OPERATIONS OF THE BOARD OF VETERANS' APPEALS AND COURT OF VETERANS APPEALS, AND REVIEW OF H.R. 3212, WITH RESPECT TO THE COURT OF VETERANS APPEALS RETIREMENT PLAN

HEARING

BEFORE THE

SUBCOMMITTEE ON BENEFITS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

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OPERATIONS OF THE BOARD OF VETERANS' APPEALS AND COURT OF VETERANS APPEALS, AND REVIEW OF H.R. 3212, WITH RESPECT TO THE COURT OF VETERANS APPEALS RETIREMENT PLAN

WEDNESDAY, JUNE 10, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON BENEFITS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:10 p.m., in Room 334, Cannon House Office Building, Hon. Jack Quinn (chairman of the subcommittee) presiding.

Present: Representatives Quinn, Filner, Mascara, Reyes, Rodriguez, and Evans (ex officio).

OPENING STATEMENT OF CHAIRMAN QUINN

Mr. QUINN. Good afternoon. Thanks for allowing me to be a little bit late. We had votes on the floor and I guess these gentlemen are faster voters than me—I think them through, all the way.

Before we begin and the subcommittee comes to order, I've been asked to note some interns from the VA who join us here today: Mr. Johnny Aguilar from the University of Minnesota Law School; Ivonne Chaustre from Berry College in Miami, FL; and, Monica Valez from the University of California at Riverside. Are you all here? Would you stand for just a second so we can say hello? Thanks for joining us.

We're here today as we begin to receive testimony relating to the operations of the Court of Veterans Appeals and the Board of Veterans' Appeals. These are two institutions that generate significant interest with the topic of claims processing arising as it does often here. The Board is empowered to provide de novo law review of any case and the Court functions as an appellate body reviewing records as designated by the Board. It's no secret that there are some problems with the claims processing. We've talked about it many times here and our witnesses have been here many times before.

VA has recently recalculated its accuracy and processing times at Regional Offices and has concluded that things are a little bit worse than they previously thought. In short, it seems to be taking longer to work a claim and the error rates are significant. Part of this issue is that the VA doesn't have sufficient personnel to do the job. That's why the Veterans' Advisory Committee has opposed the

President's proposal to cut 125 FTE's in fiscal year 1999 and recommended funding for an additional 175 personnel to the Budget Committee.

The upshot of the problems at the Regional Offices is more people file to the Board, and, by extension, the Court. As a result, the waits for a case under appeal have been enormous, some taking several years. We have to figure out a way to do the job right the first time. And I suspect that if there were no demands because of poor development of, the Regional Offices would not be facing the current situation we see.

I believe the VA must automate its decisions process, get the Service Officers more involved upfront, and communicate better with the veteran. Let's face it, a veteran may disagree with a decision, but if that decision has been timely and done by an organization noted for the quality of its work, the veteran is less likely to appeal.

I would note that the Board's statistics have improved over the dark days of 1993 and 1994. Congress has provided them with additional personnel and they have recognized and reorganized to what appears to be a more efficient, accountable system of deciding a claim and that's absolutely a step in the right direction.

From a Member's perspective, we don't hear much about the Court. We have a bill before us today that will make some changes to the way the Court manages itself, and we're eager to hear from all the witnesses about H.R. 3212, the Court and the Board, and I know that ranking member Bob Filner is as interested in this issue as anybody on the subcommittee and the full committee. I'd like to yield to him now for any opening remarks he may have. Bob?

OPENING STATEMENT OF HON. BOB FILNER

Mr. FILNER. Thank you, Mr. Chairman.

I, like you, am looking forward to hearing about the operations of the Court of Veterans Appeals and the Board of Veterans' Appeals, and to actions that our panels think are necessary to ensure our veterans that their claims are being considered in a just, fair, and timely manner.

I also understand that we'll be hearing some suggestions for changes regarding the retirement benefits for the judges of the Court of Veterans Appeals. It is important that the benefits provided to judges of this Court be comparable to those of other similar judges if we are to attract high-quality candidates for these important positions.

I am particularly interested in hearing from the Board of Veterans' Appeals with regard to issues raised by representatives of the veterans' service organizations who will be testifying later. I think we would all agree that veterans deserve to have their cases decided fairly. They also deserve to be served by a system which is perceived as fair, timely, and just.

Many years ago, General Omar Bradley stated that we are dealing with veterans, not with procedures; with their problems, not ours. The procedures which are used to adjudicate claims are designed to achieve justice for our Nation's veterans. They must be employed in a way which will achieve that end.

Therefore, I am concerned when I read testimony—and we'll be hearing that later—alleging that members of the Board of Veterans' Appeals or their staff become actively involved behind the scenes in litigation of cases at the Court of Veterans Appeals. I am concerned when I hear that it takes several years to adjudicate an appeal filed with the Court of Veterans Appeals and its recommendations for implementing changes in procedures are ignored. And I'm concerned when I hear that attorneys are reluctant to represent veterans because of the perceived unfairness in delay in paying attorney's fees which the veteran has agreed to pay a properly retained attorney. So, I hope today's hearings will address these concerns, as well as concrete steps to addressing them.

And I thank all of you for being here today, and I look forward to your testimony.

Mr. QUINN. Thanks, Bob. Thanks very much.

The ranking member of the full committee, Mr. Lane Evans, is with us, and I turn to Lane now for any opening statement he may have.

OPENING STATEMENT OF HON. LANE EVANS, RANKING DEMOCRATIC MEMBER, FULL COMMITTEE ON VETERANS' AFFAIRS

Mr. EVANS. Thank you, Mr. Chairman. I do want to thank you and Mr. Filner for holding this important hearing to review the operations of the Court of Veterans Appeals and the Board of Veterans' Appeals. I particularly want to thank Judge Nebeker for bringing to our attention the need for clarification of changes to its retirement system.

I am a strong supporter of an effective and vibrant court that addresses the claims of our Nation's veterans. I recognize that a fair and equitable retirement program, comparable to that of other judges, is necessary for the court to attract and retain competent judges to staff the court. I am pleased that the Board of Veterans' Appeals has made progress in reducing the backlog of pending claims. The length of time taken to resolve a veteran's claim continues to be too long and the quality of those decisions rendered continues to be less than adequate.

Testimony that the Board will be giving increased attention to the quality of the decisionmaking process is encouraging. I hope that the Acting Chairman will address the recommendations made by the Office of General Counsel more than one year ago concerning the organization of records and the relative role of the Board of Veterans' Appeals in preparing the record on appeal to the court.

So, Mr. Chairman, this is an important hearing and I look forward to hearing from our witness. Thank you for yielding.

Mr. QUINN. Thank you, Mr. Evans, and on behalf of all of us, I appreciate the time that you take to be at the subcommittee hearing today. I appreciate it very much.

Mr. Rodriguez, opening statement?

Mr. RODRIGUEZ. I just want to thank you for allowing this opportunity to hear the witnesses that are here, and the same comments that have been made in reference to, from both Mr. Evans and Mr. Filner, regarding the delays, I'd like to see what kind of testimony we might received in that regard.

Thank you.

Mr. QUINN. And Mr. Rodriguez, we're always grateful for your questioning when the witnesses are finished with their testimony.

Mr. Reyes.

Mr. REYES. Thank you, Mr. Chairman.

In the interest of time, I would just like to associate myself with the comments that have already been made, and also make mention that, as often happens with our veterans, there is a general feeling of disenfranchisement, and part of the solution has to come from hearings such as this. We appreciate the opportunity to participate.

Mr. QUINN. Thank you, and thanks for being here today.

We are going to begin with our first panel, and we're happy to have Judge Nebeker back again today. And joining us, accompanying him, is Judge Ken Kramer, member of the Court, as well as Mr. Standefer and Mr. Aument. We are pleased to have all of you here. And, if I may, I could remind everybody we're going to try to keep our written comments, or at least our oral comments, to about 5 minutes or so and leave time for questioning from the members who are here.

Judge Nebeker, if you'd like to begin, we're prepared now.

STATEMENT OF HON. FRANK Q. NEBEKER, CHIEF JUDGE, U.S. COURT OF VETERANS APPEALS; ACCOMPANIED BY HON. KENNETH B. KRAMER, JUDGE, U.S. COURT OF VETERANS APPEALS; HON. RICHARD B. STANDEFER, ACTING CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, AND RONALD R. AUMENT, DIRECTOR, MANAGEMENT AND ADMINISTRATION, BOARD OF VETERANS' APPEALS

STATEMENT OF HON. FRANK Q. NEBEKER

Judge NEBEKER. Thank you, Mr. Chairman, and Mr. Filner. I want you to understand that this is more than a perfunctory thank you. It's important that this legislation be brought to your attention and we're grateful that you have given us this opportunity to come at this time to address a problem which is coming at us rather rapidly.

Judge Kramer is with me, and Judge Kramer is Chair of the court's legislative committee and has in that capacity agreed to appear here this afternoon to answer any questions that I would not be able to answer, and there is likely to be a number of them.

Initially, I want to make clear that our testimony with respect to this legislation represents the views of the court alone. It does not necessarily reflect those of the administration, which we have not consulted, being an independent judicial tribunal at the behest of the Veterans' Judicial Review Act of 1988. I will briefly summarize the major points of concern in this legislation.

And the major point is this one: We are on a collision course with the years 2004 and 2005, when under present law six judges' terms will expire within a 15-month period. I have included in my prepared testimony the scenario outlined by my newest colleague, Judge William Greene, in a talk he recently gave. He envisioned a day in 2005 when he would walk into the court one morning and

find himself alone; that could happen. The most likely scenario is that four associate judges would retire within 11 months of each other between September of 2004 and August of 2005.

Let me put it another way. Two of the court's associate judgeships will be vacated in 2004. Two additional associate judgeships would be vacated in the first 8 months of 2005. In addition, my present plan is to continue to serve my full term, which expires in May of 2004. Under this assumption, it is likely that the court would have five simultaneous vacancies in 2005, especially considering that it takes upwards of 18 months for a new appointment. That was the period of time that it took Judge Greene to be confirmed. And I would remind you that the year 2004 is a presidential election year. So, it would appear that it would be a substantial period of time that the Court would not be able to function as a true appellate court.

There are other possible scenarios and I've outlined them in my prepared statement; I won't burden you with them today.

But to take us off this collision course, the provisions of this legislation that we propose would permit staggered retirement between 1999 and the year 2003, and provide a practical incentive for judges who become eligible to exercise that option. Precedent exists in three other Article I Courts for retirement based on completion of less than the full statutory term of service. And there are a number of other provisions applicable to Article III and other Article I Courts that permit retirement when less than full judicial terms have been completed.

Title II also provides for the recall of retired judges, which would allow me or my successor to call upon a retired judge, with that judge's consent, when the need arose. With the Court's increasing load, and it has doubled in the last 2 years, this provision makes eminent sense. All Article III lifetime judges and Article I Judges, except for this Court, have specific provisions for recall to judicial service. This provision would enable me and the future chief judge to deal expeditiously with the temporary spike in our caseload.

The second major facet of the proposed bill would rename the Court the United States Court of Appeals for Veterans' Claims. The name change, we believe, will give full voice to the express intent of Congress by making it quite clear that the Court is an independent judicial entity, completely separate from the Department of Veterans' Affairs. Misconceptions concerning the Court's nature still abound not only in the veterans' community, but, I am sorry to say, in the Government itself. This was recently revealed in an argument before the United States Court of Appeals of the Federal Circuit, in which a panel of that Court appeared to assume that the Court of Veterans Appeals was a part of VA for purposes of deciding the case before them.

The third major portion of the proposed legislation is that it would take further steps to achieve comparability with other Federal Courts that the legislative history surrounding the creation of the Court and its retirement shows was the actual intent of Congress at the time. The Court was created nearly 10 years ago under Article I of the Constitution. It is beyond dispute that Congress intended the Court to function as an independent judicial tribunal. That intent is reflected in language of the VJRA—the Veterans' Ju-

dicial Review Act—and many of the statements on the floors of the House and Senate. I will not quote them at this point.

In short, the Court has judicial powers and its judges have judicial responsibilities comparable with those throughout the Federal judiciary.

Further, the stated intent of Congress was that, commensurate with these powers and responsibilities, the Retirement Survivor Annuity Program be established "comparable to that available to other Federal judges" which would place the new Court "on comparable footing" in this regard in relation to other Federal Courts. The proposed legislation would achieve that goal.

The legislation, while not seeking the most favorable elements of various plans, would permit the judges to achieve parity with bankruptcy and magistrate judges. And I would point out to you that bankruptcy and magistrate judges are not appointed by the President with the advice and consent of the Senate, but are appointed by the Article III judges in their own Courts. For example, the changes to the Court's Survivor Annuity Program would make it comparable to the Joint Survivor Annuity System (JSAS), a system available to judges of four different courts including the bankruptcy and magistrate judges.

There are other changes, including that relating to contributions required by the judges, that would make the Court's Survivor Annuity Program comparable to the JSAS. The Court's present system provides too few benefits for too much cost. Only one judge has elected participation, and that was only because of the unfortunate circumstance that he learned he was dying of cancer, and he did so to protect his widow.

Enactment of H.R. 3212 would be of particular fairness to her and to the survivors of deceased judges, generally, because it would rectify the disparity between this Court's survivors annuity and the annuities of other survivors of other Federal judges, including magistrates and bankruptcy judges.

