of its scope-of-review responsibility under section 7261(a)(4), to undertake three actions in deciding whether BVA fact-finding that is adverse to a claimant is clearly erroneous and, if so, what the Court should hold as to that fact-finding.

Specifically, the three actions to be taken as noted in the plain meaning of the amended subsections (a)(4) and (b)(1) requires the Court to: (1) to review all evidence before the Secretary and the BVA; (2) to consider the Secretary's application of the benefit-of-the-doubt rule in view of that evidence; and (3) if the Court, after carrying out actions (1) and (2), concludes that an adverse BVA finding of fact is clearly erroneous and therefore unlawful, to set it aside or reverse it.

Therefore, as the foregoing discussion illustrates, Congress intended the Veterans Benefits Act section 401 amendments to section 7261(a)(4) and (b) to fundamentally alter the Court's review of BVA fact-finding. This is evident by both the plain meaning of the amended language of these subsections as well as the unequivocal legislative history of the amendments.

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[4] Pub. L. No. 107–330, 401, 116 Stat. 2820, 2832.

[5] Section 401 of the Veterans Benefits Act, effective December 6, 2002, amended title 38, United States Code, sections 7261(a)(4) and (b)(1).

[6] 38 U.S.C. § 7261(a)(4) (emphasis indicates amendments by Veterans Benefits Act section 401(a)). See also 38 U.S.C. § 7261(b)(1).

[7] See 38 U.S.C. § 7261(b)(1).

[8] 38 U.S.C. § 5107(b) (emphasis added).

Amendments to section 7261, dealing with the same elements as did Veterans Benefits Act section 401, were included in S. 2079, introduced by Sen. Rockefeller on April 9, 2002.[9] Sen. Rockefeller stated in full regarding section 401:

> Section 401 of the Compromise Agreement would maintain the current "clearly erroneous" standard of review, but modify the requirements of the review the Court must perform when making determinations under section 7261(a) of title 38. CAVC would be specifically required to examine the record of proceedings—that is, the record on appeal—before the Secretary and BVA. Section 401 would also provide special emphasis during the judicial process to the "benefit of the doubt" provisions of section 5107(b) as CAVC makes findings of fact in reviewing BVA decisions. The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit of doubt" provision . . . However, nothing in this new language is inconsistent with the existing section 7261(c), which precludes the Court from conducting trial de novo when reviewing BVA decisions, that is, receiving evidence that is not part of the record before BVA.[10]

In light of this background, the post—Veterans Benefits Act section 401 mandate supersedes the previous Court practice of upholding a BVA finding of fact unless the only permissible view of the evidence of record is contrary to that found by the Board and that a Board finding of fact must be affirmed where there is a plausible basis in the record for the determination. Yet, the nearly impenetrable "plausible basis" standard continues to prevail as if Congress never amended section 7261. Why? The DAV believes this is because the Court cannot reasonably find a way around the clearly erroneous review applicable to factual findings.

With the foregoing statutory requirements, the Court should no longer uphold a factual finding by the Board solely because it has a plausible basis, inasmuch as that would clearly contradict the requirement that the Court's decision must take due account whether the factual finding adheres to the benefit-of-the-doubt rule. Yet, such Court decisions upholding BVA denials because of the "plausible bases" standard continue as if Congress never acted.

As stated earlier, entitlement to the benefit of the doubt is a statutory right, meaning its application should be an issue of law, not one of fact. However, its application is inherently measured against a set of facts. It therefore stands to reason that the Court should review issues concerning section 5107(b) with regard to how the Board applies a specific law to a specific set of facts. Consequently, the Court reviews the Board's application of law to facts under an arbitrary and capricious standard of review. Under such a standard, the Secretary's decision is still entitled to deference from the Court, unlike a de novo review wherein the Secretary receives no deference from the Court.

The VA is a unique, non-adversarial forum for the adjudication of veterans' benefits claims. The long-standing principle that those who have borne the battle have earned a statutory right to the benefit of the doubt when doubt arises in their disability claims is the backbone of our great system. Proper and consistent application of the benefit-of-the-doubt rule is critical to maintaining the unique characteristics of this status.

Recommendations:

- Congress clearly intended a less deferential standard of review of the Board's application of the benefit-of-the-doubt rule when it amended 38 U.S.C. § 7261 in 2002, yet there has been no substantive change in the Court's practices. Therefore, to clarify the less deferential level of review that the Court should employ, Congress should amend 38 U.S.C. § 7261 to specify that the Board's application of section 5107(b), the benefit-of-the-doubt rule is an application of law to facts and therefore entitled to review by the Court under an arbitrary and capricious standard.
- Congress should enact a joint resolution concerning changes made to title 38, United States Code, section 7261, by the Veterans Benefits Act of 2002, indicating that it was and still is the intent of Congress that the Court of Appeals for Veterans Claims provide a more searching review of the Board's findings of fact, and that in doing so, ensure that it enforce a VA claimant's statutory right to the benefit of the doubt.
- Congress should require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under 38 U.S.C. § 7261, when applicable.

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[9] See S. 2079, 107th Cong., 2d Sess., § 2.

[10] 148 CONGRESSIONAL RECORD S. 11334 (remarks of Sen. Rockefeller) (emphasis added).

IX. EXPLORE THE PROS AND CONS OF PROVIDING THE COURT WITH SUMMARY DISPOSITION AUTHORITY.

The DAV would welcome meaningful discussion on the benefits and potential risks of providing the Court with limited authority to summarily dispose of certain classes of appeals. At this time, the DAV has not had the opportunity to explore this option to a degree that provides us comfort as an organization to fully support or oppose the concept. We nonetheless invite an open dialog on the matter.

CONCLUSION

We are confident these recommendations, if enacted, will help streamline the protracted appeals process and drastically reduce undue delays. Some of recommendations contained herein may appear novel and/or controversial at first; they may even draw criticism. However, such a response would be misdirected. These recommendations are carefully aimed at making efficient an inefficient process without sacrificing a single earned benefit.

Until such improvements are made, the VA will never be able to maximize its recent increases in staffing. However, if such improvements are made, only then will the VA see vast improvements in its entire claims process—improvements that are essential to achieving the broader goals of prompt and accurate decisions on claims. Likewise, only then will the VA be able to incorporate training, quality assurance, and accountability programs demanded by the veterans' community. It has been a pleasure to appear before this honorable Committee today.

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO KERRY BAKER, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Question 1. During the hearing it was suggested that some claims for benefits can be triaged and rated quickly because they are, for lack of a better term, "no brainer" claims. Can you provide this Committee with examples of these types of claims?

Response. There are various types of claims in which the application of law is not debatable given certain facts. For example, title 38, Code of Federal Regulations, sections 4.29 and 4.30 provide for a temporary total evaluation, or a 100-percent rating, anytime a veteran is either hospitalized in excess of 21 days or undergoes treatment, such as surgery, for a service-connected disability that necessitates convalescence. Ratings for hearing loss are another example. If a veteran is service-connected for hearing loss and undergoes an examination for an increased rating, such increased rating is based on application of a rating chart to the hearing test results—as long as data is input correctly, the rating will be accurate. Similar to hearing loss, tinnitus also receives a rating closed to discussion, 10 percent. This percentage rating is applied whether in one ear, both ears, constant, or recurrent. However, do not confuse these ratings with the issue of service connection, as these scenarios consider a veteran that is already service-connected for the disability in question.

Many other types of claims can be triaged, other than rating claims. For example, VA could complete all dependency claims in such a manner. In many circumstance, claims for ancillary benefits could also be triaged. Such claims include adaptive automobile and housing benefits, although some claims with no clear entitlement require additional development.

Question 2. Some of the common errors identified by Judge Kasold as resulting in remands from the Court are failure to obtain medical examinations and opinions and the failure to obtain documents and other evidence. During Committee oversight visits, a frequent finding is the failure of VA regional offices to obtain medical examinations and opinions before denying a claim for service connection. Does the statute need to be amended to require a medical examination or opinion before denying an original claim for service-connection?

Response. I have testified considerably regarding the subject of medical opinions. I do not believe your question can be answered in simple terms. The problem with this subject is that it exists at opposite ends of the proverbial spectrum. The VA either fails to obtain a medical opinion when the law, as applied to the facts of a case, requires it to do so, OR, when the facts are such that the law does not require it to do so. An example of the first problem would be a veteran claiming service connection for any given disability, and (1) proving that he/she has the stated condition and has some triggering event in the service, but no medical nexus (opinion) between the event and the claimed disability. The law does not allow the rating specialist (a layperson) to render such an inherent medical conclusion. Therefore, a

medical opinion is required. In far too many cases, no such opinion is requested. The claim is then denied.

The second scenario occurs when a veteran, considering the foregoing example, provides an opinion from his/her private or VA doctor in order to satisfy the nexus requirement. In this scenario, the VA routinely requests a medical opinion from a compensation & pension (C&P) examiner simply because the veteran submitted one of his or her own. In the vast majority of these cases, the VA C&P opinion is adverse to the claimant. Then, instead of applying the provisions of title 38, United States Code, section 5107, by giving the "benefit of the doubt" to the veteran, the VA sides with the adverse medical opinion when it never was required to obtain the opinion in the first place.

Each of these scenarios can be very frustrating to representatives, but especially to VA claimants. *The Independent Budget* to include the critical issues in the Executive Summary addresses some of these problems in great detail and provides specific recommended solutions, as does my previous testimony.

Question 3. Should the statute be amended so that failure to provide a medical examination or opinion before denying a claim for service connection should be considered clear and unmistakable error?

Response. This is a very interesting question. Currently, failure to obtain a medical opinion is considered a failure to assist the claimant under VA's "duty to assist" provisions. However, such a failure has been rendered meaningless by the Court for two reasons, each of which provides no incentive for the VA to apply the law correctly. First, the Court's have decided that a failure to obtain an opinion when necessary is a failure in VA's duty to assist a claimant in the development of their claim, but that such a failure is not a "clear and unmistakable error." Second, the Court's have decided that although an adjudicative error, failure to obtain an opinion does not rise to the level of an egregious error such that would toll the finality of the claim.

The combination of these policies leaves the claimant as the only one to suffer from such failures, while providing the VA no incentive for lawful application of policy. I believe your question has two possible answers. The first one is that: failure to obtain an opinion "when needed" will result in clear and unmistakable error when the benefit sought is later awarded on a subsequently obtained opinion. The second option is that instead of declaring such a failure a clear and unmistakable error, you could amend the statute to declare it an egregious error that tolls the finality of the claim, thereby warranting an earlier effective date. (The effective date statutes would probably require a conforming amendment). Either of these changes would place important incentives for VA employees to prevent such errors by placing liability on Agency actions. Either one of these actions would balance this process by adding the above liability to VA while simultaneously proving relief to VA claimants when VA fails to apply the law.

Chairman AKAKA. Thank you very much, Mr. Baker.

Mr. Cohen, your testimony, please.

STATEMENT OF RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Mr. COHEN. Good morning and aloha.

Chairman AKAKA. Aloha. Good morning.

Mr. COHEN. I thank the Committee for the opportunity to present the views of the National Organization of Veterans' Advocates.

We have a unique perspective because our 300 members actually represent veterans and are in the trenches with them. Many of our members are veterans.

We know that the VA is facing a storm of claims coming out of the global war on terror. We also know there is a tremendous backlog. And, we know that Congress has been doing everything it could, including passing the Veterans' Benefits Improvement Act of 2008, which mandated monitoring the training and certification in the VA. That has all been helpful.

But when the reports come back showing that the training is inadequate—because we believe it is—and that the work credit system is a disincentive to reaching correct decisions, we would hope Congress would revisit this issue and pass legislation to require good training, adequate training and get rid of the work credit system.

I need to change the thrust of my testimony because of things that were said previously. One of the suggestions that was reported by the Court was to get rid of the Federal Circuit. That would be a big mistake because without the Federal Circuit there would be no place where a veteran could challenge a rule of the VA. That is done in the Federal Circuit.

In addition, the Federal Circuit has been instrumental in developing veterans' jurisprudence in the area of equitable tolling when the Veterans' Court would not reach any precedential decisions. Rather, it did single judge decisions which carried no weight and which did not develop the law.

Furthermore, just recently, there was a case named *Moore* that came down on the duty to assist, where the Federal Circuit was instrumental in reversing what the Court did. It was in error.

So, the Federal Circuit provides to the Court what the Court provides to the BVA.

I would also state that the idea of doing remote hearings in all cases or in many cases is not a good idea, especially with the flood of veterans who are suffering from PTSD and TBI or who are elderly. They cannot understand going remote. It presents a problem. There is a time delay on the equipment that is being used right now.

And the biggest problem is their record cannot be in two places at the same time. So, if I want to tell a veterans' law judge, look on page so and so, look at this document, I cannot because we do not have the same documents in front of us.

I would also want to call the Committee's attention to the fact that the information in the Court's testimony regarding the remand rate is correct. It is 60 percent. If you take the number of merit decisions and subtract from that the extraordinary relief decisions, you will find pure merit decisions. Then if you look at the number that were remanded, you come up with the 60 percent figure.

It is important to remember that the figure that is remanded for bad decisionmaking by the Board does not represent all of the bad decisions. Most of the bad decisions, the decisions that have inadequate reasons and bases, inadequate explanation, are remanded by agreement of the parties. Those are the ones that, in mediation, go away.

There is a tremendous number of bad decisions coming out of the BVA. Bad decisions are what contributes to the backlog, bad decisions from the front end to the back end.

What can we do about this? We need to restructure the system. Congress was right years ago when you said that VCAA is important. Notice, advance adjudicatory notice is important. What we need is a notice up-front telling the veterans what they need to submit and where they can get it.

Many times when our people get involved in the case it is after the NOD, and we say to the veteran, oh, you just need to do this and that. You should not have been arguing that you were injured in service. What they want to know is if you have a present disability.

They say, no one told us.

What we need to do is get rid of the six separate regional office teams that they have—pre-determination rating, post-determination—and have one team that can issue a case-specific notice that is helpful and veteran-friendly. Have the veteran contribute with the VA in developing the records. They can get their medical records and bring them in. They can get an opinion from the doctor.

The other thing that would go a long measure to reduce the time is amending 5125. Where a veteran requests that their doctor's report be accepted in lieu of a compensation and pension exam, that should be mandatory if it is an adequate exam sufficient for rating. That saves tremendous amount of time.

If we rework the system, if the VA would remanage the way they handle their claims process, they could save a lot of time by making correct decisions.

The problem with the backlog in the Court and the problem with the backlog in the VA is all bad decisions that keep coming around.

I notice my time is up.

Thank you.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Mr. Chairman and Members of the Committee: Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc ("NOVA") concerning the appeals process and the operation of the Board of Veterans' Appeals ("Board").

NOVA is a not-for-profit § 501(c)(6) educational and membership organization incorporated in 1993 and dedicated to train and assist attorneys and non-attorney practitioners who are accredited by the Department of Veterans Affairs ("VA") to represent veterans, surviving spouses, and dependents before the VA, and admitted to practice before the U.S. Court of Appeals for Veterans Claims ("CAVC") and before the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written many amicus briefs on behalf of claimants before the CAVC and Federal Circuit. The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000.

