ADJUDICATION OF APPEALS BY THE BOARD OF VETERANS' APPEALS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMPENSATION, PENSION, AND INSURANCE

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

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ADJUDICATION OF APPEALS BY THE BOARD OF VETERANS' APPEALS

THURSDAY, MAY 6, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to call, at 9:32 a.m., in room 334, Cannon House Office Building, Hon. Jim Slattery (chairman of the subcommittee) presiding.

Present: Representatives Slattery, Edwards, Tejeda, Bilirakis, and Everett.

OPENING STATEMENT OF CHAIRMAN SLATTERY

Mr. SLATTERY. Good morning. The subcommittee will come to order.

We are meeting this morning to look into the processing of veterans' appeals by the Board of Veterans' Appeals. This is the second in a series of hearings we will be conducting on the adjudication of veterans' claims and appeals.

On April 21, we looked at the situation which exists at the regional offices. Today we are focused on the BVA and its problems. The BVA's decision, productivity, and response times have suffered greatly in recent times. According to the chairman's testimony, in fiscal year 1991 the Board issued 45,308 decisions; in fiscal year 1992, the number dropped to 33,483; and it is now projected that only 27,600 decisions will be made in fiscal year 1993. Likewise, the Board's response time has gone from a low of 139 days in fiscal year 1991 to 240 days during fiscal year 1992 and to a projected time of 441 days in fiscal year 1993.

Given what we heard recently about the backlog of cases at the regional offices, it comes as no great surprise that similar problems have been experienced by the Board. What concerns me more, though, is that these figures are projected to become far worse if something is not done immediately to reverse the trend.

As was the case with our last hearing, we would like to hear from the experts about what the VA and Congress should do to solve the problems the Board is facing. For example, we are presently exploring legislation suggested by Chairman Cragin that would eliminate the requirement that decisions of the Board be made by sections consisting of three Board members. According to the chairman, productivity of the Board could be increased by some 25 percent if we were to permit single member decisions. This is

only one idea under consideration, but it is the very type of proposal I hope we will eventually receive from our experts and advocates.

I want to again indicate to all parties how important it is that we work together to develop new ideas on how to improve the whole system. I am encouraged by the fact that many of the veterans groups have been meeting amongst themselves to this end. I thank each of you for your ideas and participation in this hearing, and I look forward to hearing from you today.

Before recognizing our first witness, I would like to recognize my good friend, the distinguished Minority Member, Mike Bilirakis, for any comments that he might care to make at this time.

OPENING STATEMENT OF HON. MICHAEL BILIRAKIS

Mr. BILIRAKIS. Thank you, Mr. Chairman.

I appreciate your holding this hearing, this very much needed hearing, Mr. Chairman, and I particularly appreciate your commitment to this problem. You said early on that we were going to commit ourselves to trying to do everything we could to help solve this problem, and certainly you are living up to that and I appreciate that very much and commend you for it.

I would like to welcome Charlie Cragin, who is the chairman of the Board of Veterans' Appeals, and, Roger Bauer, his vice chairman of the Board, to our subcommittee.

I recently had the opportunity, Mr. Chairman, to observe a personal hearing before the Board. I went down there and not only walked through all of their sections and met a lot of their people and saw the piles and piles and piles of dockets. If you will, I also sat in on a personal hearing after receiving permission from the principals, of course. It was truly an educational experience, and I would like to thank Charlie and Roger as well as Michael Kiser, who was representing the particular claimant on that day, for their assistance.

As you have already said, Mr. Chairman, since fiscal year 1990 there has been a steady decline in the number of cases decided by the Board, and that could be good if it were the result of better efficiency, better handling of cases, and better decisions on the lower levels, but of course it isn't the result of that, it is the result of the problems with the BVA. So while the number of decisions has decreased, as you have indicated, there has been a significant increase in the time needed to adjudicate claims.

You have already talked about the number of days that of the average response time have increased from 240 days to a projected 441 in this fiscal year and it is anticipated to go up to 540 next year.

So while many factors have affected the Board's adjudication of claims, the advent of judicial review—we have to face it—has had a profound impact on the Board. With the precedent-setting decisions of the Court of Veterans Appeals, as I understand it, court decisions have expanded BVA's workload and changed the way in which the Board operates. Consequently, the timeliness and quality of Board decisions have suffered, and there isn't any reason for me to go into all of these things again, I know we are going to go into it here.

I am concerned about ensuring pay equity between Board members and administrative law judges. I have introduced legislation to that effect. I am not sure, Mr. Chairman—we haven't talked about it, so I am not sure whether you are aware of it or not, but it certainly could be a factor in terms of retention, retention of some of the good BVA people that we have; and you have already mentioned the single-member boards.

I would hope that the veterans' organizations would be open-minded, just like we should be open-minded here, in discussing that subject. I don't think that we should have, in our own minds, committed our thinking to strictly a single-member board, but I also don't think we should be shutting our eyes to it because it could be a factor—if it will work. That is the big thing we are all concerned about, will it work?

Thanks again, Mr. Chairman.

Mr. SLATTERY. Okay. Before I recognize Chairman Cragin and Vice Chairman Bauer, do any other members of the subcommittee wish to be recognized for any opening comments?

Then, Charlie and Roger, it is good to see you, and thank you for coming over this morning. I appreciate your commitment to trying to help us solve this problem that we are all very interested in. So welcome, and we look forward to your comments.

STATEMENT OF HON. CHARLES L. CRAGIN, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY ROGER BAUER, VICE CHAIRMAN, BOARD OF VETERANS' APPEALS

Mr. CRAGIN. Thank you very much, Mr. Chairman and members of the subcommittee.

It certainly is our honor to be here this morning to work with you and our colleagues in the veterans' service organizations to carry out Secretary Brown's mandate to do the right thing for veterans, and we at the Board of Veterans' Appeals recognize that doing the right thing for veterans not only requires a quality decision grounded in the appropriate application of the rule of law but also requires a timely decision.

Mr. Chairman, as you know, the Board of Veterans' Appeals in July will celebrate its 60th birthday. I am told by people who have been observers of the Board for many years that in the last 2 years the Board of Veterans' Appeals evolved as much as it had in the first 58 years of its history, and obviously much of that is a direct result of the introduction of judicial review on a system which, until that time, was a closed system.

I would particularly like to express on behalf of Secretary Brown and all of my colleagues on the Board of Veterans' Appeals our deep appreciation to you, Mr. Chairman, and Congressman Bilirakis for your willingness to give so much of your time to come and meet with the Board and talk to its members and its staff and express to them, both through your attendance and through your counsel, your care and concern for veterans as well as your care and concern for doing whatever can be done to effectuate a more timely process, maintaining the quality that we at the Board have striven to establish over the last 2 years.

I know that you have had an opportunity to review the statement which I have filed, and therefore I am not going to take any more of the committee's time with a statement at this point in time but would be happy to respond to any of your questions.

[The prepared statement of Mr. Cragin appears on p. 32.]

Mr. SLATTERY. Okay.

Mr. Bauer, did you want to make any comments? Mr. Cragin, I assume, is making comments on behalf of both of you.

Mr. BAUER. Correct. I would just reiterate what he has said, that we are pleased to work with you on this serious problem.

Mr. SLATTERY. Very good.

I have several rather specific questions that I would like to ask before recognizing members of the committee, and I will be as quick as I can.

Mr. Cragin, do you view the authority provided to you under section 7110 as requiring a particular number of hearings before a traveling Board member?

Mr. CRAGIN. With respect to a quota before a traveling Board member? No, sir, I do not. I read 7110, a newly enacted provision that came about as part of the Veterans' Judicial Review Act, in pari materia with 7101, which requires the Board to conduct hearings and dispose of cases before the Board on a timely basis.

As you know, Mr. Chairman, the term "timely" is not defined, but we try to strive as best we can to provide a hearing at the earliest opportunity.

When I first came to the Board, we had regional offices where people were placed in a queue and may wait as much as 3 years to have a personal hearing, and so what we have tried to do, through the reconfiguration of a hearing panel from three members to one and sending hearing members out on the road, is to assure timely conduct of hearings.

Mr. SLATTERY. It was my understanding from previous conversations that you are very concerned about the number of hearings involved and how these hearings are slowing down the process, and I am just curious, you know, how do we respond to that concern of yours that you have shared with me before?

Mr. CRAGIN. Well, I think the first facet of it, Mr. Chairman, is to just recognize that we are in an evolutionary period. As I indicated in our earlier conversations, there was a time when many veterans came to Washington and had hearings conducted at the Central Office. Over the last year or so, we have seen a marked diminution in requests for hearings in Washington and obviously an increase in requests for hearings in the field. We estimate that for fiscal year 1993 we will have at least 2,500 hearings in the field. Through March 31, the Board had conducted 1,225 hearings in the field but had only conducted 505 hearings in Washington, whereas in the years before that they were up to 1,200 and 1,500.

What I try to do, Mr. Chairman, is to manage this finite resource, the 63 Board members who actually deliberate and conduct hearings, so that we can assure reasonable timeliness with respect to hearings in the field while not totally degrading their ability to deliberate here in Washington.

Mr. SLATTERY. Okay. What about the whole proposition of teleconferencing? If we utilize some teleconferencing, would this enable

us to handle some of these claims more expeditiously, more efficiently? Do you need legislation to enable you to do this? Talk to me about teleconferencing.

Mr. CRAGIN. Yes, sir. I believe that teleconferencing and video-teleconferencing, because I think there can be a distinction, both are tools that would enhance the Board's ability to conduct hearings both in the field and at out-stations.

For example, in Alaska, you have somebody in Nome who wants to have a hearing at a regional office. That is about an 800-mile trip just to get to a regional office. If we could conduct a teleconferencing hearing, at the option of the veteran obviously, that is going to save time.

Mr. SLATTERY. Do you need legislation to do that?

Mr. CRAGIN. I believe that we do, and the reason I say that is because personal hearings have been discussed in the past in the legislative record, and much has been made of them.

Secondly, with all due respect to my colleagues in the Office of General Counsel, let's assume for a moment that the office were to provide us with an opinion that, in its opinion, we are statutorily permitted, with the current state of the law, to conduct those hearings. If we were to do that and, in reliance on that opinion, conduct hearings for perhaps a year and then, on review by the U.S. Court of Veterans Appeals, the Court determines that we did not, in fact, have that authority, that becomes a jurisdictional issue because under our law we must afford the veteran an opportunity for a hearing before we may issue a final decision.

So the Court would, as it has in the past in other circumstances, declare that those cases were void ab initio and send us back to ground one.

Mr. SLATTERY. Okay.

Mr. Cragin, you have suggested that we should lift the existing cap on the number of Board members, which currently, I believe, is 63.

Mr. CRAGIN. It is 65 plus the chairman and the vice chairman, 67 in total, Mr. Chairman.

Mr. SLATTERY. Okay. Do you think that we should just lift that completely? Do you think we should change it so that it will be some other limit more realistic to deal with this backlog? What do we need to do?

Mr. CRAGIN. I have made the recommendation to the Secretary that the numerical limitation on the composition of the Board be removed completely. As you know, Mr. Chairman, I nominate or make recommendations to the Secretary; the Secretary, under the law, appoints the members; and then the President of the United States must approve them. The Secretary has the ability, by determining whether or not to appoint people, to control the size up to 67 members but does not, in fact, have the ability to control the size in excess of 67 members.

Mr. SLATTERY. So you want us to just lift the cap completely?

Mr. CRAGIN. Yes, sir, and it would essentially place within the discretion of the Secretary and the President, because both would have to play a role in the appointment of Board members, to determine, given the circumstances that existed at any point in time, what the appropriate number of Board members was.

Mr. SLATTERY. One last question, and then I will recognize other members of the committee.

One of the things that concerns me is that, based on the information I think you have provided, Mr. Chairman, about 50 percent of your decisions will be determinations to remand a case back for further development. Two questions: One, what is the problem here? Why are we having to remand 50 percent of these cases back for development? I mean it is a hassle for the veterans, it is a bureaucratic hassle, it seems to me, for everybody handling all these cases. What can we do to reduce that 50 percent remand rate for further development? and, really, what constitutes further development? What are we talking about here in terms of further development? Help me understand what we can do to deal with this.

Mr. CRAGIN. Yes, Mr. Chairman. Let me try to respond to the second part of your question first.

What constitutes further development runs into a broad categorization. I mean the U.S. Court of Veterans Appeals in many cases has specifically pointed out examples or instances in which it felt that the Secretary had not complied with the responsibility to assist the veteran in the development of a claim which had been determined to be well grounded.

In one case, for example—I think it was *Murincsak* v. *Derwinski*—the court said that if the veteran indicates that he or she has had a Social Security determination of disability, then the Department has an obligation, under its duty to assist, to reach out and get the record of that determination and then consider that determination in its determinations and articulate why that decision should not be followed.

If, for example, a veteran indicates that he or she is currently under a physician's care, then the Department has the duty, working with the veteran obviously, to reach out and get those records.

So when a case gets to the Board, if we see any instance in which the decisions of the court indicating what constitutes duty to assist have not been met in a particular case, we do one of two things. First, we try to see whether we can resolve it with our administrative people working with the administrative people at a regional office, if it is a document that has to be acquired, things of that nature, to do it on an expeditious basis, avoiding a remand. If we have to do a remand, the remand determination is written to clearly articulate the reasons why it is necessary and also to articulate what we are looking for so that when it goes back for development the regional office will have an understanding of exactly the reasons why.

The first part of your question with respect to why all these remands is, I think, to some extent, a recognition of the lag in the system itself. Cases within the Department of Veterans Affairs are, quite frankly, unique from my perspective as a lawyer for 20 years. When I would try a case in the trial court and was dissatisfied with the result, I could appeal it to an intermediate court. That court would look at the same case, and if I wasn't happy with the intermediate court result I could appeal it to the Supreme Court, and that Court would look at the same case that I tried.

Well, that doesn't happen in the Department of Veterans Affairs because of the ability to add evidence and documentation as this

case moves along the way, number one. Number two, the Court of Veterans Appeals issues cases which, as you know, Mr. Chairman, when it issues a decision, it is binding and in full force and effect on the entire Department as of the day it issues the decision.

Now a case is decided in the field a year and a half ago, gets to the Board of Veterans' Appeals, and last week the court issued a decision which has an effect upon that case decided a year and a half ago. That case now has to be remanded to be developed in accordance with a law that wasn't in effect at the time the regional office made its decision, and until and unless this court completes the establishment of its fabric of veterans' common law, we are going to have to deal with the situation.

I would observe that from my perspective the regional offices are making strides in addressing the decisions of the court, in implementing them in their development. We are seeing it in the cases that are coming back to us after remand. We are also seeing it very recently in the number of remands that we have been sending back to the field in just the last few weeks.

Mr. SLATTERY. Okay. I am going to have some follow-up questions on that, but I want to recognize at this time Mr. Bilirakis.

Mr. BILIRAKIS. Well, I guess trying to follow up, more than anything else, on your questioning, Mr. Chairman, does the court ever reverse itself?

Mr. CRAGIN. I have never read a decision, Mr. Bilirakis, in which the court said it was reversing itself, but I guess looking at it as a lawyer, I would say that any time the court withdraws a decision by vacating it and then issues another one that goes exactly in the opposite direction, that would be a reversal.

Mr. BILIRAKIS. Any way you look at it.

Mr. CRAGIN. And, yes, sir, there have been a number of instances——

Mr. BILIRAKIS. And what impact, again, to the impact of court decisions having on your job—what impact does it have on the Board, these reversals, whether they are called that or not?

Mr. CRAGIN. It has a significant impact. As I just mentioned, the entire Department under *Tobler* v. *Derwinski*, a precedent of the court, is required to treat as having the full force and effect of law a decision issued by the court on the day it is issued. We at the Board—and certainly this has exponentially increased in the regional offices—we at the Board have perhaps a thousand cases under consideration in any given day, that are working their way out the door, that have been decided, they are in quality review, or they are in the administrative service. When a decision of the court comes down that says, for example, from this day forward the sky is blue rather than black, we have to stop what we are doing, go back, rescrub all those cases.

Mr. BILIRAKIS. And you review every one of those cases? You go through all those thick files to see whether or not——

Mr. CRAGIN. To the extent that the decision of the court would have any applicability, we scrub those identified cases.

Mr. BILIRAKIS. But you don't know whether it has applicability unless you go through those files. Is that correct?

Mr. CRAGIN. That is correct, except with respect to categories. If it was a case that applied to increased ratings, for example, we

would review increased ratings cases. But then, you see, after we have done that, and let's say we now have implemented this decision of the court, 2 months later the court vacates that decision, thereby changing its mind, and saying, "Never mind, the sky is back to the color it was," so now you have got to go back, obviously rework the cases in process, and then wait for the cases that you decided in that interim to come back if you decided and issued a denial because now that is clearly and unmistakably erroneous as a matter of law, so those cases will work their way back into the system.

Mr. BILIRAKIS. What other changes take place that you are experiencing which basically prevent this case from being the case that you initially tried? Going back to your personal experience, what has changed along the way, to make things more difficult?

Mr. CRAGIN. I am not suggesting that it is more difficult. I guess I am just suggesting that it is a different system.

Mr. BILIRAKIS. It takes more time.

Mr. CRAGIN. Obviously. This is a case that is accreting as it goes. It is a ball that keeps building.

Mr. BILIRAKIS. Right. Give us some examples.

Mr. CRAGIN. New medical evidence, personal testimony of the veteran before a hearing officer that wasn't provided at the rating board; that goes into the record as part of the evidence; testimony before the Board itself goes into the record as part of the evidence. So there is constant accretion of evidence. You are not just looking at the decision of the regional office and saying, "Did they decide this case right or wrong based on the evidence?" That is what makes it somewhat difficult for veterans to understand and appreciate, that everybody is looking at, to some extent, a different case.

Mr. SLATTERY. Would the gentleman yield?

Mr. BILIRAKIS. By all means.

Mr. SLATTERY. I am just curious, in a case where new medical evidence has developed since the time that the regional office made its determination, if the Board looks at this new evidence, will it just automatically remand that case back to the regional office for review?

Mr. CRAGIN. No, sir.

Mr. SLATTERY. How do you procedurally deal with that?

Mr. CRAGIN. If evidence is submitted as part of the case that comes before the Board, the Board has the ability to review issues on a de novo basis and to consider and, in fact, is obligated and required as a matter of law to consider all material of record, and anything that is submitted while the deliberative process is going on will be considered.

We have many instances, Mr. Chairman, in which Members of Congress will send me correspondence attaching medical records and things of that nature. That will be placed in the file and will be considered by the Board in reaching its decision.

Mr. SLATTERY. But that may not result in a remand.

Mr. CRAGIN. No, sir. No, sir, and, generally speaking, if, in fact, that evidence can be considered from a substantive perspective, it will not result in a remand. In many instances information will come in which would indicate that a new examination should be

conducted—things of that nature. That might, in and of itself, result in a remand.

Mr. BILIRAKIS. But continuing on, when it leaves the Board of Veterans' Appeals and is appealed to the court, any new evidence that may arise in between, what happens there?

Mr. CRAGIN. At that point in time, Mr. Bilirakis, the court is a classic reviewing authority and by law is only to review the decision of the Board of Veterans' Appeals and determine whether it complied with applicable laws and regulations and, in fact, met the reasons and bases test, et cetera.

Mr. BILIRAKIS. They don't look at facts then? It is strictly an appeals type of process then where they look at the law only?

Mr. CRAGIN. They look at the facts that are in the record. They can look at any fact and any evidence that was considered by the Board of Veterans' Appeals. They also from time to time suggest that there was other material that we should have looked at, that we did not.

Mr. BILIRAKIS. So they are triers of fact as well as law.

Mr. CRAGIN. In a number of instances the court has determined that it can review certain things on a de novo basis. They generally characterize them as questions of law.

For example, when the Board decides that something was new and material evidence, the court reserves the right to review that and determine whether the Board made the right decision, and recently in the case of McGinnis the court indicated that if the Board finds that there is new and material evidence and reopens a case and the court finds that there isn't, they will vacate the Board's decision as if it never existed and just leave this bunch of new and material evidence just hanging out there in the ether some place.

Mr. BILIRAKIS. All right. I know we are going to have another round, so thanks, Mr. Chairman.

Mr. SLATTERY. The gentleman from Texas, Mr. Edwards.

Mr. EDWARDS. Thank you, Mr. Chairman.

Mr. Chairman, we are projecting 441 days time of response in fiscal year 1993. On average, how long have these cases been in the system before they come to the Board? Do you have an estimate of that?

Mr. CRAGIN. It looks like about 597 days for the first half of fiscal year 1993, Mr. Edwards.

Mr. EDWARDS. So about a 3-year process from beginning to end.

In terms of Board process, what do you think would be a reasonable goal to try to shoot for? What do you think makes sense if we had the proper resources in fairness to the veterans involved?

Mr. CRAGIN. Sir, that is such a difficult question. You give me the opening of appropriate resources. Let me just make one point. When I talked about processing time of 597 days, that is not the same as our response time. Our processing time at the Board is less than the projected response time, because that is a figure that is gleaned from taking all the cases that you had on hand in a year and working at that point. So the response time is different.

When I first came to the Board and met with Members of Congress and their staffs as part of the confirmation process, anecdotally people felt that an appropriate time to decide a case at the Board was some place in the area of 150 days. I don't know

that that was ever quantified on any empirical basis, it just seemed to be an appropriate period of time.

Obviously, I think anyone would like to decide cases as fast as possible under the circumstances. What I have tried to do, Mr. Edwards, is to look at the reality of the situation in which I don't anticipate that we are going to see a great addition in resources, if any, and to try to take these existing resources and maximize their utilization.

For example, we just brought on board in the last few months 49 new attorneys that are in the process of being trained, and their expertise will not really reach a level where we are going to get our investment in them back for perhaps a year-and-a-half to two years. But once they come up to speed, I now will have eight attorneys staffing up each section.

At some point, I have a constricting point in the number of Board members, because keep in mind, that is the finite resource, I can't expand that, and it is the small end of the funnel when everything reaches it. That is why, as I was commenting to the chairman, I think we have to look at single member decision ability as a way to try to meet more timeliness.

Mr. EDWARDS. If we were to add to the number of Board members, how many new staff members per new Board member do you need?

Mr. CRAGIN. Well, as I say, we are at a ratio of eight to three right now.

Mr. EDWARDS. Is that a reasonable ratio?

Mr. CRAGIN. In the current configuration, I believe it is about the max because, keep in mind, our attorneys are on a productivity measurement process, and to the extent that they are impeded in their ability to provide cases to Board members and have them decided, they are impacted negatively, and I think, based on the current configuration, that is about as much as I can do, and I can't tell you that we have thought through every single structural scenario on how we would utilize the attorneys vis-a-vis Board members, what I like to call veterans law judges so everybody knows that we are making a distinction between the lawyers and the judging part of it. We are looking at a number of different scenarios with respect to any change that might come about there, Mr. Edwards.

Mr. EDWARDS. If you change to single member decisions, is that going to change the staff ratios?

Mr. CRAGIN. Not specifically. The only way that we would be able to change the staff ratios would be if we could increase the number of people who are serving as Board members either by the chairman having the ability to designate them on a case-by-case basis or to do what I have the legal authority to do now, and that is designate them for a period of time as an acting Board member.

My problem in doing it in my current environment is, when I designate somebody as an acting Board member, I have to do it for a period of time. That takes them out of the production system for that period of time and turns them into a judge. That degrades my productivity, that doesn't necessarily help it. But in the event that I was in a single member environment, then I could do that with a bit more facility.

Mr. EDWARDS. And you do have a process of grading the productivity of staff?

Mr. CRAGIN. Yes, sir, we do.

Mr. EDWARDS. Okay.

In regard to granting administrative allowances, just for the record, would you clarify what you mean by that?