Finally, I would make a comment on the fact that I am here to address this legislation. It may occur to some of you that is rather strange to have a judge of the court come up and start talking about its problems and its legislative needs. I am here because there is no one else to speak for the Court. We do not have a constituency. We do not have legislative liaison, as the Article III Courts do. It is of necessity that I depart from the traditional role of a judge to come and implore you to give our legislative proposal very serious consideration so that we may avoid the collision course that we are presently on by the year 2004.

Thank you.

[The prepared statement of Judge Nebeker appears on p. 85.]

Mr. QUINN. Thank you, Judge. Thanks very much, and I want to associate myself with the remarks of Mr. Evans, who points out that your work on this bill, H.R. 3212, is the basis of pointing out to us where we should be editing, and we appreciate that a great deal. I think we may have some questions when we finish, but now that we've heard from the Court side, before we get to questions, I'd like to move to the Board side and receive comments from Mr. Standefer.

May I say before we begin, sir, that we appreciate the good job you're doing over there—a stand-up job for all of us and we appreciate, under somewhat difficult conditions sometimes, that improvements are being made. And on behalf of the subcommittee and the full committee, we appreciate it.

STATEMENT OF HON. RICHARD B. STANDEFER

Judge STANDEFER. Thank you, Mr. Chairman.

Mr. Aument is the Director of our Administrative and Management Service at the Board, and if, at an appropriate time, if I need to I may call on him.

It's a pleasure for me to be with you today to address our operations. In preparing for this hearing, I had occasion to review the Board's testimony before this subcommittee in February 1994; that, of course, was a little over 4 years ago. At that time, the Board's average response time was on its way to 781 days. We had decided only 22,000 cases that year, and we decided them, of course, with three-member panels, which was the law at that time. Our backlog of cases stood at 47,000 and it was on its way to 60,000. We were losing our most experienced Board members at an alarming rate; they were going to the administrative law judge ranks.

Today, I am pleased to report that the Board's response time is down to around 250 days; we've doubled our production. Our backlog is less than 30,000 cases, and we're retaining our Board members. What's behind this success? Well, a number of remarkable people.

First of all, this subcommittee has been outstanding in its support of the appellate rights of veterans and their families. You gave us the legislative tools we desperately needed. You championed the Board in budget negotiations. Our partners in the veterans' service organizations provided the Board with unparalleled support. As our decisionmaking capability increased, doubling from 1994 to 1997, these dedicated men and women have matched us step-for-step.

Our VA leadership ensured that dealing with the backlog at the Board was a top priority. At the Board itself, we reorganized so that we could take advantage of our new authority. Most of all, we've been very fortunate to have an extraordinary group of women and men, Board members, counsel, administrative support personnel—these are people who spend every working day of their lives assisting veterans and their families in the appellate process. They have responded magnificently. The average number of decisions per employee has increased by 75 percent since 1994 while the cost per case has actually declined by 25 percent.

So, I'd say we have a success story, Mr. Chairman. All of our stakeholders in this process have worked together to achieve a goal that none of us could have done alone. Before I discuss some of the challenges facing the Board today, I'd like to outline some specific things we've been doing recently.

As you may know, we recently published draft regulations to implement Public Law 105-111 that, of course, provides for a review of prior Board decisions on the grounds of clear and unmistakable error. This has been a very complex task. We have continued to strengthen our partnership with the Veterans' Benefits Administration, both at the Central Office level and at the Regional Office

level. We have implemented special quality review activities to monitor the cases remanded from the Court of Veterans Appeals. Even though these 657 cases in 1997 represented only 3 percent of the Board's appellate decisions in 1996, we are indeed committed to quality and want to ensure the fairest result for all appellants.

We do, indeed, have more to do. In our view, Mr. Chairman, the challenge facing the Board at this point is to reduce the time it takes between the filing of the appeal and a final decision. In 1992, the average processing time for final decisions was 512 days. What that means is that, on the average, a veteran could expect an allowance or denial about a year and a half after the filing of his substantive appeal. By 1995, that number had doubled, and today it stands at 1,032 days—that's close to 3 years.

We all have the right to be proud of reducing by two-thirds the time a veteran must wait for the Board to adjudicate his or her appeal. But the fact is that more than 40 percent of those adjudications continue to be remands, that is, cases returned to the Regional Office typically to gather and evaluate more evidence. These, of course, are not final decisions. And unless the Regional Office grants all the benefits that are at issue, and this happens only 25 percent of the time, then those cases come back to the Board to be worked again.

So remands cause two great difficulties: First, they mean that the veteran has to wait, in essence, through another appeal cycle, which means, on the average, another 700 days. Second, when the remand rate is very high, remands become a major factor in and of themselves in our backlog. They can, in fact, constitute more than 35 percent of our docket, and these are cases that have already been through the entire system one time. We want to reduce the number of remands because we think that can lead to giving the veteran a quality decision which is, obviously, more timely.

We need to increase training within the Board to improve quality. We need to capitalize on our business partnership with the Veterans' Benefits Administration by continuing to share some of the experience we have gained as VA's final arbiter of claims, and we're the closest contact, of course, with the jurisprudence of the Court. At the same time, we know that reducing the number of remands could have effects that may, on the surface, be perceived as negative consequences.

For example, it will reduce the number of decisions we make—that is final decisions—because it takes longer to draft a final decision, which is subject to judicial review, than it does to draft a remand. It will mean an increase in the number of allowed cases. But it will also mean an increase in the number of disallowed cases. We are going to need the understanding of our stakeholders during this transition.

In conclusion, Mr. Chairman, I think it's clear that there is much to be proud of in the Board's current performance, and many who share in the credit for that performance, we do not intend to rest but to seek out new ways to fulfill our statutory mandate of providing timely final decisions. We think that reducing the number of remands will make the appellate system even better for veterans and their families.

And I, at this point, would be pleased to answer any questions you might have.

[The prepared statement of Mr. Standefer appears on p. 90.]

Mr. QUINN. Thanks very much, Mr. Standefer, for your oral testimony here today.

For the benefit of our interns that we introduced earlier today, you need to understand that all the gentlemen and panel members later today submit a much lengthier statement that we are able to review beforehand. And some of the questions that we'll be asking today not only come from the 5 minutes or so of oral testimony, but also that written testimony. And if, again, interns are interested, we can furnish copies for you to take a look at what that looks like. Well, that's the teacher in me coming out I guess.

Judge Nebeker or Judge Kramer, if I may, VSO's have been critical, in fact, in the written testimony that we have for today regarding the participation of some of the VBA attorneys in cases that are before the Court. Can either of you comment on that, please?

Judge NEBEKER. We are unaware of any official participation by VBA members or their staff in cases before us. It is my understanding that there are two areas of participation—one perhaps, unavoidable. The first area is the preparation of the record on appeal. Since the statute says that we are governed by the record before the Secretary and the Board, it becomes necessary for the General Counsel to know what material was before the Board on which it based its decision. There are, I suppose, a number of ways in which that could be accomplished. But it does entail, in some sense, involvement of somebody on the Board to tell GC what material in the record—in the C-file—was considered by the Board at the time of its decision.

The second area began to develop shortly after the Court was created. The General Counsel's Office originally did not have what they call "settlement authority"— they soon got that. My understanding is that the General Counsel consults in some fashion with Board personnel in the process of deciding whether to try to negotiate a settlement, i.e., a remand. It's nothing official insofar as the court papers are concerned. We simply deal with General Counsel and nobody else.

Mr. QUINN. Thank you.

Mr. Standefer, any comment?

Judge STANDEFER. May I amplify on that just a little bit?

Mr. QUINN. Please.

Judge STANDEFER. Mr. Chairman, as you well know, proceedings before the Board of Veterans' Appeals are ex parte; that is, nonadversary. Once you get to the Court of Veterans Appeals, they become adversary. Our General Counsel defends its client, that is, the Secretary of Veterans Affairs, and they have the obligation to defend him very vigorously in an adversary proceeding before the Court of Veterans Appeals.

The General Counsel then, Group 7, may consult with any number of people in preparing that defense for the Secretary. This is the extent of their consultation with us. They consult with me from time to time, and they consult with our appellate liaison people. They never consult with a member of the Board of Veterans' Appeals or with its staff attorney's who prepare those decisions. They

are completely insulated from any contact with Group 7. They do not lobby or anything of that nature to have their decisions defended vigorously or in a certain way.

Settlements are run routinely through me. And I might just add this: I've never seen one that I disagreed with.

Mr. QUINN. So, it's more in terms of preparation than those kinds of things?

Judge STANDEFER. Yes, sir. We have a great deal of expertise in our litigation support group. These are not our Board members, like I've said, and I would think our litigation support group has as great an expertise in terms of the jurisprudence of the court and, of course, the procedures, as any personnel in the Board of Veterans' Appeals.

Mr. QUINN. And why not use it?

Judge STANDEFER. And it's used then, yes.

Mr. QUINN. Okay. Mr. Filner.

Mr. FILNER. Thank you, Mr. Chairman.

Judge, I would like to pursue what the chairman was saying, but that does not mean that either of us disregard your testimony on the necessity of legislation about staggered terms and other matters. We think that's very important. But we have some other questions that are coming from some of the VSO's, so please don't interpret our questions as disregarding your testimony.

I want to just follow up on the chairman's question: Judge, in your written testimony, you spent quite a bit of time, the first couple pages, on the notion of the Court as an independent judicial entity and including some very interesting statements from the legislative history. It seems to me that if, in fact, staff of the Board—and I'll get back to your answer, Mr. Standefer, later—but, if, in fact, staff of the Board was intimately involved with preparation of materials for the VA attorney in front of you—you said you were unaware of anything—but, if there were close collaboration, wouldn't that put to doubt some of the notion of an independent entity?

I mean, we are both just simple school teachers here. But I'm sure our notion of the judicial process is that when something is appealed from one level to another, the initial level from which you are appealing should not be involved in the decision of the next body, otherwise you don't have an independent decision.

Judge NEBEKER. Well, let me answer the question this way, Mr. Filner: The merits of the case before the court necessarily depend upon the record that is before the court. The independent decision on the merits must, and does, remain quite apart from the Board or any influences that it might exert——

But insofar as preparation of the record on appeal, if they did not expurgate the C-file, we would have our chambers totally full of irrelevant papers, and it would take days to go through a record and weed out that which is irrelevant that's in the C-file. So, it does become necessary——

Mr. FILNER. Define for me the C-file?

Judge NEBEKER. The claims file which will contain the history of every claim and every paper affecting that veteran for years and years. Some of them, I guess, are file cabinet size.

Mr. FILNER. So, you ask the previous level to just give you the record that's relevant?

Judge NEBEKER. The statute says——

Mr. FILNER. I understand, but if you knew that the staff was doing more than just expurgating extraneous material—and, of course, even the definition of "extraneous" might affect the way you look at the record—but if they were doing more than just presenting the written record, would you say that that threatened the independence of the decisionmaking process?

Judge NEBEKER. That would definitely contaminate the decisionmaking process. I might add this: The Court has recognized all along that General Counsel is obligated by the code of professional conduct. They recognize that fact, and their duty under that code imposes upon them the obligation to include in the record on appeal not just the material that supports the decision of the Board, but any material that may not support the decision of the Board, that may point out that there is error—and we do find error in a sufficient number of the cases that are brought before us—that I have no reason to assume that General Counsel is not responding to his or her professional obligation to ensure that both sides are accurately reflected in that record on appeal.

Mr. FILNER. Okay.

Judge NEBEKER. There seems to be integrity in it because we do find error, harmful error, in a substantial—too substantial—number of cases.

Mr. FILNER. That could just mean incompetence, also.

Judge NEBEKER. Pardon?

Mr. FILNER. Error could just mean incompetence. I mean, it doesn't have to indicate some impartiality—just a side comment.

Judge NEBEKER. But you do have to have documents in there that go both ways, if you will.

Mr. FILNER. I understand, but you did say that if you had evidence or substantial testimony to the effect that there was something more than just the presentation of the record—in your words—that would definitely indicate some contamination of the process.

Judge NEBEKER. Yes. But I would think that any assertions to that effect would have to be made with particularity——

Mr. FILNER. I understand.

Judge NEBEKER. And specificity. I have a feeling that substantiation is not often enough provided.

Mr. FILNER. I'm going to introduce some of that into the record.

Mr. Standefer, do you have anything to comment more?

Judge STANDEFER. No, sir.

Mr. FILNER. I was interested in your remarks that the Board and the Board members—and somebody, I forget what you said—were insulated from any further discussion of the process.

Judge STANDEFER. I might just explain very briefly our organization. And that is, we're divided into four decision teams, and the four teams are: Board members and their support staffs—that is, the attorneys who help them prepare decisions; out of my office then, we have what is called a Litigation Support Unit, the two are separate—that is, the Decision Teams are separate from the Litigation Support Unit. Our General Counsel's Group 7, from time to

time, in defending the Secretary of Veterans Affairs before the Court will consult with our litigation support unit seeking advice as to the best defense. We give them that advice, but that's all it is.

Mr. FILNER. Wait, wait, wait—you give them advice as to their best defense?

Judge STANDEFER. If they seek it.

Mr. FILNER. You just made the decision, presumably negative to the party, and then you're going to be involved in advice to the attorney who now takes the case to defend the decision?

Judge STANDEFER. If they seek that advice, we will give it to them based on our expertise.

Mr. FILNER. I don't have enough time here right this second, but that seems to me, again, as a layman and not an attorney, that if I were a litigant here, and I knew that the folks who just made an adverse decision on me were then involved in dealing with the next level of argument, it would seem to me that I would not be getting a fair deal here.