The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's members, as well as my own 15 year experience representing veterans.

A. THE BOARD OF VETERANS' APPEALS' UTILITY AND IMPORTANCE

NOVA considers the Board's role to be useful and important to the functioning of the Veterans Benefits Administration ("VBA") in two key respects. First, by statute, 38 U.S.C. § 7104(a), the Board provides a unique opportunity for a de novo review of an appealed claim "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." Additionally, because the Board is the highest appellate body within the VA, it acts as a buffer between the 58 VA Regional Offices ("VARO") and the CAVC. Thus, without the Board's intermediary role in reviewing and re-adjudicating claimed errors prior to court appeals, the CAVC could feasibly face a 1000% increase

in its caseload from a little over 4,000 newly filed appeals each year to over 40,000 appeals.[1]

B. PROBLEMS WITH THE BOARD'S FUNCTIONING AND THE ADJUDICATION PROCESS IN GENERAL

Although the Board's role and purpose are important, its decisionmaking is rife with delays and errors, and the Board's decisionmakers, the Veterans Law Judges, lack independence. Similarly, the decisionmaking at the VAROs is slow and inaccurate. In addition, some of the Decision Review Officers ("DROs"), who serve as the first line of appeal adjudicators at the VAROs, ignore their duty which is set forth in M21–MR, Part 1, Chapter 5, Section C, pp. 5–C–3, 5–C–15, to hold informal conferences. When DROs do so, they deny claimants and their representatives the time-saving opportunity to informally, narrow the issues and resolve the appeals.

1. Logistical Delays

From the moment the veteran files a notice of disagreement ("NOD") with an adverse rating decision he or she will experience unacceptable delays. Typically 1½ years lapse between the date the veteran files his initial appeal, the NOD, and the date the VARO issues the Statement of the Case ("SOC").[2] After the veteran receives and SOC, he must file a VA Form 9 Substantive Appeal, to continue his appeal to the Board. On average, over two more years elapse from the date the veteran files a substantive appeal to the Board and the date of the Board's decision.[3]

The Board's share of delay is due in part to inadequate staffing levels. In 2007, the Board had 56 VLJs divided into four teams. Each team is comprised of two chief VLJs and 11 line VLJs and is supported by 60 staff counsel.[4]

By contrast, in 2007, there were 1100 Administrative Law Judges ("ALJs") employed by the Social Security Administration ("SSA"). These ALJs conducted hearings in over 500,000 cases in 2007.[5] While the SSA announced in 2008 the impending hiring of 144 new ALJs, the VA continues to expect only 56 VLJs to process over 40,000 appeals each year.[6] Thus, adequately manning the Board will help alleviate the backlog of cases waiting for adjudication.

Furthermore, in cases where the veteran is represented by an accredited representative, requiring the VA's adjudicators to communicate directly with the veteran's representative would also help alleviate processing delays. Currently, it varies from VARO to VARO whether or not the rating specialists and the DROs will speak with the veteran's representative outside of a formal hearing. However, if rating specialists and DROs were required to comply with the rules to conduct informal conferences with the representatives, the parties could narrow the issues, confer on what evidence development needs to occur before adjudication, and resolve claims much more efficiently.

Using an archaic filing system also creates unnecessary delays. Veterans' records are kept in a paper claims file referred to as the "C-File." Both the VAROs and the Board use the C-File and, thus, ship it between offices nationwide to adjudicate claims and appeals. Further compounding the problem is the fact that the VAROs and Board transfer and manage the C-Files using different computerized tracking systems.[7] Together these logistical problems result in inefficiency and more delays—

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[1] See CAVC annual report, FY 2008, located at http://www.vetapp.uscourts.gov/documents/Annual_Report_-_20081.pdf, and the Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 15, cases received at BVA located at http://www.va.gov/Vetapp/ChairRpt/BVA2007AR.pdf.

[2] Department of Veterans Affairs FY 2008 Performance and Accountability Report, p. 119 located at http://www.va.gov/budget/report/2008/index.htm and Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 16, average elapsed time from Notice of Disagreement receipt until issuance of Statement of the Case.

[3] Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 16, elapsed time from when the Statement of the Case is issued until Board makes a decision. (When the VARO issues the SOC, this is what triggers the veteran's right to appeal his case to the Board.)

[4] Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 2.

[5] See, http://www.nytimes.com/2007/12/11/opinion/11tue1.html?_r=1; and Disability Determinations and Appeals, Fiscal Year 2007, Office of Disability Programs, December 2007.

[6] May 2007 Statement of Linda M. Springer Director U.S. Office of Personnel Management, Subcommittee on Social Security Committee on Ways and Means U.S. House of Representatives http://www.opm.gov/News_Events/congress/testimony/110thCongress/05_01_2007.asp and notice February 26, 2008, at http://www.ssa.gov/pressoffice/pr/ALJ-hiringpr.htm.

[7] The Regional Offices and the entire Veterans Benefits Administration is required to use the Veterans Appeals Control and Locator System (VACOLS) for on-line tracking of appeals, and it is primarily used by the BVA (see M21–1, Part I, Chapter 5, Section K). In addition, the Con-

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not to mention the very real problem of records getting lost or damaged in transit. Thus, we support Secretary Shinseki's initiative to implement electronic filing. Implementing a universal file tracking system would further save considerable time and eliminate inefficiencies.

2. Delays Caused by Decision-Making Errors

Emphasis needs to be placed on the accuracy of decisions and not the quantity of decisions made; to wit, if decisions were made correctly the first time, this would eliminate the time it takes for the VA to process appeals and correct errors on remand. The VAROs and the Board frequently make errors in their decisions. However, errors are not accurately reported. For example, the VBA claims a national accuracy rate of 88% for what the Secretary has defined as "compensation core rating work".[8] If this refers to compensation adjudications, it is, obviously, an overgenerous estimate. In 2007, the Board adjudicated 44,000 appeals and either remanded or reversed 50% of those appeals. This, suggests the VBA's accuracy rate is less than 50%.[9] Similarly, there is a great disparity between the 93.8% accuracy rate reported by the Board and the statistics provided by CAVC.[10] According to CAVC's numbers, the Board's accuracy rate is 20% and over 60% of the Board's decisions are remanded or reversed for errors.[11]

3. Lack of Independence

Although the Board functions under a Chairman, who is appointed by the President and who "serves at the Assistant Secretary level within the Department," the Board does not function independently of the VBA. Rather, the Board understands its role as that of a partner to the VBA, with whom it conducts joint training and holds monthly meetings to "resolve issues of common concern." [12] Furthermore, the Board's VLJs are not independent of the VBA. Thus, the Board's staff attorneys "provide various types of assistance and training to the VARO staff." Also, VLJs are "selected through competitive selection processes" from the group of BVA attorneys.[13] The assistance provided and the dependency and familiarity between the Board and the VBA create a cooperative environment rather than creating a system where VLJs objectively judge VARO decisionmaking.

C. RECOMMENDED SOLUTIONS

New legislation would ameliorate some of the bastions of the VBA's appellate process.

1. Streamline the Appeal Process and Utilize Informal Conferences

Currently, after a veteran receives an adverse decision from the VARO, the veteran must submit two different appeal documents for his case to be sent to the Board. The first document is called a Notice of Disagreement, which the veteran files after the VARO's initial decision. Then, after the VARO issues a Statement of the Case, which typically regurgitates the initial decision, the veteran must file a VA Form 9, "Substantive Appeal," before the VARO will send the veteran's case to the Board. There is unnecessary duplication and, thus inefficiency in the current process. Therefore, NOVA recommends that 38 U.S.C. §§ 7105(a) and 7105A be amended to eliminate the requirement that a claimant submit a "substantive appeal" or a "formal appeal." Also, NOVA recommends that 38 U.S.C. §§ 7105(d) and 7105A(b) be amended to eliminate the requirement that the VA issue a Statement of the Case. NOVA suggests that the legislative amendments require Decision Review Officer review of any case in which a veteran files a Notice of Disagreement. During this review process, the veteran or his advocate could elect to discuss the case informally with the DRO or present the veteran's case in a formal hearing with

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trol of Veterans' Records System (COVERS) is primarily utilized at the Regional Office level (see M21–1, Part I, Chapter 5, Section F).

[8] Department of Veterans Affairs FY 2008 Performance and Accountability Report, p. 8.

[9] Honoring the Call to Duty: Veterans' Disability Benefits in the 21st Century, Veterans' Disability Benefits Commission, October 2007, pp. 310, 317; Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, pp. 14,18,19.

[10] Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 3.

[11] CAVC annual report, FY 2008, subtracting the CAVC's extraordinary relief decisions from the total merits decisions and dividing that sum into the decisions affirmed results in a 20% affirmance rate as contrasted with an over 60% remand or reverse rate for errors committed at the Board. The remainder of appealed Board decisions are affirmed in part, dismissed in part, reversed/vacated and/or remanded in part.

[12] Department of Veterans Affairs 2008 Organizational Briefing Book, pp. 4,6,42 located at http://www.va.gov/ofcadmin/docs/vaorgbb.pdf; Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 5.

[13] Board of Veterans' Appeals Report of the Chairman, Fiscal Year 2007, p. 7,10.

the DRO. After considering all of the evidence of record, the DRO would issue a decision affirming, modifying, or reversing the initial rating decision. If the DRO issues an unfavorable decision, the veteran could then elect to continue his appeal to the Board without the need to file another formal request to appeal or withdraw his appeal. The election to proceed with the appeal should not require any formal argument or itemization of errors, and the NOD should be read liberally in the veterans favor.

2. Eliminate Unnecessary Medical Exams

In addition to those legislative changes, NOVA recommends amending 39 U.S.C. § 5125 to eliminate unnecessary medical exams. Currently, if a veteran submits a favorable medical opinion from his treating physician to support his claim, the VBA will request that the Veteran's Health Administration ("VHA") provide another medical examination—referred to as a Compensation & Pension ("C&P") Examination. Thus, more time is wasted waiting for the scheduling of exams and the preparation of C&P reports. NOVA suggests the title of Section 5125 be amended to read "Acceptance of Reports of VHA and Private Physician Examinations." The body of the statute should be amended to read as follows: "For purposes of establishing any claim for benefits under chapter 11 or 15 of this title [38 U.S.C.S. §§ 1101 et seq. or 1501 et seq.], a report of a medical examination administered by a VHA treating physician or a private physician that is provided by a claimant in support of a claim for benefits, including a claim for increased benefits, under that chapter shall be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim."

In addition, Judge Alan G. Lance, Sr., at the CAVC observed in *Crutcher* v. *Nicholson* that VA physicians are obligated to assist a claimant when they possess the ability to substantiate a claim.[14] Judge Lance's observation should be codified as a new section, 38 U.S.C. § 5125A. This would ensure that, when a treating VA doctor has a relevant, favorable opinion, the doctor's opinion is made available for submission to the VA, thus eliminating the need for the VBA to request and obtain a separate C&P examination.

3. More BVA Judges

Streamlining the appeal process is the first step in eliminating the excessive delays veterans face. Changes also need to be made at the Board itself. The Board needs sufficient funding to hire enough new VLJs to handle the appeals in a timely manner. Furthermore, the Board should be vigilant to prevent VLJs from denying requested informal conferences between the veterans' advocates and the Board's attorneys or VLJs. There is valid justification for a procedure allowing an oral request, instead of the written request required by regulation, to encourage pre-hearing conferences in which the parties could clarify and narrow the issues on appeal, avoid needless remands, and, thus, speed the resolution of appeals. (see, 20 CFR § 20.708).

4. Single and Secure Digital File System

As stated above, the VBA's current file system and multiple electronic claim monitoring systems are inadequate and do not merit retention. Utilizing one secure digitized C-File and one on-line computerized tracking system will save time. It will also reduce the costs associated with creating storing, and shipping paper C-Files.

5. Hiring and Selection of VLJs

At present, VLJs are selected in-house from the attorneys who have been staff counsel with the Board. 38 U.S.C. § 7101, et seq. should be amended to recategorize the VLJs as Administrative Law Judges ("ALJs") and to require that the Board's ALJs be hired through the Office of Personnel Management from a pool of qualified attorneys in the same manner ALJs are hired for other Federal agencies. Similarly, 38 U.S.C. § 7101A should be amended to eliminate the requirement that VLJs are subject to annual re-certification which makes a VLJs reappointment dependent upon making what the supervisors consider to be "the right decision." Finally, and consistent with the practice of other Federal administrative agencies, a claim which is remanded by CAVC to the Board should be assigned to a VA ALJ different than the one who originally denied the claim.

6. Separation from the VA

To maintain their independence, the new VA ALJs should maintain their office space separate and apart from the VA and should not be involved in helping VARO

[14] See, non precedential case number 03–1025, decided January 24, 2006.

employees draft rating decisions or SOCs. More importantly, the VA ALJs should maintain their reputation as an unbiased appellate body by eliminating the intra-agency partnership with VBA, OGC and VHA, to include eliminating their monthly meetings.

7. Decision Making

Rather than maintaining the artificial and erroneous accuracy rate calculation system presently in place, 38 U.S.C. § 7101(d) should be amended to require the Board to report on the percentage of unfavorable Board decisions which are appealed and later reversed or remanded in whole or in part by the CAVC. This will permit an honest assessment of the Board's accuracy in its decisionmaking. An internal quality control position reporting directly to the Chairman should be created to monitor decisionmaking and to especially sample the BVA remands with the goal of eliminating unnecessary remands. Accurate quality control to ensure is essential.

8. Evaluation of Production

Presently, VBA employees receive promotions and bonuses based upon the quantity and not the quality of decisions they make each day. This creates an incentive for decisionmakers to make quick, easy decisions to remand a case for further development that is often unnecessary. Production standards at the VAROs and Board decrease the quality of the decisions made.[15] Furthermore, VA decisionmakers should not receive the same "work credits" for remanding an appeal as they would for making a merits decision. Accuracy in decisionmaking should be emphasized and rewarded.

RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)

Question 1. During the hearing it was suggested that some claims for benefits can be triaged and rated quickly because they are, for lack of a better term, "no brainer" claims. Can you provide this Committee with examples of these types of claims?

Response. Claims which can be rated quickly fall into two categories: (1) those which indisputably should be granted with the highest possible rating and (2) those which objectively lack merit. Some examples of meritorious claims which can be quickly granted include:

- claims for service-connected benefits for PTSD by a combat veteran who is currently being treated for PTSD or who was diagnosed with PTSD while on active duty;
- claims for benefits for a condition which arose while the veteran was serving on active duty and for which the veteran still receives treatment;
- claims for benefits based on amputated limbs; and
- claims which have been substantially developed and are sufficiently complete to rate.

Some examples of claims which objectively lack merit and which can be quickly denied include:

- claims for benefits where there is no assertion of a current disability;
- claims for benefits which are objectively unreasonable, such as claims for cancers caused by radio waves emitted by UFOs;
- claims for benefits for medical conditions which are clearly not compensable such as, new claims for disabilities attributed to tobacco use and claims for refractive errors; and
- claims for benefits based on congenital defects which cannot be aggravated in service, such as color blindness.