Mr. CRAGIN. Yes, sir. Prior to the enactment of the Veterans' Judicial Review Act, the chairman and vice chairman of the Board of Veterans' Appeals had the ability, when they had a difference of opinion with a decision of a Board panel, to essentially reverse a denial, to grant an allowance, to grant the benefit. Especially in a single member decision environment, I want to, as part of a quality review process, have the ability to expeditiously reverse a denial of a veteran's claim when, in the opinion of the chairman or vice chairman, we feel that that decision was wrong rather than have to expand the panel and eat up additional resources to essentially accomplish the same result. This was a recommendation of the task force within the Department last year that studied thoroughly the adjudicative process, and this would just return us to the status quo pre Judicial Review Act.

Mr. EDWARDS. Very good.

Thank you, Mr. Chairman.

Mr. SLATTERY. The gentleman from Alabama.

Mr. EVERETT. Thank you, Mr. Chairman.

Just a couple of quick follow-ups on some of your questions, Mr. Edwards.

If the cap on the Board members should be lifted under 7107, what would you accept as a good response time?

Mr. CRAGIN. As I say, Congressman Everett, it would depend on the number of Board members. I would love to see the world get back to 150 days. I don't believe, sir—and I can't pass the smirk test that one of my Federal district court judges said you had to pass if you stood up with a motion and say that I think we are going to get back to 150 days in any time soon, because I just don't believe that when you and your colleagues are called upon to deliberate all the competing interests of America's veterans, whether it is a hospital bed or a prosthetic device or another lawyer, that we are going to be provided with significant resources, and, frankly, that is why I am trying to practice as much total quality management as we can to maximize the use of the resources that we have.

Mr. EVERETT. And when I and my colleagues are reaching that decision, will you present us with a budget proposal to reflect your interest in lifting the ban?

Mr. CRAGIN. I have proposed, and it is within the Department, going through the departmental process of lifting the ban, and I am hopeful that that will be part of the Secretary's recommendations.

Mr. EVERETT. Thank you.

Thank you, Mr. Chairman.

Mr. SLATTERY. The gentleman from Texas, Mr. Tejeda, do you have any questions?

Mr. TEJEDA. No, thank you, Mr. Chairman.

Mr. SLATTERY. Okay.

Does the gentleman from Florida have any additional questions?

Mr. BILIRAKIS. In the interest of time, Mr. Chairman, yes, a number of questions, which I know you have too, but maybe we can submit them and get responses for the record.

Mr. SLATTERY. Okay.

[The questions and answers appear at p. 65.]

Mr. SLATTERY. Does the gentleman from Texas have any further questions, Mr. Edwards?

Mr. EDWARDS. I have one last quick question, and that is: Did the Congress, in your judgment, err in removing this 30-day delay in the effective date of opinions from COVA? I mean, do we need that 30-day delay?

Mr. CRAGIN. This is my personal judgment and my personal opinion and nothing else, Mr. Chairman, but it certainly would make our job much easier if we could review a decision of the court and, in a deliberative sort of fashion, determine an appropriate response and then promulgate that response and march forward, rather than have to put cases on stays and things of that nature while we are considering it.

I think it would also provide our colleagues in the Office of General Counsel with the ability to respond, filing the most appropriate motions with the court, seeking reconsideration of the court's decisions, so that everybody in these instances could take a moment to reflect and deliberate.

I guess the quick answer to your question is, yes, I think it would be helpful, in my judgment.

Mr. EDWARDS. Okay. I have some further ideas about that, but we will chat later. My concern, I guess, is that if you do something like this, is there a way we can do it without really creating a problem with justice really being denied to veterans that are hanging out there in that 30-day period of time?

Mr. CRAGIN. And I would be happy to chat with you about that, because I think there is a way that that sort of relief could be fashioned.

Mr. EDWARDS. Okay.

Mr. BILIRAKIS. If the chairman would yield, Mr. Chairman, you have certainly hit upon it, and the bottom line here is that we are trying to come up with ways to expedite the process, but obviously not to hurt the rights and the day in court, if you will, of the veteran.

Mr. CRAGIN. Absolutely.

Mr. BILIRAKIS. That is really what we have got to do, and I am hopeful we all can get together and sit down and be open minded again and try to work these things out. I know that the job of the veterans' organizations, basically their job is to, and I don't mean this from a negative sense, put on blinders and just concentrate on what they feel is best for the veteran; that is what we all want.

But in the process here, are we better serving the veterans by making them wait as long as we do through this entire process? I mean so many of them pass on, for crying out loud, the World War II veterans, particularly some Korean veterans, because of the long delays. So we have got to serve in many ways, and one is to expedite the process, I think.

Thanks.

Mr. CRAGIN. We look forward to working, Mr. Chairman, with you and the members of your committee in fashioning a mechanism that will, as I indicated, and that Secretary Brown has charged us, do the right thing for veterans.

Mr. SLATTERY. Okay. Mr. Cragin, Mr. Bauer, thank you very much. We appreciate your time this morning, and we will be in touch. I have a feeling we are not finished with this project. So thank you very much.

Mr. CRAGIN. Thank you.

Mr. SLATTERY. The next panel is: Mr. Bob Manhan, the assistant director of the National Legislative Service of the Veterans of Foreign Wars; Mr. Frank De George, the associate legislative director of Paralyzed Veterans of America; and Mr. Philip Wilkerson, who is the assistant director of the National Veterans Affairs and Rehabilitation Commission of the American Legion.

Welcome, gentleman. We would ask you all, if you can, to summarize your statements, and we welcome you, as always, to the committee and look forward to your comments.

Mr. Manhan, you are at the plate again.

STATEMENTS OF BOB MANHAN, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; PHILIP R. WILKERSON, ASSISTANT DIRECTOR, NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION; AND FRANK R. DE GEORGE, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

STATEMENT OF BOB MANHAN

Mr. MANHAN. Thank you very much, Mr. Chairman.

It is a pleasure to be here, and I am delighted to be the first veteran advocate following the BVA. Our figures actually track, which doesn't often happen. We believe BVA will receive about 61,000 cases in all of fiscal year 1993 and they will only be able to process, that is make decisions on about 46 percent of those cases. This percentage includes the remands. This means BVA will probably complete about 28,000 cases in fiscal year 1993. The balance will be carried forward for some of their receipts in fiscal year 1994. BVA will have about 72,000 cases in fiscal year 1994. BVA will only be able to complete about 40 percent next year. The increase in time, as the chairman has already said, has been about 15 months for fiscal year 1993. It will extend 3 more months, on average, to 18 months for fiscal year 1994.

We believe that the major cause of BVA's caseload is the decisions made at the Court of Veterans Appeals, CVA. However, we don't think the CVA has created any new veteran rights or entitlements but, rather, it is making the entire Department of Veterans Affairs interpret and adhere to the rules contained in title 38, U.S.C. as Congress intended. Historically, over time, perhaps seven to 10 years, the VFW believes, unfortunately, the entire VA's compensation claims area has deteriorated into an adversarial role between the individual claimant and the administrators who process claims both at the regional office—primarily at the regional office—and ultimately on a case-by-case basis even at BVA.

Having said that, the VFW believes that at the present time, at least through fiscal year 1994, BVA, with 449 people and a payroll cost of $27 million, has enough assets to do the job. However the VFW does have three recommendations to improve BVA's operation.

The VFW would like to see the BVA put out as many of their officers as they can for travel panels in the field—that is, throughout the continental United States, wherever a regional office is. We notice that since Chairman Cragin has come aboard he has increased the travel panel option about 300 percent since fiscal year 1991 compared to fiscal year 1993. In 1991, I think he had something like 790 panels out; this year, he is projecting about 2,500. That is a step in the right direction.

The VFW will align itself with BVA to have a single member, a single attorney, decision on a case. The chairman is requesting that. He has limited resources. The VA believes we can't be any worse off trying this option than we are today.

The last recommendation that we already had in our testimony was touched upon earlier by Mr. Edwards of Texas, when he asked the chairman about an administrative allowance. An allowance can only work in favor of a veteran. The VFW very much wants that action restored. We believe that whenever the chairman can allow a case it is really based on the issue of equity, and that is what the VFW would like to see all veterans receive at all times; a fair evaluation and a level playing field.

This summarizes the VFW's position. Thank you, Mr. Chairman.

[The prepared statement of Mr. Manhan appears at p. 36.]

Mr. SLATTERY. Thank you, Mr. Manhan.

Mr. Wilkerson.

STATEMENT OF PHILIP R. WILKERSON

Mr. WILKERSON. Thank you, Mr. Chairman.

This subcommittee last month received testimony on problems affecting the overall level of service provided by the regional offices. Appeals which are an integral part of the claims process have been directly affected by the deterioration in the quality of basic claims adjudication. We therefore wish to commend you, Mr. Chairman, for scheduling this follow-up hearing today to examine these and other issues affecting the Board's ability to render proper and fair decisions in a timely manner.

It is clear that the enactment of judicial review in 1988 and the subsequent decisions of the court have had an obvious and profound impact on the Board's timeliness. However, prior to 1988 new benefit and due process legislation coupled with poor quality decisions made a the regional offices by overworked and inexperienced adjudicators and rating board members began to cause an increase in both the Board's timeliness or response time and the remand rate beginning in the late 1980's.

Between 1988 and the present, the average response time has gone from 136 days to 229 days, and the remand rate has gone from 19.3 percent to 50.5 percent. Cases before the Board are now more legally and medically complex. More specific information must be provided to the appellant in the decision. The Board now

projects a response time in excess of 400 days next year at current productivity levels.

Part of the Board's problem is clearly that it has no control over the quality of the cases being sent up by the regional offices. While the allowance rate itself has increased only slightly over the past several years, the percentage of cases being sent back for additional development of various types of action has sky-rocketed to 51 percent.

In our opinion, if the cases requiring remand had been properly adjudicated, for the most part, an appeal would be unnecessary and claimants would not be forced to wait years while their case is sent back for further readjudication. This double work wastes the time and resources of both Departments which could be more productively focused on the backlog of pending cases.

The Board, under Chairman Cragin, has, in fact, instituted a number of administrative and procedural changes intended to make the Board more productive and responsive to the court's directives. Other changes are being proposed. The American Legion has some concerns and reservations regarding some of these. However, we are willing to have the Board look at and test new ways of conducting its business in an effort to provide better and faster service to veterans.

The Board has already changed it travel hearing program to utilize one-member panels, although the decision is signed by all three members of the section. The chairman is now proposing a change which would also permit decisions of the Board to be made by a single-member panel. It projects this change, if approved, would result in a 25 percent increase in production.

One of our primary concerns with this proposal is that currently the number of personnel assigned to the quality assurance function at the Board, in our opinion, is inadequate given the current workload level and the complexity of the decisions to be reviewed. If single-member panels are to be used, additional resources need to be provided to ensure the Board's quality assurance program is effective.

One area where single members could be particularly useful, we believe, is in disposing of cases which are determined to be not ready for final appellate consideration. Remands currently make up 50 percent of the Board's workload. If all cases were screened and this type of case identified and referred to a single-member panel rather than a regular three-member section for a decision, this would greatly speed up the remand process. We also believe the service organizations could be more directly involved in this screening and referral process.

However, we still believe it is preferable in any final decision on cases involving complex medical and legal issues to have more than one person involved in the decision-making process.

In conclusion, there needs to be greater coordination and communication between BVA, the Veterans Benefits Administration, and the Office of General Counsel to make further improvements in the quality of the basic claims adjudication, with more training provided to the regional office decision makers. Veterans should not have to wait years for a final and proper decision on their claim.

That concludes our statement, Mr. Chairman.

[The prepared statement of Mr. Wilkerson appears at p. 39.]
Mr. SLATTERY. Thank you, Mr. Wilkerson.
Mr. De George.

STATEMENT OF FRANK R. DE GEORGE

Mr. DE GEORGE. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, it is a personal privilege and an honor to appear here today once again on behalf of the Paralyzed Veterans of America and its membership. PVA also appreciates your invitation to present testimony concerning the operation of the Board of Veterans' Appeals.

Mr. Chairman, PVA believes it is extremely important that the subcommittee understand that the proper functioning of the BVA is critical to the overall fairness of the system of adjudication of claims for veterans' benefits established by this Congress over a period of some 60 years.

The BVA's own statistics show that only 4.8 percent of veterans who appeal to the BVA file a further appeal with the U.S. Court of Veterans Appeals. This means that for over 95 percent of veterans, the Board of Veterans' Appeals is the final, full, and complete review of their benefit claim. It is vital that this review be thorough and fair. Consequently, before this subcommittee entertains any change in the laws governing the BVA's operation, it must be convinced that such a change will enhance the quality of the adjudication by the BVA, as this is the last fair look all but the 4.8 percent of those appealing to the court will receive.

PVA has stated in testimony in prior years that delay in benefit adjudication is a significant concern. There is always a balance that must be struck between speed and quality. A delayed allowance of benefits sought is preferred to a quick denial. To the extent that delays are the result of the BVA adjusting to the court's interpretation of the law, this delay is to be expected in the first few years in which the court issues its decisions. The amount of this inherent delay could be reduced, however, if the VA had displayed more foresight and cooperation in the process of implementing decisions of the court.

It is our opinion that the VA in general and the Board of Veterans' Appeals in particular have not embraced the era of judicial review in a cooperative manner. PVA believes these court decisions have not expanded due process but have, rather, had their intended effect, forcing the VA to accord veterans' due process rights which you, the Members of Congress, intended that they have.

The BVA chairman also views as a statutory constraint the 60-year-old practice which requires the Board to decide cases in panels of three members. PVA believes that three-member panels are far from a constraint, but are a safeguard of fundamental fairness. For 95 percent of veterans the BVA is the reviewing body of last resort; before the body denies the veteran's claim, it should receive full and fair consideration by a panel of three members, not one composed of two members, as all too often is the case, nor a single person, which has been proposed by the BVA chairman.

We further caution the committee not to blindly accept estimates of drastically increased case processing time by the BVA and the claim that these delays can be laid at the feet of judicial review.

Indeed, it was not until the court chastised the Secretary in cases such as *Jones* v. *Derwinski* that the VA moved with any alacrity to inform local adjudicators of court decisions which they were required to apply.

PVA believes the creation of the Court of Veterans Appeals has begun the restoration of integrity to the adjudication of claims for veterans' benefits. It is true that the VA has had to change its way of doing business because of the court, but the changes have, in the main, been beneficial to veterans. If the VA embraces the fact that the court is here to stay and works to align its adjudication machinery with the dictates of the law, case processing time will be reduced and the quality of claims adjudication will be vastly improved.

What the VA needs to accomplish is not a change in the laws to make life easier for the VA but sufficient resources to properly develop and adjudicate cases at the regional office level. The only way to effectively reduce the delay at the BVA is to strengthen the quality of adjudication at the regional office level so that cases are done right the first time. Quite simply, if the regional office does not have time to do it right, when will it have time to do it over?

Mr. Chairman, PVA thanks you for your aggressiveness in pursuit of appropriate services to be provided to the veterans, their dependents, and their survivors. That concludes my testimony, and I will gladly answer any questions.

[The prepared statement of Mr. De George appears at p. 43.]

Mr. SLATTERY. Thank you very much, Mr. De George.

Let me first of all ask all of you: We have met now several times, and I have asked you all to spend some time together and come up with some consensus recommendations on the part of the veterans' organizations as to what should be done. When can I expect to hear back from you in terms of your consensus recommendations?

Mr. WILKERSON. Mr. Chairman, with respect to your request, following the last hearing on regional office operations, the service organizations have met once. We have another meeting scheduled, but because of everybody's scheduling problems this week, we will be meeting on Tuesday of next week, and I would think by the end of the week we should be able to have some recommendations to you, a consensus for your consideration.

Mr. SLATTERY. Thank you.

Mr. De George, in listening to what you had to say today, I was looking for some specific recommendations that we could follow up on, and, really, I didn't hear very many, and I just wanted to make sure I understood what you were saying. Are you basically saying that we should just leave the present system alone and slug it out here for a while? What exactly do you think we should do?

Mr. DE GEORGE. I believe that is our recommendation, sir, that because of the various decisions made by the Court of Veterans Appeals, it should allow the BVA and the regional office adjudicators time to sufficiently respond to those recommendations, and because of those recommendations by the court, it will take time to respond. It created a backlog in itself.

Mr. SLATTERY. Yes, I appreciate what you are saying. I am just looking at the prospect of the time for adjudication extending to 18 months, and I am just very concerned about what effect that is

going to have on the veterans, as Mike Bilirakis indicated, that are Korean War veterans, World War II veterans, and if we delay this process for 18 months—I mean, it is the old saying that justice delayed is justice denied.

There is a balance that has to be struck here, and I think that you are trying to define that, Mr. De George, and I appreciate that, and I am trying to define it also. I am not trying to suggest that we should make a decision on all these cases in six days and, you know, get overcome by the idea of speed either. I am not suggesting that. I just think that 18 months, as we look out a year, is a long time and we need to be doing something to deal with that. I was just curious if you had any specific recommendations.

Mr. DE GEORGE. Please be assured that Paralyzed Veterans of America has the same concern on the length of time that it takes as well as quality of final claim.

Mr. SLATTERY. I don't want to put words in your mouth, but, based on your testimony today, is it safe for me to assume that you, Mr. De George, are opposed to the single-person panels, and you, Mr. Wilkerson and Mr. Manhan, you are reluctant supporters of the idea and are willing to try it?

Mr. MANHAN. The VFW is a little more enthusiastic than being just reluctant. We absolutely are willing to try this course of action.

Mr. SLATTERY. Mr. Wilkerson.

Mr. WILKERSON. We certainly are willing to see it given a fair test.

Mr. SLATTERY. Okay.

Mr. DE GEORGE. At this present time, we are opposed.

Mr. BILIRAKIS. Even against a fair test, a pilot or something to that effect, Frank?

Mr. DE GEORGE. Of course, PVA is always amenable, and I am sure that my directors would lean towards examining a pilot program, but at this present time the actual fact of a one-man board is something that we would not cherish.

Mr. SLATTERY. We just heard Mr. Cragin indicate this morning that the idea of making COVA decisions effective immediately on all pending cases is problematic. He suggested that there might be a need for a 30-day delay time for implementation and effectiveness of those COVA decisions. He thinks that he may be able to shape some kind of a process that will enable us to prevent injustice from being done in those cases that are pending that would be affected by this 30-day delay.

How do you all react to that? Do you think we can shape something that will enable us to avoid creating a monstrous paper hassle for all these cases pending? Do you think that is a legitimate concern? Can we shape something that would enable us to look at those cases that are pending that would be affected in a way that would prevent injustice from being done? Talk to me about that 30-day delay idea.

Mr. Manhan.

Mr. MANHAN. Mr. Chairman, I will attempt to do this as a nonattorney. I believe we are talking about the *Tobler* v. *Derwinski* decision. As I understand the facts, it is probably better not to have a 30-day delay period as the BVA Chairman requests. The VFW believes that once a CVA decision comes down it is not creating a

new entitlement. For example if a veteran claims PTSD and the C-file shows he or she has had a valid psychiatric evaluation that comfirms PTSD, then we think BVA should immediately allow the case." Therefore, from a VFW point of view, we don't understand the rationale for requesting a 30-day delay.

To summarize, the VFW likes the Tobler decision. Once a decision is rendered, all other cases that fit that template should be allowed. Those that don't meet the minimum requirement(s) should be denied. There is going to be a large number that fall somewhere in between. They will be remanded to see if further development—I will go to PTSD—can result in a supporting psychiatric evaluation.

Mr. SLATTERY. Okay.

Mr. Wilkerson.

Mr. WILKERSON. I can't speak with any great specificity here, nor am I a lawyer, but obviously the court had some specific concerns in mind in establishing this precedent. However, in light of the current situation, the VA and this committee and the service organizations should really take a look at whether or not there are other ways not to get around the court's concerns and to see if possibly in discussing this matter with them we could arrive at some alternative solution that would likewise protect the interests of the veterans and also accommodate the VA's workload concerns and need to be given some flexibility. We believe there is further room for re-examination of this entire problem.

Mr. SLATTERY. Okay.

Mr. De George.

Mr. DE GEORGE. I would agree.

I would just like to add, what we have to be careful of is not to get into micro-management. That is another concern in all of this effort. So I just wanted to make that point.

Mr. SLATTERY. Okay.

I would like to ask Mr. Manhan and Mr. Wilkerson, if you would, to maybe contact Mr. Cragin or Mr. Bauer and have some conversations about this problem, because even in your testimony, Mr. Manhan, you acknowledge that this, as you call it, "stop and go" environment that we have created out there in the processing of some of these claims after a decision has been rendered is disruptive, and I just would like for you all to sit down and talk about what might be done here that would enable us to address this "stop and go" problem, as you have called it, while at the same time protecting the rights of the veterans involved so that we don't create a whole new set of problems with people that are in this gap of time that would be denied justice, in fact, as defined by the Court of Veterans Appeals. Will you do that?

Mr. MANHAN. Yes, sir.

Mr. SLATTERY. Okay.

Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman.

I think it is significant to note that both Mr. Cragin and Mr. Bauer have stayed and listened to your testimony and, I gather, are going to be listening to the testimony of the next panel. I am always impressed with that, because they get the benefit of your views just the way we do, and that is very significant.

I am just going to ask one question even though we have many, and I would like to submit questions to you for the record.

We seem to be moving a little fast here, and the only reason is that there is a briefing on Bosnia at 11 o'clock, and I know we are all concerned about that. We want to try to catch as much of that as we can, although this, of course, takes priority.

Let me ask this question of all three of you. Do you feel that the Court of Veterans Appeals should have the benefit of the entire veteran's file when deciding what action to take on appeals?

Mr. MANHAN. I will lead off, Mr. Bilirakis.

Yes, I see no reason why it shouldn't have access to the entire VA file, because it is really an administrative review to make sure the veteran, historically, over time, has received all of the entitlements or benefits that he may or may not have applied for, that he may or may not even know that he has coming to him, and this is a function that CVA is doing for the first time. This type of review had never been done before. Yes, the VFW likes it.

Mr. BILIRAKIS. Yes, looking at it logically, I don't see how in the world they could do their job without the entire file. But I guess Mr. Cragin referred to it—how much assistance can be depended upon from the Secretary and that sort of thing.

Could the review that you refer to in terms of, have they applied for everything that they should have applied for, take place at a lower level before it gets up to these guys, who are the judges. It is unusual for an appeals court to go into something of that nature. Talk about the one-case process that Mr. Cragin referred to that we have gotten away from here, and I am not suggesting that we ought to do it exactly the way all other appeals courts do it.

But is this a doable thing, Bob? Getting back to your point, is it doable maybe at a lower level where possibly somewhere along the line somebody is checking that file to make sure that at a lower level all the claims that that person is entitled to should be looked into? Maybe that slows down the process a little bit. But is it doable, maybe to be streamlined somewhere along the line rather than depending upon the appeals court up at that point?

Mr. MANHAN. In an ideal world, I think it is doable at the regional office level, Mr. Bilirakis, but you don't get those grades of employees in the civil service to work that well.

Mr. BILIRAKIS. But these judges, Bob, don't have the background either. I mean they are having to learn as they go along here. We are talking about a brand new world. We have served on this committee now, Jim and I and so many others, for at least 10 years, and I am not sure that we are qualified without, you know, a real learning process.

Well, all right.

Mr. Wilkerson or Mr. De George.

Mr. WILKERSON. With regard to the first part of your question, Mr. Bilirakis, no, we don't believe that the court necessarily needs to have the entire record to make a proper decision as to the Board's adjudication of the appeal.

With regard to some form of screening process to identify any claims which should have been considered at some point in the adjudication of the claim, we believe this would be more appropriately a function to be carried out by the Board rather than the court. I

mean the court is not there to readjudicate the claim, they are there to review the Board's decision on the appeal.

Mr. BILIRAKIS. But the Board apparently does that, but it is also being done at the court level.

Mr. WILKERSON. I think it is a natural part of the appellate process and review by the court.

Mr. BILIRAKIS. Okay.

Frank, very quickly, if you have any further comments.

Mr. DE GEORGE. Regarding the records, if the court requests them in the particular case, of course, they should be made available, but not necessarily in every case.

Mr. BILIRAKIS. I thank you.

Thank you, Mr. Chairman.