And, Mr. Chairman, I would like—I'll come back to it in another question round—but I would like to introduce in the record a packet of materials that, I assume, the later testifiers will refer to, a packet of correspondence between DAV and the VA, memos from the Litigation Support Division to the attorney for the VA. There are pages of very minute discussions of reactions to a draft decision line-by-line going over the matter. This is not just expurgating a record or presenting the record of decision. This is detailed advice. And it is put in a very disrespectful way, the first thing from your Litigation Support Division said refers to the veteran: "Did this guy have two accidents in 1981 or did he only have one?"

I mean, they're talking in a way which shows very informal and intimate kinds of contact between two levels of decisionmaking which, as a laymen, I assume would be separate. I'll come back to this, but you're claiming the Litigation Support Division is different from the folks who are making the decision. I suspect that if I came to visit your offices, these people would know the other people pretty well, and would talk to them regularly, and a memo like this is not going to come from an insulated situation, in my opinion.

So, I would like to explore that with you further but Mr. Chairman, I ask unanimous consent to introduce these memos in the record.

Mr. QUINN. Mr. Filner has asked for information to be introduced in the record. My only question is whether or not that's confidential information.

Mr. FILNER. The material I have in front of me has the confidential information that you are concerned about deleted.

Mr. QUINN. Are there any other objections?

There are no objections; so ordered.

[The information follows:]

DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

AUG 2 9 1997

In Reply Refer To: 027

Disabled American Veterans
Attn: Ronald L. Smith
807 Maine Avenue, SW
Washington, DC 20024

Dear Mr. Smith:

I am responding to your June 5, 1997, letter with respect to the Board of Veterans' Appeals (BVA) participating in proceedings pending before the United States Court of Veterans Appeals (CVA). It appears that your interpretation of the February 9, 1993, Memorandum of the Secretary differs significantly from the General Counsel's (GC) and that you may not understand how "consultation" is implemented.

The Secretary's memorandum clearly stated that settlement determinations were delegated to the General Counsel. However, as occurs with any litigation decision, the Secretary expressed a concern that the General Counsel consult with affected departmental elements before reaching final settlement agreements.

In furtherance of the Secretary's policy, OGC consults with the Office of Chief Counsel to the Chairman, BVA when evaluating cases for possible settlement. That is far different from communicating with a BVA Board Member, the decision writer (ALJ equivalent), and involving the Member in settlement decisions. This practice, in fact, amounts to nothing more than requiring my action attorney to confer with the BVA's legal advisor on facts, policy or strategy to insure that all the ramifications of a settlement are fully understood and appreciated before the GC actually settles a specific case. The Board Member does not become involved in, nor does he/she influence the GC's final decision.

I hope that this brief description of the process allays your concerns. The process is quite different from what you may have envisioned, e.g., that the decision maker (ALJ) was involved in settlement or litigation strategy decisions.

Sincerely yours,

Mary Lou Keener
General Counsel

DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

RECEIVED
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June 2, 1997

In Reply Refer To: 023

Ronald L. Smith, Esq.
Judicial Appeals Representative
Disabled American Veterans
807 Maine Avenue, S.W.
Washington, D.C. 20024

Dear Mr. Smith:

We have reviewed your letter of May 7,1997, directed to me in my capacity as the Designated Agency Ethics Official (DAEO). Your letter challenges the propriety of the role of the Board of Veterans Appeals in VA litigation before the United States Court of Veterans Appeals. You suggest that, because the Board no longer has jurisdiction after an appeal to the Court begins, it is improper for the General Counsel's office to permit the Board to participate in the process of settling cases pending with the Court. You suggest that giving the Board such a role "raises at least an appearance of impropriety and may implicate the ABA Code of Judicial Conduct."

The issues you perceive are beyond the subject matters delegated to me as DAEO. Thus, I cannot analyze them authoritatively. As the DAEO and the Assistant General Counsel for ethics issues in VA, I am authorized to interpret only those ethics laws and other provisions that regulate the conduct of individual VA employees. Although ethics provisions do affect the way employees carry out the official activities entrusted to them, the provisions generally do not limit the *institutional* arrangements and practices determined and developed in the management of the Department.

The ethics rules within the scope of my delegation from the Secretary generally involve the relationship between official activities or status on the one hand and the private interests of an employee, or a person close to him, on the other. *See* 5 C.F.R. § 2638.202; 18 U.S.C. §§ 201-209; 5 U.S.C. App. (Ethics in Government Act of 1987, as amended); 5 C.F.R. Parts 2634, 2635, 2636. The practice you challenge does not involve, insofar as we can tell, any private interest of an employee or other person close to an employee. Under those circumstances, the practice does not raise an issue under ethics provisions within the scope of the DAEO's responsibility.

Further, though the canons of judicial and legal ethics may occasionally overlap employee ethics rules, interpreting and advising on the canons is also outside my role as DAEO, and may be more appropriate for the Court's consideration.

2.

Ronald L. Smith, Esq.

For these reasons I, as DAEO, am unable to comment substantively on your analysis. We will, however, supplement the copy of your letter that was addressed to the General Counsel by advising her of our response. You may wish to address further correspondence to her, should you decide that you want more departmental advice with respect to the applicability of the VA regulations cited in your May 7 letter to me.

Sincerely yours,

Walter A. Hall
Assistant General Counsel and
Designated Agency Ethics Official

Motto: "If I cannot speak good of my comrade, I will not speak ill of him."

DISABLED AMERICAN VETERANS

NATIONAL SERVICE and LEGISLATIVE HEADQUARTERS
807 MAINE AVENUE, S.W.
WASHINGTON, D.C. 20024
(202) 554-3501

April 10, 1997

Walter A. Hall, Esq.
Assistant General Counsel (023)
Department of Veterans Affairs
810 Vermont Ave., N.W.
Washington, DC 20420

Dear Mr. Hall:

The Board of Veterans' Appeals (Board) is engaged in a practice which the Disabled American Veterans (DAV) believes raises certain ethical concerns. The purpose of this letter is to request that you, in your capacity as the Department's Designated Ethics Official, 38 C.F.R. § 0.735-1(a) (1996), review that practice and issue an opinion on whether the practice is consistent with law and the applicable ethical standards.

There does not appear to be any statutory or regulatory authority which authorizes the Board to participate in proceedings before the United States Court of Veterans Appeals (Court). The Board has jurisdiction to make final decisions on matters appealed to the Secretary under 38 U.S.C. § 211(a). 38 U.S.C.A. § 7104(a) (West 1991). However, the Court has rejected the idea of dual jurisdiction, *i.e.*, that the Board may exercise concurrent jurisdiction over an appeal after a notice of appeal has been filed with the Court. *Cerullo v. Derwinski*, 1 Vet.App. 195, 196-97 (1991). Nonetheless, apparently pursuant to a February 8, 1993, memorandum from Secretary Brown, General Counsel Professional Staff Group 7 permits the Board to review, comment upon, and propose changes to draft settlement agreements and joint motions for remand in appeals pending before the Court. A copy of that memorandum is enclosed for your convenience. A number of documents demonstrating the nature of the Board's involvement are also enclosed. The Board has repeatedly argued that a proposed settlement or remand should not be filed because the Board did not agree that any error warranting remand had been committed. In these cases the Board, which had no jurisdiction over the appeal, had direct communication with the Secretary's counsel regarding the defense of a Board decision then on appeal to the Court.

The Board's involvement with Group 7 appears inconsistent with VA regulations. Proceedings before the VA are required to be ex parte. 38 C.F.R. § 3.103(a) (1996). The

regulation stands for the proposition that the Secretary, not the claimant, is unrepresented before the regional office and the Board. This general provision has been expressly adopted in the Board's rules of practice. 38 C.F.R. § 20.700(c) (1996). Proceedings before the Board are required to be non-adversarial. *Id.* When the Board departs from its role as an independent decision-maker and becomes actively engaged in the process of defending its decision while an appeal of that decision is pending before the Court, the Board becomes the claimant's adversary. Once the Board has participated in the adversarial process of defending its decision and the decision is remanded, in some cases over the Board's objection(s), we believe it is impossible for the Board to once again assume the role of an independent, unbiased decision-maker.

The present practice also raises a question regarding the propriety of what appears to be ex parte contact between the General Counsel and the Board concerning the claimant's case and implicates the ABA Code of Judicial Conduct. The law in the Federal Circuit is that:

> A judge (or other official performing a quasi-judicial function) completes his work when he decides the case before him. Once he has rendered that decision, his role in the case is over, except if he is asked to reconsider his decision or a higher tribunal remands the case to him for further proceedings. He has no judicial interest in and should not be concerned about the defense of his decision if it is challenged on appeal or elsewhere. Under our adversary system that role is left to the party who has prevailed before the judge.

Gulf & Western Indus., Inc. v. United States, 671 F.2d 1322, 1325 (Ct. Cl. 1982). Precedents of the Court of Claims issued on or before September 30, 1982, have been adopted by the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc). Members of the Board are performing the quasi-judicial function of providing de novo review of VA decisions. Under the present practice the General Counsel appears to be engaging in ex parte contacts with the Board with full knowledge that the matter will be remanded. The remand proceedings cannot be either ex parte or nonadversarial where the claimant is appearing before a Board which participated in the Secretary's defense of its decision. This seems to raise at least an appearance of impropriety.

DAV also believes that the fundamental right to due process guarantees VA claimants that their cases will be adjudicated by an impartial decision-maker. The Board conducts a substantive review of the draft Court pleadings under the present procedure. It comments, inter alia, both on whether remand is appropriate and for what reasons the appeal should be remanded. In our opinion, the Board cannot maintain impartiality on remand following such involvement in the representation of the Secretary before the Court.

Thank you for your attention to this matter. DAV looks forward to receiving your opinion.

Sincerely,

Ronald L. Smith, Esq.

Enclosures

cc: Secretary of Veterans Affairs
General Counsel
Acting Chairman, Board of Veterans' Appeals
Assistant General Counsel, Professional
Staff Group 7

Department of Veterans Affairs

Memorandum

Date: February 9, 1993

From: Secretary (00)

Subj: Settlement of CVA cases

To: Under Secretary for Benefits (20)
Under Secretary for Health (10)
Chairman, Board of Veterans' Appeals (01)
Acting General Counsel (02)

1. My predecessor authorized the General Counsel, who represents the Secretary in all cases before the Court of Veterans Appeals (CVA), to enter into binding settlements of those cases. I have reviewed that policy in the light of concerns raised by the Chairman of the Board of Veterans' Appeals. Having considered the arguments raised on both sides of the issue, including the memorandum from the Chairman, dated December 17, 1992, and the attached opinion from the Acting General Counsel, I am satisfied (without need for outside advice) the Secretary has settlement authority and its delegation to the General Counsel is appropriate. I see no reason, therefore, to change the decision made by my predecessor.

2. Once engaged in litigation before the CVA, the General Counsel's responsibility extends beyond simply defending the adjudicative judgment exercised by the Board and the field stations. Precedent decisions issued since the adjudications occurred, as well as other factors, may portend a different outcome. Where such a situation is present, the desired outcome may be most promptly achieved by a settlement of the claim without the need to remand the matter back through the adjudication/appeal process before justice prevails. Moreover, it may occasionally become necessary to compromise a claim in order to avoid a likely adverse precedent with significant repercussions.

3. Responsibility for these settlement determinations, based as they must be on an analysis of the facts before the court, the need for governmental fairness in the face of changing precedents, and the litigation risk, most fittingly lies with the Department's chief legal officer. Because of the many factors they entail, decisions to settle should not be viewed as necessarily indicating disagreement with the manner in which a claim was adjudicated. Nevertheless, as officers of the court and my representatives there, the General Counsel's staff has a responsibility to see that claimants receive all the benefits authorized by law.

2.

4. Legitimate concerns have been raised that this settlement authority, if exercised injudiciously, could compromise the integrity of the VA claims process. For this reason, I expect the General Counsel to continue the current practice of consulting closely with affected departmental elements before agreeing to settle a claim and to avoid agreements which are incompatible with the underlying purposes of authorizing statutes and validly promulgated regulations.

Jesse Brown

Attachment

Board of Veterans' Appeals

Litigation Support Division (01C2)

Fax: (202) Phone: (202)

Telefacsimile Transmittal

To: Date of Transmittal: February 4, 1997

From:

4 pages attached with changes

We agree that a remand is appropriate. See the attached pages for changes. Did this guy have 2 accidents in 1986: one in January, one in December? or did he have one in January 1986 and one in December 1987? I think the motion says both, so regardless of which it is the motion has to be corrected. Also, on page 6, the FedReg cite should either be removed or revised to show it was not re: these DCs but rather re: mental disorders. I know 3.102 applies to all DCs, but if we're quoting the Fed Reg we should have the quote in context. The conclusion should be revised to make it clear we're only vacating the BVA as to the *sc back disability*, not re: PTSD. I think the real basis for this remand is a *Colvin* violation: we decided the cause of current disability was an intercurrent injury. On page 7, if is correct when he implies the 1995 VAX report does not state the examiners reviewed the vet's prior medical record, then I think that first complete paragraph should be revised as indicated. Please check the 1995 VAX report, though, to make sure that is, in fact, the case. If just disagrees with the conclusions the docs reached in the 1995 VAX, and means that there's no way they could've reviewed the record and come to that conclusion, then I object to the entire paragraph and it should be removed. Call me if you want to discuss this!