Question 2. Some of the common errors identified by Judge Kasold as resulting in remands from the Court are failure to obtain medical examinations and opinions and the failure to obtain documents and other evidence. During Committee oversight visits, a frequent finding is the failure of VA regional offices to obtain medical examinations and opinions before denying a claim for service connection. Does the statute need to be amended to require a medical examination or opinion before denying an original claim for service-connection?

Response. Yes, the statute needs to be amended to require a medical examination or opinion before denying an original claim for service-connection. NOVA suggests

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[15] See, Department of Veterans Affairs Office of Inspector General, "Review of State Variances in VA Disability Compensation Payments," May 19, 2005, pp. 60, 61.

that Congress amend 38 U.S.C. §5103A to make it clear that the Secretary is required to assist claimants in properly developing claims by obtaining necessary medical examinations.

As it is currently written, the existing statute—38 U.S.C. §5103A(d)—requires the VA to obtain a medical exam when "necessary to make a decision on the claim" in connection with a claim for disability compensation. However, this requirement is triggered only in cases where the record already contains competent evidence of a current disability and an indication that the disability may be associated with active service. Although a recent decision from the U.S. Court of Appeals for the Federal Circuit interpreted 38 U.S.C. §5102A(a)(1) as providing such a requirement in all claims, clarifying legislation would be help to enforce Congress' original intent. See *Wood* v. *Peake*, 520 F.3d 1345,1348 (Fed. Cir. 2008).

Additionally, legislation requiring a revision of the work credit system so that VA employees are rewarded for properly-developed claims and good decisionmaking and penalized for hasty decisions in undeveloped and underdeveloped claims would drastically increase the number of claims that are properly developed and subsequently granted, thereby decreasing appeals and the ensuing backlog of appealed claims.

Question 3. Should the statute be amended so that failure to provide a medical examination or opinion before denying a claim for service connection should be considered clear and unmistakable error?

Response. Yes, NOVA recommends that Congress amend 38 U.S.C. §5103A so as to designate as clear and unmistakable error ("CUE") the failure of the VA to comply with its duty to assist and provide a medical examination or opinion when required. At present, the failure of the VA to comply with the duty to assist does not amount to CUE. See 38 CFR §20.1403(d)(2); *Cook* v. *Principi*, 318 F.3d 1334,1341 (Fed. Cir. 2002). This legislative change, especially if it has a retroactive effect, would ameliorate the damage done to the claims of unrepresented veterans who have had valid claims denied solely because the VA failed to notify and/or assist the veteran in obtaining the evidence needed to support the claim.

Question 4. If the time for filing a notice of disagreement were reduced to 180 days, what protections would you recommend for a "good cause exception" to the filing deadline?

Response. It would be a mistake to amend 38 U.S.C. §7105(b)(1) to reduce the time to file a notice of disagreement from one year to 180 days. There are at least eight reasons this amendment would be detrimental to veterans.

First, veterans do not always receive the rating decisions mailed to them—or at least not in a timely manner. Many times the VA does not have a veteran's correct or current mailing address, and numerous errors occur in the Regional Office mailing rooms.

Second, many veterans have serious medical and/or mental health disabilities which hamper their ability to seek assistance from a service officer, representative or lawyer. This obstacle becomes even more difficult for veterans who live in more rural areas and must travel several hours to obtain representation from the nearest representative.

Third, after locating a representative, it may take a veteran several months to attend any necessary medical appointments, obtain copies of records, and then schedule an appointment with his/her representative.

Fourth, emotional and psychological factors come into play. When a claim is denied, this can make the veteran feel as though his government—the same government he fought for—has denied the claim because his government does not believe he is telling the truth. These factors are even more complicated for veterans who suffer from mental health disabilities. It may take many months of extra time and inducement by friends and relatives for a veteran to continue with his claim after the first denial.

Fifth, veterans who are participating in inpatient treatment for their service-connected disabilities may not receive notice of rating decisions, mailed to their home address, until many months after the rating is mailed.

Sixth, to properly prepare a case for an appeal, the veteran and his or her representative will need to obtain necessary copies of various documents, such as the VA claims file, official military personnel file, and current treatment records. This quest for relevant records can take as long as six months.

Seventh, reviewing all of the newly obtained records and reports and obtaining additional medical records or an additional medical opinion can take two or three more months.

Eighth, in situations where a veteran has claims pending at different levels of the appellate process or multiple claims pending, the veteran may need to wait six to

twelve months or more for a decision which may impact the necessity to file an appeal for a separate but related claim.

Therefore, because of the numerous potential impediments to responding to an unfavorable rating decision within 120 days, there is good reason to continue the present statutory provision which currently provides claimants one year to file the notice of disagreement (NOD). Shortening the statute of limitations for filing an NOD, with the option of having the limitation abated by a showing of good cause, is not an effective alternative. Indeed, it will guarantee that a percentage of valid claims will be denied for failure to timely appeal. Veterans should not be compelled to rely upon the VA's benevolence in determining that one or more of the eight factors listed above apply and constitute good cause for the failure to timely appeal.

If the time for filing a notice of disagreement is reduced to 180 days, then NOVA recommends that a pilot program akin to the Expedited Claims Process be implemented at a limited number of ROs.

Question 5. You recommended in your testimony to "eliminate unnecessary medical exams." What oversight measures would you suggest VA adopt in order to minimize the potential of fraudulent claims filed if it MUST accept a favorable medical opinion from a veteran's treating physician to support his claim?

Response. It is NOVA's position that no additional oversight measures are necessary to minimize the potential of fraudulent claims if the VA is required to accept favorable medical opinion(s) from a veteran's treating physician to support a claim. The oversight measures already in place are sufficient. At present, the VA is obligated to rate a claim based on the evidence of record, which may be comprised solely of private medical records, in the event a veteran fails to report for a VA examination scheduled by the VA in conjunction with an original claim for compensation. See 38 CFR § 3.655(b). Moreover, in a recent case, the U.S. Court of Appeals for Veterans Claims opined that "most of the probative value of a medical opinion comes from its reasoning . . . [thus] [i]t is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion." *Nieves-Rodriguez* v. *Peake*, 22 Vet. App. 295, (2008). It is the weighing of medical opinions in light of all the medical records and objective medical evidence which guards against a rating based upon a fraudulent opinion.

Question 6. In your testimony before this Committee, you stated that, for the represented claimants and veterans, the AMC is a "black hole" because it will not adjudicate any claims where there is representation.

- Can you please clarify what you were talking about since claimants and veterans represented by VSOs are adjudicated at the AMC?
- If you were only referring to veterans and claimants represented by private attorneys, can you explain why the AMC will not adjudicate these claims?
- Would the process improve, in your mind, if the BVA properly sent claims that involve the representation by a private attorney back to the appropriate VARO and not the AMC?

Response. Regarding the operation of the AMC, NOVA's testimony was referring to attorney representation. Although the AMC will not adjudicate an attorney-represented claim, the BVA continues to needlessly remand claims with attorney representation to the AMC. NOVA understands that the AMC will likewise refuse to adjudicate claims where a claimant has requested an RO hearing. It makes sense for the BVA to remand all claims to the Agency of Original Jurisdiction ("AOJ") for development and readjudication. Remand to the AOJ makes even more sense if it is coupled with a redesigned adjudication system where the person who performed the initial rating will receive the claim to redevelop and readjudicate.

Chairman AKAKA. Thank you very much, Mr. Cohen.

Now we will hear from Mr. Stichman.

STATEMENT OF BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Mr. STICHMAN. Thank you, Mr. Chairman and Members of the Committee. The National Veterans Legal Services Program appreciates this opportunity to address you and address the questions that are before the Committee today.

One of the major problems in the appellate system at the VA is what advocates call "the hamster wheel" system of justice in which veterans are constantly having their claims moved from the regional office to the Board back to the regional office to the Board

to the Court, remanded back to the Board for additional decisionmaking. That is a major problem in the system today, and there are four major reasons for that problem.

The first is premature decisionmaking by the regional offices. What I mean by that is the regional office makes a decision prior to gathering all the evidence it is required by law to gather.

Why does it do that? Because it has a work credit system that rewards decisionmakers for making decisions quickly without punishing them for making decisions inaccurately. And so, that is why over 30 percent of cases are remanded by the Board to the regional office because they have not gotten the evidence needed before making the decision.

The second reason for the hamster wheel is the poor decisionmaking at the Board of Veterans' Appeals. As a number of witnesses including Judge Kasold have stated, over 70 percent of the decisions of the Board that have been appealed to the Court have been sent back because the Board made one or more errors. That is a terrible grade, and that has consistently been true for the last 14 years.

It has not only been true on Chairman Terry's watch, it has been true on previous chairman's watches; and nothing changes. The same mistakes are made time and time again.

They do not explain, the Board doesn't, why they rejected positive evidence in the record. They do not assess lay testimony that is submitted by the veteran. They act as if, if the evidence is not in the service medical records or in the service personnel records, then despite what the veterans and witnesses have to say occurred during service, it did not happen. Those cases are remanded by the Court to the Board because they didn't assess the credibility of the lay testimony.

Another reason is duty to assist. Again, while the Board remands a lot of cases, it does not send back to the regional office all the cases it should because the Agency has not gotten the evidence needed to decide the claim in compliance with the duty to assist.

What is the solution to this at the Board? We believe the solution, when 14 years have passed and nothing has changed, is a new system for selection of judges—the one used at most other administrative agencies. Have administrative law judges selected based on merit, the way most judges at other agencies are selected—from outside the system for the most part.

These judges are selected within the system and have the same attitudes that have been inculcated in the system over the years, and they just keep making the same mistakes.

A third reason for the hamster wheel is at the Veterans' Court. They have adopted a rule, in the *Best* and *Mahl* cases, not to address all allegations of error raised by the appellant.

So, what happens is you appeal. You allege four allegations of error that the Board made. The Court finds one or the parties agree on one, and they do not address the other three because it is quicker to do it that way.

So, the case is sent back to correct the one error, but the other three—since the Board was not required to change those errors, the Board agrees with what it did before. And if the claim isn't granted on remand, then you find yourself appealing to the Court again and

relitigating the same issues that were fully briefed by the Court to the Court the first time. This creates more hamster wheel remands and appeals.

Finally, you heard the Chairman of the Board brag that only 7 percent of his decisions were reversed by the Court—only 7, not 7 percent. The reason for that is the Court has a very narrow view of what it is allowed to reverse.

You have decisions where the overwhelming state of the evidence is favorable to the veteran. The Veterans' Court decides they didn't explain it enough, rather than actually looking at the evidence and finding that, in the veteran's case, the Board's decision was clearly erroneous. Instead of just ending it, granting the benefits, ordering the VA to pay the benefits, it sends it back for more adjudication due to a lack of adequate explanation.

That is a problem that is ripe for Congress to try to amend the scope of review. It tried once. It ought to try again to encourage the Court to exercise its authority to review findings of fact with more scrutiny.

Finally, I see I am over my time. I do not have much time to talk about it, but there is a need for class action authority.

Prior to the Veterans' Judicial Review Act, veterans could file class actions and did. The benefit of class actions is sometimes a large group of claims are affected by the same legal issue, and if you can resolve all those by a class action, you do not need multiple adjudication within the VA system. It can all be decided at one time, rather than piecemeal.

My testimony describes that further.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Stichman follows:]

PREPARED STATEMENT OF BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Mr. Chairman and Members of the Committee: Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on legislative and policy changes that may help expedite the timeliness of the adjudication of appeals of VA benefit claims without sacrificing accuracy. This testimony focuses on the two major tribunals that decide appeals of VA benefit claims—the Board of Veterans' Appeals (BVA) and the U.S. Court of Appeals for Veterans Claims (CAVC).

NVLSP is a nonprofit veterans service organization founded in 1980. Since its founding, NVLSP has represented over 1,000 claimants before the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision 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 that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

My testimony today is informed by the frustration and disappointment in the claims adjudication system experienced by many disabled veterans and their survivors. They face a number of serious challenges at both the BVA and the CAVC. As we describe below, there are several significant problems that cry out for a legislative or policy fix.

This testimony is divided into two parts. In part I, I discuss the Hamster Wheel phenomenon. In part II, I discuss the need for class action authority in veterans cases.

I. THE HAMSTER WHEEL

For many years now, those who regularly represent disabled veterans before the BVA and CAVC have been using an unflattering phrase to describe the system of justice these veterans too often face: "the Hamster Wheel". This phrase refers to the following common phenomenon: multiple decisions are made on the veteran's claim over a period of years as a result of the claim being transferred back and forth between the CAVC and the BVA, and the BVA and a VA regional office for the purpose of creating yet another decision. The net result is that frustrated veterans have to wait many years before receiving a final decision on their claims.

There are at least three aspects of the BVA's and CAVC's decisionmaking process that contribute to the Hamster Wheel phenomenon: (1) the high error rate that exists in BVA decisionmaking, which delays the decisionmaking process by requiring disabled veterans to appeal to the CAVC to correct these errors, which, in turn, leads to further VA proceedings on remand; (2) the policy adopted by the CAVC in 2001 in *Best* v. *Principi*, 15 Vet. App. 18, 19–20 (2001) and *Mahl* v. *Principi*, 15 Vet. App. 37 (2001); and (3) the CAVC's reluctance to reverse erroneous findings of fact made by the Board of Veterans' Appeals.

A. Contributor #1 to the Hamster Wheel: the High Error Rate at Board of Veterans' Appeals

The most prominent fact in assessing the performance of the Board of Veterans' Appeals is the track record that Board decisions have experienced when an independent authority has examined the soundness of these decisions. Congress created an independent authority that regularly performs this function—the U.S. Court of Appeals for Veterans Claims. Each year, the Court issues a report card on BVA decisionmaking. This annual report card comes in the form of between 1,000 and 2,800 separate final judgments issued by the Court. Each separate final judgment incorporates an individualized judicial assessment of the quality of a particular one of the 35,000 to 40,000 decisions that the Board issues on an annual basis.

For more than a decade, the Court's annual report card of the BVA's performance has been remarkably consistent. The 14 annual report cards issued over the last 14 years yields the following startling fact: of the 23,173 Board decisions that the Court individually assessed over that period (that is, from FY 1995 to FY 2008), the Court set aside a whopping 76.4% of them (that is, 17,698 individual Board decisions). In each of these 17,698 cases, the Court set aside the Board decision and either remanded the claim to the Board for further proceedings or ordered the Board to award the benefits it had previously denied. In the overwhelming majority of these 17,698 cases, the Court took this action because it concluded that the Board decision contained one or more specific legal errors that prejudiced the rights of the VA claimant to a proper decision.

By any reasonable measure, the Court's annual report card on the Board's performance has consistently been an "F". But an equally startling fact is that despite a consistent grade of "F" for each of the last 14 years, no effective action has ever been taken by the management of the BVA to improve the Board's poor performance. Year after year, the Court's report card on the Board has reflected the same failing grade.

To formulate an effective plan to reform the Board and significantly improve its performance requires an understanding of the underlying reasons that the Board has consistently failed in its primary mission (i.e., to issue decisions on claims for benefits that comply with the law). Over the last 15 years, NVLSP has reviewed over 10,000 individual Board decisions and thousands of Court assessments of these decisions. Based on this review, NVLSP has reached three major conclusions, which are set forth below.