Mr. SLATTERY. The gentleman from Texas.

Mr. EDWARDS. Thank you, Mr. Chairman.

I will try to be brief also for the reason Mr. Bilirakis mentioned with the Bosnia hearing coming up soon.

We have talked about this at a previous hearing. Are we creating a long-term problem by having so many Army personnel leaving military service without getting exit physicals? Just in order to expedite the process, they are leaving and not getting any kind of physical examination. Are we creating in the future—2, 5, 10 years from now—a huge backlog through that process? Maybe in a nutshell if one of you could summarize, is that a serious problem? a moderate problem? or not really much of a problem?

Mr. MANHAN. VFW will try to answer you, Mr. Edwards. If you have any service person who may have been injured while on active duty and they don't recieve a separation physical examination, there is no way they will ever be able to successfully pursue a claim within the VA for a service-connected problem under the existing rules. Therefore, to be fair or equitable to all of our citizens on active duty, they not only get an entry physical coming in which includes both a physical and a psychiatric evaluation—but they should also get a physical examination upon separation. It protects the Government and it is also fair to the individual. Otherwise, he has no recourse to document the fact he was injured while on active duty.

Mr. EDWARDS. Do you agree with that, just generally?

Mr. WILKERSON. I would say so. You are creating not only a problem in terms of initial claims being considered and denied by the regional office, but certainly long term problems when these people have later developing disabilities which, again, go into the claims process and the appeals process. They are being severely penalized by the fact that they did not get a proper examination at the time of separation.

Mr. DE GEORGE. At least a written checklist, a questionnaire type examination, if not a physical examination, should be provided.

Mr. EDWARDS. I wish you would work with us through the Armed Services Committee as we are looking at this huge block of money for transition out of Defense into the civilian sector. It seems to me that would be one very appropriate area to put some of that money into, and I think it would save a lot of money in the long run and certainly allow us to treat our veterans more fairly.

Thank you, Mr. Chairman.

Mr. SLATTERY. Any further questions?

Gentlemen, thank you very much, and I will again look forward to receiving your consensus recommendations on how to deal with this in the next week or so.

Mr. WILKERSON. Yes, sir.

Mr. SLATTERY. Thank you very much.

Mr. DE GEORGE. Thank you, Mr. Chairman.

Mr. SLATTERY. The next panel, and the final panel, that we will hear from today is composed of Mr. Joseph Violante, who is the legislative counsel for the Disabled American Veterans; Mr. Michael Brinck, the national legislative director of AMVETS; and Mr. Paul Egan, the executive director of the Vietnam Veterans of America.

Gentlemen, we welcome you, as always, and, as Mr. Bilirakis indicated, the members of the committee are anxious to participate in this hearing at 11 o'clock to learn as much as we can about Bosnia, so we would ask that you be in a position to summarize your statement, if you can, this morning.

Mr. Violante.

STATEMENTS OF JOSEPH A. VIOLANTE, LEGISLATIVE COUNSEL, DISABLED AMERICAN VETERANS; MICHAEL F. BRINCK, NATIONAL LEGISLATIVE DIRECTOR, AMVETS; AND PAUL S. EGAN, EXECUTIVE DIRECTOR, VIETNAM VETERANS OF AMERICA

STATEMENT OF JOSEPH A. VIOLANTE

Mr. VIOLANTE. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, on behalf of the more than 1.4 million members of Disabled American Veterans and its Women's Auxiliary, I wish to express our deep appreciation for this opportunity this morning. We would also like to commend the subcommittee on the concentrated effort to garner as much information as possible on this important issue.

Mr. Chairman, I have had the unique opportunity to have represented veterans before the U.S. Court of Veterans Appeals for the past 3 years as well as having been a staff attorney at the Board of Veterans' Appeals for 5 years before that. I have witnessed this process first hand.

Initially let me state that in order to make this process run more efficiently, appeals must be fully developed by the RO's. The issues must be properly identified, and, if necessary, a complete and thorough examination should be of record.

Mr. Chairman, although COVA has had a profound impact on the VA claims and appeals process, COVA is not the problem. COVA has merely focused VA's attention on the adjudication of claims based on VA law and regulations.

We believe that a crisis situation currently exists within VA. In order to properly address this crisis, there must be a large increase of trained employees. These additional trained employees are but a small price to pay to restore some semblance of timely and quality benefit determinations to this Nation's service-connected disabled veterans and their families. Otherwise, it must be recognized that decisions are going to take longer. However, it would be beneficial if those decisions were done correctly the first time.

Mr. Chairman, many administrative changes to streamline and improve the way BVA conducts appellate review have been identified and discussed in my written testimony. In summary, these include single-member decisions, reconsideration by a three-member panel, restoration of the chairman and vice chairman's authority to grant administrative allowances, restoration of obvious error as the standard of review for reconsideration, and to allow appeals to COVA on certain claims for reconsideration on the basis of clear and unmistakable error.

In closing, we wish to thank you again for your willingness to place the highest priority on resolving the claims adjudication and appeals backlog. Together, Congress, VA, and the VSO's can and must solve this national crisis.

This concludes my statement. I would be more than happy to answer questions.

Thank you.

[The prepared statement of Mr. Violante appears at p. 47.]

Mr. SLATTERY. Okay.

Mr. Brinck.

STATEMENT OF MICHAEL F. BRINCK

Mr. BRINCK. Good morning, sir. Thank you for inviting us and holding this hearing. Since you have our full statement, I will try to be very brief so we can have some questions.

The first point I would like to make is, fix the RO. The second point: The philosophy of the system that delays people from getting benefits in order to weed out a few who don't deserve it is wrong and should be changed. The third is, the work measurement process by which VA judges the output of their employees must be changed. We addressed that the last time. That still remains a problem, and it applies equally to BVA.

We support the one-member Board with the ability to do a three-member review in the case of decisions that go against a veteran, and we would also hope that this would not be made permanent right off the bat; let's take a look at it and see how it goes first.

We also support the chairman's request for the ability to do administrative allowances, and we also support raising the pay of the BVA board members to equal ALJ's because they have a turnover problem; they have lost five out of 63 members in the last 9 months. And, finally, fix the RO's.

[The prepared statement of Mr. Brinck appears at p. 57.]

Mr. SLATTERY. Do you think we ought to fix the RO's?

Mr. BRINCK. Yes, sir.

Mr. SLATTERY. Okay. Very good.

Mr. Egan.

STATEMENT OF PAUL S. EGAN

Mr. EGAN. Thank you, Mr. Chairman.

First of all, I would like to say that we have nothing but favorable things to say about the job that Mr. Cragin has done in refurbishing the Board of Veterans' Appeals. I think it is safe to say he has turned what used to be a swamp of cronyism and political favoritism into a legitimate adjudicative entity and the kind of entity that I think we now can finally be proud of.

We have in our testimony made essentially six recommendations, and those recommendations track along with what Mr. Brinck here has said and, to some extent, with Mr. Violante's comments. You have to look at the regional office first, because that is the place where the problem begins. If the claim isn't developed thoroughly, originally, it is ultimately going to be remanded back to the regional office, and that is going to be true no matter what the Court of Veterans Appeals decides.

There needs to be a management criterion incorporated at the regional office level that encourages thoroughness rather than stopgap measures that allow adjudicators to earn work credits. There needs to be comprehensive and ongoing training as to considerations of due process and the meaning and consequences of Court of Veterans Appeals decisions, and that training needs to be done not only at the RO but also at the Board of Veterans' Appeals.

We further suggest that if you want to take a step, I think an important step, contributing to the thoroughness of original claims development, it is well worth seriously considering lifting the restricted use of attorneys so that they may become involved on behalf of the veteran from the regional office level all the way up rather than currently restricting their use to veterans who have gotten a first final decision from the Board of Veterans' Appeals.

Veterans service representatives do a fine job representing veterans, but the addition of legal counsel, if the veteran chooses to employ that legal counsel, ought to be made available.

We think that it is appropriate to allow individuals representing veterans at the Board of Veterans' Appeals to be given a remand motion opportunity. That way, you will save the Board of Veterans' Appeals the time it takes to prepare the remand decisional documents. If everyone can agree—and that is usually the case—that a claim has not been thoroughly developed, the representative for the veteran should be permitted to simply motion the Board of Veterans' Appeals that the claim be remanded and have it done. Another alternative would be to incorporate some form of triage system to do the same thing, take those claims that can't be adjudicated, take them off the table right off the bat.

On the topic of single-member BVA panels, it is obvious that there are some efficiencies that can be effected by using single-member BVA panels, and we would support that. However, we would add—and perhaps this can be seen as a compromise that might be acceptable to those who either believe that the panel should remain at three or who believe that single-member panels are okay, and that would be to go with single-member panels but, in the event of a denial of a claim, authorize an appeal right to a three-member panel, excluding the single-member panelist having originally denied the claim. I think that would dovetail quite nicely, Mr. Chairman, with the suggestions that have been made with regard to removing the ceiling on the number of BVA members.

Our final suggestion is to accept non-VA medical records. It is as important at the regional office that that be allowed as it is at the Board of Veterans' Appeals. Time can be saved, and it should be permitted.

I can see that my time is running low here, but I would like to comment on a couple of things that have been discussed here, in

the interest of brevity and perhaps making it unnecessary for you to repeat the same questions that have been asked already, on the topic of lifting the ceiling on the numbers of the Board of Veterans' Appeals. We think if you do that legislatively it is important to set a floor below which no one should have the discretion to breach.

On the topic of administrative allowances where the chairman of the Board of Veterans' Appeals might be permitted to overturn a decision of a panel or perhaps of a single-member panel, I think it is important to understand the legislative history of why that is not now permitted. There was a time when the chairman of the Board of Veterans' Appeals maintained what was then called the chairman's Personal Signature List, and that consisted of a list of individuals, typically Members of Congress in the House and Senate on key committees or who otherwise were regarded as key friends of the Board, and what happened was that every time there was inquiry about a claim from one of those individuals this administrative allowance authority was exercised to overturn a BVA panel and allow a claim.

We have an adjudicative entity here that needs to be—its integrity needs to be protected. Now I would agree with the gentleman from the VFW who said any time an administrative allowance goes forward it benefits the veteran. That is true, but there is another consideration here, and it is the impartiality of this entity, and for that reason I think administrative allowances should not be permitted, and, again, it is in the interest of assuring the integrity of the adjudicative entity.

The Court of Veterans Appeals may be an Article III court as opposed to an Article I court, but it is a court, and it is a real court nonetheless. If the Board of Veterans' Appeals has some trouble with implementing immediately the decisions of the court, then it should do what it is authorized to do under judicial review, which is to appeal to the Federal Circuit Court. Simply legislating a curb on the immediate implementation of court decisions strikes us as an unnecessary erosion of the court's authority.

Finally, with regard to your question, Mr. Edwards, about the physical exams, I would characterize that as a major problem even though the veteran has a year within which to get an exam that can be placed on the record. It could be a major problem for veterans in the out years.

Thank you.

[The prepared statement of Mr. Egan appears at p. 61.]

Mr. SLATTERY. Mr. Egan, thank you very much, and I want to thank all of you today for the specificity of your comments on these points.

As I have asked the previous panel, I would encourage you all to get together and come to some consensus on these recommendations. You have covered the waterfront, all of you have, and I would really like for us to get a consensus agreement among the veterans' organizations—as you know, I have said this before—as quickly as we can, so that we can move forward with this. I would encourage you all to spend some time, if you need to, with Mr. Cragin and Mr. Bauer and others, whoever you consult, to help us get off the dime on this. As you know, I want to move forward with

something that will prevent the kind of problem that I see emerging out here on the horizon.

So thank you very much for your testimony today. You, frankly, have already answered all the questions that I had in your individual testimony. So I am going to recognize the gentleman from Florida and then the gentleman from Texas.

Mr. BILIRAKIS. Well, to even press forward on what the chairman has said, look, you have got a subcommittee that has committed itself to devoting all of its time to trying to get this problem fixed. If you don't take advantage of it, I say to you, look in the mirror, it is your darn fault. I mean that. The chairman has asked for you to get together, and he means it.

The way I have always done things—and I am not belittling hearings and all of that because they are information gathering, but the way I have always done things is to sit around the round table and sit there and knock the darn thing off. I am hopeful, and I can't speak for the chairman, but I am hopeful that you guys can get together and try to reach a consensus, which means a little give and take in some cases, and I hope when we get together and have a representative from Mr. Cragin's office, a representative from the regional offices, and whoever else might be necessary, we can sit down and get all these things worked out.

You know what is happening a lot better than we do, but I think you have got the ball first here, and the sooner you all say to us, hey, we have gotten together, we have reached pretty well consensus—if the PVA, and, Frank, I don't mean to pick on you alone, is against it, maybe taking a shot at it or a look at it, not on a permanent basis maybe, the single-member type of thing, and then say, hey, in the interest of unit and consensus here, we are willing to give, and that sort of thing, then we can get down and I think we can really greatly improve it. Solve it? Heck, I don't know that we ever solve any of these things, but greatly improve it, and that is what we are trying to do it. So you have got the ball. We are willing to do it.

Thank you, Mr. Chairman.

Mr. SLATTERY. The gentleman from Texas.

Mr. TEJEDA. I know we all want to get to the Bosnia hearing, but several of you, very briefly, said, "Fix the RO." I would like to hear in more specificity and detail, but in writing, for the record, how you would go about that. But just for right now, and just as briefly, "Fix the RO," in three or 5 years, or less, what would be your number one priority or concern in fixing the RO, just very briefly?

Mr. EGAN. First of all, Mr. Tejeda, I would suggest putting language in the bill mandating that either the VA general counsel or charge the under secretary of VA for benefits to devise a management system for implementation in regional offices that creates incentives, drawing a clear relationship between adjudications and outcomes, between adjudications and thoroughness, and between adjudicators and the veterans for whom the claims are being decided.

I cited an example of a claim being carried from its original filing all the way up through the Board of Veterans' Appeals and after several years it is finally decided. The reason for that is that there

is a work credit system in place that rewards paper shuffling rather than thorough development of original claims.

Mr. BRINCK. I think in our last hearing on the regional offices we mentioned TQM; improved automation; case management in a team environment; split shifts; improved hiring, training, and promotion; and we certainly agree with the work management assessment methods that they use, improving those.

Mr. VIOLANTE. Briefly, what the RO needs to do is to identify all the issues that the veteran has brought forth, determine what benefits he is seeking, and fully develop all of those issues, including a thorough examination, because there is nothing more frustrating than to be at the BVA and to have an appeal come up that hasn't been fully developed. I think if they work on that, it will definitely help.

Mr. TEJEDA. Okay. Thank you very much.

Thank you, Mr. Chairman.

Mr. SLATTERY. Gentlemen, thank you again. I know you have been here before and we have met before, and, again, I look forward to working with you on this. As my friend from Florida, Mr. Bilirakis, just said, let's get this consensus among the veterans' organizations as I see the first step in resolving some of the problem. Again, thank you very much for coming today.

The hearing is adjourned.

[Whereupon, at 11:04 a.m., the subcommittee was adjourned.]

APPENDIX

THE HONORABLE MICHAEL BILIRAKIS
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
MAY 6, 1993

OVERSIGHT ON ADJUDICATION OF APPEALS BY
THE BOARD OF VETERANS APPEALS

THANK YOU MR. CHAIRMAN.

I APPRECIATE YOUR SCHEDULING THIS OVERSIGHT HEARING TO REVIEW THE BOARD OF VETERANS' APPEALS (BVA) ADJUDICATION OF APPEALS OF VETERANS' BENEFIT CLAIMS AND TO DETERMINE WHAT IMPROVEMENTS NEED TO BE MADE IN ORDER TO BRING ABOUT MORE TIMELY AND EFFICIENT DECISIONS BY THE BOARD.

I WOULD LIKE TO A TAKE A MOMENT TO WELCOME CHARLES CRAGIN, CHAIRMAN OF THE BOARD OF VETERANS' APPEALS, AND ROGER BAUER, VICE CHAIRMAN OF THE BOARD TO THE SUBCOMMITTEE. I RECENTLY HAD THE OPPORTUNITY TO OBSERVE A PERSONAL HEARING BEFORE THE BOARD. IT WAS AN EDUCATIONAL EXPERIENCE, AND I WOULD LIKE TO THANK CHARLIE AND ROGER, AS WELL AS MICHAEL KISER FROM DAV, FOR THEIR ASSISTANCE IN THIS ENDEAVOR.

SINCE FISCAL YEAR 1990 THERE HAS BEEN A STEADY DECLINE IN THE NUMBER OF CASES DECIDED BY THE BOARD OF VETERANS' APPEALS. IN FY90, BVA ISSUED 46,556 DECISIONS. HOWEVER, IN FY93, THE BOARD ESTIMATES THAT IT WILL ONLY BE ABLE TO RULE ON 27,604 CASES.

WHILE THE NUMBER OF DECISIONS BEING ISSUED BY BVA HAS DECREASED, THERE HAS BEEN A SIGNIFICANT INCREASE IN THE TIME NEEDED TO ADJUDICATE CLAIMS. IN FY92, THE BOARD'S AVERAGE RESPONSE TIME WAS 240 DAYS. IF WE DO NOTHING TO ADDRESS THE PROBLEM, BVA IS CURRENTLY PROJECTING AN INCREASE TO 441 DAYS IN FY93 AND A RESPONSE TIME OF 540 DAYS IN FY94. CLEARLY, THIS IS UNACCEPTABLE.

WHILE MANY FACTORS HAVE AFFECTED THE BOARD'S ADJUDICATION OF CLAIMS, THE ADVENT OF JUDICIAL REVIEW HAS HAD A PROFOUND IMPACT ON THE BOARD WITH THE PRECEDENT-SETTING DECISIONS OF THE COURT OF VETERANS' APPEALS (COVA). COURT DECISIONS HAVE EXPANDED BVA'S WORKLOAD AND CHANGED THE WAY IN WHICH THE BOARD OPERATES. CONSEQUENTLY, THE TIMELINESS AND QUALITY OF BOARD DECISIONS HAVE SUFFERED.

IN ADDITION TO ALARMING DELAYS AND BACKLOGS, JUDICIAL REVIEW HAS RESULTED IN EXTRAORDINARILY HIGH LEVELS OF REMANDS BACK TO THE REGIONAL OFFICES. THE BOARD CURRENTLY REMANDS OVER 50% OF ITS CASES BACK TO THE REGIONAL OFFICE FOR FURTHER DEVELOPMENT.

I AM ANXIOUS TO TAKE WHATEVER ACTIONS ARE NECESSARY TO ASSIST THE BVA IN PROVIDING QUALITY DECISION-MAKING AND ALLEVIATING THESE HUGE BACKLOGS IN BENEFIT CLAIMS. ONE OF THE MANY ISSUES I HAVE DISCUSSED WITH CHAIRMAN CRAGIN IS THE RETENTION OF QUALIFIED BOARD MEMBERS.

I HAVE INTRODUCED LEGISLATION, H.R. 69, WHICH WOULD ENSURE PAY EQUITY BETWEEN BOARD MEMBERS AND ADMINISTRATIVE LAW JUDGES. WHILE RETENTION OF BOARD MEMBERS IS ONLY ONE ASPECT OF THE PROBLEMS CONFRONTING US TODAY, I BELIEVE IT IS SIGNIFICANT. THE CURRENT CADRE OF BOARD MEMBERS POSSESS SKILLS AND EXPERIENCE THAT SIMPLY CANNOT BE DUPLICATED AND THAT ARE ESSENTIAL TO MAKE JUDICIAL REVIEW WORK IN A TIMELY MANNER. WE CANNOT AFFORD TO LOSE THEM.

FINALLY, I WOULD LIKE TO THANK THE VARIOUS VETERANS SERVICE ORGANIZATIONS APPEARING BEFORE US TODAY. THEIR INPUT IN MATTERS AFFECTING THE DELIVERY OF BENEFITS AND SERVICES TO VETERANS IS VITAL. I LOOK FORWARD TO THEIR TESTIMONY THIS MORNING.

THANK YOU MR. CHAIRMAN.

DEPARTMENT OF VETERANS AFFAIRS
Statement of the Honorable Charles L. Cragin
Chairman, Board of Veterans' Appeals
To the Subcommittee on Compensation,
Pension and Insurance
House Committee on Veterans' Affairs

May 6, 1993

Introduction

Mr. Chairman and Members of the Subcommittee:

It has been a little over two years since my appointment as Chairman of the Board of Veterans' Appeals. During that time, the Board of Veterans' Appeals (hereinafter, "the Board" or "BVA") has substantially revised its procedures, decision format and analytical methods to comport with the rapid changes in the law of veterans' benefits, particularly those established by the precedent decisions of the U.S. Court of Veterans Appeals (hereinafter, "the Court"). The Board has endeavored to adapt to its evolving legal environment with all deliberate speed. However, the Board's responsiveness has not come without cost. Because of its increased workload, decision productivity and response time have been significantly degraded when compared with the past. In the following narrative, I wish to briefly describe to you the impact of the Veterans' Judicial Review Act (hereinafter, "VJRA" or "Act") on the Board and discuss the initiatives that I believe will assist us in meeting the challenge of providing veterans with high quality, consistent decisions in a timely manner.

The Impact of the Veterans' Judicial Review Act

While other legal mandates governing the adjudication of appeals have changed, the mission of the Board has remained constant: "All questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board." 38 U.S.C. § 7104(a). In accomplishing its mission, it is the Board's objective to decide cases on a timely and consistent basis and issue quality decisions in compliance with statutory and regulatory requirements, as interpreted by the Court. As required by law, each decision of the Board must "include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions . . ." 38 U.S.C. § 7104(d).

The enactment of the VJRA in 1988 has had a profound effect on the process by which the Board fulfills its responsibility for the appellate adjudication of claims for veterans benefits on behalf of the Secretary. Particularly, since late 1990, when the Court began issuing a continuing series of landmark decisions, VA's system for the adjudication of claims for veterans' benefits has been in a state of rapid evolution. A detailed analysis of the specific changes in VA adjucation procedures in response to changes in the law and decisions of the Court is beyond the scope of this discussion. The impact of the Act and judicial review on the Board has been discussed in depth in my statement and testimony before this subcommittee in March 1992, as well as in my Annual Report for Fiscal Year 1992, which was submitted by the Secretary of Veterans Affairs to Congress in December 1992, pursuant to 38 U.S.C. § 7101(d). For the sake of economy, with the permission of the Subcommittee, I wish to incorporate those documents into the record by reference.

In brief, it is clear that no Court decision, other than *Bethea v. Derwinski*, 2 Vet.App. 252 (1992), has had a salutary effect on decision productivity and response time at the Board of Veterans' Appeals. The complexity of appellate decision making has resulted in lengthier BVA decisions, each of which must, as required by law, include a detailed analysis of the "reasons or bases" underlying the determination. In addition, the adjudication environment has become increasingly unpredictable, as appeals in progress are immediately subject to precedents established by the Court and, where they are

deficient in a material way under a new precedent, must be readjudicated, either by the Board or by the agency of original jurisdiction.

The Board's workload has increased in other respects. For example, cases remanded by the Court to the Board must be readjudicated and a high percentage of cases remanded by the Board to VA regional offices will be returned to BVA for final appellate adjudication. In addition, personnel once devoted primarily to preparing decisions on the merits must now be allocated to other tasks that are part of the new adjudication environment. The demand for BVA hearings at VA regional offices has steadily grown. This requires the dedication of limited resources, particularly Board member time, to the conduct of hearings and the necessary travel. Other activities that have been added since enactment of the VJRA include the processing and review of attorney fee agreements, including the payment of attorney fees from past-due benefits, assisting the Office of the General Counsel in the designation of the record on appeal to the Court, and an expanded motions practice resulting from a more formalized environment. These activities consume considerable senior staff, Board member and administrative personnel time. A special Liaison staff has been formed (7 FTE) in order to process appeals to and remands from the Court, interpret and disseminate Court decisions for BVA use, and assist the Office of the General Counsel with litigation.