PLEASE NOTE: This transmission is intended only for the use of the person or office to whom it is addressed and may contain information that is privileged, confidential or protected by law. All others are hereby notified that the receipt of this message does not waive any applicable privilege or exemption from disclosure and that any dissemination, distribution or copying of this communication is prohibited. If you have received this communication in error, please notify us immediately at the above telephone number and return the original message to this office, 810 Vermont Avenue, NW, Washington, DC 20420 via the United States Postal Service. Thank you.

Comments regarding Proposed Joint Motion in

I do not agree with the need for this remand. However, if you decide to go forward with this motion you should indicate in the motion that the entire Nov. 1995 Board decision is not to be vacated; the Board did grant a 30% rating for the earlier period of Sept. 10, 1975 to Aug. 12, 1984, for mitochondrial myopathy of the lower extremities.

I think the representative has misinterpreted the block quote from the Board decision which is on p. 5 of the motion. In the phrase "the veteran's currently diagnosed mitochondrial myopathy was first manifested during service with symptoms diagnosed then as anterior compartment syndrome," the word "then" refers to "during service." This is an accurate statement; at least this motion doesn't note that the service medical records contain any symptoms other than pain in the lower extremities. The information in the chart on PP. 6-7 begins with complaints in March 1978 which is after service (and it should be noted that all the information in this chart in the motion is in the Reasons or Bases section of the Board decision).

I think that the Board provided adequate Reasons or Bases that the effective dates are awarded pursuant to 38 C.F.R. § 3.400, which provides that the effective date is the date of receipt of the claim or when entitlement arose, whichever is later. In this case, the later date is the date of receipt of claim. Only the claim regarding the disorder of the lower extremities was received within one year of separation and only complaints involving the legs were noted in the service medical records. Therefore, the effective date of only mitochondrial myopathy involving the lower extremities is effective from the day following separation. The claim for mitochondrial myopathy involving other parts of the body was not received until Aug. 13, 1984 (an Aug. 1984 hospital report was found to be an informal claim). There is no dispute, as noted in the proposed joint motion for remand, that now the appellant's mitochondrial myopathy affects parts of his body other than his lower extremities." (p. 7) But, I don't think we have the medical knowledge to say, as indicated in this motion (p.6-7), that specific prior complaints of pain in certain areas were physical manifestations of his mitochondrial myopathy; this statement must be supported by a medical expert's opinion, which the motion does not cite to so I assume there is no such medical opinion.

I also disagree with the statement on pp. 7-8 that indicates that the information in the chart demonstrates continuity of symptomatology since service. There are no complaints noted in this motion for the period from Sept. 1975 (date of separation from service) to March 1978.

In regard to the psychiatric disability, even if the Board erroneously characterized the issue as reopening the claim, rather than an original claim for a psychiatric disorder, it would be harmless error, as the effective date is the

same for a reopened claim or an original claim, pursuant to 38 C.F.R. § 3.400. In addition, the first diagnosis of atypical depression appears to be in May 1989, at which time the examiner also opined that the appellant's psychiatric disorder preexisted military service but was aggravated by the onset of the appellant's service-connected mitochondrial myopathy.

Board of Veterans' Appeals

Office of the Chief Counsel

Fax: (202) Phone: (202)

Telefacsimile Transmittal

To: Appellate Litigation Staff, Group VII (027)

Fax:

Phone: Date of Transmittal: February 5, 1997

From: re Joint Motion for Remand in Appeal of

Number of pages to follow: Two.

Like I said in my incoherent telephone message, it is probably too late to make any changes in this "joint motion." Appellant's counsel made almost no changes and took out none of the unnecessary and irrelevant language that the first motion contained. This document looks like a brief, not a joint motion.

The requirement that another VA examination be conducted needs to be based on something. So far, appellant's counsel merely says that the prior diagnosis of PTSD was inadequate because the examiner qualified it by adding the words "only if we accept his subjective symptoms as fact and his stressors in the service can be verified." This is a valid diagnosis of PTSD and would support a grant of service connection if the veteran's stressors can be verified. As I said before, the problem with this case is the stressors, not the diagnosis.

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In my earlier comments, I cited to *Dizoglio*, 9 Vet.App. 163, 167, which contains a reference to 38 C.F.R. § 3.304(f) and M21-1, Part VI, para. 7.46 regarding the presence or absence of other traumatic events and their relevance to current symptoms. In other words, this appellant might have PTSD that is due to stressors unrelated to military service. It would have nice if the joint motion mentioned that.

Give me a call if you want to talk about it. Good luck!

We think the plaintiff is correct in this view. The Government did not clarify the base bid control points prior to award of Alternate A as required by the plaintiff's condition. The Government had ample opportunity to review the problem and get the matter resolved—at least administratively. It knew as early as August 8 that plaintiff was disputing the base bid control point count which impinged on the Alternate A control point count. Yet it took the Government almost 3 months to get its act together before it was even prepared to "award" the alternate and even then the Government awarded without doing anything about the condition. This case indicates a rather classic example of where the contracting officer did not exhibit the control over the contract that he or she should have had, but delegated far too much authority to other Government officials.

In any event, the court agrees with the plaintiff's legal theory in regard to the award of Alternate A. The Government is bound by the plaintiff's interpretation of what the contract called for—*i.e.*, 16 points as bid. To the extent that the Government's award of Alternate A required the plaintiff to install 54 more points (121–174) than bid, the action constitutes a constructive change and the plaintiff is entitled to recover an equitable adjustment, covering those 54 points. Furthermore, concluding to the contrary, would in our view be inequitable and amount to Government overreaching under the facts of this case. *Cf. Bromley Contracting Co. v. United States*, 219 Ct.Cl. 517, 527–28, 596 F.2d 448, 453–54 (1979).

Substantial evidence does not support the Board's position in regard to the award of Alternate A and it is incorrect as a matter of law.

GULF & WESTERN INDUSTRIES, INC.

v.

The UNITED STATES.

No. 65–80C.

United States Court of Claims.

Feb. 24, 1982.

Plaintiff requested interlocutory review of an order of trial judge remanding contract case to Armed Services Board of Contract Appeals for a trial de novo before a different hearing member of the Board. The Court of Claims, Friedman, Chief Judge, held that: (1) remand by trial judge to Board following Board's denial of plaintiff's appeal from decision of contracting officer denying plaintiff any adjustment on contract was improper; (2) ex parte contacts between member of Board who wrote Board's opinion in the contract case and attorneys for government were improper, even though they occurred after Board's decision; and (3) trial de novo of contract case was not required, rather, remand to a new Board was appropriate.

Ordered accordingly.

1. United States ⇐73(15)

Remand by trial judge to Armed Services Board of Contract Appeals following the Board's denial of plaintiff's appeal from decision of contracting officer denying plaintiff any adjustment on contract was improper, rather, trial judge should have referred plaintiff's motion for trial de novo to the Court of Claims for disposition, accompanied by whatever recommendation he wished to make. U.S.Ct.Cl.Rules 13(a), 149(a), 28 U.S.C.A.; 28 U.S.C.A. § 1491.

2. Judges ⇐49(1)

Cardinal principle of judicial conduct is that a judge must avoid not only actual impropriety but also the appearance of any impropriety.

3. United States ⇐73(15)

Although technically standards providing that a judge must avoid not only actual

impropriety but also the appearance of impropriety may not cover administrative judges who are members of the Armed Services Board of Contract Appeals, sensitive nature and public importance of the adjudicatory duties those individuals perform require that the same principles should govern their conduct. ABA Code of Jud.Conduct, Canon 2.

4. United States ⇐73(15)

Ex parte contacts between member of Armed Services Board of Contract Appeals who wrote the Board's opinion in a contract case and the attorneys for the government were improper, even though the activities occurred after the Board's decision.

5. Federal Courts ⇐1116

When a Court of Claims concludes that further administrative proceedings are required in a case coming to it from a Board of Contract Appeals, its normal practice is to remand the case to the Board; in the exceptional circumstances where the agency cannot provide adequate relief on such remand, the court will refer the case to its trial division.

6. United States ⇐73(15)

Trial de novo of contract case in which member of Armed Services Board of Contract Appeals who wrote the Board's opinion improperly made ex parte contacts with attorneys for the government was not required, rather, remand to a new Board was appropriate with certain qualifications.

William J. Spriggs, Washington, D.C., for plaintiff; Robert E. Gregg, McKenna, Conner & Cuneo, Washington, D.C., Thomas E. Harrison, Jr., and Gregory J. Battersby, New York City, of counsel.

Elizabeth Langer, Washington, D.C., with whom was Asst. Atty. Gen., J. Paul McGrath, Washington, D.C., for defendant.

Before FRIEDMAN, Chief Judge, and BENNETT and SMITH, Judges.

ON DEFENDANT'S REQUEST FOR REVIEW

FRIEDMAN, Chief Judge:

The defendant has requested interlocutory review, pursuant to Rule 53(c)(2)(ii), of an order of Trial Judge Bernhardt remanding this contract case to the Armed Services Board of Contract Appeals ("the Board") for a trial *de novo* before a different hearing member of the Board. The trial judge took the action because of *ex parte* contacts between the Board member who wrote the Board's opinion and attorneys for the government.

The defendant does not oppose a remand to the Board. It argues, however, (1) that only the court and not one of its trial judges may direct such a remand, and (2) that the remand should not be for a trial *de novo* but for the limited purpose of determining whether the Board member was biased and prejudiced. We agree with the defendant's first contention but disagree with its second one.

I.

This case grows out of a contract by which the plaintiff agreed to supply the government with military material at a charge of approximately $4 million. After the plaintiff completed performance of the contract, it sought from the contracting officer an equitable adjustment of more than $2 million. The contracting officer denied any adjustment, and the plaintiff appealed to the Board.

After a hearing, the Board on January 23, 1980, denied the appeal. The lengthy opinion of the Board was written by Administrative Judge Grossbaum, who had presided at the hearing, and was concurred in by three other members of the Board. The plaintiff sought review in this court of the Board decision. In its amended petition, filed in August 1980, the plaintiff challenged the Board's decision on various grounds, including the claims that the Board improperly had denied discovery and had excluded relevant evidence.

On January 19, 1981, according to a contemporary memorandum she prepared, the lawyer in the Department of Justice han-

dling this case received a telephone call from Judge Grossbaum. The memorandum reported that Judge Grossbaum

> stated that he wanted to talk to me about the case because, as he emphasized, "I don't want this case to be lost in the Court of Claims." He emphasized that he had more than an academic interest in the outcome of the litigation. He stated that, in his opinion, plaintiffs violated Court of Claims rules, because they did not take exception to any particular findings, but rather took general exception to the findings of fact. He also repeated several times that the papers on file in the case are terse.

Four days later, the attorney reported in a second memorandum, Judge Grossbaum again called her. After asking about the briefing schedule, Judge Grossbaum

> stated again that he would like to talk to me about the case and I replied that I had been instructed by my supervisors to reply to his inquiry in writing and that further discussions would be inappropriate. He immediately dropped the subject of the briefing schedule and stated that I should not feel compelled to write a letter. I replied that I would follow the instructions of my supervisors in this matter. He then terminated the conversation rather abruptly.

Following these conversations, the Department of Justice asked the Office of the Judge Advocate General of the Army whether any members of that office had had *ex parte* conversations about this case with Judge Grossbaum. The Office responded that two members of its staff had discussed the case with Judge Grossbaum. The first telephone contact was in January 1980, shortly after the Board had rendered its decision, in which "Judge Grossbaum discussed in considerable detail portions of his opinion and the source of the support in the record for the finding of fact number 122." The officer who had that conversation also reported that "[f]ollowing this conversation, Judge Grossbaum has spoken with me several other times requesting that I furnish him a copy of the pleadings in the Gulf and Western case."

In February 1981, the Department of Justice informed the plaintiff's lawyer about Judge Grossbaum's telephone conversations with its attorney and enclosed copies of her two memoranda discussing the conversations. In August 1981, the plaintiff filed in this court a motion for a trial *de novo*. The plaintiff asserted that the *ex parte* contacts violated the rules of the Board and the standards of conduct for Department of Defense employees. It also cited certain canons of the American Bar Association's Code of Judicial Conduct. The motion stated that "ASBCA Judge Grossbaum's ex parte contacts with the government attorneys responsible for this case give rise to the appearance of prejudice and bias and raise questions regarding Judge Grossbaum's impartiality in reaching his appealed-from decision .... Because of the appearance of bias and prejudice and the questionable impartiality of the Board's decision, plaintiff was denied basic due process."

The trial judge to whom this case was assigned remanded the case to the Board "with instructions to conduct a trial *de novo* before a different hearing member of that body." On the defendant's motion for clarification, the trial judge explained that his order "was for the purpose of obtaining a trial *de novo* on the merits" and not on the issue of bias and prejudice. The trial judge did not explain the reasons for his action.

II.

[1] Since the trial judge has not certified his order for interlocutory review pursuant to Rule 53(c)(2)(i), the defendant is required to show "extraordinary circumstances whereby further proceedings pursuant to the said order would irreparably injure the complaining party or occasion a manifest waste of the resources of the court or of the parties." As we explain below, the trial judge exceeded his authority in ordering the remand. Moreover, if the government is correct that the *de novo* hearing the trial judge directed is improper, review at this time would be appropriate to avoid the unnecessary time, expense, and

effort that such a trial *de novo* would entail. We therefore shall grant the request for interlocutory review.

III.