1. The Board Keeps Making the Same Types of Errors Over and Over Again

The decisions of the Board and the final judgments of the Court reflect that the Board keeps making the same types of errors over time. For example, one common error involves the type of explanation the Board is required to provide in its written decisions. When Congress enacted the Veterans' Judicial Review Act of 1988, it expanded the type of detail that must be included in a Board decision to enable veterans and the Court of Appeals for Veterans Claims to understand the basis for the Board's decision and to facilitate judicial review. See 38 U.S.C. § 7104(d).

The Board has consistently been called to task by the Court for faulty explanations that violate 38 U.S.C. § 7104(d). These violations fall into several common patterns. One pattern is that the Board often does not assess or explain why it did not credit positive medical evidence submitted by the claimant from a private physician, while at the same time expressly relying on a negative opinion provided by a VA-employed physician. The problem here is not that the Board decided to believe

the VA physician and disbelieve the private physician. The problem is that the Board never explained its analysis (if indeed, it had one) of the private physician's opinion in the first place.

Another common pattern involves lay testimony submitted by the claimant and other witnesses. Despite the statutory and regulatory obligation (38 U.S.C. § 5107(b) and 38 CFR § 3.102) to give the veteran the benefit of the doubt in adjudicating a claim for benefits, in many of the Board decisions that have been set aside by the Court, the Veterans Law Judge has refused in his or her written decision to assess, no less credit, this lay testimony. The decisions of the Federal Circuit and the Court of Appeals for Veterans Claims in *Buchanan* v. *Nicholson*, 451 F.3d 1331, 1336–37 (Fed. Cir. 2006), and *Kowalski* v. *Nicholson* 19 Vet. App. 171, 178 (2005) chronicle this refusal to analyze the validity of lay testimony.

Sometimes the lay testimony that the Board refuses to analyze involves what happened during the period of military service. The underlying philosophy in these Board's decisions appears to be: "If the event is not specifically reflected in the existing service medical or personnel records, we don't need to assess the lay testimony"—no matter what lay testimony has been submitted.

Sometimes this lay testimony involves the symptoms of disability that the veteran experienced following military service. Despite the legal obligation to consider lay evidence attesting to the fact that veteran continuously experienced symptoms of disability from the date of discharge to the present, the Board often denies the claim on the unlawful ground that the evidence in the record does not show that the veteran was continuously provided medical treatment for the disability, without assessing the lay evidence of continuity of symptomatology.

Another common Board error is to prematurely deny the claim without ensuring that the record includes the evidence that the agency was required to obtain to fulfill its obligation to assist the claimant in developing the evidence necessary to substantiate the claim. The statutory duty placed by Congress on the VA to provide such assistance is a fundamental cornerstone of the nonadversarial pro-claimant adjudicatory process. Unfortunately, the Board often fails to honor this very important obligation.[1]

2. Board Management Does Not Downgrade the Performance of a Veterans Law Judge for Making These Types of Errors

One method of eliminating repetitive types of Board errors would be if Board management downgraded the performance of Veterans Law Judges for repeatedly violating deeply embedded legal principles. This has not been done.

The problem is not that Board management fails to assess the performance of the Board's Veterans Law Judges. Board management does conduct such assessments. The problem lies in Board management's definition of poor performance. As the Chairman of the Board stated in his FY 2006 Report, Board management assesses the accuracy of Board decisionmaking and its assessment is that Board decisions are 93% accurate.

There obviously is a major disconnect between the annual report card prepared by the Court of Appeals for Veterans Claims and the annual report card prepared by Board management.[2] How can it be that year in and year out the Court consistently concludes that well over 50% of the Board decisions contain one or more specific legal errors that prejudiced the rights of the VA claimant to a proper decision,

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[1] Ironically, one reason for premature denials by the Board is the campaign launched by Board management to avoid "unnecessary remands" from the Board to the regional offices to correct prejudicial errors made by the regional office in failing to obtain the evidence necessary to decide the claim. If this campaign truly influenced the Board to avoid "unnecessary" remands, NVLSP would applaud the effort because it would help eliminate the "hamster wheel" phenomenon that plagues the VA adjudication process. But the problem is that this campaign has promoted Board decisions that prematurely deny the claim without a necessary remand to the regional office to obtain the evidence that the law required, but the RO failed to obtain, before the case ever reached the BVA. This unlawful failure to remand actually contributes to the "hamster wheel" phenomenon by forcing the claimant to appeal to the Court, which, after a year or two, sets the Board decision aside with instructions for the Board to do what it should have done years earlier—send the case back to the RO to obtain additional evidence.

[2] Because the only BVA decisions that the Court assesses are those appealed to the Court by a VA claimant, the decisions the Court reviews are self-selected by VA claimants. They do not represent a true random sample of BVA decisionmaking. Thus, it does not necessarily follow that the Board's overall error rate is 77.7%.

On the other hand, the Court's report cards undoubtedly indicate that the Board's overall error rate is quite high. In NVLSP's experience, many of the BVA decisions that are not appealed to the Court contain the same types of errors as those contained in the decisions that are appealed to the Court. Some veterans do not appeal these flawed decisions because after years of pursuing their claim, they simply give up.

while at the same time Board management concludes that only 7% of Board decisionmaking is inaccurate?

NVLSP understands that there is a simple answer to this question. Board management simply does not count as "inaccurate" many of the types of prejudicial legal errors that have forced the Court to set aside the Board decision and place the veteran on the well-known "hamster wheel" of remands and further administrative proceedings. In this way, Board management actually promotes, rather than discourages, these errors of law.

NVLSP'S RECOMMENDATIONS

Recommendation 1: Adopt the Long-Standing Process Used and the Protections Afforded to Administrative Judges Who Adjudicate Disputes in Other Federal Agencies.

NVLSP believes that one of the major steps that Congress should take to reform the Board and significantly improve its performance is to change the methodology used to select the individuals who adjudicate appeals at the Board of Veterans Appeals. These individuals, called Veterans Law Judges (VLJs), are usually long-time VA employees who are promoted to this office from within the agency. By the time they become a VLJ, they often have adopted the conventional adjudicatory philosophy that has long held sway at the VA—an adjudicatory philosophy that underlies the failing grade assigned by the Court. Moreover, Veterans Law Judges do not enjoy true judicial independence.

In the Federal administrative judicial system outside the BVA, most judges are administrative law judge (ALJs). An ALJ, like a VLJ, presides at an administrative trial-type proceeding to resolve a dispute between a Federal Government agency and someone affected by a decision of that agency. ALJs preside in multi-party adjudication as is the case with the Federal Energy Regulatory Commission or simplified and less formal procedures as is the case with the Social Security Administration.

The major difference between Federal ALJs and the VLJs that serve on the Board of Veterans' Appeals is that ALJs are appointed under the Administrative Procedure Act of 1946 (APA). Their appointments are merit-based on scores achieved in a comprehensive testing procedure, including an 4-hour written examination and an oral examination before a panel that includes an OPM representative, American Bar Association representative, and a sitting Federal ALJ. Federal ALJs are the only merit-based judicial corps in the United States.

ALJs retain decisional independence. They are exempt from performance ratings, evaluation, and bonuses. Agency officials may not interfere with their decisionmaking and administrative law judges may be discharged only for good cause based upon a complaint filed by the agency with the Merit Systems Protections Board established and determined after an APA hearing on the record before an MSPB ALJ. See *Butz* v. *Economou*, 438 U.S. 478, 514 (1978).

There are many attorneys who have never been employed by the VA who are familiar with veterans benefits law and who are eminently qualified to serve as an administrative judge at the Board of Veterans' Appeals. Moreover, while use of the ALJ process may not always result in the selection of an individual with a great deal of experience in veterans benefits law, it should not take a great deal of time for someone without such experience to become proficient. The experience of the many judges who have been appointed to the Court of Appeals for Veterans Claims without prior experience in veterans benefits law attests to this proposition. NVLSP believes the likelihood of improved long-term performance of a judge selected through the ALJ process greatly exceeds whatever loss in short-term productivity may result if someone who is not steeped in veterans benefits law happens to be selected.

Recommendation 2: The Criteria Used in, and the Results of the Evaluation System of VLJs Employed by Board Management Should Be Publicly Available and Reported to Congress.

This recommendation may not be necessary if Congress adopts the first recommendation. But if Congress does not embrace the ALJ system for the BVA, it should at least require Board management to make publicly available the details of the system it employs for evaluating and rewarding the performance of VLJs and the results of the evaluation as applied to individual VLJs. When the evaluation system employed by Board management results in the conclusion that 93% of all Board decisions are accurate, it is plain that the evaluation system suffers from serious defects. Oversight of this system requires that it be made publicly available and reported to Congress.

B. Contributor #2 to the Hamster Wheel: Best and Mahl

In *Best* and *Mahl*, the Court of Appeals for Veterans Claims held that when it concludes that an error in a Board of Veterans' Appeals decision requires a remand, the Court generally will not address other alleged errors raised by the veteran. The CAVC agreed that it had the power to resolve the other allegations of error, but announced that as a matter of policy, the Court would "generally decide cases on the narrowest possible grounds."

The following typical scenario illustrates how the piecemeal adjudication policy adopted by the CAVC in *Best* and *Mahl* contributes to the Hamster Wheel phenomenon:

- after prosecuting a VA claim for benefits for three years, the veteran receives a decision from the Board of Veterans' Appeals denying his claim;
- the veteran appeals the Board's decision within 120 days to the CAVC, and files a legal brief contending that the Board made a number of different legal errors in denying the claim. In response, the VA files a legal brief arguing that each of the VA actions about which the veteran complains are perfectly legal;
- then, four and a half years after the claim was filed, the Central Legal Staff of the Court completes a screening memorandum and sends the appeal to a single judge of the CAVC. Five years after the claim was filed, the single judge issues a decision resolving only one of the many different alleged errors briefed by the parties. The single judge issues a written decision that states that: (a) the Board erred in one of the respects discussed in the veteran's legal briefs; (b) the Board's decision is vacated and remanded for the Board to correct the one error and issue a new decision; (c) there is no need for the Court to resolve the other alleged legal errors that have been fully briefed by the parties because the veteran can continue to raise these alleged errors before the VA on remand.
- on remand, the Board ensures that the one legal error identified by the CAVC is corrected, perhaps after a further remand to the regional office. But not surprisingly, the Board does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six years after the claim was filed, the Board denies the claim again;
- 120 days after the new Board denial, the veteran appeals the Board's new decision to the CAVC, raising the same unresolved legal errors he previously briefed to the CAVC.
- the Hamster Wheel keeps churning . . .

The piecemeal adjudication policy adopted in *Best* and *Mahl* may benefit the Court in the short term. By resolving only one of the issues briefed by the parties, a judge can finish an appeal in less time than would be required if he or she had to resolve all of the other disputed issues, thereby allowing the judge to turn his or her attention at an earlier time to other appeals. But the policy is myopic. Both disabled veterans and the VA are seriously harmed by how *Best* and *Mahl* contribute to the Hamster Wheel. Moreover, the CAVC may not be saving time in the long run. Each time a veteran appeals a case that was previously remanded by the CAVC due to *Best* and *Mahl*, the Central Legal Staff and at least one judge of the Court will have to duplicate the time they expended on the case the first time around by taking the time to analyze the case for a second time. Congress should amend Chapter 72 of Title 38 to correct this obstacle to justice.

C. Contributor #3 to the Hamster Wheel: the Court's Reluctance to Reverse Erroneous BVA Findings of Fact

Over the years, NVLSP has reviewed many Board decisions in which the evidence on a critical point is in conflict. The Board is obligated to weigh the conflicting evidence and make a finding of fact that resolves all reasonable doubt in favor of the veteran. In some of these cases, the Board's decision resolves the factual issue against the veteran even though the evidence favorable to the veteran appears to strongly outweigh the unfavorable evidence.

If such a Board decision is appealed to the CAVC, Congress has authorized the Court to decide if the Board's weighing of the evidence was "clearly erroneous." But the Court interprets the phrase "clearly erroneous" very narrowly. The Court will reverse the Board's finding on the ground that it is "clearly erroneous" and order the VA to grant benefits in only the most extreme of circumstances. As the CAVC stated in one of its precedential decisions: "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish . . . To be clearly erroneous, then, the [decision being appealed] must be dead wrong . . ." *Booton* v.

Brown, 8 Vet. App. 368, 372 (1995) (quoting *Parts & Electric Motors, Inc.* v. *Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

The net result of the Court's extreme deference to the findings of fact made by the Board is that even if it believes the Board's weighing of evidence is wrong, it will not reverse the Board's finding and order the grant of benefits; instead, it will typically vacate the Board decision and remand the case for a better explanation from the Board as to why it decided what it did—thereby placing the veteran on the Hamster Wheel again. Congress should amend the Court's scope of review of Board findings of fact in order to correct this problem.

II. INJUSTICE AND INEFFICIENCY DUE TO THE LACK OF CLASS ACTION AUTHORITY

The second major set of issues we would like to address involves the injustice and inefficiency that derives from the fact that Federal courts do not currently have clear authority to certify a veteran's lawsuit as a class action. When Congress enacted the Veterans' Judicial Review Act (VJRA) in 1988, 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 veterans organization 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).

The lack of class action authority has led to great injustice and waste of the limited resources of the VA and the courts. To demonstrate the injustice and waste that result from the unavailability of the class action mechanism, we have set forth below an illustrative case study taken from real events.

Case Study: The Battle Between the VA and Navy "Blue Water" Veterans

This case study involves the multi-year old battle that was fought between the VA and thousands of Vietnam veterans who served on ships offshore the Republic of Vietnam during the Vietnam War (hereinafter referred to as "Navy blue water veterans"). In section A below, we summarize the multi-year battle that was waged without the benefit of a class action mechanism. In section B, we describe the more efficient and just way the battle would have been waged if a class action mechanism had been available. Finally, in section C, we describe how the battle would have inevitably resulted in dissimilar VA treatment of similarly situated veterans even if the Blue Water Navy veterans had won the battle.

A. Description of the Multi-Year Battle

From 1991 to 2002, the VA granted hundreds, if not thousands of disability claims filed by Navy blue water veterans suffering from one of the many diseases that VA recognizes as related to Agent Orange exposure. These benefits were awarded based on VA rules providing that service in the waters offshore Vietnam qualified the veteran for the presumption of exposure to Agent Orange set forth in 38 U.S.C. § 1116.

In February 2002, VA did an about face. It issued an unpublished VA MANUAL M21–1 provision stating that a "veteran must have actually served on land within the Republic of Vietnam . . . to qualify for the presumption of exposure to" Agent Orange. As a result, all pending and new disability claims filed by Navy blue water veterans for an Agent Orange-related disease were denied unless there was proof that the veteran actually set foot on Vietnamese soil.