The decrease in decision productivity and increase in average processing time have been directly proportional to the impact of the Court decisions overturning VA interpretations of the law. In Fiscal Year 1991, the Board issued 45,308 decisions. That number dropped to 33,483 in FY 1992. We estimate that 27,600 decisions will be promulgated in FY 1993. Approximately 50 percent of these "decisions" will be determinations remanding cases to agencies of original jurisdiction for further development. Appeal receipts have decreased from 43,093 in FY 1991 to 38,229 in FY 1992. We project that we will receive 39,000 appeals in FY 1993 and that over 33,000 appeals will be pending as of the end of FY 1993. While appeal receipts have decreased from 43,093 in FY 1991 to 38,229 in FY 1992, anecdotal information from the Veterans Benefits Administration (hereinafter, "VBA") reflects that the number of Notices of Disagreement received at Regional Offices has not decreased. In fact, as the result of the projected "downsizing" of the military, it is anticipated that the veteran population and, accordingly, the number of new claims for veterans' benefits, will increase. Therefore, it appears that the reduction in appeals received is temporary and, perhaps, a reflection of the increased processing time required at the regional office level in the changing environment. It also may be expected that many of the cases remanded by the Board to the regional offices will be returned to the Board for a final determination. As over 50 percent of the Board's dispositions are remands for additional development, a considerable increase in receipts may be anticipated.

Compounding the degradation of productivity and response time resulting from the impact of judicial review are factors including the number of hearings held both in the Board's offices in Washington, D.C. and at VA regional offices. In FY 1991, the Board held 873 travel hearings and 1,502 hearings in Washington, D.C. In FY 1992, 1,258 hearings at regional offices and 1,394 hearings in Washington, D.C were conducted. For FY 1993, it is projected that the Board will hold 2,500 travel hearings and 1,000 hearings in Washington, D.C. The necessity of conducting hearings and travel time, in the case of hearings at regional offices, places additional constraints on the Board members' time. As the number of Board members currently is limited by 38 U.S.C. § 7101 (a) to 63, aside from the Chairman, Vice Chairman and Deputy Vice Chairmen, decision making resources are restricted. In addition, as the Board must render decisions in sections usually composed of three members, the existing law establishes an additional point of constriction in the processing of appeals. 38 U.S.C. § 7102(c) and 38 U.S.C. § 7103(a).

The Board generally computes timeliness of decision making in terms of "response time," which is defined as the projected number of days it would take BVA to render decisions on all currently pending appeals. The average number of decisions rendered per day over the preceding one year period is used as the basis for making this projection. In FY 1990, response time was 152 days. In FY 1991, that figure had dropped to 139 days. In FY 1992, the data began to reflect the new environment of judicial review, as response time

increased dramatically to 240 days. A dramatic increase to 441 days is projected for FY 1993. Assuming no change in resources or procedures, response time is projected to increase to 540 days by the end of FY 1994.

Initiatives to Improve BVA Decision Productivity and Response Time

In 1991, a Departmental Task Force was established and charged with analyzing the impact of the Veterans' Judicial Review Act on the process of the VA claims adjudication process. In 1992, the Task Force made several recommendations, including proposals requiring legislative change. These proposals currently are under consideration by the Department.

The Board has adopted several administrative initiatives to insure responsiveness to the changes in veterans' law and to improve BVA decision productivity and response time. Some of the initiatives that have been implemented or are in the process of implementation at the Board are as follows:

a. Complete revision in decision analysis, format and preparation.
This was initiated by Chairman's Memorandum in August 1991. Since November 1, 1991, all BVA decisions are prepared in accordance with these revisions.

b. Single member hearings
In January 1992, pursuant to my authority under 38 U.S.C. § 7102(b), I decided that all BVA hearings, except for those on reconsideration, will be conducted by a single member of the Board section that will render the final determination in the case. Transcripts of all BVA hearings are prepared for the review of the other Board members participating in the section's determination. This change from three member to one member hearing panels enabled a more timely response to hearing requests, especially for travel hearings. In addition to reducing the backlog in travel hearing requests, the policy enabled the Board to more effectively use its limited Board member resources. Whereas, in the past, there was a wait of up to three years in some regional offices for a BVA hearing, most claimants now are afforded a hearing from 90 days to one year from the date that the Board is informed that a BVA hearing has been requested. On a quarterly basis, the Board reviews the data provided by the regional offices as to hearings requested and revises its travel hearing schedule accordingly to meet the demand. The number of requests for BVA hearings at regional offices has continued to increase, perhaps as the result of the change in the law, as discussed above, and the use of a revised VA Form 9, which provides appellants with the option of requesting a hearing before a member of the Board either in Washington, D.C. or at a regional office. As of March 31, 1993, there were 2,412 pending requests for BVA hearings at regional offices. However, a hearing will not be held in many of those cases because of factors including the withdrawal of the request by the appellant or because the appellant canceled or failed to appear for a scheduled hearing. Overall, the number of BVA hearings held at regional offices has grown substantially, as noted above, from 873 in FY 1991 to a projected 2,500 for FY 1993.

c. Consolidation of all BVA personnel (with the exception of the Wilkes-Barre, Pennsylvania transcription unit) and VSO offices in one building.
When I was appointed Chairman in March 1991, the Board's professional staff was dispersed in several locations in Washington, D.C. One of my first objectives as Chairman was to bring the Board's decision makers and most of its administrative personnel together in one location. This would help restore the proper collegial communication required to insure high decisional quality and consistency, as well as increase the efficiency and economy of the Board's internal operations. I am pleased to inform you that the consolidation of personnel was completed in March 1993.

d. Automation
The Secretary has allocated additional funding to increase automation activities. In March 1993, the Board completed negotiations with representatives of the American Federation of Government Employees to permit training of and computer use by BVA staff counsel. By the end of FY 1993, it is expected that all Board members and staff counsel will be provided with computer workstations. It is projected that these measures will increase

productivity and quality, while decreasing response time. In addition, the Board is exploring opportunities to integrate appropriate new technologies into its automation structure. Technologies under consideration include imaging capabilities for on-line storage of archived decisions and voice-to-text software for decision generation.

e. Trailing Docket
In the fall of 1992, I established a "trailing docket" for BVA travel hearings. Under this system, instead of a fixed schedule of hearings, several hearings are scheduled at specific intervals, usually three, throughout the day. The hearings in each group are held in order, but the starting time of each hearing can be adjusted to accommodate circumstances such as hearings of shorter than average length or the failure of a claimant to appear for a scheduled hearing. This increases our capacity to hold hearings by reducing the waiting time between hearings. The previous system for scheduling individual hearings at a specific time was inadequate in the current environment, with its increased number of hearing requests and large number of "no shows" at certain regional offices. The "trailing docket" permits more effective use of Board member time and improved service to claimants.

f. Comprehensive Training Program
In the Fall of 1992, the Board established a formal and comprehensive training program for new staff counsel. This program permits consistency in training, as well as depth. The program includes medical lectures, visits to a VA regional office, coordination with VBA's training program, as well as the traditional "on-the-job" training that historically had been provided to new attorneys. During the period between October 1, 1992, and April 30, 1993, the Board added 49 new attorneys and placed them in its training program.

g. Staff Medical Advisers
In view of changes in the law, BVA physicians are more effectively used as medical advisors than adjudicators. A cadre of staff medical advisers has been established to provide expert opinions for the record on medical questions, conduct training of Board members and staff counsel on medical subjects, and enhance the Board's quality review process.

h. Docketing Notification to Appellants
In the past, appellants were not informed that their records had been received from the originating agency by the Board for appellate review. As a result, the Board frequently received status inquiries from appellants, their representatives, or other interested parties, such as Members of Congress and their staffs. In order to respond to these inquiries, the appellant's files had to be located, transferred and reviewed, resulting in a delay in the adjudication of the appeal. I have initiated a procedure whereby all appellants are now immediately notified by letter when their appeals are docketed at BVA. In that letter, appellants also are provided with telephone numbers and mailing addresses for BVA points of contact for any questions they may have regarding their appeals. It is expected that this procedure will provide better service to appellants and concomitantly reduce the overall processing time for appeals.

Conclusion

It is now clear that, without a substantial commitment of additional resources, a change in the decisional process, or significant compromise in decisional quality, BVA productivity and response time will not return to past levels in the immediate future. In the current environment, an exponential increase in funding is not a realistic alternative. Quality cannot be compromised. We are developing a package of legislative proposals which would, if enacted, enable us to stem, if not reverse to some extent, any further decline in productivity and timeliness with minimal expenditure of additional resources. I can assure you that we at the Board will continue to explore all avenues that will improve the quality and efficiency of our service to America's veterans and their families. Thank you, Mr. Chairman, for providing the Board with the opportunity to discuss BVA's portion of the Department's adjudication system.

STATEMENT OF

BOB MANHAN, ASSISTANT DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, AND INSURANCE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

OVERSIGHT HEARING ON THE BOARD OF VETERANS' APPEALS

WASHINGTON, DC MAY 6,1993

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting the Veterans of Foreign Wars of the United States (VFW) to participate in your hearing this morning. It is my privilege to represent the 2.2 million members of the VFW who are very concerned about the overall deterioration of the entire Department of Veterans Affairs (VA) claims processing efforts.

Title 38, United States Code, Chapter 71 establishes the Board of Veterans' Appeals (BVA) under the administrative control and supervision of its Chairman who is directly responsible to the Secretary of Veterans Affairs. Hence, BVA functions primarily as an independent, quasi-judicial agency within the VA. Its mission is to conduct hearings and consider and dispose of the appeals properly and in a timely manner.

The entire BVA staff for most of fiscal year (FY) 1993 and projected for FY 1994 consists of about 449 people, with an average annual salary cost of around $27 million dollars. Of immediate interest to the veteran community are the 21 Hearing Board Sections, each composed of three attorney Board Members and seven or eight assigned staff counsels, all attorneys, too. This workforce should be able to process about 29,000 cases during FY 1994, according to VA's FY 1994 Budget Submission. Unfortunately, this workforce and caseload projection does not necessarily mean there will be any improvement in either the timeliness or the backlog of cases at BVA. The VFW reached this conclusion after reviewing the Board's program highlights.

In FY 1992, BVA had a total workload of about 55,000 cases. It decided/completed about 33,500 with an average BVA response time of 8 months per case. For all of FY 1993 BVA expects to have a total workload of 61,000 cases of which it will process about 28,000 decisions using on average about 15 months for BVA response time. It further projects the FY 1994 total workload to be around 72,000 cases and expects to process the 29,000 cases previously mentioned in its budget request. The expected FY 1994 BVA average response time will be 18 months. The important fact these numbers make is that the workload will continue to increase, as will the BVA response time. Specifically, next year at this time BVA will have received almost 17,000 more cases than it had last year, FY 1992, at this time and it will take BVA twice

as long to process the average case. There are several new and significant reasons for this increased workload and why it may take longer to now reach a BVA decision.

Prior to 1988 BVA was for all practical purposes the final appellate authority for all veterans benefits claims. In November of that year Public Law 100-687 established the Court of Veterans Appeals, hereafter referred to simply as the Court.

The initial results of cases appealed from BVA to the Court and subsequent early Court decisions has required the BVA and in turn the VA's Regional Offices to change their way of doing business. Since January 1991, Court decisions have greatly expanded BVA's workload both because of the need to comply with the legal and factual analysis mandated by the Court and the increase in case volume resulting from the readjudication of cases remanded by the Court to BVA and those remanded by BVA to the Veterans Benefits Administration (VBA) to comply with the Court's requirements, which are later returned to BVA for adjudication. The Court has generally required BVA to assist the claimant in development of his case, to better document the decision(s) rendered, and to consider implied issues. These three requirements were highlighted by the VFW at an April 21, 1993, oversight hearing regarding claims processing at the RO level. A few additional requirements unique to BVA are the need to use only independent medical evidence to support its decision(s) and to obtain and consider the records pertaining to the veteran's claim for Social Security Administration benefits. We point these facts out to better explain some of the reasons that there is an increasingly large backlog of cases and less timeliness in responding at BVA level. However, the VFW believes that over a period of time these new requirements problems will be incorporated into an overall standardized procedure for case review. This may take another three to four years.

The single most significant problem that presently exists at BVA, as the VFW understands the Court's decision in Tobler v. Derwinski; 2 Vet. App.8 (1991), involves landmark decisions of the Court, that is, those decisions which will have a broad application. This requires BVA to stop the flow of cases, to identify those cases that are now affected by the Court's decision, cease adjudication of any cases affected by the Court's decision until an analysis of the implications of the Court's decision is completed, and only then readjudicate any affected cases at BVA in light of the Court's decision. In brief, this "stop" and "go" approach is very disruptive to any orderly administrative case processing system.

In summary, the VFW has noted that no Court decision has yet reduced the appeal processing time. We have every right to believe that through FY 1994 the Court will continue to require BVA to expend additional time, effort, and resources in producing its decisions. BVA will continue to receive cases remanded for readjudication from the Court and the Board will, in turn, continue to remand a large(r) proportion of cases to the RO for further development. These expectations point toward a greater backlog of cases and an increasing lengthening of time before a case is resolved. In other words, BVA's duty performance will continue to deteriorate, at least for the near future of, 18 to 24 months. This certainly was not the intended results the VFW had expected or anticipated when we asked congress to establish this veteran's court. However, the VFW believes the Court has moved in the right direction to require the Board to perform its mission in a more professional manner.

Based on the present facts, the VFW does think the BVA travel hearings is an excellent resource to help reduce both the case backlog and the timeliness issue to some degree. As recently as FY 1991, BVA sent out 870 panels to various ROs. Today, BVA is projecting that they will have used some 2,500 travel hearings during the entire FY 1993. This is a concept we strongly support including exploration of other technological concepts such as teleconferences. This would have the advantage of more quickly "visiting" those RO's that have few appeals to be heard.

Along the lines of streamlining BVA hearings, the VFW believes this is the time to allow single attorney board members to make final case decisions. This approach has the significant advantage of greater managerial flexibility. The major criticism might be that a bias or prejudice

decision is more likely to occur with a single person. The VFW believes this probability could not go undetected for very long. Either BVA's internal quality control would identify such a trend or the ROs who receive the cases would note a significant decision variance on the same issue(s) from others on similar cases.

A last suggestion, and one that favors the veteran, is to restore the Chairman's authority to administratively allow a case. The VFW realizes this function was taken away by VA's General Counsel in May 1990. We do not have the facts to fully understand why this element of flexibility was lost to BVA in the first place.

This concludes the VFW's statement, Mr. Chairman. I shall be happy to answer any questions you or the committee may have. Thank you.

STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
MAY 6, 1993

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to offer comments on the current operations of the Board of Veterans Appeals and the adjudication of veterans' claims.

This Subcommittee, last week, received testimony on problems affecting the timeliness and quality in the processing of benefit claims by the regional offices. Three factors were identified as the primary causes for the deterioration in the overall level of service provided veterans: persistent staffing cuts over the last ten years together with turnover and retirement of experienced adjudicators and rating board members - the Class of '46; insufficient training of new personnel responsible for making decisions on claims; and the introduction of judicial review into the VA claims adjudication and appeals process. In as much as appeals are an integral part of the overall claims process, these same factors, to varying degrees, have also had an adverse affect on the Board of Veterans Appeals's workload and decision-making.

We believe it important for this Subcommittee to consider the specific problems and issues affecting the ability of the Board of Veterans Appeals to render proper and fair decisions in a timely manner. We, therefore, wish to commend you, Mr. Chairman, for scheduling this follow-up hearing today.

Everyone acknowledges that judicial review and the decisions of the Court of Veterans Appeals have had a profound impact on the operations of regional offices and the Board of Veterans Appeals. However, processing times for claims and appeals had begun to increase even before the passage of the Judicial Review Act (PL 100-687). Prior to 1988, Congress enacted new benefit and due process legislation which placed major workload demands on both the regional offices and the Board. No additional resources were provided and personnel continued to be cut, rather than added. Large numbers of the adjudicators and rating board members were inexperienced and lacked needed training. Overall productivity declined and backlogs and response times grew. This also contributed to a growing number of appeals being filed.

In 1988, the Board of Appeals average response time was 136 days. In 1989, it was 167 days and by 1990 186 days. In 1991 it improved to 160 days. However, in 1992, it rose to 179 days. Over this same period, the Board's remand rate also began to increase as more and more cases were sent back for additional action. In 1988, the remand rate was 19.3% and by 1992, it was 50.5%.

The Court of Veterans Appeals was established in November 1988 and first began issuing decisions beginning in mid-1991. Its review of decisions of the Board of Veterans Appeals has continued to highlight basic deficiencies and inequities in the way claims and appeals adjudicated. Under Chairman Cragin, the Board has been generally responsive to the Court's directives in the individual cases and also in addressing the larger legal issues involved. Substantial changes in its policies and

procedures have been implemented. In fact, the Board has been required to review and reassess its decision-making process continually which requires that more time and attention be paid to each decision to ensure it meets the current judicial standards. Cases are now becoming more legally complex and involve an increasing number of complex medical questions and issues. The Board is also required to provide more specific information in their decision as to the reasons and bases for their determination. These factors have contributed to a steady rise in the Board's response time. For the first half of FY 1993, it was 229 days and is projected to increase to over 240 days by the end of this fiscal year. The Board projects a response time in excess of 400 days next year, at current productivity levels.

From The American Legion's perspective, we would much rather see the Board be more concerned with issuing a quality decision which properly grants or denies benefits, rather than a decision hastily made in a effort to keep the response time down. On this point, we do not feel there can or should be any compromise.

Part of the Board's problem is that it has little or no control over the cases which are sent in from the regional offices. It must review each one, not only on its individual merits, but whether or not it was properly developed and adjudicated. In FY 1992, the Board allowed 15.8% of the appeals and for the first half of FY 1993, the allowance rate was 15.0%. However, what we find shocking is that 51% of the cases decided this year have to be sent back to the regional offices for additional development or action and for such reasons as duty to assist, statement of reasons and bases for a decision, improper use of medical opinion, etc. This, once again, calls attention to the fact that the Veterans Benefits Administration has been slow to accept the Court's authority and slower still in providing the necessary practical guidance and training on how specific Court decisions are to be interpreted and implemented. Clearly, if the remanded cases had been fully developed and properly adjudicated in the first place, an appeal may have been unnecessary, or the Board would have been able to render a final decision without making the claimant wait another year or year and a half while their claim is sent back for readjudication.

In an effort to be responsive to the Court, Chairman Cragin has instituted a number of administrative and procedural changes intended to improve the Board's operations and timeliness. The American Legion has expressed some concerns and reservations regarding some of these initiatives, but in the interest of trying to provide better service to veterans, we believe they deserve a chance to be tested and evaluated.

In early 1992, final regulations were issued limiting the timeframe within which certain actions could be taken once the case was at the Board. The claimant must now submit any request for a change in representation, request a personal hearing, or submit additional evidence within 90 days of transfer of the records to the Board from the regional office. The Board's reason for instituting such restrictions was to make it easier for the Board to complete action on an appeal without delays or interruption. We still believe this type of restriction is unnecessary, since it makes it much more difficult for the claimant to get additional information or evidence into the record and for the Board to consider the appeal completely. The only course now open, if the Board declines to accept the additional evidence, is to seek a reopening of the claim at some later date.

In response to the problem of delays in scheduling personal hearings before the travel board, Chairman Cragin instituted a policy of having personal hearings in the field conducted before a single member of the Board, rather than a two or three member panel. We believe this is a better utilization of the Board's scarce personnel resources and proving to be an effective way of making personal hearings available to those who are unable to travel to the Board in Washington, DC, for a hearing.

Earlier this year, Chairman Cragin discussed with the veterans service organizations a proposal which would authorize decisions of the Board to be made by single member panel. If this change were to be implemented, the Board estimates a 25% increase in productivity with no additional personnel required which would help offset the projected increase in the Board's response time.

We have several concerns with respect to this proposal, in light of the limited resources currently allocated for quality review or quality assurance of the Board's decisions. At present, there are approximately six attorneys reviewing decisions for consistency, legal correctness, and content. This function is under the Deputy Vice Chairman. For FY 1993, the Board projects that it will issue 27,000 decisions. Given this workload, the complexity of the decisions to be reviewed and the Board current structure, the level of staffing presently allocated to quality assurance is clearly inadequate. Should single member decisions be authorized, additional resources should be provided to ensure that the Board's quality assurance program is effective.

In considering any change in the Board's structure which could help improve productivity, we believe the Chairman should have sufficient latitude to utilize single member boards, if conditions warrant. One situation where this might prove useful and appropriate would be for the Chairman to authorize the use of single member panels in non-final decisions, i.e. remands, IME requests, and similar actions. We believe this would permit a more productive use of available resources and the Board member's time.

If the limited use single member panels were permitted, we believe the Board should establish an initial screening process to identify those cases which are not ready for final appellate consideration and which require additional development or adjudicative action by the regional office. Such cases would then be referred to the single member panels. Those cases which are ready for final appellate would then be referred to a regular three member panel. In our opinion, since at least 50% of the Board's workload is made up of cases which require remand, a considerable amount of time and effort could be saved by modifying the Board's current structure and workflow.

However, we believe that in any final decision on routine cases as well as those involving complex medical and or legal issues it is preferable that more than one person be involved in the decision-making process.

In conclusion, Mr. Chairman, there must be greater coordination between the Board of Veterans Appeals and the Veterans Benefits Administration with the assistance of the Office of the General Counsel to improve the quality of claims adjudication at the regional office level. This will require an intensive, coordinated, long-term training effort directed toward new as well as more experienced adjudicators and rating board personnel. There must also be greater communication

between these Departments to ensure changes in policy, regulations, and procedures are consistent with the precedents established by the Court of Veterans Appeals and being properly applied.

We firmly believe that veterans are entitled to a system which will act fairly and correctly on their claims within a reasonable period of time so that any benefits due can be paid. And, if the claim is denied, they should not have to endure years of waiting to have their appeal considered and a final decision rendered. We are, therefore, willing to have the Board look at new ways of conducting its business and to see if certain changes will provide better service to veterans.

That concludes out statement.

PARALYZED VETERANS
OF AMERICA
Chartered by the Congress
of the United States

STATEMENT OF
FRANK R. DE GEORGE, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
THE OPERATION OF THE BOARD OF VETERANS' APPEALS
MAY 6, 1993

Mr. Chairman and Members of the Subcommittee, it is a personal privilege and an honor to appear here today on behalf of the members of Paralyzed Veterans of America (PVA). PVA appreciates your invitation to present testimony concerning the operation of the Board of Veterans' Appeals (BVA).

Mr. Chairman, PVA believes it is extremely important that the Subcommittee understand that the proper functioning of the BVA is critical to the overall fairness of the system of adjudication of claims for veterans benefits established by this Congress over a period of some sixty years. The BVA's own statistics show that only 4.8 percent of veterans who appeal to the BVA file a further appeal with the U.S. Court of Veterans Appeals (Court). This means that FOR OVER 95 PERCENT OF VETERANS, THE BOARD OF VETERANS APPEALS IS THE FINAL, FULL AND COMPLETE REVIEW OF THEIR BENEFIT CLAIM. It is vital that this review be thorough and fair. Consequently, before this Subcommittee entertains any change in the laws governing the BVA's operation, it must be convinced that such a change will enhance the quality of the adjudication by the BVA, as this is the last fair look all but the 4.8% of those appealing to the Court will receive.

PVA has stated in testimony in prior years, delay in benefit adjudication is a significant concern of ours. But there is always a balance that must be struck between speed and quality. A delayed allowance of a benefit sought is preferred to a quick denial. The Court of Veterans Appeals was created because Congress was convinced that, for purposes of fundamental fairness, the adjudicatory decisions of the Board of Veterans Appeals should be subject to an impartial, independent review. Congress limited the scope of these appeals by providing standards of review that are favorable to the VA. In essence the Court may overturn the BVA only when it acts arbitrarily, capriciously or contrary to law. To the extent that delays are the result of the BVA adjusting to the Court's interpretation of the law, this delay is to be expected in the first few years in which the Court issues its decisions. The amount of this inherent delay, could be reduced, however, if the VA had displayed more foresight and cooperation in the process of implementing decisions of the Court. It is our opinion that the VA in general and the Board of Veterans Appeals in particular have not embraced the era of judicial review in a cooperative manner. The VA consistently and vigorously opposed judicial review in the years of hearings that preceded the passage of the Veterans Judicial Review Act and, in our opinion, have continued that resistance, albeit in a much more subtle manner, to this day.