Section 1491 of Title 28 states:

> In any case within its jurisdiction, the court [of Claims] shall have the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just.

28 U.S.C. § 1491 (Supp. III 1979). Rule 149(a) parallels this statute. It states:

> At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official, with such direction as may be deemed proper and just.

A remand to an agency for a trial *de novo* is an action that under both 28 U.S.C. § 1491 and Rule 149(a) only the court and not a trial judge may direct. We have not delegated to our trial judges the authority to enter such an order. It is not the kind of procedural order that our trial judges may issue under their general power under Rule 13(a) "to do and perform any acts which may be necessary or proper for the efficient performance of their duties and the regulation of proceedings before them." Although Rule 149(c) recognizes that a trial judge sometimes may order a remand—it states that a remand order "by the court (as distinguished from the trial judge) shall terminate the suspension (if any) of the reference to the trial judge"—that provision refers to routine orders and does not authorize a remand for a new trial.

Accordingly, in this case the trial judge should have referred the plaintiff's motion for a trial *de novo* to the court for disposition, accompanied by whatever recommendation he wished to make.

IV.

A judge (or other official performing a quasi-judicial function) completes his work when he decides the case before him. Once he has rendered that decision, his role in the case is over, except if he is asked to reconsider his decision or a higher tribunal remands the case to him for further proceedings. He has no judicial interest in and should not be concerned about the defense of his decision if it is challenged on appeal or elsewhere. Under our adversary system that role is left to the party who has prevailed before the judge. Indeed, one of the criticisms of the use of the writ of mandamus to obtain interlocutory review is that it makes the judge whose decision is challenged a party in the mandamus proceedings who must defend his ruling. *Kerr v. United States District Court*, 426 U.S. 394, 402–03, 96 S.Ct. 2119, 2123–24, 48 L.Ed.2d 725 (1976).

Administrative Judge Grossbaum violated this rule. In his *ex parte* communications with the Justice Department lawyer handling the case, Judge Grossbaum went far beyond inquiring about the status of the case. Instead, he attempted to inject himself into and actively participate in the defense of his decision before this court. He explained to the lawyer that he wanted to discuss the case with her because "I don't want this case to be lost in the Court of Claims," emphasized that "he had more than an academic interest in the outcome of the litigation," and criticized the plaintiff's handling of the case as violating the rules of this court.

[2, 3] A cardinal principle of judicial conduct is that a judge must avoid not only actual impropriety but also the appearance of impropriety. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, 89 S.Ct. 337, 340, 21 L.Ed.2d 301 (1968). *See also, Taylor v. Hayes*, 418 U.S. 488, 501, 94 S.Ct. 2697, 2704, 41 L.Ed.2d 897 (1974). The comment to Canon 2 of the American Bar Association's Code of Judicial Conduct warns that "[a] judge must avoid all impropriety and appearance of impropriety." Similarly,

Canon 2 of the Code of Judicial Conduct for United States Judges, which the Judicial Conference of the United States has approved, states that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." Although technically these standards may not cover administrative judges who are members of the Armed Services Board of Contract Appeals, the sensitive nature and public importance of the adjudicatory duties those individuals perform require that the same principles should govern their conduct. *Cf. Butz v. Economou*, 438 U.S. 478, 512–14, 98 S.Ct. 2894, 2913–15, 57 L.Ed.2d 895 (1978) (administrative judges have functions similar to those of article III judges and so are entitled to absolute immunity from damage suits).

The Standards of Conduct for employees of the Department of Defense instruct Departmental employees to "avoid any action . . . which might result in or reasonably be expected to create the appearance of . . . (d) [l]osing complete independence or impartiality . . . or (f) [a]ffecting adversely the confidence of the public in the integrity of the government." 32 C.F.R. § 40.-6 (1980).

[4] Judge Grossbaum's actions in this case created at least an appearance of impropriety. His endeavors to influence and participate in the defense before this court of the decision he wrote for the Board overstepped the bounds of proper judicial conduct. Moreover, his statement that he "had more than an academic interest in the outcome of the litigation" went beyond a mere attempt to influence the handling of the case on appeal. The statement could have been viewed as suggesting the kind and degree of personal involvement in the case and hostility to the plaintiff that would warrant disqualification of a judge for bias and prejudice.

Indeed, we have already held that Judge Grossbaum's activities in this case created "the appearance of potential bias and prejudice." *Gulf & Western Industries, Inc. v. United States*, 226 Ct.Cl. ——, ——, 655 F.2d 1106, 1106 (1981). There we previously had upheld another decision of the Board, which Judge Grossbaum also wrote, rejecting certain claims by the same contractor growing out of a different contract. *Gulf & Western Industries, Inc. v. United States*, 226 Ct.Cl. ——, 639 F.2d 732 (1980). After that decision, the Department of Justice informed the plaintiff's counsel of Judge Grossbaum's *ex parte* communications in the present case. The plaintiff then sought relief from our judgment in the prior case, based upon "the appearance of bias and prejudice on the part of" the Board. "[B]ecause of the co-pending status of the two actions, and the appearance of potential bias and prejudice," we vacated our prior judgment and remanded the case to our Trial Division "for a de novo determination and report by a trial judge, based upon a preponderance of the evidence in the existing administrative record." 226 Ct.Cl. at ——, 655 F.2d at 1106–07.

The present case is an even more compelling one for vacating the decision of the Board. In the first case we directed a trial *de novo* even though there was "no charge" or "evidence" "of any attempted *ex parte* communication" in that case. *Id.* at ——, 655 F.2d at 1106. If the Board's decision in the earlier case could not stand because Judge Grossbaum's activities in the present case created "the appearance of potential bias and prejudice," *a fortiori*, the Board's decision in the very case in which the improper activities took place must suffer the same fate.

The fact that these activities of Judge Grossbaum occurred after the Board decision had been rendered does not warrant a different result. The appearance of impropriety that these activities created tainted the Board proceedings and requires that the Board decision be vacated. Moreover, as indicated above, at least one of Judge Grossbaum's statements to the Justice Department lawyer suggested the possibility of actual bias and prejudice.

The government, however, argues that the remand to the Board should not be for a *de novo* determination but solely "to hold an evidentiary hearing by a different hear-

ing member on the question of alleged bias and prejudice by Judge Grossbaum." Since we have concluded that Judge Grossbaum's conduct created an appearance of impropriety which itself requires that the Board decision be vacated, it is immaterial whether Judge Grossbaum actually was biased or prejudiced. The short of it is that, without regard to Judge Grossbaum's actual bias or prejudice, the Board decision of which he was the author cannot stand.

V.

The remaining question is what is the appropriate remedy in this case.

[5] When we conclude that further administrative proceedings are required in a case coming to us from a Board of Contract Appeals, our normal practice is to remand the case to the Board. In the exceptional circumstances where the agency cannot provide adequate relief on such remand, we refer the case to our Trial Division. *Cf. United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 86 S.Ct. 1539, 16 L.Ed.2d 662 (1966); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963); *Baltimore Contractors, Inc. v. United States*, 226 Ct.Cl. ——, 643 F.2d 729 (1981); *Moore-McCormack Lines, Inc. v. United States*, 188 Ct.Cl. 644, 413 F.2d 568 (1969) (cases remanded to agency or decision ordered to be made on administrative record). Although the plaintiff originally sought a trial *de novo* before this court, apparently it now supports the trial judge's determination that further proceedings should be before the Board.

[6] We agree. There is no reason to believe that a new Board composed of different individuals who have had no prior connection with the case would not fairly consider and decide the case. Here, unlike the situation in *Baltimore Contractors*, where we remanded the case to our Trial Division, the circumstances that require vacation of the Board decision are not the nature and character of the Board itself but the improper post-decisional activities of a member of a properly constituted and operating Board. This case also is unlike the prior *Gulf & Western* case, which we remanded to the Trial Division. In that case, the plaintiff tells us, it made no claim that Judge Grossbaum had excluded relevant evidence; here, however, the plaintiff makes that claim. *See infra.*

We do not think, however, that a trial *de novo* of this case necessarily is required. We believe that the new Board could decide the issue *de novo* based upon the existing administrative record, subject to the following qualifications:

1. The plaintiff contends that Judge Grossbaum improperly denied discovery and excluded relevant evidence. If the Board—or a member to whom it may assign the case for initial review—should agree with either of those contentions, then the record could be reopened to permit the plaintiff to introduce any additional evidence the hearing member deems admissible. If, in the judgment of the hearing member, the admission of such additional evidence warrants the introduction of still further evidence, he may permit it to be introduced.

2. If, upon study of the record, the Board or the hearing member concludes that there are questions of credibility that must be resolved, the record could be reopened to give the hearing member the opportunity to observe the demeanor of the witnesses whose credibility is in issue.

If, on the other hand, the Board should conclude that a trial *de novo* should be had, it may conduct one. Should it do so, however, it may not be necessary to try the entire case anew.

The record in this case is lengthy. The Supreme Court in *Carlo Bianchi*, 373 U.S. at 717, 83 S.Ct. at 1415, expressed concern, although in a different context, about "needless duplication of evidentiary hearings and . . . heavy additional burden in the time and expense required to bring litigation to an end." To avoid that situation, the parties might agree to accept as part of the record in the *de novo* trial portions of the existing record.

It is for the newly constituted Board, in the exercise of its discretion, to determine

whether to conduct a trial *de novo* or merely to decide the case *de novo* upon the existing or an augmented record.

CONCLUSION

The request for interlocutory review is granted. The decision of the Armed Services Board of Contract Appeals in ASBCA No. 21090, dated January 23, 1980, is vacated. The case is remanded to the Board to decide it *de novo*, before a panel consisting of individuals who have had no prior connection with this case. The Board's new decision may be based upon the existing administrative record, which may be supplemented as specified in this opinion, or the Board may hold a trial *de novo*.

Further proceedings before this court are stayed for six months. Pursuant to Rule 149(f), plaintiff's counsel is designated to advise the court of the status of the proceedings before the Board. *See also* Rule 150.

Raymond E. HORN, Jr.

v.

The UNITED STATES.

No. 199-79C.

United States Court of Claims.

Feb. 24, 1982.

Former Army Reserve officer brought action challenging his nonselection for promotion. The Court of Claims, Cowen, Senior Judge, held that: (1) two errors on officer's officer efficiency report, a failure to delete a ranking which was to have been removed pursuant to officer's successful appeal action, and the erroneous labelling of an officer efficiency report as an "adverse efficiency report," were material errors, and therefore, officer was denied consideration by the selection board on the basis of a record which portrayed a service career on a fair and equitable basis; (2) the illegal composition of the standby advisory board was fundamentally defective, and its nonselection of officer would be voided; and (3) fact that officer had not been selected for promotion by selection board should not have been included in officer's record before standby advisory board, and the inclusion of the prior nonselection record constituted prejudicial error rendering subsequent nonselection of officer invalid.

Plaintiff's motion for summary judgment granted.

1. Armed Services ⇐7

Former Army Reserve officer's action challenging his nonselection for promotion would not be remanded because of his failure to submit his complaint to the Army Board for the Correction of Military Records, since, under the circumstances, review by the Board was a permissive rather than mandatory administrative remedy, and officer's failure to submit his complaint to the Board was not a failure to exhaust administrative remedies.

2. Armed Services ⇐7

Two errors on officer's officer efficiency report, a failure to delete a ranking which was to have been removed pursuant to officer's successful appeal action, and the erroneous labelling of an officer efficiency report as an "adverse efficiency report," were material errors, and therefore, officer was denied consideration by the selection board on the basis of a record which portrayed service career on a fair and equitable basis.

3. Armed Services ⇐7

Where some of the officers who served on initial selection board also served on standby advisory board which was convened to reconsider officer for promotion after the discovery of certain material errors in officer's military records, the illegal composition of the standby advisory board was fundamentally defective, and its nonselection of officer would be voided.

Mr. QUINN. Mr. Rodriguez is next. Questions?

Mr. RODRIGUEZ. Thank you. Let me just ask the question. I guess maybe the Judge or anyone might respond to it. We had, at least I've gotten some cases and some situations where—and I'm wondering whether you take any precautions for those individuals that are seriously ill—that maybe by the time you reach the case, the individual is no longer alive? And I'm wondering whether you take any precautions at all in those cases either for the ones that appealing and are in initial appeal?

Judge NEBEKER. Yes, sir, we do. Anytime anyone representing a veteran informs the Court of a circumstance requiring expedited consideration and decision we will grant that. I think in February I testified, I gave an example—I don't recall the name of the case, but I did include it in my testimony then—of a case that was exemplary of that where we did grant expedited consideration and we did rule on the matter in a very short order and before the individual died.

Mr. RODRIGUEZ. How often do you do that?

Judge NEBEKER. It doesn't happen too often because the parties don't file a motion for expedited consideration. And so we'd have no way of knowing whether they're *in extremis* or not until such a motion is filed. And it is favorably acted upon when it is filed.

Mr. RODRIGUEZ. Okay. And also, there was a recent court decision suggesting that the Board of Veterans' Appeals should revise its notice to avoid problems of veterans being deprived of their appellate rights because the appeals are inadvertently filed with the Board of Veterans' Appeals or the Department of Veterans Affairs. Has the Board taken any action to address this situation? Do you know?

Judge STANDEFER. We have those notice papers under consideration at all times and we think right now that our notice is clear. We inform any appellate that we send a decision to what the address of the Court of Veterans Appeals is and how that appeal with the Court is to be filed and time limits therefor.