In November 2003, the CAVC convened a panel of three judges and set oral argument to hear the appeal of Mrs. Andrea Johnson, the surviving spouse of a Navy blue water veteran who was denied service-connected death benefits (DIC) by the Board of Veterans' Appeals on the ground that her deceased husband, who died of an Agent Orange-related cancer, had never set foot on the land mass of Vietnam. See *Johnson* v. *Principi*, U.S. Vet. App. No. 01–0135 (Order, Nov. 7, 2003). The legal

briefs filed by Mrs. Johnson's attorneys challenged the legality of the 2002 Manual M21–1 provision mentioned above. Thus, it appeared that the CAVC would issue a precedential decision deciding the legality of VA's set-foot-on-land requirement.

Six days before the oral argument, however, the VA General Counsel's Office made the widow an offer she could not refuse: full DIC benefits retroactive to the date of her husband's death—the maximum benefits that she could possibly receive. Because Mrs. Johnson did not and could not file a class action, once she signed the VA's settlement agreement, the oral argument was canceled, the Court panel convened to hear the case was disbanded, and the appeal was dismissed. Buying off the widow allowed the VA to continue for the next three years to deny disability and DIC benefits to Navy blue water veterans and their survivors based on VA's new set-foot-on-land rule.

Some Navy blue water veterans and survivors who were denied benefits by a VA regional office based on the 2002 rule gave up and did not appeal the RO's decision. Some appealed the RO's decision to the Board of Veterans' Appeals, which affirmed the denial. Some of those who received a BVA denial gave up and did not appeal the BVA's denial to the CAVC. And some of those who were denied by the RO and the BVA did not give up and appealed to the CAVC.

One of those who doggedly pursued his disability claim all the way to the CAVC was former Navy Commander Jonathan L. Haas. He filed his appeal in March 2004. The CAVC ultimately convened a panel of the Court and scheduled oral argument for January 10, 2006 to decide Commander Haas' challenge to VA's set-foot-on-land rule. This time, however, the VA did not offer to settle. On August 16, 2006, a panel of three judges unanimously ruled that VA's 2002 set-foot-on-land requirement was illegal. See *Haas* v. *Nicholson*, 20 Vet. App. 257 (2006).

But this did not end the battle between the VA and Navy blue water veterans. In October 2006, the VA appealed the decision in *Haas* to the U.S. Court of Appeals for the Federal Circuit, which reversed the CAVC's decision. Haas petitioned the U.S. Supreme Court, which denied the petition to hear the case last month.

Not all battles of this type result in a VA victory. Sometimes, the courts issue a final decision ruling that the VA has interpreted the law improperly for a long period of time. The injustice due to the lack of class action authority becomes apparent if one assumes that the Navy blue water veterans had ultimately prevailed in its battle with the VA—an assumption we make for the purposes of the discussion below.

B. How This Battle Would Have Been Waged If A Veteran Could File a Class Action

Compare the true events described above with how the battle between the VA and Navy blue water veterans would have been coordinated if a Federal court (the Federal Circuit or the CAVC) had authority to certify a case as a class action on behalf of similarly situated VA claimants. Years ago, Mrs. Johnson could have asked the Court with class action authority to certify her lawsuit as a class action on behalf of the following class members: (1) Navy blue water veterans who (a) have filed or henceforth file a VA disability claim based on an Agent Orange-related disease and (b) never set foot on the land mass of Vietnam and (2) all surviving family members who filed or henceforth file a DIC claim based on the death of such a Navy blue water veteran from an Agent Orange-related disease.

If the Court certified Mrs. Johnson's lawsuit case as a class action, the VA would not have been able to end the case by buying her off. Class actions cannot be dismissed merely because one class member is granted benefits. The Court could then have ordered the VA to keep track of, but not decide, the pending claims of all class members until the parties filed their briefs and the Court issued an opinion deciding the legality of VA's set-foot-on-land requirement. This action would have conserved the limited claims adjudication resources of the VA by allowing the agency to adjudicate other claims while the class action was pending. What actually occurred instead is that the regional offices and the Board expended scarce resources adjudicating and denying thousands of claims filed by Navy blue water veterans during the period from 2002 to the fall of 2006, when the VA issued a moratorium on deciding claims filed by Blue Water Navy veterans when the CAVC ruled in favor of veteran Haas.

This action would also have conserved the resources of thousands of disabled class members and their representatives. They would not have to complete and submit notices of disagreement, substantive appeals forms, and responses to VA correspondence in order to keep their claims alive.

Then, after the Court resolved the legality of VA's set-foot-on-land requirement, it could act to ensure that all of the pending claims filed by class members were uniformly and promptly decided by the VA in accordance with the Court's decision. And all of this would have occurred well before January 2009 because Mrs. John-

son's earlier case would have led to the key Court decision, not the later filed case of Commander Haas.

C. Why this Battle Would Have Inevitably Resulted In Dissimilar Treatment of Similarly Situated Disabled Veterans and Their Survivors

By definition, all of the Navy blue water veterans and their survivors who have been denied benefits due to the VA's set-foot-on-land rule are suffering from, or are survivors of a veteran who died from, one of the following diseases that the VA recognizes as related to Agent Orange exposure: soft-tissue sarcomas, Hodgkin's disease, lung cancer, bronchus cancer, larynx cancer, trachea cancer, prostate cancer, multiple myeloma, chronic lymphocytic leukemia, and diabetes mellitus (Type 2). These are seriously disabling, often fatal diseases.

Assume that the Federal Circuit and the Supreme Court reached a different result. Assume that these courts agreed with the unanimous panel of the CAVC and affirmed its ruling that VA's set-foot-on-land requirement is unlawful. The VA, upon issuance of a final court decision, would lift its 2006 moratorium, and orders the ROs and BVA to decide all of the claims subject to the moratorium and belatedly pay these disabled war veterans and their survivors—to the extent that they are still alive—the many-years-worth of retroactive disability or death benefits they were long ago denied due to VA's set-foot-on-land requirement.

Even if all this were done, the fact would remain that hundreds, if not thousands of similarly situated Navy blue water veterans and their survivors would never receive the benefits that those whose claims were subject to the moratorium would receive. That is because VA's denial of their claims for disability or death benefits for an Agent Orange-related disease became final before the VA instituted a moratorium. To be specific, the following similarly situated VA claimants not subject to the VA's moratorium and will never receive benefits based on their claims:

Navy blue water veterans who filed a disability claim and survivors of Navy blue water veterans who filed a DIC claim that was denied by a VA regional office based on its set-foot-on-land rule, and who either

- did not file a notice of disagreement with the RO decision during the one-year appeal period; or
- filed a timely notice of disagreement, but failed to file a timely substantive appeal to the Board of Veterans Appeal; or
- filed a timely notice of disagreement and a timely substantive appeal, received a decision from the Board of Veterans' Appeals denying their claim based on VA's set-foot-on-land rule, and failed to file a timely appeal with the CAVC.

The number of these similarly situated claimants is likely to be high. Veterans with seriously disabling diseases often give up on their claim when the VA tells them that they are not entitled to the benefits they seek. Their disabilities deplete their energy and their resources. Fighting the VA bureaucracy can seem a very daunting task to a veteran suffering from cancer. Plus, they are not lawyers and are not familiar with the legal authorities relied upon the CAVC in *Haas*. When the VA tells them they are not entitled to benefits because they did not set foot on land in Vietnam, they often believe that the VA must know what it is doing. Thus, many of these disabled veterans simply give up and don't appeal their cases all the way to the CAVC.

If the Federal Circuit and Supreme Court had ruled in the favor of the Navy blue water veterans, no law would have required the VA to use their computer systems to identify similarly situated claimants who were not included in the VA's 2006 moratorium. No law requires the VA to notify these similarly situated claimants about the Court's decision. And even if these similarly situated claimants somehow found out about the Court decision and reapplied, the VA would refuse to pay them the retroactive benefits that it paid to the claimants subject to the 2006 moratorium because the VA would conclude that its previous final denial of the claim—which occurred before the *Haas* decision—was not the product of "clear and unmistakable error."

Thus, the unavailability of a class action mechanism would have doomed the claims of all similarly situated Navy blue water veterans and their survivors who were not part of the VA's 2006 moratorium. Legislative action is needed to ensure that unjust situations like this do not occur.

RESPONSE TO POST-HEARING QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM

Question 1. During the hearing it was suggested that some claims for benefits can be triaged and rated quickly because they are, for lack of a better term, "no brainer" claims. Can you provide this Committee with examples of these types of claims?

Question 2. Some of the common errors identified by Judge Kasold as resulting in remands from the Court are failure to obtain medical examinations and opinions and the failure to obtain documents and other evidence. During Committee oversight visits, a frequent finding is the failure of VA regional offices to obtain medical examinations and opinions before denying a claim for service connection. Does the statute need to be amended to require a medical examination or opinion before denying an original claim for service-connection?

Question 3. Should the statute be amended so that failure to provide a medical examination or opinion before denying a claim for service connection should be considered clear and unmistakable error?

Question 4. If the time for filing a notice of disagreement were reduced to 180 days, what protections would you recommend for a "good cause exception" to the filing deadline?

[Mr. Stichman's responses were not received as of press time.]

Chairman AKAKA. Thank you very much, Mr. Stichman.

Mr. Baker and Mr. Stichman, do you agree with Mr. Cohen that the Federal Circuit serves some value in the appellate process and should not be removed?

Mr. Baker?

Mr. BAKER. The DAV does agree with him. We do not believe that should be removed.

The issue has been presented quite recently. We have not had a chance to discuss it in great detail, but we did briefly discuss it, and we would be opposed to that type of situation.

Chairman AKAKA. Mr. Stichman?

Mr. STICHMAN. I also agree that the Federal Circuit serves a very important purpose. Let me illustrate that with an example.

In the nineties, the Veterans' Court ruled that not all veterans had the right to the duty to assist them in getting evidence (the VA duty to assist). And they ruled, wrongly in my view and wrongly in the view of many others, that the veteran had to come forth with some medical evidence on their own in order to earn the right to VA assistance. That unfortunate ruling was true for many years.

Finally, it was appealed to the Federal Circuit which decided to convene en banc, the whole Court of the Federal Circuit, to review that decision. I believe they were going to strike that down when Congress came to the rescue before the Federal Circuit needed to decide the case and passed the Veterans Claims Assistance Act (the VCAA), which basically repealed the Court's case law.

Now sometimes you can rely on Congress to come in. It takes a while. But the Federal Circuit, that additional layer, it does not review a lot of cases, but it is very important. It increases the quality of the system of justice.

Chairman AKAKA. Thank you.

I asked Chairman Terry this a moment ago, and I would now like to hear from each of you. What difference would it make if the time period for filing a notice of disagreement was reduced from 1 year to 180 days?

Mr. Baker?

Mr. BAKER. We believe it would simply add to the efficiency in the process. DAV is looking at small changes in various places that have a large impact with no expenditures if we can get there.

We believe that enough changes like that in the appellate process, which there is room for, and changes like that in the initial appeals process, which there is room for, if many of those changes were implemented, that one change is simply part of that to make the entire system much more streamlined.

We do not know if it would cut down the number of appeals. That is obviously not our goal. We want the system to flow better.

As far as Senator Burr's question to the other panel, when he asked if it is reducing benefits, we do not believe so, because right now a veteran would have to fill out about two sentences on a piece of paper and mail it in. Or, call up his rep and indicate that he disagrees or she disagrees with the decision. Or, go into a regional office and do the same thing: call the VA if they are following their intricate roles and fill out a report of contact and state they disagree with the decision. So, all these different methods, and they have 6 months to do it.

So, this is something that takes a very minute period of time that you have 6 months to do.

That appellate period is cut down by 2 months to go from the Board to the Court and then cut down by another 2 months to go from the Veterans' Court to the Federal Circuit. So, you are still allowing an extra 60 days at each appellate level, starting with the initial appellate level being the longest period.

We simply think it would be a good move without taking anything away from veterans.

Chairman AKAKA. Mr. Cohen?

Mr. COHEN. We are not sure because one of the problems that we see with this is very similar to what is going on with the expedited claims process. It is an initiative pilot project to see if the time to resolve claims could be reduced, but it imposes no deadlines upon the VA. All the deadlines are imposed upon the veterans, upon the claimants.

This 1 year time period is not something that is required. In other words, it is not required that the veteran take 1 year to put the notice of disagreement in place.

But there are situations where the notice doesn't get to the veteran until months later, where the veteran wants a service representative to help them with putting in a notice of disagreement or an attorney to help them put in a notice of disagreement. And the first thing the representative said is: I will need to look at your claims file because I need to know if there are other pending claims here that need to be in this notice of disagreement. I just cannot go by what you said or what the decision is.

If you have a shorter period, the likelihood of being able to get the claims file to review, to get the medical evidence to review before putting in the notice of disagreement and actually putting in a meaningful notice of disagreement, the likelihood that that happens is shortened.

The way to reduce time in the system is not to reduce time on the back of the veteran, but there are time periods that are in there because of fumbling around to develop the claim. If veterans

were told what they needed up front and were asked to work as partners with the VA, we could develop these claims quicker and reduce the time rather than putting time limits on the veterans.

Chairman AKAKA. Mr. Stichman?

Mr. STICHMAN. I would like to commend DAV for its testimony. They have a number of interesting and perhaps valid suggestions for change. I haven't had an opportunity to review all of them, but with regard to the reduction of the time within which to file a notice of disagreement I would have to think about that more.

I worry, as Senator Burr alluded to, do all people have enough time to consider what to do in filing a notice of disagreement. Many accredited service representatives for the service organizations have a tremendous number of claims assigned to them to represent—some, close to 1,000 per individual service officer. So the veteran is often left without hands-on service for a long period of time.

And so, I would worry, and I need more time to think about whether they would be hurt by not having the full year.

Chairman AKAKA. Thank you very much.

Mr. Burr.

Senator BURR. Well, let me thank all three of you for your testimony.

I am going to ask you to do something rather unique for me; not today, but after you to go from this hearing. I would like you to take a clean piece of paper and I would like you to design the system as if we were standing up a process of processing claims and allowing for appeals. I would like you to design for us what you think that system would look like today.

In other words, do not build it based upon the faults you find with the existing system. Do it from the standpoint of what you said, how does it flow right?

I understand exactly where DAV is coming from, from the standpoint of the 1 year. I understand where the reservations might be from the standpoint of making sure that every veteran has the full time that they need to seek help in filing what it is they need.

I also understand from a reviewer's standpoint, if every time you send something out you know it might be up to a year, then you are sort of putting something back even if it came in 30 days. The likelihood is you are not inclined to pull that file out in 30 days and start processing it because you have sequenced your flow of cases in a way that you will get back to that at a certain timeframe.

So, I understand the need. I also understand the results of what a 1-year timeframe would do to the flow, and that is the built-in design of the flow.

If you will, take a clean piece of paper, design us a system. I would like to see how different each one of the three might be. I would also like to see how different it would be from where we are today.

[A response received from Mr. Cohen of NOVA follows:]

RESPONSES TO REQUEST ARISING DURING THE HEARING FROM HON. RICHARD BURR TO RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)

In response to your request for ideas to re-think and re-design the VBA, attached are NOVA's suggestions.

RECOMMENDATIONS FOR REMAKING THE VBA

Summary

NOVA's recommendations include utilizing secure, electronic files; decentralizing rating and appellate functions; and implementing a user-friendly, simplified system which puts the veteran first.