Consequently, we believe it would be a mistake, at this time, to make changes to the law based solely upon projections of increased case processing time, without very close scrutiny of those

projections and the validity of the reasons asserted for delay. This scrutiny should be in detail and sufficient for the members of the Subcommittee to ensure themselves that they are effecting legislative change for the good of the veteran, not to validate and reward inefficiency and footdragging by the VA and the BVA. Let us explain what we mean by these comments.

For example, the Chairman of the Board of Veterans Appeals has characterized the Court's holdings as "expanding due process requirements" and making the "adjudication environment unpredictable." Holdings of the Court that would apparently fall within the Chairman's definition of "expanding due process" are: where a VA regulation affects substantial rights of a veteran, the VA is bound to follow its own regulations, Jolley v. Derwinski, 1 vet. App. 37 (1990); the BVA is not free to ignore regulations of the Department of Veterans Affairs, Payne v. Derwinski, 1 Vet. App. 85; in adjudicating veterans claims, the VA Regional Offices must ensure that all relevant sections of the Code of Federal Regulations are fairly and impartially applied, Sawyer v. Derwinski, 1 Vet. App. 139 (1991); the VA must assist the veteran who has presented a well grounded claim by searching for VA medical treatment records identified by the veteran, Schafrath v. Derwinski, 1 Vet. App. 589 (1991); 38 U.S.C. 5107 requires the VA to assist a veteran who has presented a well grounded claim in developing facts pertinent to his or her claim for benefits, Littke v. Derwinski, 1 Vet. App. 90 (1990); the VA has a duty to conduct a contemporaneous medical examination of a veteran who has presented a well grounded claim and to explain to the veteran what additional evidence is required to adjudicate the claim with advice in obtaining it, Connoly v. Derwinski, 1 Vet. App. 566 (1991); when a veteran seeks to reopen a previously denied claim and submits new and material evidence in support of this application, the VA must view that evidence, not in isolation, but in light of all of the evidence already of record, Bailey v. Derwinski, 1 Vet. App. 441 (1991); Godwin v. Derwinski, 1 Vet. App. 419 (1991); before the VA changes a regulation involving new rating criteria and new testing procedures which directly affect the award of benefits, the Department must give notice and the opportunity to comment on the change, Fugere v. Derwinski, 1 Vet App 103, affirmed 972, F2d 331 (Fed. Cir. 1992). There are many other examples we could provide. PVA believes these Court decisions have not expanded due process but have rather had their intended effect -- forcing the VA to accord veterans due process rights which you, the members of Congress, intended that they have.

The BVA Chairman also views as a "statutory constraint" the 60 year old practice which requires the Board to decide cases in panels of three members. We believe the BVA's Chairman has been systematically skirting the intent of 38 U.S.C. § 7102, which requires decisions to be made by at least three Board members, absent unusual circumstances, by allowing cases to routinely be decided by less than three members.

Since April of 1992, 874 or 66 percent of the 1,319 decisions in cases which PVA has handled at the Board have been decided by fewer than three Board members. This trend has existed at least since 1990 and is increasing steadily. PVA believes that three-member panels are far from a constraint, but are a safeguard of fundamental fairness. Since for 95 percent of veterans the BVA is the reviewing body of last resort, before that body denies the veteran's claim, it should receive full and fair consideration by a panel of three members, not one composed of two members, as is all too often the case, nor a single person, which has been proposed by the BVA Chairman.

We further caution the Committee not to blindly accept estimates of drastically increased case processing time by the BVA and the claim that these delays can be laid at the feet of Judicial Review. The VA, for example, was very slow in developing a system to promulgate the decisions of the Court to the Regional Offices where they must be applied if they are to have any practical impact on the adjudication of claims. Indeed it was not until the Court

chastised the Secretary in cases such as Jones v Derwinski, 1 Vet. App. 596 (1991) that the VA moved with any alacrity to inform local adjudicators of Court decisions which they were required to apply.

Some of the adjudication backlog has occurred as a direct result of the VA's response to certain Court opinions. For example, after the Court's decision in Gardner, (which found that the VA regulation regarding entitlement to compensation for additional disabilities incurred while undergoing VA medical treatment unlawfully restricted the veteran's entitlement to compensation) the VA instituted a system-wide stay on the adjudication of all such claims pending the Department's decision to appeal. In this regard it should be noted that the VA's inability to render timely decisions on veterans claims is not a phenomenon that has arisen since the advent of the Court of Veterans Appeals.

In March of 1988, eight months before the passage of the Veterans Judicial Review Act, the Chief Benefits Director of the VA testified before the Senate Committee on Government Operations. This is what he said:

> There are twenty-eight standards in our timeliness measurement system. As of January 31st, 1988, we were meeting an acceptable level in only five of them. One year ago it was eleven categories, and two years ago it was eighteen. We were meeting acceptable levels in twelve of sixteen categories two years ago, and seven of sixteen last year; today we are doing so only in three.

U.S. Code Cong. & Admin. News, 3437 (1988). Indeed the Senate Committee was concerned with the then existing trend of increased time for claim adjudication.

> [T]he Committee noted that internal VA statistics show an increase in the number of cases remanded from the BVA back to the DVA for further development. The number of remands has increased [before judicial review] from approximately 15 percent of all appeals in 1978 to 21 percent by the end of fiscal year 1987 (or 8,564 cases out of 41,296 appeals).
>
> Such remands may be an indication of several system-wide problems-for example, poor original claims development within the DVA regional offices, inadequate medical examinations conducted by private or VA physicians, overworked adjudicators within both DVA and BVA, uncertainties regarding the resolution of highly complex cases like post-traumatic stress disorder or radiation exposure. . . .

U.S. Code Cong. & Admin. News, 3437 (1988) (emphasis added). These are some of the very deficiencies noted by the Court in cases such as those listed above. The only difference between the situation referred to in those statements and now is that now the veteran has the ability to bring these deficiencies to the attention of a court which will act to overturn erroneous denials of benefits entered by the BVA. It would be a mistake, then, to change the law merely because the VA is being required to do what they should do and is complaining about it.

In summary we would like the Committee to know that PVA believes the creation of the Court of Veterans Appeals has begun the restoration of integrity to the adjudication of claims for veterans benefits. It is true the VA has had to change its way of doing business because of the Court, but the changes have, in the main, been beneficial to veterans. If the VA embraces the fact that the Court is here to stay and works assiduously to align its adjudication machinery with the dictates of the law, case processing time will be reduced and the quality of claims adjudication will be vastly improved. What the VA needs to accomplish is not a change in the laws to make life easier for the

VA, but sufficient resources to properly develop and adjudicate cases at the regional office level.

The BVA is currently remanding or allowing over 65 percent of the cases it reviews. This means that in 65 percent of the cases appealed to the BVA, the Regional Office has made an error. The only way to effectively reduce the delay at the BVA is to strengthen the quality of adjudication at the Regional Office level so that cases are done right the first time. Quite simply, if the Regional Office does not have time to "do it right," when will it have time to do it over?

Mr. Chairman, PVA thanks you for your aggressiveness in pursuit of appropriate services to be provided to the veterans, their dependents and survivors. That concludes my testimony. I will gladly answer any questions.

STATEMENT OF
JOSEPH A. VIOLANTE
LEGISLATIVE COUNSEL
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
OF THE
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
MAY 6, 1993

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1.4 million members of the Disabled American Veterans (DAV) and its Women's Auxiliary, I wish to express our deep appreciation for this opportunity to provide the Subcommittee with DAV's assessment of veterans' appeals processing at the Department of Veterans Affairs (VA) Board of Veterans' Appeals (BVA) and the impact of budget shortfalls and judicial review on BVA's appellate process.

At the outset Mr. Chairman, we wish to thank you, Ranking Minority Member Representative Bilirakis and the members of the Subcommittee for the timely exercise of your oversight responsibilities. We certainly appreciate the fact that your highest priority has been placed on bringing about major improvements in the manner in which veterans' claims and appeals are processed. By focusing your attention on the final appellate body within the VA, you have demonstrated, in a most meaningful way, your commitment to ensuring that America's service-connected disabled veterans and their families receive the VA benefits and services to which they are entitled.

Mr. Chairman, you have shown your concern for this important issue by meeting with members of the Veterans' Service Organizations (VSOs) to discuss the seriousness of the crisis facing the claims adjudication and appeals process and to request suggestions as to how to make the system work more efficiently. Additionally, Ranking Minority Member Representative Bilirakis has recently observed a personal hearing before the BVA and has solicited suggestions from our staff as to how the system can be improved.

Mr. Chairman, you and members of the Subcommitee deserve special recognition for the concentrated effort being made to garner as much information as possible on this most important subject. The DAV acknowledges and applauds these efforts.

Like you and the members of the Subcommittee, Mr. Chairman, DAV is committed to assuring that America's service-connected disabled veterans, their dependents and survivors receive the VA benefits and services to which they are entitled.

The DAV, founded in 1920 and Congressionally chartered in 1932, has been actively involved, presenting both oral and written testimony, in every major piece of legislation affecting disabled veterans, their dependents and survivors. DAV works for the physical, mental, social and economic rehabilitation of wounded and disabled veterans, and obtains fair and just compensation, adequate medical care and suitable gainful employment for wartime veterans who became disabled in service to their country. To accomplish these goals, DAV employs a core of 220 professionally trained National Service Officers (NSOs) in 69 offices throughout the country. Our NSOs provide counseling on a wide range of VA benefits and services. However, the majority of their activities are dedicated to assisting veterans and their families on claims for

compensation, pension and survivors' benefits from VA Regional Offices (ROs).

In addition to the NSOs who provide representation at ROs, DAV maintains a National Appeals Office in Washington, D.C. This office, staffed by 11 highly skilled National Appeals Officers (NAOs) and a Medical Consultant, has the primary responsibility to ensure, in all cases where DAV has been appointed as the appellant's representative, that each appeal is clearly and accurately articulated in its most favorable light to BVA. DAV represented 12,839 claimants before BVA in FY 1992, almost 40 percent of all appeals.

With the enactment of the judicial review legislation, DAV opened an office here in Washington, D.C. to represent individuals who appeal BVA decisions to the United States Court of Veterans Appeals (COVA). This office, the first office opened by a VSO practicing before COVA, is currently staffed by four Judicial Appeals Representatives, possessing a wealth of knowledge and experience regarding the adjudication of VA claims both at the RO and BVA levels.

The DAV COVA staff filed the first represented, and jurisdictionally correct, appeal with the Court, briefed the first case, provided the first oral argument by a nonattorney representative, and won the first fact-based case. Additionally, DAV led the way with the first settlement agreement entered into with VA and accepted by COVA, participated in the first prehearing conference, filed the first motion for substitution of a party, and entered into the first settlement of an Equal Access to Justice Act claim. Finally, DAV had the first oral argument on a COVA decision before the United States Court of Appeals for the Federal Circuit, which we subsequently won.

Since its inception in mid-1989, DAV's COVA staff has represented hundreds of veterans before COVA. Even more noteworthy is the fact that our COVA staff has reviewed thousands of claims for possible representation before COVA. In meritless cases, veterans are advised not to appeal their claims to COVA, and, in many such cases, alternative actions, including reopening the claim with necessary evidence, are recommended.

During our last reporting period (July 1, 1991 - June 30, 1992) DAV NSOs reviewed 393,000 VA claims folders, appeared before VA Rating Boards 230,000 times, obtained 233,000 benefits awards and obtained $1.5 billion in monthly and retroactive benefits for veterans, their dependents and survivors.

DAV is also extremely proud of its members and the members of its Women's Auxiliary who volunteer their services to assist this nation's veterans. Our volunteers have donated countless hours in an effort to provide for the needs of our sick and disabled veterans. The DAV Department of Veterans Affairs Voluntary Services (VAVS) program is the largest of the DAV's volunteer programs. Through this program, DAV volunteers provide a broad array of services to veterans who receive care in our nation's VA medical centers. As of April 1, 1993, 8,490 DAV VAVS volunteers had donated 1,885,913 hours in the past 12 months to caring for veterans.

The DAV volunteer effort is enhanced by a very active 3,540 DAV Auxiliary volunteers who donated 480,094 hours last year. Together, DAV and DAV Auxiliary volunteers provided 2,366,007 hours of VAVS service over the past year. This is equivalent to the VA having an additional 1,200 full-time employees with an estimated value of $28 million in hourly wages alone.

Monetary VAVS donations for the period of January 1, 1992 through December 31, 1992 total $3,086,208.00. Other hospital and service related donations which include Department and Chapter costs associated with welfare and relief, as well as Hospital Service Coordinator and Department Service Officer Programs were $14,791,236.00 for a total of $17,877,444.00. This and the estimated value of the hourly wages combines to a total of $45 million.

Because so many sick and disabled veterans have no transportation to and from VA medical facilities for the treatment they need, the DAV established a nationwide Transportation Network in 1987. This program continues to show fantastic growth in all areas of its operation. It has become a program that veterans could not do without. There are 170 Hospital Service Coordinators (HSCs) operating 172 active programs that provides not only transportation to veterans but claims assistance as well.

These HSCs have recruited 4,374 volunteer drivers who drove 16,686,285 miles last year, transporting 373,361 veterans to VA medical facilities. Many of these veterans were transported on DAV vans that were donated to VA medical facilities for use in the DAV Transportation Network. DAV Departments and Chapters, together with the national organization have now donated 315 vans to medical centers nationwide at a cost of $4,572,004.10.

But DAV HSCs do more than coordinate the Transportation Network, they also assist veterans with filing claims for VA benefits. HSCs completed 100,412 VA claim forms, referring 35,563 veterans to DAV National Service Officers for professional benefits assistance. They also conducted over 450,000 telephone and personal interviews.

DAV HSCs and DAV VAVS volunteers form a medical center based service program that thousands of veterans have come to know and trust for help whenever they need it.

Mr. Chairman, as you know, the mission of the VA is to serve America's veterans and their families with dignity and compassion, acting as their principle advocate and assuring that they receive the care, support and recognition earned in service to this nation. In the VA's own words, "[p]roceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. Section 3.103(a).

Within the VA, the BVA is charged with the responsibility of ensuring that a claimant has not been denied benefits to which he or she is entitled to receive. The BVA renders decisions on a claimant's appeal from the RO's adverse determination which are based on the entire evidence of record, in light of all applicable laws and regulations and the controlling precedent of COVA decisions.

BVA, located here in our nation's Capitol, is currently organized into 21 board sections consisting of three members each. In addition, BVA employs approximately 150 "attorney reviewers" as well as an administrative staff to assist them in rendering quality decisions in a timely manner. It is the BVA's expressed objective to decide cases on a timely and consistent basis and to issue quality decisions in compliance with statutory and Court requirements.

Mr. Chairman, in your letter of invitation to testify, you requested DAV's views as to the current status of the BVA operation and the impact of budget shortfalls and judicial

review on the BVA. You also requested our ideas on ways to make this process more efficient. Additionally, you have encouraged the VSOs to meet and to explore ways to enhance the VA adjudication and appeals process.

Mr. Chairman, as was recently stated in testimony before this Subcommittee in April 1993, DAV convened a meeting of DAV, VA and House and Senate Veterans Affairs Committee staff. The participants at this full day meeting included: DAV National Service Officers, National Appeals Officers and Judicial Appeals Representatives; a VA Regional Office Adjudication Officer, Rating Board Specialist and Hearing Officer; and Majority and Minority staff from the House and Senate Veterans Affairs Committees.

During our roundtable discussion, a wide variety of topics regarding VA's compensation and pension claims adjudication process were discussed. It was the consensus of opinion that there are no "quick fixes." Likewise, DAV and VA regional office employees unanimously agreed that the bottle neck in the adjudication of compensation and pension claims is at the Rating Board.

Subsequent to the April 1993 hearing, DAV and the other VSOs met to continue our exploration into making the process more efficient. We took this opportunity to brainstorm on this issue. We are currently in the process of fine tuning and evaluating our ideas as a result of the brainstorming session. When we have had the opportunity to formalize our ideas, we will notify the Subcommittee staff.

With your permission, Mr. Chairman, DAV will now address the important issue of the BVA operation.

The Veterans' Judicial Review Act (VJRA), Public Law 100-687 (November 18, 1988) established COVA, which is charged with reviewing appeals of BVA final decisions. Prior to the law's enactment, BVA was the final appellate authority for almost all veterans' benefits claims: veterans had no recourse to the federal court system. The BVA workload now includes cases COVA remanded to BVA for additional development or action, and the additional responsibility under VJRA for reviewing all fee agreements between claimants and attorneys for representation before VA (subsequent to a final BVA decision). BVA also interprets COVA decisions and assists the General Counsel on certain matters before COVA, such as memoranda on questions of law and designation of records on appeal to COVA.

COVA has affected BVA profoundly. Landmark COVA decisions have led to substantial changes in BVA's decisions, content and format. Pivotal COVA decisions include:

- Littke v. Derwinski, 1 Vet.App. 90 (1990) (setting forth principal of statutory duty to assist);
- Gilbert v. Derwinski, 1 Vet.App. 61 (1990) (BVA must review all evidence of record, weigh credibility and probative value of evidence, provide reasons or bases for decisions, and consider benefit of doubt doctrine);
- Colvin v. Derwinski, 1 Vet.App. 171 (1991) (BVA must support its decisions with independent medical evidence);
- Manio v. Derwinski, 1 Vet.App. 140 (1991) (BVA must perform a two-step finality analysis -- that is, determine whether evidence is new and material and, if so, consider all evidence, both new and old);

- Douglas v. Derwinski, 2 Vet.App. 103 (1992) (a direct claim for service-connection is not invalid as a matter of law, if the evidence of it did not manifest during service or within one year thereafter); and

- Schafrath v. Derwinski, 1 Vet.App. 589 (1991) (reductions carried out without observance of law are prejudicial *per se*, and later BVA actions cannot justify these illegal reductions).

COVA's profound impact on BVA has had both positive and negative effects on claims adjudication. COVA's positive influence is seen in the increasing number of appeals allowed by BVA. Prior to COVA, the BVA allowance rate averaged about 12 percent. In FY 1992, the allowance rate peaked at 15.7 percent and then dropped to 14.8 percent for the first four months of FY 1993. Remanded cases in FY 1993 have reached almost 53 percent (greatly impacting regional offices around the country), while denied cases have decreased significantly from 62 percent in FY 1990 to 31.1 percent in the first four months of FY 1993.

The impact of COVA has affected the number of decisions each FTE at BVA produces. In FY 1991, each FTE generated 109 decisions; in FY 1992, this number decreased to 81.5, and estimates for FY 1993 reflect the number of decisions per FTE will be only 61.7. Although the number of appeals BVA receives is declining, the number of pending cases at year's end is rising. In FY 1991, there were slightly more than 17,000 pending cases. FY 1992 saw almost 22,000 cases and, in FY 1993, 33,300 pending cases are anticipated. The number of decisions BVA issues is also decreasing. It rendered 45,308 decisions in FY 1991 and 33,483 decisions in FY 1992. For FY 1993, this figure will dip well below 30,000 decisions.

What does all this mean for BVA timeliness? BVA response time -- the number of days it takes to render decisions on pending appeals during a year -- equaled 139 days in FY 1991, increased by more than 100 days to 240 in FY 1992 and is predicted to be 441 by the end of FY 1993. BVA's average processing time -- the average number of days BVA takes to produce a decision -- has also increased. In FY 1991, the processing time was 160 days; in FY 1992, 179 days; and, in the first four months of FY 1993, 218 days. Based on current staffing levels, it is projected that BVA's response time would be more than 550 days at the end of FY 1994 and over 700 days by FY 1996.

Mr. Chairman, as noted, the processing time at BVA for the first quarter of FY 1993 was 218 days. The BVA has broken that time down into the following areas:

- 13 days administrative time at beginning of process;

- 58 days for review and dictation of informal presentation by representative;

- 47 days for case storage;

- 68 days for BVA decision;

- 12 days for quality review and administrative time; and

- 20 days miscellaneous administrative time.

There are no "quick fixes" for the problems BVA faces. While the rapid pace with which COVA issues "landmark" decisions may slow in the future, COVA will continue to effect BVA profoundly, including BVA productivity. The long-term solution

seems obvious to us. Congress must provide BVA with the resources necessary to hire and train enough employees to adjudicate appeals in a timely manner.

Mr. Chairman, realizing that more money or FTEs will not be forthcoming, we would like to suggest other ways to make this process more efficient. At the outset, let me state that, in order to make the process run more efficiently, appeals must be fully developed by the ROs, the issues must be properly identified and, if necessary, a complete and thorough examination should be of record. Without these bare minimums, cases will continue to float back and forth between the BVA and ROs, adding to the already long delays veterans must wait to have their cases adjudicated and their benefits delivered.

DAV would support a change in law which would allow the BVA to issue appellate decisions signed by a single member. Without expending any additional funds, single member decisions would increase BVA productivity by about 25 percent. The BVA estimates that single member decision-making would reduce response time from an estimated 441 days in 1993 to 258 days in 1994. BVA production would increase from approximately 30,000 cases decided to 36,500 cases decided annually. Decisions per BVA FTE would also increase from about 65 cases per year to 92 cases per year.

Single member decision will add more accountability to the process. No longer will there be comfort in numbers. Individual Board members will be accountable for their own work product and can be closely monitored. This should result in increased quality and consistency. Reconsideration would be by a three member panel.

Presently, although two or three Board members may sign a decision, the decision is not always thoroughly reviewed by all the signing members. The process remains a production process and not a deliberation process. For the most part, an "attorney reviewer" (correct title is either Counsel or Associate Counsel) will review the case he or she has been assigned. He or she will then write a "tentative decision" to allow, deny, or remand each issue involved. This determination is strongly influenced by the writer's perception of how the dominant Board member, usually but not always, the Chief member, would decide the case.

With the exception of personal hearing cases and reconsiderations, a Board member does not see the claim until the "tentative decision" is submitted to the Board room. This decision is reviewed and, if necessary, changes and/or corrections are noted. The "attorney reviewer" does not get credit for his decision until the decision is signed and is ready to be dispatched. Therefore, it is in the best interest of the "attorney reviewer" to get the decision "right" the first time by anticipating what the Board section will sign.

Work credit was assigned based on the type of claim presented. For instance, a claim for service connection was assigned 351 minutes of credit, while a claim for an increased rating received 261 minutes of credit, unless it was an increased rating for a gunshot wound in which case it received 360 minutes. A claim for pension was assigned 300 minutes and a reconsideration decision received 750 minutes. If there was more than one issue on appeal, only the highest work credit was assigned. Therefore, if the appeal involved issues of service connection for x, y and z and increased ratings for PTSD and a gunshot wound to the right arm, a work credit of 360 minutes was assigned for this decision, regardless of whether all the issues were remanded in a three page remand decision or whether it was a ten page decision on the merits.

Mr. Chairman, is there any wonder that the remand rate has gone above 50 percent? Presently, the Chairman of the BVA is considering, and may have already put in place, a new method of calculating work credit. It is too early for us to comment on, but we certainly hope that it will encourage timely, quality decisions based on VA laws and regulations and precedential COVA decisions.

Mr. Chairman, anticipating what a Board member will sign is not always an easy process. Not only must an "attorney reviewer" take into consideration VA laws and regulations, he or she must also consider General Counsel Precedent Opinions, "BVA Myths," e.g., a rating should be increased only one level at a time; granting a claim on new and material evidence is preferable to a finding of clear and unmistakable error; private medical evidence is not credible; and, if a veteran could lie in a coffin or sell pencils on the street, he is employable, and, now, decisions by COVA must also be considered.