Mr. RODRIGUEZ. What percentage—and I know you gave a great number of figures, but you indicated that it takes 3 years for the re-appeal or a thousand and something days—what percentage of the cases are re-appeal?

Judge STANDEFER. Well, let me answer you this way. What I said was is that when we must remand to the Regional Office an appeal, it takes about 700 additional days for that case to be reworked throughout the system and to come back before the Board and to be adjudicated again before the Board. And right now, over 40 percent of our appellate decisions are remands. So that adds to the total processing time, bringing it up to about 1,032 days, which is over 3 years with respect to our total appellate system processing time. This was my testimony.

Mr. RODRIGUEZ. Forty percent?

Judge STANDEFER. Yes, sir.

Mr. RODRIGUEZ. And have we filed maybe some discrepancies in the initial decision that might need to be reviewed or need to be corrected in order to make those initial decisions so people don't have to go through that process?

Judge STANDEFER. Remands can be for any number of reasons. Ordinarily, it's because of deficiencies in evidence development at the Regional Office level. It could be because of a due process defect, an overlooked hearing or request for example. It could be because the claimant had introduced new evidence at the Board of Veterans' Appeals level and had refused to waive initial consideration of that at the Regional Office level. There are many, many reasons for that high remand rate.

To some extent, unfortunately, it does reflect a quality problem that Regional Offices are having with their initial adjudications and they have acknowledged the same. We're working very hard to reduce that remand rate, both at the Veterans' Benefits Administration level and at the Board of Veterans' Appeals level.

Mr. RODRIGUEZ. Do you know how many cases, overall, deal with mental health cases that can be defined in terms of mental health?

Judge STANDEFER. A good many. A high percentage of our appellate workload does involve psychiatric-related cases. I could provide that for the record. I just would be reluctant to tell you exactly what that percentage is right off the top of my head.

Mr. RODRIGUEZ. I'm just curious. And I don't know about this, but I'm having difficulty with social security and SSI and I've encountered judges that have basically either verbalized openly that in some cases they don't even believe in mental health problems, and deny the claim just under those basis. Thank you.

Mr. QUINN. Thank you, Mr. Rodriguez.

Mr. Reyes.

Mr. REYES. Thank you, Mr. Chairman. I just wanted to follow up on a couple of points that Mr. Rodriguez was mentioning. Judge, the first one is: have you considered the promulgation of the rule that would provide or advance cases on the docket as Mr. Rodriguez was making a note of, either a serious illness or age consideration?

Judge STANDEFER. Yes, sir, we have, in our rules of practice right now and have had for many years, provisions for advancement on the docket for the reason you've just suggested, a serious illness, financial catastrophe is imminent.

Mr. REYES. Is it clearly defined and specified where veterans and/or their representatives can clearly understand that that is an option? I kind of sense that perhaps you acted more as an intervenor in some of these cases than actually that this was spelled out or stipulated in writing.

Judge STANDEFER. I think probably we do not spell that out in the information we send to the clients when we receive their appeals.

Mr. REYES. And that is a very common complaint that we hear. And again, in discussions with some of my colleagues, part of the complaint that manifests itself over and over to us, is that the veterans and/or their attorneys or representatives or organizations feel like it's a situation akin to pulling teeth in terms of getting the information. I just think that it'd be more practical to be able to lay out what the options are so that, let's face it, in too many cases we don't do a good enough job for our veterans and we discount the sacrifice that they have paid for this country, and I don't know what the process is Mr. Chairman, in terms of making rec-

ommendations or asking that there be a systemic way of providing information to veterans about issues like this.

Mr. QUINN. Well, you are part of that solution, Congressman, and this subcommittee is where it would happen. So, we're anxious to hear just like we were anxious to hear the suggestion of the staggered terms and recall provisions that the Judge brought to our attention, the subcommittee is the place to do that.

Mr. REYES. And so, I'm assuming that we would be talking about legislative remedies or——

Mr. QUINN. I'm sure staff would be pleased to work with you as would the gentlemen at the table here today.

Mr. REYES. Okay.

Mr. QUINN. Am I right? I mean, you're nodding yes. But for the record, Mr. Reyes has asked for some assistance and maybe some legislative remedies. Judge, would your people be willing to discuss that with him?

Judge NEBEKER. Of course. And I would be most happy to supply copy of our Court rule that deals with this problem to assure you that we do have such a rule.

[The information follows:]

prevent any agency from making such charges for its services as it may otherwise properly require;

(F) certify in writing that he or she has read and is familiar with the code of professional responsibility or rules of professional conduct in effect in the state or jurisdiction in which the student's law school is located.

(g) Self-representation. Any appellant may appear and present his or her own case before the Court.

RULE 47. EXPEDITED CONSIDERATION

(a) Motion and Order. On motion of a party for good cause shown, on written agreement of the parties, or on its own initiative, the Court may order that any matter before the Court be expedited.

(b) Filing and Service of Papers. Expedited proceedings will be scheduled as directed by the Court. Unless otherwise ordered, the appellant's principal brief shall be served and filed within 25 days after the date of the Clerk's notice that the record on appeal has been filed. The Secretary's brief shall be served and filed within 15 days after service of the appellant's brief. Any reply brief shall be served and filed within 10 days after service of the Secretary's brief.

(c) Form and Length of Briefs. Briefs filed under this rule must comply with Rules 28 and 32, except that principal briefs must be limited to 10 pages, reply briefs must be limited to five pages, and a table of authorities is not required.

(d) Supplementation of the Transmitted Record. If expedited proceedings are ordered, any motion for supplementation of the record on appeal must be served and filed before the date on which the appellant's brief is due. See also Rule 11(b). Such supplementation does not extend the time for filing any brief.

RULE 48. DISCLOSURE OF CERTAIN PROTECTED RECORDS

(a) If, during the time periods set out in Rule 10 or at any other time during a proceeding before the Court, the parties identify records protected by 38 U.S.C. § 7332 and at least one of the parties believes that disclosure of such records is required in such proceeding and, further, the parties cannot agree with respect to the disclosure of such records, the party requesting disclosure shall make immediate application therefor, pursuant to 38 U.S.C. § 7332(b)(2)(D), caption the case "In re: Sealed Case No. [insert Court of Veterans Appeals case number]" (not disclosing the identity of any individual), and serve on the protected patient or subject or successor in interest a copy of the application. Such application must include a statement specifying those

Mr. QUINN. And Mr. Standefer?

Judge STANDEFER. Yes, sir, Mr. Reyes. Thank you. I'd take your suggestion on board.

Mr. REYES. Thank you.

Mr. QUINN. Thank you, Mr. Reyes.

Mr. Mascara, thank you for joining us this afternoon, and I know you've seen the written testimony. Would you like to ask some questions now?

Mr. MASCARA. Thank you, Mr. Chairman, and thank you for calling these meetings. I have an opening statement that I'd like to place in the record.

Mr. QUINN. Without objection, so ordered.

[The prepared statement of Congressman Mascara appears on p. 82.]

Mr. MASCARA. Thank you.

I had an opportunity last night, and much to my chagrin, it did not help me to fall asleep but caused me to be up until about 3 o'clock this morning sifting through the information I have here—information provided not only through your testimony, but by my staff. Just let me read to you what I read and I began to wonder what the problem—because I think there are some very serious problems here. And I don't know whether you have any solutions or maybe it will take a legislative remedy to get to the bottom of all this.

And I'm reading, of course, just one paragraph out of the many paragraphs that was written by my staff that "the Board and Court are too cozy." Do you know what that means? Any reason why my staff would write that in information provided to me to prepare myself to be here today? Does anybody want to comment on that statement?

Judge STANDEFER. I don't think we're cozy at all.

Mr. MASCARA. I'll go on then. "After a case is decided by the Board, it goes to the Court. However, the Board briefs the Court ahead of time as to why they decided the case in that way. The defendant is left out of the loop and has less of a chance to get the appeal approved." And it seems like sort of an ex parte kind of thing and I'm not a lawyer, my son is, so I can say with some impunity that I often question motives of the judicial system back home and in this country. I guess that's what they meant by being cozy. Here is this person who lost his appeal, he's out here while these other two parties—one of which should at least be looking out for his interests—are—excuse the expression—in bed with the Court. I mean, who wrote those laws or rules? I mean, how did that ever happen?

Judge NEBEKER. Mr. Mascara, I think that's a total misconception. First of all, there are two parties before the Court, the veteran who lost and the Secretary. The Secretary is ubiquitous. The Board is under him, and, under the law he is represented by the General Counsel. The General Counsel is charged to represent him. Now, to the extent that those two entities of the Secretary get together, that's an executive branch function and it's their business. It's not two parties. It's not them dealing with the Court at all; they're dealing with themselves. Insofar as the Court being briefed by the Board, that is a total misconception.

In the record on appeal, there will always be a copy of the Board's decision. Of necessity that has to be there. We review the Board's decision for its accuracy under the law and for whether there's evidentiary support for their factual conclusions. Of necessity, we have to have that opinion. But that does not constitute, if you will, a private, an ex parte briefing of the Court by the Board. The only party before the Court is the Secretary. I repeat—the Secretary is ubiquitous. He is the Board and the General Counsel, and the General Counsel represents the Secretary before the Court. The record before the Secretary and the Board in that particular decision is the only thing we can look at, nothing more. That record on appeal has to have integrity. We rely upon the professional integrity of the General Counsel's lawyers to ensure that that record is complete and fair, that it is not totally one-sided.

But, whatever it is that you've got in your hand there reflects, to my way of thinking, a total misconception of the function within the Department of Veterans Affairs of the Board and the General Counsel as entities of the Secretary and the separate distinct review authority, independent authority of the Court which deals with the matter only on the record on appeal.

Mr. MASCARA. It's apparent that I touched a nerve.

Judge NEBEKER. No, you've not touched a nerve. You just simply indicated to me that there's still misunderstanding as to the nature of appellate review.

Mr. MASCARA. Maybe I need to ask the chairman if I can submit some future questions in writing to the judge.

Mr. QUINN. And Judge Kramer has asked if he could be heard for just a second. Judge——

Judge KRAMER. Mr. Mascara, if I might just comment briefly on your inquiry, I think that it shows in a "nutshell" what we're trying to accomplish with a name change. Now, admittedly, a name change is perceptual. It's not going to go the whole way to state to the world that we're an independent judicial tribunal that's totally separate and apart from the VA. I suspect whoever provided you with this information may be confusing the Court with the BVA, the gentlemen that are sitting to the left of us. And this happens all the time. Not only does it happen on the Hill, not only does it happen amongst the general public, but it even happens with the Court, the Federal Court which has been charged with the responsibility of reviewing our decisions.

Even it, as late as 2 months ago, for all practical purposes, indicated in an oral argument that it thought our Court was part and parcel of the VA and actually located in the VA and inferentially was under the control of the Secretary. So, anything that you can do legislatively to make sure that that misconception is cured is going to be of immense help.

Mr. MASCARA. Well, the Court of Veterans Appeals, as I understand it, is an independent judiciary. Do we have oversight, this committee?

Mr. QUINN. I'm not able to answer that. Counsel?

Yes, we do.

Mr. MASCARA. Thank you, Mr. Chairman.

Mr. QUINN. Thank you, Mr. Mascara.

I might also point out that in most cases when we have hearings the Court usually and its representatives—Judge, and often that's you—appear separately. We probably confuse it even further by having all of you at the same table this afternoon, in the interest of time, I might say, and then we ask you to sit next to each other.

Judge NEBEKER. I felt confident that you would not misconstrue the role of the Court just because we were sitting here together.

Judge KRAMER. Speaking for myself, I can tell you that this is about the coziest I've gotten with these guys since I've been on the Court. I always thought that, rather than being cozy with them, that they had a high degree of consternation for some of my decisions. (Laughter.)

Mr. QUINN. Well, thank you. And I think, Mr. Mascara, the offer has been made by the panel before to feel free to forward some questions and some suggestions. And while renaming is a step in the right direction, Judge Kramer, it's a start and maybe that's part of the problem.

We're going to begin a second round of questioning here. And I'm going to yield to Mr. Filner. Mr. Filner?

Mr. FILNER. Thank you, Mr. Chairman, and before we underplay the seriousness of Mr. Mascara's question, with his permission, I would like to re-phrase the sense that some of us here are getting that the coziness is not between the Board and the Court, but between the Board staff and the staff of the General Counsel at the Court level in dealing with some of the problems. Now that shows the difference there which you described, Mr. Kramer, and Judge Nebeker.

But the general consensus of a layperson and a veteran is that these are independent situations. The record of the Board is there and then people can work on it. And when I asked Judge Nebeker earlier about what would constitute contamination—I'll use your words—of the independence, you laid out two conditions. Let me read you just three or four sentences from a memo from the Litigation Support Division of the Board of Veterans' Appeals to the General Counsel and ask you if that goes beyond your two conditions and leads to the coziness which Mr. Mascara suggested.

First sentence: "We agree that a remand is appropriate." I mean, this is the Board staff saying, this is an appeal of their decision, and they're commenting on the appropriateness of their initial decision. I'll go further. "I think the representative," that is, the veteran I take it, "has misinterpreted the block quote from the Board decision which is on page five of the motion." That is, he's commenting for the attorney on what the veteran's attorney has said. Here's the Board, which made the initial decision, is telling the attorney at the next level that the veteran is wrong in his interpretation.