Specific recommendations

NOVA's plan to remake the Veterans' Benefits Administration contemplates an organization dedicated to being user-friendly, considerate of the needs and limitations of veterans when adjudicating claims, and believing that veterans generally file meritorious claims for VA benefits. Fundamental to creating a system which truly does put veterans first is ensuring that veterans and their families receive actual assistance in the development of their claims and that fully-developed claims are properly paid regardless of whether the veteran is represented or proceeding pro se.

First and foremost, there must be a system which allows disabled veterans and their families to file simplified claim forms, participate in hearings and review claim files without having to travel four or more hours to participate in the adjudication of their claims. Under the present system, 57 Regional Offices (RO) handle all of these functions, forcing many veterans to travel long distances to their "local" RO. A veteran-friendly system would disperse most of the functions of the present ROs closer to VA Hospitals, VA outpatient clinics, and/or Vet Centers. This way, the processes of meeting the veteran, completing forms, developing evidence, and attending hearings would take place closer to the claimant's home, while centralized state offices would house the rating boards. With computerized files, the file could be accessed in all locations. A system like this has been utilized by the Social Security Administration, which has multiple local offices dispersed throughout each state for these precise processes.

Such a system would begin to process the simplified application by requesting specific documentation from the claimant, such as a necessary DD214 or current medical records. Then, rather than continuing with the obsolete system of separating work functions at the ROs into six teams, there should be one decision unit which handles everything from reviewing the application for completeness in predetermination through gathering the evidence and producing rating decisions. This reworked adjudication unit would be charged with the responsibility of partnering with the claimant and the claimant's representative, if the claimant is represented, to fully understand and develop the claim. It would then issue an understandable and case specific VCAA notice, prior to any rating decision, assist with any additional development, and then, after case-development was completed, issue the rating decision.

Because the present rating system is obviously difficult for veterans to understand and for rating boards to apply, it often results in erroneous decisions. What is needed is an overhaul of the entire Schedule for Rating Disabilities contained in 38 CFR Part 4 to simplify and update the schedules.

There should be increased use of presumptions to eliminate the need for development of evidence regarding the incidents of military service for all those who were deployed to a war zone regardless of their military occupational specialty or place of assignment within the war zone. For example, any veteran who was deployed to a war zone, whether during WWII, Korea, Vietnam, the Gulf War or the GWOT and who is subsequently diagnosed with PTSD, the sole inquiry during the rating stage of their claim should concentrate on the severity of their symptoms without requiring development of the nature of their in-service stressor(s) or the connection between their stressor(s) and their present diagnosis of PTSD. Any veteran who is diagnosed with a medical condition while on active duty and who is presently being treated for that same condition should not need to prove a medical nexus between the in-service condition and the current condition. Also veterans who are receiving Social Security Disability or Supplemental Security Income benefits based on medical conditions and/or disabilities which are related to service should be presumed to be unemployable.

PTSD, TBI, and their underlying symptoms and residuals are leaving increasing numbers of veterans' lives in shambles. It is only right, therefore, that any rewrite

of the Schedule for Rating Disabilities include consideration and compensation for a veteran's loss of quality of life as well as for his/her loss of earning capacity as related to these medical conditions.

Obviously, NOVA's recommendation to decentralize the VA will not work without a 21st century VA claims system, i.e., one that is paperless and secure. Also, the VA will never secure the confidence of our country and our veterans until there are secure claims files.

Together with a modern claims file system, veterans must be granted the same rights granted to all other classes of citizens—the right to choose to hire a lawyer for assistance, if desired, from the very beginning of the claim adjudication process. Presently, veterans are the only class of citizens who do not have the right to hire an attorney to assist with a claim from the claim's inception. For example, veterans who are notified of the possibility that their rating will be reduced are not permitted to hire an attorney for a fee to represent them even after objecting to the notice of reduction. They must wait until after their rating has been reduced to hire a lawyer. Moreover, once a lawyer or other representative is hired, neither the first-line decisionmakers, the appellate teams nor the BVA should view the veteran's representative as having interests opposed to the VA's central mission of providing proper benefits to veterans and their families. It follows that the VA should partner with the claimant's representative and use informal conferences to speed claim-development and narrow the issues to be decided.

Following an unfavorable rating decision, the claimant should only need to file one request for an appeal instead of the present requirement to file both a notice of disagreement and a substantive appeal to the BVA. Thereafter, the claimant and his representative should have the right to submit further evidence and/or argument, have a de novo review on the record, and/or a personal hearing before a Board Member (in person at the "local" RO, via video-conference, or in person in Washington, DC).

Fundamental to remaking the VBA is adequate training, supervision and accountability. This will require a revamping of the VA's organizational chart so as to provide reporting and direct accountability from the Regional Offices to the Secretary. Presently, there are an excessive number of layers of executives in the system which impedes the flow of knowledge and communication to the Secretary, thereby impeding accountability. With direct accountability comes less likelihood of lost, shredded or compromised evidence and/or claims files. Direct accountability also brings about better-trained staff who are properly motivated to perform functions essential to the mission. Finally, in a system with adequate training and accountability, VLJs are less likely to write decisions which are affirmed only 20% of the time when appealed to the Veterans Court.

To ensure efficient, convenient, timely and proper appellate review at the administrative level, the Board of Veterans Appeals should be made independent of the VBA and should be decentralized and dispersed within reasonable distances from the many Regional Offices. Not only should the BVA Veterans Law Judges be moved out of their fortress in Washington, DC, but the BVA's VLJs should be reconfigured into a corps of truly independent and well-trained Federal Administrative Law Judges.

It is fundamental that the pressures placed on raters and VLJs to turn out decisions must be replaced with a system which expects the right decision to be made at all levels of the process. Veterans require a system which does not provide a decision until the claim is fully developed, which involves a true partnership between the claimant and the VA, and which rewards prompt and correct decisionmaking. NOVA's experience confirms the findings in the 2005 report of the Office of Inspector General that the present work credit system is providing a disincentive to properly deciding claims. It should be replaced. To complement new expectations of increased accuracy and accountability, it is essential that VA employees be repeatedly and adequately trained and supervised. Additionally, the high rate of VLJ decisions which are returned to the BVA because of inadequate reasons and bases is unacceptable and contributes to the backlog and to the reputation of "hamster wheel" adjudications.

Appeal from a VLJ's decision should go to the CAVC and then to the Federal Circuit. Two changes to the operation of the court would make a big change. First, the CAVC should be granted class action jurisdiction to remedy situations which affect a broad class of veterans. Second, the CAVC should be required to resolve all issues reasonably raised, except for constitutional claims, if the appeals can be resolved without reaching the constitutional claim.

Senator BURR. Now, I made the statement to the last panel that if you merely look at it from a standpoint of how many claims came

in and in all three baskets how many were received and how many you processed, we have a system right now that works. I know we all agree that is not the case.

But if we are purely looking at in and out flow, then you have to say we are processing a few more than what we are taking in.

The problem is that with a 30,000 plus backlog, based upon the numbers, that is about 10 years to work through that backlog. I think we would all agree that is unacceptable.

By the same token, I hope everybody understands that we have an obligation not to build an infrastructure that 5 years from now, 10 years from now has an over-capacity of 30 percent because we never get rid of anything in Washington. I think that we have to hit this fairly accurately from a standpoint of the size of these institutions.

Let me just move to one area if I could. I think, Mr. Baker, you have been very clear—and I appreciate it—on the Appeals Management Center. You have called for it to be closed.

Clearly, it was a creation in 2003 by the VA to hopefully address questions that were being raised by either you or people that preceded you and veterans around the country, that we could do this better, faster. If we didn't need to go through the whole process, let's stand up this new Appeals Management Center and see what we can alleviate with that piece.

And I think all of us can question, did we train people to the degree that we should have? Did we do this? Did we do that?

I only want you to focus on whether it should continue to exist. Does it help today? Could it potentially help with change? Or, should we just can it and take it out of the system because it contributes to the ineffective flow?

Let me move to you, Mr. Cohen.

Mr. COHEN. Thank you, Senator Burr.

This is an easy question. From our perspective, it does not work and it needs to be removed.

The reason why it does not work is for the unrepresented veterans and claimants whose claims end up there—they do not get timely, good decisions out.

For the represented claimants and veterans, it is a black hole because the AMC will not adjudicate any claims where there is representation. Yet, the BVA remands those claims when there is representation to the AMC, and it may take a year or more to get it out. During that period of time, nothing happens. It just sits in the black hole.

So it doesn't add value to the system anyway around. It would be much better to just remand back to the agency of original jurisdiction and have the development occur there.

Senator BURR. Mr. Stichman?

Mr. STICHMAN. I am inclined to agree with my colleagues that it has not worked out well.

I think part of the reason for creating it was to have a centralized authority that you would have better control of, that would have better quality in their decisionmaking.

It would be, DAV argues, that that takes the regional office off the hook. So, they do not care about their quality because they are not going to have to suffer the consequences because a Board re-

mand will go to a different entity. I think there is merit to that criticism.

At any rate, they haven't been speedy in their decisionmaking. They make decisions away from where the veteran is, not at the local level like the regional office, which causes problems in representation, et cetera. So, all in all, I agree with my colleagues that it has not worked out well.

Senator BURR. Great. Thank you.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Burr.

Senator Begich.

Senator BEGICH. Mr. Chairman, thank you very much.

And, Senator Burr, I like that idea of asking each one of them to prepare a process if you had a clean slate how it would flow. And I would also say—I think this was your intent too—do you have the capacity—all three of you—to actually create a system that you agree on?

Mr. STICHMAN. No.

Senator BEGICH. Then I think that is where you also were going, I am assuming.

Senator BURR. I knew better than to go there.

Senator BEGICH. Because that is what I am interested in, to be very frank with you. I think it would be great to have three plans, but for the Senate to decide on one, let alone three, the backlog will get done quicker.

So let me also add to that, I would be interested in—as you think about this idea—if there is a way to look at a new system, what are those resources and technology that you would need to make it happen?

Mr. Cohen, your comment, and I agree to a certain extent with you on the video component. But the technology that exists today is incredibly advanced, and I know there is a time delay but not like it used to be. Also, the capacity to look at documentation is unbelievable today, more than it was 6 months ago, let alone a year ago, let alone 5 years ago.

But I do recognize your point on elderly veterans who may not have that capacity to utilize that technology or those that have medical conditions.

But I want to make sure I am clear on one thing. You did not say that it should not be utilized as much as possible, where possible, right?

Mr. COHEN. Yes.

Senator BEGICH. I do not want to put words in your mouth, but it sounded almost at one point that you did not think technology was good enough for the videoconferencing.

You are talking to someone who believes in it, uses it. The technology is far advanced. When I talk to Senators around here about how I talk to my son by Skype, they are still trying to figure out what Skype is.

But the reality is we are in a new age, and we would be foolish not to deploy that for the benefit of our veterans who want to use it and know it. I get a ton of emails from veterans, and I get videoconference requests from veterans all the time.

Mr. COHEN. Well, Senator Begich, my problem is not with using it all because I agree with you that there are circumstances where it can provide tremendous benefits in terms of having speedier hearings, in terms of not requiring people to travel.

My concern is there are certain people who cannot have that. There are certain situations where credibility is important, and you cannot judge that over a video screen. The Social Security Administration that uses videoconferences has a provision for not using it under certain circumstances where the impairment of the individual would make a further impediment to using it.

Senator BEGICH. Good point. That is great.

Also, I know, Mr. Chairman, that the format here is very structured. So I am just going to ask a question, not for a response but really to kind of pass through the bodies that are here, to Chairman Terry.

I would be interested in your comments back too, Mr. Stichman.

The way we do it in local government is I would have those folks sitting here, you folks sitting here and we would not mess around with this formal 5-minute process. We would get to it and get on with the show. But I know we have tradition and structure here, so I do not want to get in trouble and get thrown off the Committee.

So I am kind of going through you and Chairman Terry, but that is the question because I would be very curious.

Mr. STICHMAN. The statistics, you mean?

Senator BEGICH. Statistics and kind of the concerns that you brought because I think your concerns are very valid because you do not want to get into a situation where all you are doing—I think Senator Burr said it—just counting data points because you can do that all day.

Really, the goal is how do we deliver services to those who are in need that clearly qualify yet the system has eaten them up? I think the words you used—the hamster wheel—that you are chewed up, and you give up at some point.

So I would be very interested. It is not for you to do. But, Chairman Terry, I hope you took notes, and I would be very interested in your response back to the concerns.

The other one which I do not know enough about, and I will get some additional information from staff, and that is the work credit system. I agree with you. I did not realize that was part of the system. That is just a production number. It is "get your widget done and move on." That is very dangerous when you are dealing with service requirements or trying to make sure someone has services.

So I would be interested in all three of you, not right now because the time is limited, but some additional material on how you see what could be eliminated, reformed. But that was new to me, and I did not realize that piece of the equation. So I thank you for that.

Part of what I am doing here is getting educated on elements of it. So, I thank you for all you guys' testimony.

Mr. Baker, yours was very bam, bam, bam, and I appreciate that because I could sense there was a little disagreement on a couple things, and that is good because that helps me understand a little bit where the issues are.

I thank you all.

Chairman AKAKA. Thank you very much, Senator Begich.

I want to thank our panelists. We do have other questions we will submit for the record.

I want to extend my thanks to all of our witnesses for appearing today. Your testimony has given us insight into a variety of different proposals on how to amend the current system for the appeals process for disability claims.

I look forward to continuing to work together to improve the ways in which claims for benefits are handled.

So, again, thank you very much for being here.

This hearing is adjourned.

[Whereupon, at 11:12 a.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, LOCAL 17

INTRODUCTION

AFGE Local 17 appreciates the opportunity to present its views on the Department of Veterans Affairs (VA) disability compensation appeals process to the Senate Committee on Veterans' Affairs. AFGE Local 17 represents all the professional and nonprofessional staff at VA Central Office (VACO), including the entire professional and nonprofessional bargaining unit members at the Board of Veterans' Appeals (Board).

AFGE Local 17 makes the following recommendations for process improvement:

I. EXPAND LEGAL STAFF

The Board needs additional attorneys to handle its caseload. We use the term "caseload" rather than "backlog" because it more accurately describes the flow of claims from VA Regional Offices (ROs) and the U.S. Court of Appeals for Veterans Claims (Court) by operation of statutes and regulations. The Board's jurisdiction in claims by veterans is established by receipt of a substantive appeal signed by either the veteran or by the representative of the veteran. All cases for which a substantive appeal has been entered become the Board's caseload.

AFGE Local 17 urges Congress to provide funding for the Board to hire at least fifty additional attorneys in addition to maintaining current staffing levels. That expansion should continue with additional attorneys being hired thereafter until the current caseload decreases. The expanded legal staff should remain in place until the caseload significantly declines, as measured by a percentage of the total caseload or another measure that accurately reflects a decrease in the number of cases for which a substantive appeal has been filed.