VA laws and regulations are very liberal. They were designed to be liberal in order for a grateful nation to properly care for its sick, wounded and injured veterans, their dependents and survivors. Pursuant to the provisions of 38 C.F.R. Section 3.303(a), determinations as to service-connection are made "with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case." Unfortunately, not all Board members are as liberal as VA laws and regulations. Over the past 60 years, "BVA Myths" have been handed down from one generation of Board members to another. Most of these myths have no foundation in VA laws or regulations; however, they became the underlining basis for many BVA decisions. Many veterans and their representatives were frustrated, to say the least, by the BVA's failure to consider or apply VA laws and regulations.

Many of these cases which were decided long before the advent of judicial review can be expeditiously handled if Congress could restore the Chairman's and/or Vice Chairman's authority to administratively allow claims based on difference of opinion or other equitable concerns. This authority was taken away from the Chairman and Vice Chairman in a ruling by the General Counsel in G.C.Op. 11-90. The BVA is bound by the precedent opinions of the General Counsel pursuant to 38 U.S.C. Section 7104; 38 C.F.R. Section 19.5 (1992).

Mr. Chairman, another alternative would be to allow claimants, who have had their claims previously denied and who have no new and material evidence to reopen their claims, a de novo review of their claim on the total evidence of record. These claimants should also be allowed to appeal to COVA, notwithstanding the fact that their claims were not reopened with new and material evidence. Many of these claimants presented their claims in a piecemeal fashion over the years and these claims were adjudicated in a piecemeal fashion. Because of this fact, some of these claimants have been denied benefits to which they are rightfully entitled to. Although this will not decrease the backlog of cases or speed up the process, but will in fact increase the number of new claims, it certainly is in the best interests of those claimants who have been wrongfully denied benefits under the old system.

The standard of review on reconsideration by the BVA must be clarified so that it is understood, by all, to be "obvious error." Based on a General Counsel opinion, the standard of review on the basis of "obvious error" has been replaced by a nebulous standard. It is important that the standard of review be clarified so that the BVA, claimants and representatives know and understand what that standard of review is. It is also

important that the BVA honestly and accurately review these cases to ensure that the benefit sought has not been erroneously withheld. In a number of cases, claimants have been successful at COVA in an appeal that the BVA refused to acknowledge error in and to reconsider.

The BVA must also be more aggressive in its assessment of whether the RO committed clear and unmistakable error in a prior rating decision. The BVA has, in the past, been too timid in its review for clear and unmistakable errors in rating actions. All too often, the BVA will avoid making such a finding, choosing to either grant the benefit on the basis of new and material evidence (thereby denying an earlier effective date) or remanding the case back to the RO with the hope that the RO will do the "right" thing.

With the increasing backlog of cases at the ROs, the BVA must, whenever possible, grant those benefits which can be granted based on the evidence of record, regardless of whether that means finding clear and unmistakable error in a prior rating action, resulting in a large retroactive payment, or assuming appellate jurisdiction of a nonfinal determination in order to grant a benefit. If these cases can be allowed, the BVA must take the initiative to do so, instead of merely remanding these cases to the ROs.

Mr. Chairman, presently, one of your constituents, a veteran for whom we hold power of attorney, may be caught in a similar situation. I do not have all the details, but it appears that he has had a claim pending since 1987, with his claim traveling back and forth between the RO and the BVA on numerous remands. It is my understanding that he is service-connected for a number of disabilities including arteriosclerotic heart disease, lupus, diabetes, chronic obstructive pulmonary disease, and arthritis of the spine, with a combined rating of 80 percent. Certainly, during all of these many years the BVA could have decided the merits of this case. For whatever reason, the BVA is unwilling to do so in this veteran's case. Effectively, his entitlement to individual unemployability has been denied, notwithstanding the fact that his claim is still pending.

It has come to our attention that ROs are not reopening claims for clear and unmistakable error in a prior rating action if that determination has been affirmed by the BVA. Since the VA believes that an RO cannot override a BVA determination, these claims are treated as a Motion for Reconsideration of the BVA decision and forwarded to the BVA. However, neither the BVA denial of the motion nor a denial on the merits of the appeal on reconsideration are presently appealable to COVA if there is no valid Notice of Disagreement (NOD).

These cases involve previous claims that were not eligible for COVA review because the NOD had not been filed on or after November 18, 1988. If a veteran is unable to reopen his or her claim, under the above-described circumstances, he or she will be prevented from having the appeal reviewed by COVA.

DAV would support a change in law which would allow a claimant to appeal to COVA a decision of the BVA not to grant a Motion for Reconsideration or denial of the claim on the merits in any case where the claimant has alleged clear and unmistakable error in a prior rating action which had been affirmed in a decision or reconsideration decision by the BVA. This method would relieve the pressure on the RO by not forcing it to reopen and review a claim that, according to VA, it has no authority to change and would allow a claimant to have his or her case reconsidered by the BVA and, if necessary, reviewed by COVA.

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Mr. Chairman, although COVA has had a profound impact on the VA claims and appeal process, COVA is not the problem. COVA has merely focused VA's attention on the adjudication of claims based on VA laws and regulations, as opposed to the nebulous adjudication process of doing what is believed to be right.

It has been mentioned that the decisions of COVA are responsible for the increased backlog of claims, particularly COVA's case law on due process and the "duty to assist." Some have suggested that legislation be introduced to restrict VA's duty to assist veterans in the development of their claims or that due process must somehow be limited. The DAV strongly disagrees with this position.

Due process rights and the duty to assist claimants in developing facts pertinent to their claims have existed in VA regulations long before they were codified in the VJRA. Under the provisions of 38 C.F.R. Section 3.103, a claimant's due process rights are spelled out. Additionally, under Section 3.103(a), it is the obligation of VA to assist a claimant in developing the facts pertinent to his or her claim. The controlling precedent of COVA has merely refocused the VA's attention to this important aspect of the ex parte proceedings conducted by the VA and it has helped to delineate the limits of that assistance.

The duty to assist as mandated by COVA certainly falls within the mission of the VA and the ex parte nature of its proceedings. Nor is the duty to assist limitless. In Godwin v. Derwinski, 1 Vet.App. 419, 415 (1991), COVA stated that "[t]he duty to assist is not unlimited." It arises with respect to all relevant, pertinent facts where the claim is well-grounded (a prerequisite to the triggering of the duty-to-assist obligation as codified at 38 USC Section 5107(a)). Inherent in the duty-to-assist obligation is a requirement for the Secretary to respond to a claimant's request for VA assistance one way or the other. If the request is turned down because the information is not relevant or the claim is not well-grounded, the veteran then has the opportunity to convince the VA otherwise.

Mr. Chairman, due process and the duty to assist must remain an integral part of the entire system, especially at the initial level. The solution is obvious: the VA must get it right the first time.

Ongoing training on VA laws and regulations must be conducted at all levels of VA's adjudication and appeals process and it must be given top priority. If VA cannot be given more people, then the people already on board must be better trained. They must properly apply all pertinent laws and regulations and, therefore, they must at least have a basic understanding of those laws and regulations. Without more FTEs, it must be recognized that decisions are going to take longer; however, it would be beneficial if those decisions were done correctly the first time.

Another bottleneck in the process has to do with BVA's informal involvement in a number of functions before COVA. The BVA, as the finder of fact at the highest level in the VA appeals process, should not become actively involved in the appeals process at COVA. Presently, the BVA is involved with settlement and remand negotiations conducted by Appellants and General Counsel's Professional Staff Group Seven (PSG7) attorneys representing the Secretary, designation of the record before COVA, preparing legal memoranda for PSG7 staff and conducting training for the staff at PSG7. It is our view that there should be no communication between BVA and PSG7 on specific cases before COVA. The BVA has already rendered its

legal opinion on the issue in its written decision and there is no need for further communications between the BVA and PSG7 on the merits of a particular issue.

Mr. Chairman, the military reduction-in-force also has been noted as a major source of the increased compensation claim workload and is contributing to the ever increasing backlog of compensation claims. We know that the current Department of Defense (DoD) budget contains funding for training and job placement for defense workers displaced by our military draw down. It would seem only fair that VA also receive funds from DoD to assist in handling the increasing compensation workload created by the military reduction-in-force. It has also been pointed out that some of the individuals being separated from military service may be ideal candidates for employment within VA. Additionally, these funds would help with VA's training programs and automation.

Mr. Chairman, many administrative changes to streamline and improve the way BVA conducts appellate reviews have been identified and discussed. In summary, these include:

- Single member decisions.
- Reconsideration by a three member panel.
- Restoration of the Chairman/Vice Chairman's authority to grant administrative allowances.
- Restoration of obvious error as standard of review in reconsiderations.
- Allow appeals to COVA on certain claims for reconsideration on the basis of clear and unmistakable error.
- BVA must allow claims, when justified by the evidence of record, instead of remanding to ROs.

Mr. Chairman, we believe that a crisis situation currently exists within VA. In order to properly address this crisis, there must be a large increase of trained employees. These additional, trained employees are but a small price to pay to restore some semblance of timely and quality benefit determination to this nation's service-connected disabled veterans and their families.

We wish to state here that our purpose in pointing out the deficiencies within BVA should not be construed to reflect negatively upon BVA employees. To the contrary, DAV wishes to acknowledge the efforts of those dedicated BVA employees whose tireless efforts too often go unnoticed.

In closing, we wish to again thank the Subcommittee for its willingness to place the highest priority on solving the claims' adjudication and appeals backlog crisis. Together, Congress, VA and the VSOs can and must solve this national crisis.

This concludes my statement. I would be happy to answer any questions you may have.

SERVING
WITH
PRIDE

Statement

of

Michael F. Brinck
AMVETS NATIONAL LEGISLATIVE DIRECTOR

before the

House Subcommittee on Compensation and Pensions

on

THE BOARD OF VETERANS APPEALS

May 6, 1993

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Mr. Chairman, AMVETS would like to thank you for inviting AMVETS to testify on the challenges confronting the Board of Veterans Appeals (BVA). With me today is AMVETS National Appeals Officer, Harry Bennett, who manages AMVETS' cases before the BVA.

Today, I would like to address several issues confronting the BVA, and hopefully offer some reasonable solutions to the problems.

In recent testimony before this subcommittee regarding problems with the huge case backlog facing the VA regional offices, we stated that a systems engineering approach using the principles of Total Quality Management would be appropriate. Those same principles apply to the BVA. We urge VA to break this production system into its basic components and analyze the components' contribution to a quality product. If the component does not contribute positively, change it or discard it.

BVA faces the same daunting uphill battle to reduce the backlog in claims as does the regional offices. The current backlog of pending cases stands at nearly 28,000 and the BVA average decision time is now 229 days and climbing. The remand rate for the first half of FY 93 is 51.4%, and the annual production rate is below 26,000, down from a high of over 46,000 in FY 90. Obviously, one way to fix the problem at BVA is to fix the problems at the regional offices (RO's) is to decrease the number of poor decisions emanating from the RO's. There is no substitute for quality production at the lowest levels.

First a point about the philosophy of the claims processing system. AMVETS does not advocate blanket approval of all claims, but the presumption of ineligibility that seems to permeate the system is wrong. A system that is designed to prevent an undeserving person from receiving benefits and that delays benefits for thousands of deserving veterans in order to weed out the rare case of fraud has its priorities backward. Fraud should and must be pursued, but the system should be built around a presumption of eligibility.

The first issue is case management. The major advantage of case management is that it combines the virtue of individual responsibility with personal oversight and guidance. It also interfaces well with a single-member board system as a method of checks and balances.

The second issue is that of work measurement. A proper management system requires accurate data on how long it takes to produce a final product and how long each step of the production cycle takes. It is vital that VA cease giving work credits for merely moving a case

from one desk to another because this creates a false impression of great amounts of work being done. But doing work does not automatically create a quality final product. A case is not finished until the veteran accepts a decision as final or a certain amount of time passes without response from the veteran. Until either happens, the case is pending and subject to further action and must not be considered closed. Upon closure, the entire production line should get credit for one finished product. Anything short of that is merely a false front hiding a flimsy structure.

The third issue is that of the composition of review boards. Within certain constraints, AMVETS is willing to TEST the efficiency of single-member boards to determine the impact on the backlog of cases. Chairman Cragin estimates a significant productivity increase should this method be adopted. We are willing to take him at his word, but with some reservations.

The obvious danger with a single-member board is a potential lack of checks and balances, and we suggest that the team approach to case management coupled with the single-member board should provide adequate controls to monitor individual member's decision rates. The TEST must provide adequate safeguards to protect claimants against arbitrary and capricious decisions and claimants must retain the right to appeal a single member decision to a full three member board.

Despite the fact that BVA board members perform duties identical with administrative law judges (ALJ) and handle equivalent case loads, the current grade structure at BVA pays board members at rates lower than pay scales for ALJ's. In the last nine months alone, five of the 63 board members have left BVA for higher paying jobs. BVA expects turnover rates to increase when OPM reopens the ALJ register. The loss of experienced board members will only exacerbate the backlog of cases and lessen the quality of decisions at a time when the effects of the Court of Veterans Appeals is being fully felt. Therefore, AMVETS strongly supports legislation that would raise the pay scales of BVA board members to equal those of ALJ's.

Mr. Chairman, to summarize, AMVETS feels the root of the problem facing the BVA is the large quantity of poor quality decisions at the RO level. We have previously testified that fixing the RO will go a long way toward fixing the BVA. Our suggestions regarding RO solutions included TQM management methods, improved automation, case management, split shifts, improved hiring, training, and promotion. When coupled with the BVA changes we

have mentioned today, VA should be able to decrease the unacceptably long adjudication times. That completes our statement.

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STATEMENT OF

VIETNAM VETERANS OF AMERICA

Presented By

Paul S. Egan
Executive Director

Before The

House Veterans Affairs Subcommittee On Compensation, Pension and Insurance

On

Reform of VA Regional Office Adjudication Practices

May 6, 1993

68-445

DISCUSSION

Mr. Chairman and members of the subcommittee, Vietnam Veterans of America (VVA), appreciates the opportunity to present its views on operations at the Board of Veterans Appeals (BVA) and the effects of judicial review on veterans claims for benefits. This is the second in a series of hearings on VA adjudications, the first having been held on April 21.

At the April 21, hearing we focused our attention on adjudications at the Regional Office (RO) level while noting the interrelationships between adjudicative and adjudicative-support entities such as the BVA, VA Medical Centers (VAMCs) as well as DoD to the extent that mandatory exit physicals are not being done when service personnel leave the military. Today we reiterate the importance of the interrelationship of adjudicative entities but focus on activities at the BVA that are affected by decisions of the Court of Veterans Appeals (CVA). Importantly operational improvements made at one adjudicative or adjudicative support entity should also improve operations at the others.

Moreover, the performance of the BVA has been vastly improved since Charles L. Cragin took charge. By performance we refer not to the volume of claims adjudicated but instead to a restoration of respect for due process in the adjudications of appeals. Mr. Cragin has resurrected a significant measure of integrity to what for many years was a swamp of cronyism, political favoritism and general disrespect for the laws and regulations governing adjudications.

HIGH REMAND RATES

Even though meaningful improvements have been brought about at BVA, significant problems still remain. One of the most obvious problems is the high rate of remands back to ROs from the BVA. Currently standing at 53 percent, this rate of remands is the result of several factors. Perhaps the most significant reasons for remands are decisions handed down from CVA requiring further case development at ROs and inadequate original development of claims by RO adjudicators.

The latter of these topics was discussed in our testimony on April 21, but it is worth repeating the fact that management-developed incentives for the earning of adjudicator work credits is the enemy of thoroughness and quality in RO adjudications. We maintain the need for legislation mandating performance criteria based on qualitative claims development. Such a criteria should both penalize and reward RO managers whose RO adjudications either exceed or fall below a 10 percent BVA remand-rate threshold. We further maintain that no work credit should be given for any adjudication until either the 60 day period to file a substantive appeal of an RO denial has passed or until the BVA renders a final decision other than a remand. In this way good managers will motivate their charges to balance the sometimes competing demands for speed and quality. Poor managers on the other hand, can more systematically be culled from the ranks.

Management Criteria Encouraging Thoroughness

In essence we propose six initiatives for easing the rate of remands. First, as discussed already, management systems must be changed to encourage quality and thoroughness of claims development. This can be expected to ease remand rates by basing the performance of RO managers on adjudications exceeding or falling below a 10 percent threshold rate of remands.

Comprehensive and On-Going Training

Second, and also discussed on April 21, comprehensive and on-going training must be routinely scheduled and required for RO adjudicators. The state of veterans law is fluid with CVA decisions of precedential importance being handed down regularly. Added to this the compensation and pension division of VA's Central Office must do a better job of systematically advising RO managers and adjudicators of changes in veterans law as these changes occur. Ongoing training must also be made available at the BVA.

Lift Restricted Use of Attorneys

Third, the law limiting veterans use of attorneys until after the BVA makes an initial decision must be modified. Complicated claims needing extensive development could be expedited if attorneys were available at the earlier stages of benefit claims processing. Service organizations do a fine job in representing veterans but they are sometimes less aggressive than attorneys would be in demanding that VA produce files, records and evidence to support often complicated claims. This step would benefit BVA by assuring better developed claims and, hopefully, fewer remands.

An added benefit of considerable consequence expected to result from an expanded availability of attorney use by veterans is the encouragement of veterans law as a legal practice. Today, the development of a veterans bar is slow. The amendment to the Equal Access to Justice Act (EAJA) enacted last year will help in developing the ranks of CVA practicing attorneys entering the field of veterans law by making attorney fees available on a limited basis. However, much more needs to be done. Were attorneys available at the RO level, it seems likely that law schools and public interest law firms around the country would create veterans law clinics in far greater numbers than exist today. This could be done by legislatively eliminating the ban on attorney fees until the BVA issues its first final decision.

Preliminary Motion to Remand

The fourth proposal designed to ease the rate of remands, ironically, is to give those representing claims at the BVA authority to offer preliminary motions to remand claims that are inadequately developed. Since many of the remands today are caused by inadequate claims development, such a motion would save considerable BVA staff time by obviating the present need for preparation of decisional documents effecting remands. Naturally these proposed motions would be made without prejudice and could be challenged and denied by the BVA. It makes little sense, however, to consume valuable time on claims at the BVA that are obviously in need of further development.

Perhaps a different method of accomplishing the same objective would be to assemble the same sort of triage team suggested for use at ROs by Chairmen Slattery but for use at the BVA as well in culling obvious remands from the claims that can be decided at the BVA. In this way those inadequately developed claims or claims needing RO decisions based on more current law could more systematically be sent back to the ROs.

Single Member BVA Panels

Limited personnel resources and a high volume of work make single member panels at the BVA an appealing fifth suggestion. In order to effect this type of modification from current practice without placing the veteran's claim at risk, however, certain protections must also be incorporated. In the event that a claim is denied by a single member panel, the veteran should be given the

right to appeal within the BVA to a three member panel excluding the single member BVA panelist who denied the claim.

Under the circumstances, claims allowed by single member panels can be efficiently disposed of without having consumed the time of two additional BVA members. This is an economy of some scale that would allow better use of scarce personnel resources.

Acceptance of non-VA Medical Records

As we suggested at the April 21, hearing adjudications could be more efficient and timely if ROs accepted non-VA medical evaluations in the adjudication of claims. This is our sixth proposal. Consistent with our general theme, what works to speed up RO adjudications works to speed up BVA adjudications. It seems reasonable to accept outside medical examinations not only for the sake of efficiency, but also to assure quality and thoroughness in medical exams. As we suggested on April 21, overburdened VAMCs facing more requests for medical exams than they can realistically accomplish have found rather creative ways to earn performance credit for exams without actually doing them.

Under the circumstances there seems good reason for VA to accept non-VA exams. Lacking a legislated mandate to do so, however, we doubt VA will change its current policies. Assuming a legislated requirement for VA to accept outside medical exams is approved, we further believe VA should be required to ask non-VA examining physicians to provide supplemental information if needed to adjudicate a claim. As we understand it, claims for Social Security Disability benefits are handled in this fashion. The need to specifically require the VA to ask non-VA providers for additional information is based on our expectation that VA would simply throw out the entire non-VA medical exam without asking for added material and subsequently deny the claim.

CONCLUSION

Mr. Chairman, some of our proposals at the April 21, hearing as well as those made today are designed to promote management practices that establish meaningful administrative relationships between speed and quality, and between adjudicators and the veterans for whom claims are adjudicated. Some would insist that our proposals constitute micro-management of VA's administrative practices. Perhaps this is true, but VA has an obvious need to be compelled to adopt practices that make sense; the agency over many years has failed of its own accord to adopt these practices.

Moreover, there is a cultural perspective within VA adjudications management that is hostile to accountability. This perspective was well formed and cultivated prior to enactment of legislation creating the Court of Veterans Appeals and the lingering vestiges of this cultural perspective are still clearly evident in the representations of VA officials that disparage the CVA as an inconvenience and as a principal reason for slowness in adjudications. While the Congress cannot legislate bureaucratic culture, it most assuredly can legislate minimum requirements designed to foster public policy preferences.

Mr. Chairman, this concludes our testimony.

WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSES

CONGRESSMAN EVANS TO DEPARTMENT OF VETERANS AFFAIRS

Questions from Congressman Lane Evans

1. Why are BVA remands often criticized as simply being attempts by BVA staff to gain work credits rather than to fully develop and adjudicate claims?

I do not believe that such criticism would be offered by those who have an accurate understanding of the appellate process at the Board of Veterans' Appeals. Staff counsel prepare tentative decisions which are reviewed by a section of three Board Members. The Board Members generally revise the decision or direct staff counsel to make the necessary revisions. In any event, the final decision of the Board is made by the Board Members, not staff counsel. By executive order, Board Members are not under formal performance standards, including "merit pay" performance incentives, nor do they receive "bonuses" or other production based financial awards. This policy was implemented to insure judicial objectivity and avoid the appearance of result-oriented or productivity-directed decision making, such as the type referred to in your question. Board Members do not "gain work credits" based on their disposition in an appeal. Rather, in remanding a case, the Board Members are attempting to insure that the record is properly developed for a fair adjudication of the claim, consistent with the Department's statutory duty to assist the veteran and that all due process requirements have been met.

Staff counsel, however, are subject to performance standards. The two critical elements of their performance plan are decision quality and productivity. If counsel prepared a tentative remand decision when the case should have been adjudicated on the merits, his or her performance in the critical element of decision quality would suffer. Moreover, as the case probably would be sent back to the counsel to prepare a decision on the merits, that counsel's productivity would also be adversely affected. The increase in average case processing time and decrease in the number of decisions promulgated on a yearly basis are not reflective of a system that fosters productivity at the expense of quality.

While in the past BVA staff counsel may have received the same productivity credit for the preparation of a tentative remand as a tentative final decision, this practice has effectively ended. On May 1, 1993, a new productivity measurement system was implemented at the Board. This system is designed to measure productivity by the amount of work performed by counsel in an individual appeal. However, because of the changes in BVA appeals necessary for compliance with the May 14, 1993, decision of the U.S. Court of Veterans Appeals' decision in *Thurber v. Brown*, No. 92-172 (U.S. Vet. App. May 14, 1993), the application of the productivity performance standard for staff counsel has been temporarily placed in abeyance. A special internal Task Force will reexamine the performance measurement system to permit a more accurate assessment of staff counsel performance measurement in the wake of *Thurber*.

2. a. Noting the high percentage of cases remanded back to regional offices, please give your opinion as to why VA fails to adequately identify and develop claims?

Initially, it must be recalled that the evidence and the law at the time of the decision of the originating agency is not necessarily the same as that in the case on appeal before the Board. During the time that has elapsed between the time the agency of original jurisdiction has certified an appeal and transferred the appellant's records to the Board, the appellant and his or her representative may submit additional evidence directly to the Board. If this evidence is not accompanied by a waiver of consideration by the originating agency, the Board is obligated under its Rules of Practice to remand the case to the originating agency for such initial consideration. 38 C.F.R. § 20.1304(c). Under existing case law, if the appellant has indicated that he or she is undergoing medical treatment that has continued beyond the time the case was before the originating agency, the case must be remanded so that the records of such treatment can be obtained and reviewed by the originating agency and, if necessary, the Board. *Murincsak v. Derwinski*, 2 Vet.App. 363 (1992). Compounding this problem is the fact that decisions of the Court are effective as precedent on the date that they are issued. Therefore, VA adjudications

are subject to review under legal precedents that may not have been in effect at the time the adjudications were made. As a result, these cases must be remanded by the Board to the originating agency for readjudication in light of subsequent changes in the law.