I quote again, "I think that the Board provided"—this person who is writing this memo is a staff of the Board—"that the Board provided adequate reasons about this which provides at the effective date," et cetera. The memo's commenting line-by-line on a potential decision that is being suggested to the Court, I take it.

"I also disagree," this is quoting, "with the statement on page 7 and 8 that indicates the information in the chart demonstrates community." That is, you're giving the staff of the initial decision

the right to comment on the next level of decision. That's enough. Doesn't that go beyond, Judge, the conditions you laid out earlier in the answer to a theoretical or a hypothetical question?

Judge NEBEKER. Well, I think not, sir. You're absolutely correct in your initial observation that, if there's a problem, it's within the Executive branch.

Let me make this suggestion to you: There isn't a case in the United States Supreme Court involving the Government that does not have agency counsel dealing with counsel who will appear on behalf of the United States in the Supreme Court. Of necessity, those lawyers have to get together and talk about the position that they want to take. There's an official position that the agency will want to take. The Department of Justice will say maybe, that's fine, or no. There has to be that interdepartmental communication.

I'm neither rising to the defense of what is going on——

Mr. FILNER. That goes beyond your initial statements. I understand what you're saying. Again, and the legal niceties may even be followed here, I don't know yet, we're going to follow this up—but the average person bringing an appeal of a decision, I think, is entitled to the sense, the perception, and the reality that this is a new level of decisionmaking. This is a new look at it and if the Board staff is, in fact, commenting on the exact terms of the settlement agreement, this is not an independent thing. The same people who made the original decision and who will look at it again on the remand, are deciding the terms of interpreting their original decision and the terms of which they're going to reconsider. That, it seems to me to be unfair even if it's "legal."

Judge NEBEKER. Well, and that may be a political issue that is to be decided by the Congress as to just exactly who can talk to whom in the Department. But that conversation between those folks, bear in mind, has nothing to do with the ultimate decision that the Court may make if the case is one that does not settle and then comes on for a decision.

We are an adversarial system at the Court level. Ultimately, we get the position of the Secretary in his brief. Now that position may be dictated or not, by virtue of what staff at the Board suggests, or requests, or demands that the General Counsel say in that brief. But we——

Mr. FILNER. No, I understand that you make a distinction, and Mr. Mascara, I think, will accept that. But in the initial statement about coziness, if you'll just change some words that, I think, exist. I think this committee should look at whether that, again, fits in the legal niceties, whether the Board of Veterans' Appeals, which, again, made one decision and may have to be involved in a remand takes an intimate role in the phrasing of the way a decision above it is made and the terms of the remand.

I think that the veteran's entitled to a little more fairness than that. And I'm going to let the VSO representative speak to this because they, I think, represent people in a far more intimate way than I know and can comment on this. But, I think, that's the essence of the situation that, I think, several of us have come——

Mr. QUINN. The gentleman's time has expired. The gentleman's time has expired, but will be back.

Mr. Rodriguez, follow-up question? Mr. Reyes? Mr. Mascara? I've just been advised by counsel that we do have the VSO—now it's my time; I get a green light. Thank you.

Our next panel will be VSO's, and that's what Bob talked about. We'll hear some more oral testimony of what they've written to us and that generates some of the questions, obviously, that you have here today.

Is the General Counsel here? If someone from the office is here, I don't know how out of the ordinary this is, but, Mr. Filner, I'm wondering if it might not be appropriate to ask someone from the Counsel's office to join us at the table and yield about 5 minutes or so, to at least comment without being questioned any further on what we've been listening to for the last 45 minutes or so. Is there anybody here? Mr. Zeglin? I'm being told someone's here. Sir, are you prepared to join us? We saw you in that third row there.

Mr. ZEGLIN. I'm with the General Counsel's office, but you really need to be talking to someone——

Mr. QUINN. Just one second. Why don't I excuse the rest of the four gentlemen that have been with us. Okay.

Judge NEBEKER. Thank you, sir. Thank you very much.

STATEMENT OF DONALD ZEGLIN, DEPUTY ASSISTANT GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS

Mr. ZEGLIN. My name is Donald——

Mr. QUINN. I'll ask you to introduce yourself.

Mr. ZEGLIN. My name is Donald Zeglin. I'm a Deputy Assistant General Counsel for the Department of Veterans Affairs.

Mr. QUINN. Thank you. And let me be more direct then. Thank you for joining us at the table before our next panel joins us. You've been in the room this afternoon. I know you don't have prepared remarks of any sort, but for the benefit of five Members of Congress who are here—the Board has stayed there in the room as well—could I ask you just to comment in a few brief moments as to this past 45 minutes discussion?

Mr. ZEGLIN. It's rather difficult for me to comment because it seems like there's a factual discrepancy here——

Mr. QUINN. Would you tell us what you might see as factually—what the discrepancy seems to be?

Mr. ZEGLIN. Well, the Board seems to be saying that the staff attorneys in Group 7 who handle the CVA cases do not talk to the Board members. The Service Officers seem to be saying that they do. I don't know. So it's difficult for me to comment. I'm not in the group that handles—I'm not in Group 7, so I just don't know factually——

Mr. FILNER. What if one of the facts was correct? I mean, what if they did talk to each other? Does that create any legal or ethical or common-sense problem?

Mr. ZEGLIN. I think there may be problems if they were talking to the Board members who were deciding cases. But, as I said, I don't know if they are and I don't believe——

Mr. FILNER. But the problem with that legal nicety is that the Board, as do all Congress people except the five here, depend on staff. I mean, if the staff is talking to staff, in reality, the Board members are going to be dependent on what the staff tells them

what the thing was, and so, the legal nicety breaks down in practice.

Mr. ZEGLIN. I thought what Mr. Standefer was trying to point out is that the Board is set up in such a way that the Board staff that deal with Group 7 are not the same Board staff that are involved in rendering BVA decisions.

Mr. FILNER. Well, that's something we should find out and discuss. I appreciate that.

Mr. QUINN. Thanks very much, Bob.

Sir, I didn't mean to put you on the spot. I mean, we're here. We're sometimes more formal than we should be, and I believe that maybe Mr. Filner and I, on behalf of all the members of the subcommittee can have a discussion following this hearing today. And it's likely that maybe another hearing is in order, and we can have all the people we need prepared, Bob. And then we can get some more specifics, even to the document that you entered into the record today. That might be helpful today. Thanks very much. We appreciate it.

Our second panel, I'd like to call forward. Representatives of VSO's please come forward: the Disabled American Veterans, the Vietnam Veterans of America, AMVETS, Veterans of Foreign Wars, and Paralyzed Veterans of America. Please come forward and join us this afternoon.

Good afternoon, everybody. Thanks for bearing with us. We were a little late getting started this afternoon, but it's good to see you back again. You've been before the subcommittee and the full committee before. We're going to begin by saying we ask that you keep your oral statement to about 5 minutes. We are aware that you submitted testimony. The members and the staff have had a chance to review it, and if it's okay with all of you, I'm just going to start from my left—that would be your right—with Mr. Thomas and ask if you'd begin tonight and we'll work our way across the table. Welcome.

STATEMENTS OF HARLEY THOMAS, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; JOHN J. MCNEILL, ASSISTANT DIRECTOR FOR VETERANS' BENEFITS POLICY, VETERANS OF FOREIGN WARS; VERONICA A'ZERA, NATIONAL LEGISLATIVE DIRECTOR, AMVETS; WILLIAM F. RUSSO, DIRECTOR, VETERANS' BENEFITS PROGRAM, VIETNAM VETERANS OF AMERICA, AND RICK SURRATT, ASSISTANT LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

STATEMENT OF HARLEY THOMAS

Mr. THOMAS. Thank you, Chairman Quinn.

On behalf of the Paralyzed Veterans of America, I appreciate this opportunity to testify regarding the issues concerning the Board of Veterans' Appeals.

It seems that we raise the same issues regarding BVA year after year. We point out the delays faced by veterans, and although these delays have improved, they are still intolerable. Although many statistical indices have improved, we are still seeing remand rates that are too high, processing times that are too long, and pro-

ductivity that is too low. Again, PVA believes that an approach which highlights the quality of the decisionmaking process over mere quantity, will lead to fewer remands and will markedly reduce the intolerable time delays still facing veterans seeking benefits.

A simple step that can be undertaken by VA to improve quality would be to correct the regulation that provides that the BVA is not bound by VA manuals, circulares, or administrative issues. Currently, this regulation is not in accordance with statute or case law. To ensure that consistent decisions are made in the Field Office, and at the BVA, this regulation must be changed. One matter that gravely troubles CVA is the involvement of the BVA in defense of its decisions before the Court.

Before an appeal can reach the Court, the BVA decision must be final. Once a decision is final, the BVA ceases to have an interest in it. The current practice is analogous to a district court judge attempting to influence how his or her decision is decided on appeal in the circuit court. BVA is not a party to the appeal once it reaches the Court. The BVA's clandestine participation harms veteran appellants, is not authorized by law or statute, and leads to concerns over the impartiality of the process. PVA asks that you address this troubling situation.

Another issue facing the Court is the large number of requests for time extensions brought by the VA. The delays adversely effect veteran appellants. PVA is not entirely convinced that the solution to this problem lies in amending Rule 26(b) of the Court. The Court already possesses the power to deny extinctions where good cause cannot be shown. We ask the Court to be more sensitive to the often detrimental effects that time extensions can have on veterans.

PVA believes that the biggest hurtle facing timely appellate decisions and the cause of many VA's request for extensions is a lack of resources within Group 7. The VA must be accorded sufficient resources to enable the VA to meet its responsibilities before the Court.

PVA, in general, is not opposed to H.R. 3212. In our view, the guiding principle with respect to the Court's retirement system is that the system must be equitable and comparable to other Article I Courts. To remedy an oversight in the Veterans' Judicial Review Act that did not provide for staggered terms, we do not oppose title II, which provides for staggered retirements of a limited number of judges.

Mr. Chairman, and members of the subcommittee, PVA appreciates this opportunity. I'd be happy to answer any questions that you may have.

[The prepared statement of Mr. Thomas appears on p. 94.]

Mr. QUINN. Thanks, very much, Mr. Thomas.

I think what we'll do is hear from all the members of the panel and then, adding any questions for all of you when we're finished, if that's okay.

Ms. A'zera from AMVETS.

STATEMENT OF VERONICA A'ZERA

Ms. A'ZERA. Thank you. Mr. Chairman, AMVETS appreciates the opportunity to testify before the subcommittee on benefits on the operations of the Board of Veterans' Appeals and the Court of Veterans Appeals. We believe it's very important for your committee to conduct oversight hearings on these issues. We are also prepared to give testimony on H.R. 3212, a bill to revise the provisions of law relating to the retirement on judge's on the Court.

You have my written testimony, so I'll make my remarks brief.

The Board of Veterans' Appeals is responsible for entering the final decision on behalf of the Secretary in each of the many thousands of claims for entitlement to veterans' benefits that are presented annually for appellate review. The Board's mission is to conduct hearings and dispose of appeals properly before the Board in a timely manner. There have been many changes to the BVA operations over the years which have mostly improved the process. Congress has provided BVA with the resources to hire and train enough employees to adjudicate appeals in a timely manner.

To ensure that decisions are properly decided, Board members must be held accountable for the decisions they sign. Additionally, Regional Offices must be held accountable for the quality of their decisions and ensure that each case is properly developed prior to its transfer to BVA. The VA has adopted the idea that adjudicators will also be held accountable for their decision. We believe this was a step in the right direction.

We were also heartened by the passage of the clear and unmistakable error bill passed last year. AMVETS has been a long time supporter that claimants should have a way of challenging an otherwise final BVA decision on the basis of clear and unmistakable error.

We have one recommendation for an improvement to BVA. VA should remove its provisions exempting BVA from VA manuals, circulares and other Department directives as Harley was just telling you. We believe that this provision is contrary to the law, and therefore, invalid. Without furnishing any reasons for maintaining this provision in the regulation, VA has refused to remove it. We continue to urge VA to amend it so as to comply with the statutes and well-established case law.

On November 18, 1988, President Ronald Reagan signed the Veterans' Judicial Review Act into law. This law created an Article I Court with exclusive jurisdiction to review final Board of Veterans' Appeals decisions. We welcome the appointment of the Honorable William Greene to the Court last year. With this appointment brings up one of the major concerns about the Court which is also addressed in the bill H.R. 3212. Because six of CVA's current judges were all appointed within one year of each other, their 15-year terms will expire near the same time. This will result in the retirement of most of the judges and appointment of their successors within the same year.

Provisions for early retirement will stagger the turnover and allow the retention of experienced judges on the Court during the more orderly retirement and replacement process. AMVETS supports H.R. 3212, which amends the law to permit early retirement of the Court judges.

Another major problem at CVA is the undue delays of veterans' appeals. Under the Court's rules of practice, an appellant has 30 days from Court's notice of filing of the record on appeal to file the brief of appellant. The appellee, the Secretary of Veterans Affairs has 30 days after he is served with an appellant's brief to file the brief of appellee. Courts typically enforce their rules and time limits strictly. Under the Court's rules, an appellant or the appellee may be granted an extension of time for filing a brief for good cause.

The courts have held that the Government's excuse of a heavy caseload is not a good cause. Yet, the General Counsel has continued to routinely request extensions of time. In fact, the General Counsel has requested multiple extensions in most cases. The Court does not enforce its own rulings and has granted General Counsel extensions of time, even over the objections of appellants who point out the lack of any valid grounds.