II. EXPAND ADMINISTRATIVE STAFF

The Board currently faces a fairly significant bottleneck in the administrative processing of claims caused by a shortage of staff to process claims. An initial inadequate ratio of support staff to attorneys has worsened over the years as the Board has increased the number of attorneys without a comparable increase in support staff. Administrative staff members are as critical to sending completed decisions to the veterans as the attorneys and Veterans Law Judges (VLJs) who write and sign decisions. We suggest an approximate ratio of one administrative support staffer for every two attorneys.

III. SPECIALIZATION

Specialization by both the attorneys and the VLJs would increase their familiarity with laws governing a specific set of benefits, which in turn would increase the quality of the decisions as well as their quantity (the quantity would increase due to greater familiarity with the pertinent case law and a consequent decrease in the need for research).

Therefore, AFGE Local 17 recommends that Congress require the Board to identify twenty areas of specialization and to assign no more than three such areas to each VLJ. Each VLJ would retain those areas of specialization for three years. Other cases not involving an issue of specialization could be assigned to any VLJ.

Attorneys would also benefit from this specialization. Attorneys who completed their probationary period and are performing successfully for the VLJ would continue working in that VLJ's area of specialization for three years. If the attorney passes his or her probationary period and thereafter performs unsuccessfully, he or

she will be reassigned to a different supervisor for a year, with that supervisor allowed to administer a performance-based action after 90 days.

IV. ESTABLISH ANOTHER DECISION TEAM

The Board should be reorganized to add an additional decision team to the four presently in place. The additional decision team would be larger than the others and would handle all issues appealed from decisions by the other four teams, by reconsidering them (a current part of the law) and issuing a decision that is ready for appellate review. This would increase both the quality of the decisions reviewed by the Court and the quality of decisions received by veterans. It should also speed up the issuance of decisions generally.

In addition, the four current decision teams should be required by statute to write "veteran friendly" decisions, i.e. decisions meant solely for the veteran and his or her representative, and not the Court. Thus, these decisions would be shorter and would not contain the legal explication only required to pass Court muster. Decisions would be more accessible to veterans since there would be no requirement to use language designed to be defended before the Court.

V. USE EMPLOYEES OF THE BOARD TO TRANSFORM THE BOARD'S ADJUDICATION INTO A PAPERLESS SYSTEM

AFGE Local 17 strongly supports conversion of the Board to a fully paperless system, moving with all due dispatch to have all files be paperless. Rather than contract out the scanning and other related tasks to a private contractor, we urge Congress to create additional employment opportunities by establishing a new administrative unit within the Board (but not necessarily stationed in Washington, DC) to convert files at a reasonable pace and reasonable cost. In this way, the Board's in-house knowledge base would grow and other Board staff would have access to technicians who are directly responsive to the Board and to the veterans—in contrast to private contractors, who in addition to being excessively expensive work first and foremost in the interests of an enterprise concerned with making a profit as opposed to helping our Nation's veterans.

VI. PRESUMPTION IN FAVOR OF TREATING PHYSICIAN EVIDENCE

We recommend the following when a claim includes a physician's assessment of a veteran's subjective complaints and observations (also called a diagnosis), a treatment plan, and a physician's statement relevant to the issue: This evidence should be dispositive of the issue. Further development would only be in order if medical evidence exists elsewhere in the claims folder that directly contradicts the physician's relevant statement.

VII. CHANGE ELIGIBILITY RULES FOR VICE CHAIR POSITION

We urge Congress to modify the current statutory provision related to the Vice Chair of the Board to require that that person be employed at the Board for at least 12 months prior to appointment as Vice Chair. Veterans and the Board's attorneys are both adversely impacted when the Vice Chair lacks sufficient familiarity with Board operations.

VIII. OTHER COMMENTS

A. *RO Training:* During the hearing on February 11, Chairman James P. Terry of the Board referred to training that the Board conducts at the RO level. We support this training and believe it improves the quality and timeliness of decisions made at the RO level. However, AFGE members from the field report that this training program is sporadic and not available at most ROs. We urge Congress to provide the oversight and funding to ensure that this valuable training is provided consistently across all ROs.

B. *VCAA:* The letter notifying claimants of their rights under the Veterans' Claims Assistance Act should be much shorter and use nontechnical language.

C. *Revise VA Form 9:* Instead of requiring the veteran to submit a VA Form 9 to indicate whether he or she wants to continue or withdraw the appeal, a form should be attached to the front of the Statement of the Case (SOC) that the veteran can fill out to state his or her preference in this regard. Also, the deadline for receipt of the form by the RO should be made much more visible than it is currently.

WILLIAM ANGULO PRESTON,
Acting President, AFGE Local 17,
VA Central Office, Washington, DC.

WILLIAM H. WETMORE,
Third Executive Vice President,
National VA Council, AFGE &
Steward, AFGE Local 17,
VA Central Office, Washington, DC.

PREPARED STATEMENT OF PARALYZED VETERANS OF AMERICA

Chairman Akaka, Ranking Member Burr, Members of the Committee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to submit a statement for the record concerning improvements that can be made to the appeals process as part of the veterans' disability claims process. We recognize that the claims processing system is in need of change. However, we believe that the current system is fundamentally sound and staffed by many dedicated employees who made the conscious choice to work at the Department of Veterans Affairs (VA) so that they may help veterans. However, the implementation of the process must still be improved.

PVA understands the need to focus attention on the appeals process. However, we believe that there are a number of actions that can be taken internally by the VA, without the enactment of new legislation that could improve the process. We will focus on issues that we believe Congress must address first, and we will also provide comments on statements made during the hearing on February 11.

RECOMMENDATIONS FOR CONGRESS

First, we would invite the Committee to examine the recommendations of *The Independent Budget* for FY 2010 at www.independentbudget.org. Moreover, as a part of the funding recommendations of *The Independent Budget*, we have included what we believe are adequate funding levels for the operations of the Board of Veterans' Appeals (BVA or Board) and the U.S. Court of Appeals for Veterans Claims (CAVC or Veterans' Court). We also believe Congress should provide sufficient funding for comprehensive training for Board employees.

Congress should fund the expansion of paperless claims processing. In fact, we would suggest that it might be better to accelerate the implementation of paperless appeals processing as this could expedite implementation in the larger claims process. Congress should include additional funding to accelerate the implementation of an appeals process that maximizes the opportunities to conduct a paperless review process by BVA. Since only about one claim in eight reaches the Board, it would appear practical to begin conducting paperless BVA reviews at a pace in advance of original claims entered by the Veterans Benefits Administration. Insight gained from the BVA paperless experience then will aid the transition of all VA to a paperless claims process.

PVA opposes any suggestion to shorten the current statutory time periods allowed for appellants to submit evidence and to file necessary documents to initiate and perfect appeals. PVA does not agree that the time has come to deprive veterans of their one year opportunity to disagree with a decision entered by VA or to perfect an appeal. PVA's mission focuses on veterans catastrophically disabled by spinal cord disease or injury. The rehabilitation process is arduous and often long. So there is a need for the current one year period to allow the veteran time for recovery, adjustment, and to gain insight and understanding into the veterans' benefits claims and appeals processes. For some, their ability to respond depends on aid from others, others who are not always under their control or aware of the processes.

For those with one of the signature injuries of the current War on Terror, particularly serious Traumatic Brain Injury, time is needed for recovery, or to find an advocate that can help, or to exchange communication with their representative or with VA. Imposing more stringent deadlines at a time more veterans are less able to respond in a timely fashion is unconscionable.

Why do we permit veterans to exercise their appellate rights for a longer period than others interacting with the Federal Government? Because they are our veterans and we are grateful for their sacrifice.

PVA also opposes the Expedited Claims Adjudication Initiative and its extension to the appeals process. The process solicits claimants' permission to waive their opportunities to participate in the claims process and sacrifice their time limits, with no corresponding obligation on the part of VA to enter a decision that is any more accurate or timely. Sacrificing the right to due process, the opportunity to respond and the right to representation at all stages in the process, by opting into the expedited process provides only the opportunity to increase the number of prompt denials with no opportunity to introduce new argument or evidence. The Initiative is

only one of several pilot programs VA is currently conducting. We believe each of these programs must be carefully monitored and evaluated before deciding whether expansion is warranted.

PVA also has serious concerns about suggestions made by Judge Bruce Kasold, U.S. Court of Appeals for Veterans Claims, in his statement before the Committee. During the hearing, Judge Kasold suggested that Congress should consider abolishing limited judicial review of CAVC decisions by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). PVA, as the only veterans service organization with a regular practice before both courts, adamantly opposes the idea of removing the limited jurisdiction from the Federal Circuit to review the Veterans Court's interpretations of statutes and regulations. The reasons presented by Judge Kasold do not support his suggestion. His written testimony states:

> Is the time right to evaluate the need for the unique, additional appellate review provided by the Federal Circuit? I understand Chief Judge Greene is on record in support of such an evaluation, as is our first Chief Judge—Chief Judge Nebeker—and I too strongly suggest that it is now worthy of consideration. I note that although direct certiorari review by the Supreme Court initially was not provided for the other two Article I appellate courts—the U.S. Court of Appeals for the Armed Forces (formerly the Court of Military Appeals), and the District of Columbia Court of Appeals—over time, as those courts matured and developed a seasoned body of case law, such review was provided. Moreover, when such review was provided for the D.C. Court of Appeals, the intermediate review previously provided by the U.S. Court of Appeals for the District of Columbia was eliminated.
>
> Eliminating the intermediate appellate review currently extant with veterans judicial appeals not only would reduce the time involved in the judicial appeal process for a particular case, it would reduce the overall processing time for many cases as issues that have a system-wide impact generally would be brought to final resolution in a more timely manner. I know some will object to losing that unique, additional bite at the apple, but is has been my observation that the few significant case that the Federal Circuit viewed differently that our Court, generally have come down fairly equally, with the Secretary or the appellant being satisfied in one case only to be dissatisfied in another. Given Justice Jackson's observation, and the fact that we now have a seasoned body of case law, it appears timely to bring the judicial appeals process provided for review of claims for veterans benefits in line with the overall Federal appeals process.

PVA does not believe the time is right to review whether the limited judicial review by the Federal Circuit over CAVC decisions should be abolished. To support his suggestion, Judge Kasold analogizes the Veterans Court to two other Article I courts—the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals. This analogy, however, does not work. Indeed, this analogy actually presents strong reasons for continuing the Federal Circuit's limited jurisdiction over CAVC decisions.

First, the only significant similarity that exists between the Veterans Court and the two other Article I courts is that each is an Article I court. Aside from this characteristic, no other relevant similarity exists between the Veterans Court and the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals. The Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals review decisions that are made by lower courts. The Court of Appeals for the Armed Forces reviews decisions that are made by appellate courts of the military services such as the Army Court of Criminal Appeals for the Army, the Navy-Marine Corps Court of Criminal Appeals for the Navy and Coast Guard and the Air Force Court of Criminal Appeals for the Air Force. The District of Columbia Court of Appeals is the equivalent to a state supreme court. As the highest court in the District of Columbia, the District of Columbia Court of Appeals has authority to review all final orders of the Superior Court of the District of Columbia. The District of Columbia Court of Appeals also has authority to review decisions that are made by administrative agencies, boards, and commissions of the District of Columbia.

Unlike the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals, the Veterans Court does not review the decisions of inferior courts. Rather, the Veterans Court reviews decisions of the BVA. The BVA is not a court. The BVA is an adjudicative body of an administrative agency, the VA. Unlike the decisions of the courts that are made in an adversarial, litigation context and are reviewed by the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals, the BVA makes its decisions in an ex-parte and non-

adversarial manner. Therefore, because the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals review decisions that are made by lower courts and the Veterans' Court reviews decisions that are made by an adjudicative body of an administrative agency, the judicial appeals processes governing the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals, do not apply to, and are not analogous to, the judicial appeals process of the Veterans Court.

Second, the attempted analogy between the Court of Appeals for the Armed Forces, the District of Columbia Court of Appeals, and the Veterans Court appears to assume that all three Article I courts provide appellants with their initial level of judicial review. This is not true. Indeed, the assumption applies only to the Veterans Court. The assumption does not apply to the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals. These two courts provide, respectively, intermediate appellate review in appeals from the appellate courts of the military services and the Superior Court of the District of Columbia. In the CAVC context, however, when the Veterans Court reviews a BVA decision, the Veterans Court is providing the appellant with his or her very first opportunity for judicial review. Therefore, if Congress removes the Federal Circuit's limited jurisdiction to review the Veterans Court's decisions, Congress will actually take the "judicial appeals process provided for review of claims for veteran's benefits [out of] line with the overall Federal judicial appeals process[es]" as they currently exist before the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals. As a result, PVA respectfully submits that Congress should leave the current review structure intact. By retaining the Federal Circuit's limited jurisdiction to review decisions of the Veterans' Court, Congress will keep the judicial appeals process provided for review of claims for veterans benefits in line with the Federal judicial appeals processes that exist elsewhere, including before the Court of Appeals for the Armed Forces and the District of Columbia Court of Appeals.

Finally, we would like to include a brief outline of additional steps that we believe the VA can take without Congressional action to improve the appeals process:

ACTIONS BY THE DEPARTMENT OF VETERANS AFFAIRS

Revise VA Form 9 to:

• Fully inform the appellant of the opportunity to waive their right to a Supplemental Statement of Case in response to new evidence and allow the appellant to select a block expressing their intent to waive or not to waive the right to have VBA review further evidence in the first instance. Some remands are entered by BVA because an appellant has introduced additional evidence into the record after the record has been transferred to the Board but the appellant has not waived the right to have this evidence reviewed in the first instance by the agency of original jurisdiction (AOJ). Consistent with 38 CFR § 20.1304(c) the evidence is to be returned to the AOJ for consideration and a new decision prior to review by BVA, unless BVA allows the appeal based on this evidence. The Board has for so long remanded appeals owing to evidence introduced without a waiver, that it has become ingrained in the culture. The appeals process would be improved should BVA choose to allow more appeals without a waiver as currently authorized.

Rather than depriving all veterans of the right to due process in response to additional evidence, PVA proposes a change to the VA Form 9 to permit the appellant at the time they perfect their appeal, to make a fully informed decision as to whether they desire to have future evidence reviewed by VBA in the first instance and a disclosure of the effect of this evidence on their appeal, or they desire to have their evidence reviewed by BVA for the purpose of a final decision by BVA. The VA Form 9 should provide two blocks so that the appellant may choose to waive or not waive.

Meanwhile, we believe that the VA should review all of its standardized forms and determine if there is any need for improvement. These forms are the method by which the VA communicates with the veteran and it is important that they are not incomprehensible for the veteran.

• Fully inform the appellant of the availability of a videoconference hearing and provide the opportunity to select a block to choose that option. Videoconference hearings are permitted by 38 U.S.C. § 7107(e). We agree that BVA can operate more efficiently with increased utilization of videoconferencing capabilities. But this option is under utilized, we believe, because appellants are not offered this option at the same time and in the same manner as other hearing options.