In addition, it is clear that the enactment of the Veterans' Judicial Review Act and the interpretations of the law contained in the decisions of the Court have greatly changed the system for the adjudication of appeals for veterans benefits. The VA adjudication system has been in a continual state of evolution. I believe that significant efforts have and will be made to educate all personnel involved in the originating agency adjudication process in these evolving areas of the law. However, it is difficult to disseminate these rapid changes in the law, many of which are themselves subject to varying interpretations, throughout an organization as large as VA. As a result, changes in the law have not been communicated throughout the Department with sufficient speed to avoid a significant number of remands by the Board to the Regional Offices for additional development.

b. What would you suggest doing in order to improve the development of claims by ROs?

I would suggest that the Veterans Benefits Administration continue its efforts rapidly to communicate and disseminate changes in the law, including the decisions of the Court, to adjudication personnel in the field. I believe that the regular VA "Hotline" conference calls with central office and regional office adjudication personnel are a commendable effort in this regard. I also feel that the Office of the General Counsel has made and will continue to make a significant contribution in educating VA adjudication personnel in interpreting and implementing the decisions of the Court.

c. Have you conducted any studies as to why so many cases are remanded back to the ROs?

BVA has not conducted any formal studies into this matter. The anecdotal evidence, compiled from observations of Board Members and the members of the Board's Quality Review staff, is that most remands are required because additional development of the record is necessary to comply with the Department's duty to assist the appellant. A significant factor in remanding many of the remaining cases is to insure that due process requirements have been fully met.

3. a. BVA's workload and response time have been increasing since before enactment of VJRA. What resources would need to be made available in terms of both FTEs and financial support to eliminate this situation?

The problems underlying the rising response time and backlog of appeals at BVA can be primarily attributed to the effects of judicial review on VA's entire system of adjudication. Precedent decisions of the U.S. Court of Veterans Appeals (COVA) have completely altered VA's appellate processes and continue to introduce additional changes on a daily basis, necessitating fundamental revisions to BVA's procedures, its decision format and its analytical processes. These process-related problems do not lend themselves to any simple solution such as merely increasing the resources at BVA's disposal. I believe we must focus our attention on changing our basic appellate processes and structure as well as BVA's administrative support systems so that we are able to more quickly adapt to a rapidly evolving appellate system and workload. The Department has recommended several legislative proposals currently under consideration by the Office of Management and Budget (OMB) that are designed to improve BVA productivity and decision-making timeliness within existing resource levels.

b. In its FY 1994 Budget Submission, VA failed to request a funding increase for BVA. Why?

The BVA budget rose from $22,896,000 to $27,426,000 and from 411 to 460 FTE between FY 1992 and FY 1993. This represents a nearly 20% increase in funding and a 12% increase in staffing. These are substantial resource increases, and they have allowed BVA to significantly increase the number of staff counsel used in developing BVA decisions. Between November 1, 1992, when BVA was first able to begin hiring following enactment of the 1993 appropriations bill, and the end of January, BVA hired over 40 new attorneys. VA adjudication law is a highly specialized field, and newly hired BVA staff counsel require a considerable amount of training. We estimate that at least a year of combined formal and on-the-job training is needed before a new attorney can begin to become a truly contributing BVA counsel. Therefore, the impact of the FY 1993 attorney staff build-up will not actually begin to be realized until late FY 1993 or early FY 1994. No additional BVA staff increases have been requested for FY 1994. Given the staffing additions of FY 1993, I feel there are process change proposals that can have a greater impact on BVA productivity and decision-making timeliness in 1994 than budget increases. Our proposal to permit decisions of the Board to be made by single members rather than requiring each decision to be signed by three member Board Sections is one of these process changes.

4. How many BVA appeals do you receive annually, how many attorneys are on staff, and how many cases do you expect each attorney to handle annually?

BVA received 38,229 appeals in FY 1992 and over 43,000 annually in both FY 1990 and FY 1991. Our current projections for FY 1993 and subsequent years are that BVA will receive 39,000 appeals annually. Recent information, however, suggests that actual receipts may exceed this 39,000 annual level in the near future. Included in appellate receipts projections are appeals returning from VA regional offices following completion of development actions performed pursuant to BVA remand decisions. BVA's remand rate gradually started to rise in 1990 when the Court of Veterans Appeals began issuing substantive decisions, many of which contained sweeping due process considerations affecting the entire VA appellate system. The remand rate, which typically accounted for about 20% of the appeals processed annually by the Board, rose to slightly over 50% in FY 1992 and was at 51.4% for the first half of FY 1993. It appears that many of these previously remanded appeals are now returning from the VA regional offices for readjudication and final BVA decisions. Continuation of this trend combined with unabated receipts of original appeals could very well result in BVA receipts above current projections.

BVA currently has 178 attorneys employed in the capacity of staff counsel, 51 attorneys in Board Member decision-making roles, and 9 attorneys in executive or other managerial positions. On many occasions, attorneys serving as staff counsel will be temporarily detailed to other BVA staff positions outside of Board sections to meet organizational needs such as training newly hired attorneys or serving in BVA's Quality Review Program. BVA has no simple formula that can be used to project with precision the number of appeals a Board counsel is expected to handle annually. Many variables enter into such projections, including counsel experience, issues on appeal, complexity of appeals, the extent of assignments to BVA details outside of Board sections (e.g., training or Quality Review details), and, most importantly in recent years, the dynamic environment in which Board counsel must develop their decisions in the judicial review environment. Given these caveats, over the past year journeyman Board counsel were able to produce approximately 200 to 220 decisions each.

As noted in response to question 1, above, the Board has assembled a Task Force that is exploring alternatives for the measurement of productivity of staff counsel. The difficulty and amount of work involved may vary significantly from case to case. In addition, attorney experience is also a variable. For these reasons, the Board has never measured attorney performance in productivity by a "raw" case count. It is unlikely that the Task Force would recommend such a system for future implementation. At present,

the situation is in flux and we are unable to provide meaningful data as to the number of cases that an attorney "should" handle.

5. a. Without reducing procedural protections for claimants what would you suggest doing in order to reduce the backlog of appeals pending before BVA?

The single most effective means of reducing the backlog of pending appeals without reducing procedural protections for claimants and without incurring a significant increase in expenditures would be the enactment of legislation to authorize the Chairman to assign cases to single members for final decisions. This change from the use of a section of three members to decide cases will maximize the effective use of Board members' time, thereby increasing timeliness and productivity. The proposal, if enacted into law, would provide the Board with the administrative flexibility to more effectively adjust its resources to changing needs, including personal hearing and caseload requirements. Reconsideration procedures, administrative allowance by the Chairman or Vice Chairman, and judicial review serve to guard against any perceived deficiencies resulting from decisions by single members, as opposed to panels. In addition, the Board's internal Quality Review section and increased use of the regulatory process to provide systematic Rules of Practice will help insure the integrity of the adjudication process. Thus, this change would not significantly erode any of the procedural safeguards now in place. It is projected that the use of single member decisions will result in a productivity increase of 25 percent at the BVA organizational level. In terms of timeliness, it is projected that this change would reduce response time from an estimated 441 days in FY 1993 to 358 days in FY 1994.

Elimination of the absolute limit on the number of Board members contained in 38 U.S.C. § 7101(a) would permit VA more flexibility in allocating its resources to meet the appellate workload. In the current environment, this change would remove a statutory point of constriction in the appellate adjudication process and permit the use of additional personnel to insure the consideration and disposition of appeals before the Board in a timely manner.

b. Would it help cut down the backlog of cases at BVA if you accepted private medical opinions as long as they are issued in accordance with The Physician's Guide and is otherwise credible?

First, I wish to explain that private medical opinions and records received by the Department in the course of an appeal become part of the record that the Board must consider in reaching its determination in the claim. 38 U.S.C. § 7104(a). Thus, the Board will always "accept" a private medical opinion in the adjudication of an appeal. Private medical records and opinions are treated like any other item of evidence in the record. In its written decision, the Board must analyze the probative value and credibility of such evidence and provide the "reasons or bases" for each of its findings and conclusions in an appeal. 38 U.S.C. § 7104 (d)(1); *Gilbert v. Derwinski,* 1 Vet.App. 49 (1990). Therefore, in a given case, a private medical opinion, like a VA medical opinion, may be afforded great weight, while, in another context, such an opinion would be of little probative value.

It appears that the question addresses the possibility of the Board accepting, without independent confirmation, the findings reported in a private medical report as determinative in a case. Under the current 38 C.F.R. § 3.326, VA is required to authorize a VA examination where a reasonable probability that a valid claim for disability compensation or pension benefits is indicated. The Department plans to propose to amend 38 C.F.R. § 3.326(d) to permit acceptance of a private physician's statement for rating purposes in claims for increased compensation due to the increased severity of service-connected disabilities, with no need for verification by a VA examination. The proposed regulation would require that the private medical statement include clinical manifestations and substantiation of diagnosis by findings of diagnostic techniques generally accepted by medical authorities and be otherwise adequate for rating purposes. In addition to increased rating claims, this change would apply to claims for aid and

attendance benefits, a veteran's pension claim, as well as certain other housebound or aid and attendance benefits.

The regulatory change would provide the Board greater flexibility, in its *de novo* review of a claim, to either rely on the record as developed by the originating agency or seek additional medical evidence. However, in every decision the Board must consider the credibility and probative value of the all items of evidence, including private medical statements. Moreover, in claims not subject to the planned regulatory change, such as service-connection claims, it would serve to diminish the quality of decision making without a commensurate gain in productivity or timeliness if a BVA decision was required to rely exclusively on any single item of evidence, without due regard to the entire evidentiary context. The decision as to whether the record on appeal is sufficient or whether additional evidentiary development is needed is left to the deciding Board Members.

Questions from Honorable Michael Bilirakis

1. Mr. Cragin, please give us a typical type of case where only a one-member Board could appropriately decide an appeal and where you, as Chairman, determine that a reconsideration is in order.

Most cases involving general medical issues are appropriate for decision by single Board Members. An illustrative simple "medical" issue would include a case involving entitlement to an increased rating for flat feet.

Cases that involve exceptionally complex medical-legal issues, such as cases involving entitlement to special monthly compensation, may warrant the use of a panel of Board Members.

Reconsideration may be granted on the Chairman's own motion where, for example, the BVA decision appears to contain obvious error in fact or law. For example, reconsideration would be ordered if a decision fails to discuss a significant item of evidence contained in the record, or where the record shows that there has been inadequate assistance afforded to the claimant in the development of the claim, or where the pertinent law has not been applied by the deciding Board Member.

2. Are you considering any changes in the way work credits are calculated?

Yes. The Board had developed a revised system of measuring the performance of staff counsel in the critical element of decision productivity which, pursuant to an agreement with the union that represents this bargaining unit, was implemented on May 1, 1993. This revised system was designed to measure productivity by the amount of work performed by counsel in an individual appeal. Because of the changes in the Board's processing of appeals necessary for it to comply with the Court's decision in *Thurber v. Brown*, No. 92-172 (U.S. Vet. App. May 14, 1993), the application of the new productivity performance system has been suspended for a temporary but indefinite period. A special Task Force is reexamining the performance measurement system to permit a more accurate assessment of staff counsel performance measurement, in the aftermath of *Thurber*.

3. Do you have any idea how long it takes a decision by the Court to filter down to the regional offices for implementation?

All precedential Court decisions are reported in West's Veterans Appeals Reporter which is published monthly. All regional offices subscribe to that publication.

In order to promote uniform interpretation of the decisions issued by the Court, VBA established a Judicial Review Staff within the Compensation and Pension Service in August 1991. This staff reviews all Court decisions, remands and orders, and prepares a decision assessment document as necessary. Their written analysis addresses any need for change or clarification of existing policy, regulations and procedures.

There are several methods used by this staff to provide notification of Court decisions and of clarification or changes in policy, regulations and procedures. The first of our three primary methods of providing claims processing personnel with Court-related instruction is to transmit copies of the decision assessment documents to all regional offices. The first set of documents was sent on December 20, 1991. Beginning with the submission of the second set on March 11, 1992, assessment documents have been furnished to regional offices on a monthly basis.

A second method is in the form of interim instructions. The Judicial Review Staff is responsible for preparation of interim instruction letters which are issued by the Service Director if a Court decision requires an immediate change in the method of adjudicating

claims. These instructions supersede any other existing procedural guidelines on the issue involved. Interim instructions are issued as quickly as possible after the Court's decision.

Another information dissemination means is the Judicial Review Conference Call, commonly called hotlines. The Judicial Review Staff conducted the first of these teleconferences on April 2, 1992, and continue to do so monthly. One of the purposes of these calls is to reiterate and reinforce the Court decisions and the exigency of full compliance with Court decisions and remands. The calls are followed by written transcripts of the narrative as well as the questions posed by the field and answers given by the participating Central Office staffs.

When the Court decision involves an issue other than compensation or pension benefits, the Service concerned with that specific area is requested to prepare an assessment. If it is determined that changes in policy, regulations or procedures are required, information is disseminated by the Service which administers the benefit program impacted by the Court decision.

4. Does the Board participate in any way in the transmission of COVA decisions to the field?

Decisions of the Court, which are effective as precedent as of the date they are issued, are cited where applicable by the Board in its decisions. The Board's decisions are transmitted to adjudication personnel in the appropriate regional office and are incorporated in the appellant's claims file as part of the process of appeals processing. In this limited sense, the Board assists in the dissemination of Court decisions. Otherwise, the transmission of Court cases to regional office personnel lies with the Veterans Benefits Administration.

5. Should we legislatively clarify your authority to use your own doctors or those of the Veterans Health Administration as outside sources to medical opinions as part of the appellate review process?

I believe such legislation would be helpful. Currently, 38 U.S.C. § 7109(a) may be read to implicitly provide the Board the authority to obtain an advisory opinion from a BVA staff medical advisor or other expert medical opinion within the Department. Some veterans' advocates have expressed a differing interpretation of the law. Citing *Colvin v. Derwinski,* 1 Vet.App. 171 (1991), they assert that the Board may rely only on medical opinion that is entirely independent of the Board, even if such opinion is that of a BVA staff medical advisors who does not otherwise participate in rendering the decision in the appeal. The Court has issued decisions in several cases in which an opinion by a BVA staff medical advisor was of record, perhaps indicating implicit approval of the practice. However, the Court has not yet issued a precedent decision resolving the matter. If the Court ultimately concludes that BVA's use of VA medical advisor opinions is not permissible, the Board would be required to rely exclusively on its own research into the medical literature or on expert opinions from outside the Department. This would further degrade decision productivity and timeliness without any significant gain in quality. In addition, an adverse decision on this matter by the Court would open to readjudication the thousands of BVA decisions in which the opinion of a VA physician, particularly that of a BVA staff medical adviser, was considered.

6. If the Board were to assume a more significant role in the "designation of record," what would this entail and what effect would it have on your productivity?

Establishing appropriate procedures to comply with the designation of the record on appeal, as required by the Court, has created difficulties for the Department. In a memorandum dated June 8, 1993, the Secretary of Veterans Affairs, after careful consideration of the available options, "determined that the Board is best qualified to identify the documents and other evidence relevant to its decision." He specifically

directed "that all decisions issued by the Board after October 1, 1993, contain a list of all materials contained in the claims file, or other VA records before the Board, that were specifically relevant in arriving at the decision and that this list be made a part of, or attached to, the Board decision." The Secretary added "that the list should also be in full compliance with any rules or other requirements of the Court for designating records to be used in considering a veteran's appeal." The Secretary indicated that he was aware of the resource concerns and possible impact on response time resulting from his decision, but concluded that this decision would serve to benefit veterans and that resource issues should be addressed in the Board's FY 1995 budget submission.

Clearly, the more time and resources that are diverted from the Board's primary mission of the consideration and disposition of appeals, the fewer the number of cases that will be decided. In addition, the average length of time before the Board promulgates a decision in an appeal will increase. The Secretary's decision will require the Board to prepare a detailed list of the evidence considered to be relevant and material in every decision. The evidence included must also include that which supports a "negative" conclusion on any material matter, evidence that all notice and due process requirements were met, records of all efforts by the Department in compliance with its statutory "duty to assist" the claimant, as well as all medical records, statements and other substantive items of evidence contained in the claims file or other VA files. In addition, the Board will indicate that no evidence other than that specified in the itemized listing was relied upon in reaching the determinations contained in its decision.

At this point, it is too early to accurately quantify the effect of this additional responsibility on timeliness and productivity. The Board has requested and received what was described as an "average" distribution of record designations prepared by the Professional Group in VA Office of General Counsel charged with representing the Secretary before the Court. Those samples include a list of 275 separate items of evidence, which ran 17 pages in length. I have designated two Board sections, one "automated" section, which employs new computer technology, and the other a "non-automated section, to begin to prepare the itemized lists of relevant evidence for each decision in order to establish procedures to efficiently implement the Secretary's directive on a Board-wide basis by October 1, 1993. I expect that more precise estimates of the effect on timeliness and productivity will be forthcoming after we gain more experience with the process.

It is worth noting that, prior to the Secretary's directive, the Board considered the effect of the inclusion of an evidence summary in every BVA decision for purposes of the designation of the record. It was assumed that each summary would, on the average, require an additional 2 hours of attorney time, 2.25 hours of Board Member time, and 1 hour of administrative time. Based on data from the first quarter of Fiscal Year 1993, it is projected that the Board would render 6,955 fewer decisions for FY 93 if an evidence summary were prepared for each case. Similarly, the projected increase in response time would be 272 days in FY 93, to at total of 713 days, with a projected increase of 491 days, for a total of 1,031 days in FY 94. It must be noted that these calculations do not contemplate the additional increase in response time resulting from the Board's compliance with the requirements of *Thurber v. Brown*, No. 92-172 (U.S. Vet. App. May 14, 1993), which will add at least 60 to 90 days to the processing time of affected decisions on the merits at the Board. Clearly, the preparation of an itemized, comprehensive listing of the evidence will have a far more dramatic adverse effect on productivity and timeliness than contemplated by the above noted projections.

7. Do you feel that the Court should have the benefit of the veteran's entire record in order to reach a more complete decision? If not, why not?

Under 38 U.S.C. § 7104(a), the Board is required to review the "entire record in the proceeding" before deciding an appeal. The "entire record in the proceeding" generally consists of the appellant's complete claims folder and may also include additional files.

The Court, under its rules and procedures, reviews only that portion of the record which has been specifically "designated" by the litigants in an appeal. The Court's procedures require the Secretary to complete the initial designation of the record. The appellant is then provided with the opportunity to counter-designate the record. In this process, the appellant identifies documents that were not included in the record designated by the Secretary, but which the appellant believes are relevant and should have been considered by the Board in rendering its decision.

As noted in my response to the preceding question, the Secretary, in order to insure Departmental compliance with the Court's procedures, has charged the Board to prepare, in all cases issued after October 1, 1993, an itemized listing of all materials contained in the claims file or other VA records before it that were considered to be specifically relevant and material in reaching the determinations contained in its decision. As the Secretary stated in his June 8, 1993, memorandum, "[i]t is in the best interest of both the veteran and the Department that the specific evidence relied on by the Board in arriving at the Department's final decision on a claim, be presented to the Court for consideration."

8. What legislative or budgetary proposals are you planning to recommend to resolve the response time problem at the Board?

The Department supports proposed legislation which is currently under consideration by the Office of Management and Budget (OMB) that contains several measures to prevent further degradation in response time. The proposed legislation contains at least two provisions which will have a significant impact on the problem. One proposal would eliminate the absolute limit on the number of Board members contained in 38 U.S.C. § 7101(a). Removing the restriction on the total number of Board members would permit VA more flexibility in allocating its resources to meet the appellate workload. In the current environment, this change would remove a statutory point of constriction in the appellate adjudication process and permit the Board to devote additional personnel to insure the consideration and disposition of appeals in a timely manner.

The other proposal that would have a significant ameliorative effect is the authorization of the Chairman to assign cases to single members for final decisions. This change from the use of a section of three members to decide all cases will maximize the effective use of Board members' time, thereby increasing timeliness and productivity. The Chairman would retain the authority to assign the appeal to a panel of more than a single member, should this be warranted by the complexity of the case or other administrative factors. The proposal, if enacted into law, would provide the Board with the administrative flexibility to more effectively adjust its resources to changing needs, including personal hearing and caseload requirements. Reconsideration procedures, administrative allowance by the Chairman or Vice Chairman, and judicial review serve to guard against any perceived deficiencies resulting from decisions by single members, as opposed to panels. In addition, the Board's internal Quality Review section and increased use of the regulatory process will help insure the integrity of the adjudication process. It is projected that the use of single member decisions will result in a productivity increase of 25 percent at the BVA organizational level. In terms of timeliness, it is projected that this change would reduce response time from an estimated 441 days in FY 1993 to 358 days in FY 1994.

9. It is our understanding that Board Members are leaving to take positions as ALJs in other Federal departments. Why? How is this impacting on the Board?

The Administrative Law Judge (ALJ) position offers as much as $26,000 more per year than the Board Member position. In addition, the ALJ position is a career appointment, and is not subject to appointment for a term of years, as is the Board Member position. Most ALJ positions are with the Social Security Administration and involve the adjudication of entitlement to disability benefits administered by that agency.

Most Board Members consider the work of a Social Security Administration ALJ to be comparable to, if not significantly less demanding, than that of a Board Member. In the past, both the ALJ and Board Member positions were classified at the GS-15 level. ALJ pay was increased as the result of the Pay Act of 1990. In this light, and considering other factors such as locality differentials and the impact on retirement benefits, the ALJ program understandably will result in attrition of some of our most qualified Board Members.

When the register from which ALJ's are hired was last open, 9 Board Members applied. Of these, 8 were placed in positions. The remaining Member qualified, but was not offered a position because none was available in the geographically limited locality in which she would accept a position. I am advised that 6 additional Board Members are now on the register and are being considered for appointment and that 32 other Board Members intend to apply for inclusion in the register that is now being prepared.

Historically, almost all Board Members are appointed from the ranks of BVA staff counsel. Board Member appointments are extremely competitive. Seven to ten years experience as a staff Counsel generally is required before a candidate will be seriously considered for appointment to the Board. Thus, once lost to the ALJ program, a fully qualified Board Member cannot easily be replaced. If circumstances remain unchanged, I believe that it is realistic to expect that BVA will face a significant retention problem.

10. What percentage of Board Members' time is spent doing field hearings?

We project that 2,500 Travel Board hearings will be conducted by BVA Board Members during FY 1993. We have further projected that the equivalent of a projected three FTE of Board Member time is involved in conducting these 2,500 hearings and in traveling to and from the various field locations where these hearings are held. Three FTE out of the total 64 decision-making Board Members available to BVA under the current 67 Board Member statutory ceiling represents slightly less than 5% of each Board Member's time.

11. Since the Court has held that BVA is responsible for determining attorney fees, would you support being allowed to rule on fee motions in order to free up your Board Members to do fact finding and appellate review?

Yes. If the Chairman were granted the authority to decide matters relating to attorney and agent fee agreements, the processes currently in place for the disposition of such matters would be substantially streamlined. It would be more efficient to issue rulings on such matters by the Chairman rather than the current practice of issuing such rulings by a Board Section consisting of three Board Members. Consequently, we would anticipate that the Board would be able to rule on fee agreements more quickly. In addition, Permitting the Chairman to rule on motions in proceedings before the Board would result in similar improvements in efficiency and economy. Legislation to accomplish this change would provide the Board the flexibility to adjudicate the approximately 17 different types of motions and "requests" by the Chairman or his delegee. This would permit administrative personnel to process most motions, leaving Board Members free to accomplish their primary mission -- to adjudicate appeals on the merits. It would also enhance the consistency of adjudication in the area of motions practice. Clearly, Board Members will continue to adjudicate motions that arise in the course of a hearing.

12. Since the Court has ruled that a docket be maintained at each regional office, what has been the impact to the Board of this mandate?

Under 38 U.S.C. § 7110, a claimant who requests a BVA hearing at a regional office must be afforded such hearing "in the order in which the requests for hearing are received by the Department with respect to hearings in that area." The current practice

for implementation of the statute has been the maintenance of a hearing docket at each of the 58 VA regional offices. This has made it very difficult for the Board to monitor requests for BVA hearings in order to insure that each appellant who requests such a hearing receives proper notification and a timely hearing, and that hearings are held in such a manner as to maximize the effectiveness of the limited resources available.

13. Does the Court ever reverse itself? And if so, what impact do those reversals have on the Board?

The Court, in effect, has reversed itself on only a few occasions. In assessing the impact of these reversals, it is important to remember that, as a result of the repeal of the 30-day period before which a decision of the Court would become final, contained in 38 U.S.C. § 7262(d), by Pub. Law 102-82, § 1, 105 Stat. 375 (Aug. 6, 1991), any precedent decision of the Court is binding as of the date the decision is issued. *See, Tobler v. Derwinski*, 2 Vet.App. 8 (1991) Therefore, the Board on several occasions has been required to stay the processing of its appellate caseload and readjudicate decisions which have not yet been promulgated in order to insure that they are in compliance with the Court's directives.

One of the more significant episodes involved *Rowe v. Derwinski*, U.S. Vet. App. No. 90-1326. On November 27, 1991, the Court issued a memorandum decision ordering the Board to apply 38 U.S.C. § 5108 and the "finality" analysis of *Manio v. Derwinski*, 1 Vet.App. 140 (1991) to a claim for an increased rating for a service-connected disability, a practice which was not previously used by the Department. The Board ceased adjudication of appeals involving claims for increased rating and returned more than 1,000 cases to the originating Board Sections for readjudication in light of directives issued in a Chairman's memorandum on December 10, 1991. This memorandum included the changes articulated in the *Rowe* decision. The readjudication of these appeals required over 1,000 hours of staff Counsel time and 500 hours of Board Member time. On December 11, 1991, a motion for reconsideration was filed with the Court, informing the Court, in part, that the Department generally considers claims for increased ratings as new claims warranting a *de novo* review to the extent that a well-grounded claim was presented. By a memorandum decision of January 3, 1992, the Court vacated the November 1991 *Rowe* decision, holding that the veteran had not demonstrated that the Board had committed either legal or factual error which would warrant reversal. Consequently, the Board again halted processing of cases affected by *Rowe* and returned them to the Board Sections for readjudication. In January 1992, approximately 600 cases were returned to the Sections, and over 600 hours of staff Counsel time and 300 hours of Board Member time were spent in this process. Additional Administrative Services time was also expended in examining and rerouting cases, although this time was not measured.

Another example of the Court reversing itself is provided by the *Abernathy* case. In April, May, and June 1992, the Court issued a series of significant decisions concerning claims for pension benefits. On May 21, 1992, the Board ceased processing pension cases concerning a disability issue to readjudicate such cases due to these Court decisions. I issued a Chairman's memorandum containing instructions for the adjudication of such cases on June 17, 1992, and the Board resumed processing these cases. One of the Court's decisions, *Abernathy v. Derwinski*, 2 Vet.App. 387 (1992), held that the Board should apply the *Manio* analysis to pension claims, a practice which was not previously employed by the Department. On reconsideration, the Court held in November 1992 that the *Manio* analysis does not apply to pension claims. *Abernathy v. Principi*, 3 Vet.App. 361 (1992). Consequently, I issued a revised Chairman's memorandum on December 2, 1992, to reflect the Court's holding on reconsideration.

14. How would removal of the cap on the number of Board Members impact on the Board's response time? How many members would be ideal?

As noted in response to question 8, above, the removing of the statutory cap on the total number of Board members would provide the Department with increased

flexibility in allocating its resources in response to the appellate workload. In addition, the cap presents a statutory point of constriction in the appellate adjudication process. Removal of that cap, would allow the Department to dedicate additional personnel, as needed, to insure that appeals are considered and disposed of in a timely manner without sacrifice of quality.

At present, I believe that there are insufficient data to provide an fully informed estimate as to the number of Board Members that would be "ideal." What may be "ideal" under current circumstances may change as the appellate workload changes. The removal of the cap would permit increased flexibility to respond to such alterations in the adjudication environment. For example, the enactment of legislation such as the proposal which would authorize the Chairman to assign cases to a single Board Member for a decision or which would authorize the Chairman or his or her designee the authority to decide motions and attorney fee matters may affect the optimum level of Board Member staffing.

15. Does the Board actually get into interpretation of statutes in its decisions when current VA regulations are in conflict with the statute?

Generally not. Under general principles of administrative law, the Board does not construe its jurisdiction to encompass adjudications of the validity of VA regulations. In fact, under 38 U.S.C. § 7104(c), the Board is specifically "bound in its decisions by the regulations of the Department."

16. How binding on the Board are General Counsel precedent opinions?

Under 38 U.S.C. § 7104(c), the Board is "bound in its decisions by . . . precedent opinions of the chief legal officer of the Department." Accordingly, in reaching its decision in an appeal, the Board must apply the precedent opinions of the General Counsel.

17. You mention in your statement about the updating of the automation system and training of staff counsels. Do you truly feel that by the end of FY 93 all your Board Members and staff counsels will be working with their own computers?

We plan to have all of our professional units, which would include all Board Members and staff counsel, networked into BVA's automation system by the end of calendar year 1993. All Board Members and staff counsel will be working with their own desktop personal computers by that time.

18. What effect do you believe this will have on your productivity?

I expect automation to benefit BVA operations in many areas, including staff productivity improvements, improvements to the quality of our decisions and various other work products, improved timeliness in decision-making, and improved responsiveness in areas such as our responses to Congressional inquiries regarding matters before the Board. Attempting to precisely quantify our expectations regarding these expected benefits can be a tenuous proposition. We do know that through the Board's early automation efforts, we were able to reduce our transcription staff requirements by over 20 FTE. This has enabled us to refocus the activity of our transcription unit in Wilkes-Barre, Pennsylvania, from the transcription of decisions from dictation by staff counsel to the preparation of transcripts of BVA hearings. We hope to achieve similar economies in our current automation projects. More importantly, however, we plan to place the right tools in the hands of both our professional and administrative staff to enable them to produce the highest quality products they are capable of producing.

Chairman Slattery to Disabled American Veterans

1.) Do you feel that the Court of Veterans Appeals should have the benefit of the entire veteran's file when deciding what action to take on appeals?

No. I have five years of experience as a staff attorney at the Board of Veterans' Appeals reviewing claims files and writing decisions and three years of experience representing veterans before the Court of Veterans Appeals. It has been my experience that it is entirely unnecessary to have the entire claims file when deciding what action to take on an appeal. In the vast majority of cases, only a few of the documents in the file are relevant to issue(s) on appeal. To require the Court to receive the entire claims file would create an unnecessary burden for the Court and distract the Court's attention from the issue(s) the veteran is raising, while providing no additional benefit to the appellant.

Until recently, the record before the Court consisted of a record designated by the Office of the General Counsel and any pertinent and relative documents counter-designated by the appellant. On June 8, 1993, the Secretary of Veterans Affairs directed the BVA to compile a list of all relevant evidence considered by the VA in reaching its determination. This list will be made a part of, or attached to, the BVA decision. Presumably, the record on appeal to the Court will consist of the documents contained on this list and any additional relevant evidence contained in the claims file.

2.) What is your organization's position concerning BVA's responsibility for determining attorney fees? Should the court be responsible or perhaps the Office of General Counsel?

Pursuant to the provisions of 38 U.S.C. Section 5904(c)(2), the BVA, "upon its own motion or the request of either party, may review [] a fee agreement and may order a reduction in the fee called for in the agreement if the [BVA] finds that the fee is excessive or unreasonable." The BVA's finding or order is appealable to the Court of Veterans Appeals.

The BVA is in the best position to accurately assess the reasonableness of attorney fees for proceedings before the VA. The BVA has considerable expertise in adjudication of claims for veterans' benefits and can most accurately assess the amount of attorney time spent in preparing and presenting a case before the VA. The Office of General Counsel is not directly involved in the administrative adjudication process and is, therefore, not as well suited as the BVA for this task. Additionally, the Court should retain its position as an appellate body and should not be involved in the initial decision-making process regarding attorney fee matters before the VA.

3.) Do you feel that the initiation by Chairman Cragin of a trailing docket at the regional offices has helped alleviate the time a veteran has to wait for a personal hearing?

Yes. The BVA conducted 873 Travel Board hearings in Fiscal Year 1991 and 1,258 in Fiscal Year 1992. We understand that the BVA expects to conduct 2,500 Travel Board hearings in Fiscal Year 1993 and that the trailing docket concept is one of the major reasons for the BVA's success in expanding the availability of the Travel Board hearing program. The trailing docket concept has enabled the BVA to conduct approximately 43 hearings per week, up

from 25 hearings per week prior to the institution of the trailing docket. The trailing docket concept gives more veterans the opportunity for a personal hearing before the Travel Board and has shortened the time period a veteran had to wait to have his case heard by the Travel Board.

The trailing docket also allows the BVA to maximize the use of Board Members' time. It has been the BVA's experience that between 25 to 40 percent of claimants who request a personal hearing, either in the field or in Washington, D.C., fail to appear for their scheduled hearings. Whenever a claimant fails to appear for a Travel Board hearing, the Board Members' time is completely lost during this "dead time." The overlapping hearing schedules of the trailing docket anticipate a certain "no-show" rate among claimants and allows BVA to make prudent use of valuable resources, eliminating "dead time," while offering improved service to veterans.

Vietnam Veterans of America, Inc.
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In Service to America

JUN 22 1993

June 17, 1993

Hon. Jim Slattery, Chairman
Subcommittee on Compensation, Pension and Insurance
Committee on Veterans' Affairs
335 Cannon House Office Building
Washington, DC 20515

Dear Rep. Slattery:

Thank you for the opportunity to expand upon our testimony before the Subcommittee on Compensation, Pension and Insurance regarding the Board of Veterans Appeals. As requested, here is our response.

QUESTION: Do you feel that the Court of Veterans Appeals should have the benefit of the entire veteran's file when deciding what action to take on appeals?

Yes, but there must be a change in the way COVA gets access to VA records. If the claimant's file is simply pulled and given to COVA during the years in which the appeal is in progress, no other claims of any kind can be filed in the claimant's behalf until COVA completes it work. Yet COVA needs access to that information, because allowing the VA's General Council to supply only those documents he or she considers relevant is exactly the kind of self-serving paternalism that judicial review was meant to end. VVA thinks the answer is for COVA to receive a copy of the entire file.

QUESTION: What is your organization's position concerning BVA's responsibility for determining attorneys fees? Should the court be responsible or perhaps the Office of General Counsel?

At present, BVA has the authority to challenge attorney fees for being too high. So far there is not enough experience to tell us that there is a problem with that. The current limit in the 1988 Veterans Judicial Review Act on contingency fees is unreasonable -- despite the adoption of the Equal Access to Justice Act in 1992 -- and needs to be set significantly higher, parallel to the Federal Tort Claims Act (20% at the agency, 25% in court.) This will call for amendment of 38 USC 3404, which means that Congress should be responsible for making this determination. Current limits effectively preclude freedom of choice for veterans. This results in losing cases initially and appealing them with legal help, which

further chokes the system's backlog. Reasonable legal fees are a step towards quick resolution of claims.

QUESTION: Do you feel that the initiation by Chairman Cragin of a trailing docket at the regional offices has helped to alleviate the time a veteran has to wait for a personal hearing?

We think so, but it is hard to tell. The trailing docket is simply a waiting list that can allow veterans to have a hearing quickly rather than wait in a waiting room. It is worth a try, and should be revaluated after it has been in place a bit longer.

What it does not address, of course, are the delays in adjudication, which have grown steadily worse, despite Chairman Cragin's generally good performance. The frightening truth is that we do not see a quick fix for the problem, which arises from, and is seriously exacerbated by VA's prediliction for denying claims that it should approve, and its preoccupation with work credits that bear no relationship to developing claims.

Sincerely,

Paul S. Egan
Executive Director

June 15, 1993

AMVETS answers to additional questions from Congressman Bilirakis regarding adjudication procedures of the Court of Veterans Appeals (CVA).

1. Do you feel that the Court of Veterans Appeals should have the benefit of the entire veteran's file when deciding what action to take on appeals?

Answer: AMVETS supports inclusion of the entire veteran's file in proceedings before the Court.

2. What is your organization's position concerning BVA's responsibility for determining attorney's fees? Should the Court be responsible or perhaps the Office of General Counsel?

Answer: AMVETS is satisfied with BVA's role in determining attorney's fees. We do not feel the court should be involved with determining fees. AMVETS feels the General Counsel is not the appropriate place to determine attorney's fees since they represent VA in legal proceedings and could be perceived as having a conflict of interest when determining the "opposition's" fees.

3. Do you feel that the initiation be Chairman Cragin of a trailing docket at the regional offices has helped to alleviate the time a veteran has to wait for a personal hearing?

Answer: It appears the use of trailing dockets has shortened the time for personal hearings and we therefore support the continued use of such dockets.

Congressman Bilirakis to Veterans of Foreign Wars

1. **What is your organization's position concerning BVA's responsibility for determining attorney fees? Should the Court be responsible or perhaps the Office of General Counsel?**

The Veterans of Foreign Wars (VFW) has always supported a reasonable fee to be paid an attorney for representing a veteran. However, an attorney cannot provide representation until a decision has been made by the Board of Veterans Appeals (BVA). At the present time it takes one year to receive the decision.

The determination as to what is reasonable must be made from within the Department of Veterans Affairs (VA) rather than the Court. (The Court has its own fee agreements to look after). However, the fee decision may be appealed to the Court if an attorney so decides.

The question of whether the BVA or General Counsel should make this fee review is one that can only be answered by VA. The VFW has no comment on which agency within the VA should rule on the fee agreement. The fee agreement could, of course, be for a flat 20% of the veteran's award, as called for in title 38, USC, 5904(d)(1). The Court fee agreements are set forth in title 38, USC, 7263.

2 **Do you feel that the initiation by Chairman Cragin of a trailing docket at the regional offices has helped to alleviate the time a veteran has to wait for a personal hearing?**

At the present time our VFW Service Officers in the field have experienced no problem with the trailing docket. Most feel that it has increased productivity. Of course, it is still very early to tell if this program will cause problems in the future.

HONORABLE MICHAEL BILIRAKIS
QUESTIONS SUBMITTED FOR THE RECORD
FRANK DeGEORGE
PARALYZED VETERANS OF AMERICA
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
MAY 6, 1993

1. What is your organization's position concerning BVA's responsibility for determining attorneys' fees? Should the Court be responsible or perhaps the office of General Counsel?

a. Agreements between claimant and representative.

Persons representing claimants before the Board of Veterans' Appeals may obtain payment for services after the Board's final decision. A copy of the fee agreement must be submitted to the Board. The Board on its own motion or at the request of either party may reduce fees found to be excessive or unreasonable. This action can be appealed to the Court of Veterans' Appeals (see 38 U.S.C. 5904(c) and (d)). Payment of fees may be made by VA directly to the attorney from past due benefits owed the claimant. See Aronson v. Derwinski, 3 Vet. App. 162 (1992) (Order per curiam). There are certain limitations on the amount of the fee collected (38 U.S.C. 5904(d)).

A person representing a claimant before the Court of Veterans Appeals must file a fee agreement with the Court. The Court on its own motion or motion of any party may review the fee agreement. It "may" order reduction of excessive or unreasonable fees (38 U.S.C. 7263(c) and (d)).

The Court holds that it will not review fee agreements on its own motion except in "exceptional circumstances." It will review fee agreements at the request of the parties and reduce the fee only when the agreement is "patently unreasonable on its face" (Lewis v. Brown, ____ Vet. App. ___, ___, No. 91-1332, slip op. at 4-5 (U.S. Vet. App. May 18, 1993)).

The following Court of Veterans Appeals cases address the issue of fee agreements: Nagler v. Derwinski, 1 Vet. App. 297, 304 (1991); Matter of Smith, 1 Vet. App. 492, 500 (1991); Aronson v. Derwinski, 3 Vet. App. 162 (1992) (Order per curiam); Matter of the Fee Agreement of Smith, ____ Vet. App. ___, ___, No. 91-1058, slip op. at 18 (U.S. Vet. App. Apr. 8, 1993); Lewis v. Brown, at 4-5.

b. Equal Access to Justice Act (EAJA).

The Equal Access to Justice Act (EAJA) is an alternative for obtaining attorney fees in VA cases. Under this Act, a veteran who prevails in a claim against the VA can apply to the Court for an award that will pay the cost of his attorney and expenses. PVA supported this legislation when it was considered and passed in 1992.

There are no Court opinions on the subject of EAJA fees to the best of my knowledge. It is my understanding that oral arguments were heard in one pending case in June 1993. It is entirely possible that the case will be decided on an issue having nothing to do with the EAJA question. There are no doubt other pending cases of which I am not aware.

c. Analysis.

Regardless of whether Board of Veterans' Appeals, the General Counsel, or the Court review attorney fees, the standard for invalidating an excessive fee will still be interpreted by the Court. The Court now says, in essence, that a fee would have to be "patently unreasonable on its face" to be reduced. Any attempt to establish a standard more favorable to the veteran (the person most likely to want a change) would be met with opposition from the Bar Associations.

PVA attorneys do not charge fees to represent claimants. This is in keeping with established PVA policy. Very few of the membership would, therefore, be affected by any change in legislation. Because we do not enter into fee agreements, we have no direct knowledge as to which Government entity would best serve the veteran.

It is anticipated that PVA may seek reimbursement of legal fees under EAJA in appropriate cases. Forms for representing claimants already reflect that fact. At present, PVA attorneys have filed no claims under the Act.

d. Recommendations: None

2. Do you feel that the initiation by Chairman Cragin of a trailing docket at the regional offices has helped to alleviate the time a veteran has to wait for a personal hearing?

PVA asked its National Service Offices to comment on the effect the "trailing docket" system has had on veterans with regard to the scheduling and holding of BVA Travelling panel hearings. Of the 58 PVA National Service Offices, eleven responded with negative comments. Among those were the following:

* Many veterans are arriving at the same time for morning or afternoon hearings, and Regional Offices (ROs) are not all set up appropriately for large numbers of people to wait.

* When two panels are located at a given RO, National Service Officers have been called upon to represent two different veterans at the same time.

* National Service Officers representing more than one veteran in a given block of time have found themselves representing cases "back-to-back" without sufficient time to do appropriate pre-hearing interviews.

* Veterans are frequently driving very long distances to appear for hearings, then waiting for hours, and occasionally having to remain overnight to have their cases heard.

* Long waiting times for hearings have caused problems for spinal cord injured veterans, particularly quadriplegics, who have set routines they must follow to maintain their health.

* One office (Montgomery, AL) reported that the lack of a proper waiting area and PA system caused difficulties for veterans who were awaiting their hearings. This indicates that care should be taken to ensure the Regional Offices utilizing this system are equipped to handle it.

* Our Seattle, WA office reported that although the procedure has been in use for the past two Travelling Board visits, he is still having veterans' cases delayed due to limitations in numbers of cases to be heard.

Many of our offices reported that the "trailing docket" system was not yet in use and a few reported that the Directors and Adjudication Officers of their stations had refused to use it as it was not necessary. Other than those problems mentioned above by one or more of the eleven offices with negative comments, most of our National Service Officers felt the system could be beneficial in reducing the delay times for veterans whose cases are to be heard by the Travelling Board.

As you can see by the attached copy of PVA's December 8, 1992 memo to BVA Chairman Charles L. Cragin, the specific incidents we feared have, in fact, come to pass. It is noted, however, that many of our National Service Officers feel the trailing docket system could succeed with better planning in most offices. Since the new system purports to shorten delay time for hearings, however, more veterans are requesting appearances before the Travelling Panel, and it remains to be seen whether the trailing docket will actually alleviate the problem.

December 8, 1992

Mr. Charles L. Cragin
Chairman
Department of Veterans Affairs
Board of Veterans Appeals
811 Vermont Avenue, N.W.
Washington, DC 20420

Dear Mr. Cragin:

Thank you for allowing PVA the opportunity of responding to your proposition to establish "trailing dockets" to accommodate the overall effectiveness of the Board of Veterans Appeals' Travel Boards at VA Regional Offices. We agree with the need to conserve Travel Board resources while availing the Board to the greatest possible number of appellants who desire personal hearings before traveling members of the BVA at Regional Offices.

PVA's main concerns about implementing this plan rests with the potential costs incurred by affected appellants and their actual accessibility to the Travel Board. Many appellants travel great distances across their State of residence to attend hearings. There should be some assurance that no one will be denied a hearing because a "trailing docket" is overbooked and everyone reports for their hearing. We believe that appellants should not incur an overnight lodging or other extraneous expense to report for a hearing on the day subsequent to the scheduled day and still be denied access to the appellate authority because of an overloaded docket.

Ostensibly, representatives too, may be inconvenienced by the trailing docket. Representatives can ill afford nonproductive periods due to the waiting associated with the overbooking of a hearing docket. We strongly support your proposal to establish A.M. and P.M. sessions for these Boards and request your emphasis on this scheduling criteria when dispatching travel boards. This will allow appellants and their representatives to plan their daily calendars accordingly. This is especially important for veterans who must take uncompensated time from their employment to attend their hearing, to arrange for child care, transportation and a host of other contingencies.

Other concerns for consideration extend to those veterans with severely disabling conditions. Many veterans with severe types of disabilities may not have the physical ability to sit for long periods of time without exacerbation of their primary or underlying disabilities. We certainly hope that reasonable accommodation can be extended to those individuals.

We are of the position that your proposal has merit, but are nevertheless concerned with the associated inconveniences of an overbooked docket. We therefore suggest a trial of your proposed "trailing docket" at a few Regional Offices prior to implementing a nationwide policy.

Thank you for considering our comments.

Sincerely,

Richard L. Glotfelty
Associate Executive Director
Veterans Benefits Department

cc: Richard Johnson, National President
Fred Cowell, Executive Director
John Bollinger, Deputy Executive Director

The American Legion
For God and Country

★ WASHINGTON OFFICE ★ 1608 "K" STREET, N.W. ★ WASHINGTON, D.C. 20006-2847 ★
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May 26, 1993

The Honorable Jim Slattery
Chairman
Subcommittee on Compensation, Pension
and Insurance
Committee on Veterans Affairs
335 Cannon House Office Bldg.
Washington, DC 20515

MAY 27 1993

Dear Chairman Slattery:

This is in regrard to your letter of May 19th requesting response to several followup questions submitted from Congressman Bilirakis.

Question #1 - What is your organization's position concerning BVA's responsibility for determining attorney fees? Should the Court be responsible or perhaps the Office of the General Counsel?

Response:

The American Legion is not aware of any complaints concerning such fee reviews or pending workload problems either from the BVA, attorneys, or appellants.

In our view, this is basically an administrative rather than an appellate type of determination which is currently made by the Counsel to the Chairman of the BVA. As such, attorney fee reviews could just as easily and appropriately be made elsewhere in the agency initially - perhaps the Office of the General Counsel - with the right of appeal to BVA (and CVA) just as in any other VA determination.

Question #2 - Do you feel the initiation by Chairman Cragin of a trailing docket at the regional offices has helped alleviate the time a veteran has to wait for a personal hearing?

Response:

Chairman Cragin has been responsive to the need to improve the timeliness in scheduling hearings before the Travel Board. The use of single members to conduct hearings and the trailing docket enable the Board to schedule more hearings in more localities on a more timely basis than under the old procedure. In general, these program changes have been to the veteran's advantage and make better use of the Board's limited resources.

Sincerely,

Philip R. Wilkerson
Asst. Dir. for Info. Mgmt.
National VA&R Commission

cc: Steve Robertson

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