We propose that VA change the form to reflect the options in this manner:

☐ I do not want a BVA hearing
☐ I want to appear before a BVA videoconference hearing at an available VA facility nearest my home.
☐ I want to appear before a BVA hearing in Washington, D.C.
☐ I want to appear before a BVA travel board hearing at a local VA facility when BVA can next visit and schedule that type of hearing because: (Please explain why a videoconference hearing cannot satisfy your needs because a travel board hearing will require more time to arrange.)
If you are represented, we strongly urge you to seek their advice before making your selection.

• Fully inform the appellant of the availability of a travel board hearing and of the average waiting time before the next available travel board hearing date and provide the opportunity to select a block to choose that option.

ACTIONS BY THE BOARD OF VETERANS' APPEALS

• The BVA should not expend resources training Regional Office personnel, other than as to appellate procedures.
• Beginning with new original appeals, VA should scan all paper records to permit BVA to conduct a review of electronic records. Because the Board reviews only one in eight benefit decisions, the Board presents an opportunity to more quickly convert to paperless processing. VA should expand the scanning capabilities as soon as practical and discontinue the practice of transferringpaper records to the Board. BVA and VSOs operating at the Board should be given access to VBA and VHA software applications in order to review current VHA treatment records and note such things as recent RO activity and address changes, which are constructively a part of the record on appeal. For those appellants who have not waived the right to VBA review of new evidence, VSOs and BVA may quickly identify those cases with the need for a remand for consideration of new evidence. For those who have entered the waiver, these records may be reviewed and considered without the delay imposed by the need for a remand to VBA. In some cases VSOs or others representing veterans may contact those who have not previously waived and solicit a waiver, if in the best interests of the appellant.
• Expand the number of VA facilities equipped to conduct videoconference hearings for BVA, to include additional medical centers, outpatient clinics and mobile health care and counseling vehicles.
• Explore the possibility of conducting videoconference hearings utilizing the appellant's videoconference capabilities from public or private sources.

ACTIONS FOR THE VETERANS BENEFITS ADMINISTRATION

• Review actions of the Appeals Management Center and determine its role going forward. The VA stated at the creation of the Appeals Management Center (AMC), that since the AMC would handle only remands, the results would be better and faster than remands worked by the Regional Office. According to the VA quality review study, at one point, approximately 30 percent of remands by BVA were necessary because the AOJ had failed to develop the record in accordance with existing Compensation and Pension Service instructions. There's never enough time to do it right, but there's always enough time to do it over. The offending AOJ is never made aware of the consequences of these failures because the appeal does not return. Given the C&P Service work product model measures and rewards only the quantity and timeliness of claims decided, there is no incentive to invest the time needed to completely develop and correctly decide the claim. This lack of accountability promotes errors in great numbers.

An unforeseen complication has arisen. The appellant may have concurrent claims and appeals pending. Owing to its mission, to provide faster development and adjudication of remands, the AMC will adjudicate only matters expressly remanded by BVA. The AMC will not address other pending claims. Therefore, other pending claims will languish for years at the RO because the AMC retains the claim file until it is returned to BVA. This only hurts veterans. At times the pending claims provide the potential for greater benefit than the pending appeal. Other than yielding and giving up on the appeal, the veteran cannot get the other claims addressed. PVA believes that the time has come for a thorough examination of the activities of the AMC to identify problems that exist. The AMC should then be required to correct these problems, and if it chooses not to do so, then the time may come to dissolve the operations of the AMC.

• The Veterans' Benefits Administration should revise its current work product models to reduce the credits given for the number of claims decided at a Regional Office by the number of appeals allowed and/or remanded by BVA originating from that office. VBA measures and compares office productivity based on the quantity and timeliness of decisions. There is no built in incentive to slow the process in order to make more accurate decisions. The raters, RSVRs, never realize the consequence of advancing inaccurate or underdeveloped appeals to BVA because the remands proceed to AMC, not the offending RO.

PVA proposes that VBA implement new measuring models that reduce the number of credits given for decisions emanating from a given RO, by the number of cases allowed or remanded by BVA that originate from that office. By reviewing the "net" figures VBA will be able to identify those offices that deviate from the normal rates and focus training efforts or adjust resources to correct the issue.

• Simplify and automate the rating process to the extent possible.
• Implement system wide training to emphasize accuracy in the decisions.

Mr. Chairman and Members of the Committee, PVA appreciates the continued emphasis that this Committee has placed on fixing the systemic problems within the claims process. It is important that in the interest to appease veterans who have many complaints about the process, that the system itself be reformed. We look forward to working with the Committee, as well as the entire Congress and the Administration, to ensure that meaningful improvements are made to the claims process at all levels.

We would be happy to answer any questions you might have. Thank you.

VETERANS LAW SECTION, FEDERAL BAR ASSOCIATION,
Arlington, VA, February 11, 2009.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

Hon. RICHARD BURR,
Ranking Minority Member,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

RE: FEBRUARY 11 HEARING: A REVIEW OF VETERANS DISABILITY COMPENSATION: WHAT CHANGES ARE NEEDED TO IMPROVE THE APPEALS PROCESS?

DEAR CHAIRMAN AKAKA AND SENATOR BURR: The Veterans Law Section of the Federal Bar Association appreciates your dedication to America's veterans and your leadership in holding the February 11 hearing on "A Review of Veterans Disability Compensation: What Changes are Needed to Improve the Appeals Process?" We request the inclusion of this correspondence in the record of that hearing.

As you know, the Federal Bar Association is the foremost national association of private and government lawyers engaged in the practice of law before the Federal courts and Federal agencies. Sixteen thousand members of the legal profession belong to the Federal Bar Association. The Veterans Law Section of the Federal Bar Association is one of the dozen sections within the Association, organized by substantive area of practice. These comments are exclusively those of the Veterans Law Section of the Federal Bar Association and do not necessarily represent the views or official position of the entire Association.

As the 111th Congress begins and the Committee continues its oversight of the Department of Veterans Affairs, we strongly urge the Committee to devote special attention in the months ahead to assuring the establishment of legislative and administrative improvements in the veterans disability claims process in the Department of Veterans Affairs. We believe the utmost aim should be to assure equitable and expeditious determinations through attention to the following oversight and legislative goals.

PROFESSIONAL LEGAL REPRESENTATION OF VETERANS

The Veterans Law Section supports legislation that enhances and expands the availability to veterans of professional legal representation before the Agency. Section 5904 of Title 38 provides for professional legal representation once a veteran has filed a Notice of Disagreement, thus initiating the appeals process, but only if the Notice of Disagreement has issued on or before June 20, 2007. Subsequent regu-

lations enacted by the Agency have established certification, continuing legal educational and fee regulation requirements implementing the legislation. We believe that the breadth of the regulatory scheme promulgated by the Agency, the most stringent of any agency within the executive branch, preempts any necessity to maintain the restriction on the availability of professional legal representation imposed by the June 20, 2007 date. We support and urge the adoption of legislation which removes this restriction.

ACTION IS NECESSARY CLARIFYING ATTORNEY FEES

We support legislative and regulatory action that clarifies the regulation and management of attorneys fees to avoid the transmittal of either debt letters to the veteran claimant at the fee withholding stage, or confusion of jurisdiction over processing of fees within the Agency or the management of offset of EAJA fees resulting from representation before the Court of Appeals for Veterans Claims.

We urge the recognition of the value of fee-based professional legal advocacy within the disability claims process in the preparation and prosecution of claims before the Department of Veterans Affairs. Effective advocacy inevitably inures to the benefit of the entire claims process by refining the issues presented and thus enhancing expeditious and equitable resolution of factual and legal issues. Skilled advocacy at initial filing promotes expeditious and equitable resolution of claims at the Regional Office level, reducing the number of claims that advance to the appellate level. It also reduces the incidence of re-opened and remanded claims, contributing significantly to the reduction of the current backlog.

ORGANIZATIONAL RESTRUCTURING OF THE DVA

We urge you to support whatever organizational restructuring of the DVA is necessary to assure vertical accountability from the Office of the Secretary through the Under Secretary to each of the Regional Offices, to establish effective oversight and reporting practices. This should assure that the Department is properly equipped to address the backlog in each office and attain equitable and expeditious resolution of the claims of current and earlier generations of veterans.

A SECURE, PAPERLESS VBA-VHA RECORDS SYSTEM

We strongly support the transition to a secure, paperless Veterans Benefits Administration, Veterans Health Administration records system compatible with the Department of Defense, Social Security Administration, Indian Health Service and the U.S. Court of Appeals for Veterans Claims, assuring meaningful integration of records into the disability claims process. The resulting enhancement of the initial adjudication of claims would significantly reduce delays in the initial adjudication and the number of claims entering the appeals process. This will also enhance the fair and equitable verification and resolution of claims by Special Operations Personnel, which have been inordinately difficult because of the security concerns involved.

LONG-RANGE PERFORMANCE GOALS FOR DVA MANAGERS AND REVIEWERS

Administrative changes should be accompanied by the establishment of long-range performance goals for DVA managers and reviewers that effectively promote, through the performance evaluation process the elimination of the measurement of productivity by operations performed.

EQUITABLE AND EXPEDITIOUS CLAIMS RESOLUTION

We encourage the implementation of a veteran-centric culture that advances equitable and expeditious claims resolution, substantially limiting the number of appeals while maintaining the integrity of the process. We urge strong and proactive Congressional support and oversight in this area, directed to DVA revisions of policy, process and training. As you know, the policy of previous administrations was less than veteran-centric. Veterans were convinced that the Agency only waited for them to die before claims were resolved. In this regard, we urge the revocation of the recent policy of requiring Central Office review, without Notice to the veteran's representative, of awards of back benefits in excess of $200,000.00; awards which nearly uniformly result from years and years of prosecution before the claim is resolved in the manner required by the statutes and regulations when it was initially filed. While legislative changes have begun to address these issues, operational policy has remained much the same. Conformance with the spirit as well as the legal requirements of statutory, regulatory and case law must be the goal in the initial as well as the appeals process.

IMPROVED TRAINING OF RATING PERSONNEL

In order to assure equitable and expeditious determination of claims, and the minimizing of the number of claims appealed, we support improved training of rating personnel with the establishment of agency-wide training programs and meaningful testing regimens that include monthly refreshers on case, regulatory and statutory changes. This should minimize increase in backlogs and provide for the equitable, expeditious resolution of claims by getting it right the first time, as well as assuring rating consistency among the Regional Offices.

INDEPENDENCE FOR THE BOARD OF VETERANS APPEALS

We also support legislation requiring independence of the Board of Veterans Appeals from the Agency and the selection and retention of BVA judges only when they meet the training and certification standards for Ails in other agencies within the executive branch.

ABOLISHMENT OF THE APPEALS MANAGEMENT CENTER

We support the abolishment of the Appeals Management Center, created to circumvent Court rulings and which now has become a virtual "black hole" for cases remanded from the Court of Appeals for Veterans Claims. The existence of the Appeals Management Center undermines Agency compliance with the "expeditious" processing of remanded cases ordered by the CAVC.

ABOLISHMENT OF THE STATEMENT OF THE CASE/
SUPPLEMENTARY STATEMENT OF THE CASE

We support the abolishment of the Statement of the Case/Supplementary Statement of the Case, which in its current form demonstrably fails to contribute to the appeals process by inundating the claimant with endless regulatory and statutory quotations, often irrelevant to the issues and thus impeding the orderly progress of the appeal.

RESTORATION AND EXPANSION OF THE DECISION REVIEW OFFICER PROGRAM

In this regard we strongly support the re-invigoration, restoration andexpansion of the Decision Review Officer Program consistent with its original purpose and function. Through this program the claimant could request review of the denial of his claim by a single, highly experienced individual with the authority to settle the claim. Claimants should be adequately advised of the availability of the Program and encouraged to utilize it. The process initially functioned as a dialog with the goal of equitable and timely resolution which minimized further appeal and resolved the issues within the regulatory and statutory provisions at the Regional Office. It should be restored and expanded.

THE *HAAS* ISSUE AND EXPOSURE TO AGENT ORANGE

We also support legislation to resolve the *Haas* issue and address equitably issues involving exposure to Agent Orange in settings outside of Vietnam, where dioxin-based defoliants were routinely used. Claims entering the appeals process would be greatly reduced by the establishment of presumptions for diseases and disorders in a manner that accommodates and accepts the realities of modern warfare in the areas of toxic exposure, PTSD and TBI.

THE OTC CONTRACT

We support legislative and Agency review of the costly QTC contract. If, after review of the QTC contract it is determined that outsourcing is required, that such contract be submitted to arms-length competitive bidding. To reduce the need for outsourcing C&P exams, we encourage acceptance of opinions by treating VA physicians and allocation of equal weight to the opinions of treating physicians, both VA and private. In this regard we support regulatory change which requires that all physicians, VA and private be advised of the "elements" of a probative opinion, reducing the number of remands for to obtain probative, adequate opinions.

In recognition of service to their country, and injury and illness incurred in harms way by veterans now incarcerated, we support regulatory enhancement of the processing of claims for benefits by incarcerated veterans through negotiation and cooperation with state and Federal prison administrations. Claims are frequently denied for failure to appear for examinations, which are impossible in most instances, and hearings are similarly unavailable, thus impeding the appeals process and the equitable and expeditious processing of these claims. The Veterans Law Section sup-

ports regulatory changes to ensure that information of the availability of apportionment is communicated to every eligible family of incarcerated veterans.

IMPROVEMENT OF BENEFITS AND SERVICES TO NATIVE AMERICANS

Finally, in recognition of the extraordinary population of veterans within all of the Native American Tribes and Nations (on some reservations equal to 10% of the population), the Veterans Law Section strongly urges and supports legislative and regulatory action that improves and provides funding for the availability of the full range of veterans benefits and services to Native American veterans. We support, in light of the Rural Health outreach by DVA, the institution of and funding for the presence of Veterans Health Administration services in Indian Health Services hospitals and clinics on every reservation, utilizing the existing Memorandum of Understanding between Veterans Health Administration and Indian Health Service.

This would greatly enhance the expeditious availability of quality health care to veterans for injuries and illness arising from their military service and provide for C&P exams by VA providers, precluding journeys of 100 or more miles for that purpose, as well as oversight by or referral to trained physicians of problems with "high tech" prostheses and the quality management of Traumatic Brain Injuries. Culturally compliant mental health care is desperately needed, as the incidence of suicide, drug and alcohol self-medication and crimes of violence domestic and otherwise is very high in these areas.

The Veterans Law Section supports legislative and regulatory enhancement of the meaningful availability of VA loans, GI bill and other existing programs which provide educational and economic opportunities to Native American veterans and their families, particularly in the West, where unemployment on reservations is frequently as high as 90%. Most existing programs designed to be available to all veterans are functionally unavailable to Native American veterans who live on and near reservations. While DVA has sponsored "Tribal Veterans Representative" programs, the individuals participating are only trained to advise of the availability of benefits. They are not competent or trained as representatives of the individual veteran, nor may they be so trained under conflict of interest restraints. If a veteran files a claim resulting from advice received, he or she all too often does so without formal representation and any denial is not appealed, with the result that the bar is then raised for ensuing re-opened claims.

The membership of the Veterans Law Section of the Federal Bar Association thanks the Committee for its consideration of these comments.

Sincerely,

CAROL W. SCOTT,
Chair, Veterans Law Section,
Federal Bar Association.

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