To correct this problem, we believe the Office of General Counsel needs additional staffing to assign to representation of the Secretary in appeals before the Court. We have been suggesting this corrective measure for many years. It is apparent, that corrective action will never likely be taken unless the Court enforces its own rules and orders. This is an issue that Congress can take up in its oversight hearing.

As mentioned earlier, AMVETS supports H.R. 3212 and congratulates Congress for their support on this important issue. And as Judge Nebeker testified earlier, this legislation is imperative to keep from the collision course the Court is headed for.

Mr. Chairman, this concludes my statement and I will be happy to answer any questions.

[The prepared statement of Ms. A'zera appears on p. 99.]

Mr. QUINN. Thank you very much. Mr. Surratt.

STATEMENT OF RICK SURRATT

Mr. SURRATT. Mr. Chairman and members of the subcommittee, good afternoon. I am Rick Surratt with the Disabled American Veterans.

Today's appeals processes afford veterans better assurances of fair and lawful decisions on their claims than at any time in the modern history of VA. That is not because of changes in the established processes themselves. That is because Congress superimposed judicial review on the existing administrative processes. Before judicial review, VA operated its appeals system according to its own deep-set institutional views, which unfortunately compromised strict adherence to the law for what VA saw as good practice. In many areas the Court of Veterans Appeals has caused the Board of Veterans' Appeals to abandon self-serving practices and return to the letter of the law in deciding veterans' appeals. Because judicial review exists, the Board of Veterans' Appeals is no longer free to ignore veterans' evidence and legal arguments as it once did. The Board is no longer free to follow a set of unwritten rules that circumvented the law in many instances. Veterans no longer have to accept arbitrary decisions by the Board.

The Court's enforcement of the letter of the law has made the mere existence of judicial review a more effective deterrent to arbi-

trary decisionmaking. This new climate has not only benefited veterans, however, it has added integrity to the VA system and given VA decisions more credibility. That is not to say that all of the problems are solved.

The necessity for more thorough and better-reasoned decisions was sure to cause its own problems, such as a slow-down in case outputs in the short-term. BVA has shown signs of adjusting to the new demands and appears to be recovering from the initial sharp decline in case production. BVA has increased efficiency by realignment of its organizational structure and Congress helped by authorizing much needed additional staffing.

However, while quality has improved and production levels are rebounding, the Board has not totally cast off its old ways. Despite overall improvements, we still see an intolerable number of flawed and arbitrary decisions from the Board. The Court still reverses and remands a large percentage of the Board's decisions. That tells us that the Board needs to do more to encourage and enforce quality. Quality is the key to long-term efficiency and real customer service and satisfaction.

The Court has, on a whole, done an admirable job. We would not have seen improvements at BVA if the Court had subscribed to many of the self-serving arguments the VA made before the Court or if the Court had been timid in enforcing the law and just rubber-stamp BVA's decisions. However, in those areas where the Court has not been firm with the VA, the VA has taken advantage of the Court's leniency.

For example, appellate rules of practice allow sufficient time for the parties to make filings such as briefs. Courts typically grant additional time under exceptional circumstances only. The Court of Veterans Appeals departed from its own rules and the judicial precedent in this area of appellate practice and began granting VA's motions for extension of time routinely. VA began by requesting extensions in some cases, then quickly started requesting extensions in every case and eventually filed multiple extension motions in essentially every case.

The Court's laxity in this area sent VA a clear signal that it need not be concerned about obeying the Court's rules, and VA has shown no appreciable effort to bring itself into compliance.

In one of its recent orders the Court noted that VA has filed more than 4,000 extension motions in the last year alone. As a consequence of VA's failure to correct the problem and the Court's tolerance of it, veterans with urgent needs suffer additional delays in a process that is already protracted. For the Court to extend such special treatment to VA and acquiesce in VA's disobedience of the rules of practice makes the court appear biased. Obviously, when a court appears biased it loses some of the public's confidence and respect, and its stature is degraded. In many subtle ways, that can diminish a court's effectiveness.

The DAV and the veterans' community are concerned about the Court's willingness to let VA delay justice to suit VA's own purposes. VA has one promising and positive new initiative to properly dispose of appeals. In this early intervention program, the VA General Counsel's Office conducts a preliminary screening of cases ap-

pealed to the Court to identify the ones that should be remanded to BVA and not be defended in the Court.

Currently, about 20 percent of all the cases reviewed are found to warrant such an expedited remand. This avoids the unnecessary delay of designating the record on appeal and briefing, alleviates the need for a decision by the Court and in the process, conserves VA and court resources.

Unfortunately, VA has apparently not fully embraced this program and has not devoted sufficient resources to ensure its maximum effectiveness. To allow thorough review of all the new appeals filed each month, VA should devote more personnel to this effort.

Mr. Chairman, that concludes my statement.

[The prepared statement of Mr. Surratt appears on p. 104.]

Mr. QUINN. Thank you, very much.

Mr. McNeill, thanks for joining us.

STATEMENT OF JOHN J. MCNEILL

Mr. MCNEILL. Good afternoon, Mr. Chairman.

My remarks will be a synopsis of a more lengthy written statement, concentrating from that document more on the current state-of-affairs in the VA rather than the past history. But history is important to the subject, and accordingly, we appreciate that our written statement will be made a part of the record.

We have been asked to talk on two topics. The first is H.R. 3212, the "Court of Veterans Appeals Act of 1998." We agree with all aspects of that proposed legislation, particularly the institution of a staggered retirement option. That will help ensure the maintenance of judicial experience on the Court. The second subject, concerning the impact of veterans processing by the court and the Board of Veterans' Appeals, is more complex. Quite simply, the impact has been tremendous, probably beyond any imagination at the time of the Veterans' Judicial Review Act of 1988 which established the Court. Literally from the inaugural court decision in 1989, the Court has been steeped in controversy. Many have opinions whether the Court has been good or bad for the veteran.

Let us be unequivocal in our opinion in the VFW—the Veterans' Judicial Review Act of 1988 has been, and is, one of Congress' most important pieces of legislation ever for veterans.

The Court has not created new laws or regulations, but has only highlighted past VA failures to fairly process claims, mainly from the inability to correctly apply the statutes and regulations of record through misinterpretation, selective interpretation or unawareness. Further, it took a few years of the court's existence for the VA to realize this, and that lack of realization formed the core of the claims processing timeliness and quality difficulties, such as the horrendous backlog, the high BVA remand rate, and the lengthy processing times for compensation claims.

That is the negative. The positive is that, because of the Court, a veteran now has the best chance ever for a proper and correct decision on a claim, as Congress has always intended the system to be. Further, VA is now making great strides toward changing that historically entrenched culture of autonomy.

Therefore, we still have hope for the VA. This optimism resides primarily in the many initiatives the VBA is undertaking to correct

both quality and timeliness deficiencies. Four are absolutely critical to us. They are: the pre-discharge examination program for our active duty military; the post-decision review process (and, particularly, the decision review officer program); the Partner Assisted Rating and Development System, commonly known as PARDS; and, the out-basing of rating specialists in the VA medical centers.

The VA has now decided to expand the pre-discharge examination program to all military services at an additional 15 sites. This is a project that is already paying dividends for the Government. For example, the program between the Seattle Regional Office and Fort Lewis has been able to establish an average completion rate of less than 60 days from the discharge date for a final compensation rating. That figure is expected to go much lower as the Regional Office continues to refine the program. The ultimately goal is to give a rating to a veteran immediately upon his discharge.

Even more important is the quality of the rating decisions as part of the pre-discharge program. That quality is easily achieved because the VA, through the ready cooperation of the military, has a captive audience for their outreach briefings, immediate and fresh access to the service medical records, and direct communications with the applicants in assisting them in the proper techniques for filing a claim.

Post-discharge programs have also been instituted by the VA. PARDS was initiated at the St. Petersburg Regional Office with the idea of rendering very quick decisions on claims submitted with accompanying complete evidentiary documentation. The initial goal was 19 days for claims not requiring a compensation and pension examination, and 45 days for those that do. The program has now progressed so well that the average decision time for a PARDS claim is now 5 days. Even better, less than 3 percent of PARDS claims in St. Petersburg continue to the beginning appellate stage with a Notice of Disagreement.

The most significant initiative that will eventually impact the most on the high remand rate and the quality of regional office decisionmaking is, in our opinion, the post-decision review process instituted as part of the VBA's Business Processing Reengineering. This included the important related decisions to delegate difference of opinion authority to the regional offices and the establishment of the Decision Review Officer.

While it's too early to form a conclusive opinion on the possible success of the program since it only started last December 1, and it's a 1-year test program, our service officers at the 12 Regional Offices test-site locations are already universally praising the potential of the program as a means to drastically reduce the amount of appeals on VA rating decisions. That is because of the early involvement by the DRO in informally communicating with the veteran and representative, techniques and requirements to successfully support a claim, and if need be, direct explanation for the reasoning for denial of any claimed issues.

This is really an expansion of the widely successful Hearing Officer program as suggested by both the Veterans' Claims Adjudication Commission in their 1997 report and Congress in review of that report.

The fourth initiative is one being done essentially on some Regional Office Directors' own volition and that is the out-basing of rating and adjudication personnel in VA medical centers. This initiative, which was first started by the Chicago Regional Office Director has objectively shown to basically eliminate the problem of inadequate and/or incomplete compensation and pension examinations. With inadequate examinations being the significant issue for most BVA remands, it would seem reasonable that all Regional Office directors will soon adopt this initiative.

Accordingly, these four initiatives have put the VA on the edge of a major breakthrough toward making the agency a model of government efficiency and service to its clientele. There is one major obstacle, however, and if not corrected or checked will sidetrack any further forward movement. The BPR initiatives just described have occurred, for the most part, through internal diversion of FTE resources and at a time when the VBA has also been suffering significant reductions in FTE.

As an example, lack of available resources is the only reason given by Regional Office directors precluding their ability to outbase rating personnel in medical centers. Yet, the administration, as you just so recognized, Mr. Chairman, came forward with a 125 reduction as part of their budget proposal this year. That recommendation—which we are happy to realize that you, Mr. Chairman, now basically have checked—would basically sidetrack any BPR initiatives that was undertaken by the VBA. Indeed, a recommendation in the 1999 veterans' independent budget and policy is for an increase of 500 FTE for those programs. That FTE increase must be used to place rating specialists in the VA medical centers; to increase the number of DROs (Decision Review Officers); and, to recruit new veterans' service representatives to rectify the past hiring freezes.

Essentially, Mr. Chairman, while we appreciate that you had indicated a 175 increase, we still believe that 500 is the figure, and that is not a whimsical figure for the reasons that I just stated.

Thank you.

[The prepared statement of Mr. McNeill appears on p. 116.]

Mr. QUINN. Thanks very much for your comments. Mr. Russo.

STATEMENT OF WILLIAM F. RUSSO

Mr. RUSSO. Mr. Quinn, members of the subcommittee, Vietnam Veterans of America believes that the staff and Members of the Board of Veterans' Appeals are generally competent and dedicated. Nevertheless, the past year without a permanent chairman seems to have caused the Board to lose its focus on its mission of providing prompt, fair decisions to our Nation's veterans.

This past April, the Board's staff confirmed our assessment that, when a case is remanded by the Court of Veterans Appeals back to the Board, it takes the Board about 10 months to render a decision. This is much longer than the Board takes to render a decision in a case coming from the Regional Office. The discrepancy is inexplicable since most court remands are based on a joint-motion or are the result of a short-order by the Court. These cases should take about a few hours for the Board to decide and to process, not 10 months.

We brought this matter to the attention of acting chairman, Richard Standefer, and I'm pleased to say that he, that day, disbanded the unit within the Board that was in charge of processing these cases. Now, these cases come from the Court back to the individual Board member who erroneously decided them for that Board member to make a new decision.

In addition, we note that this practice and these problems directly contravene Congress' order in the 1994 Veterans' Benefits Improvement Act. In that act, Congress said that all remanded cases from the Court back to the Board and then, from the Board back to the Regional Office must be given expeditious treatment, and Congressman, 10 months is not expeditious treatment.

Other problems the Board is currently having is that it still gets reversed in over half the cases that are appealed up to the Court. So the Board is still making major errors in over half of the decisions that go up to the Court, and that is an unacceptable error rate as Mr. Surratt stated. We ask, why is the Board still failing in these areas? And our assessment is that the Board is wasting its time in other unproductive ways, one of which we've talked about here today.

First, the Board reviews every single attorney fee agreement that is filed with the VA which is an action that is not required by any law or regulation. It's frankly a waste of the Board's time. The second example of the Board wasting resources is that within the last few months the Board has spent hundreds of hours drafting regulations that would prohibit the VA from withholding any attorney fees as part of an award to an attorney.

The VA received over 60 comments from individuals opposing these proposed regulations, and that, in itself, shows that these regulations were very ill-conceived, and frankly, a waste of time. The only thing they might accomplish is to discourage attorneys from practicing before the VA.

One of the champions of Veterans' Judicial Review, Representative Lane Evans of this committee, has introduced legislation which would require the VA to pay these contingent attorney fees out of past-due benefits. VBA strongly supports this legislation and the hard-fought of veterans to hire an attorney if they so choose.

Now the last area in which we feel the Board is wasting its time is in collusion with Group 7 of the VA General Counsel's Office as we've talked about here today. If you'll notice the attachments to my testimony, this issue has been discussed among veteran attorneys including articles in the Federal Bar Association's newsletter and it's been alleged that this practice violates the code of judicial conduct and the model rules of professional conduct. We also feel it causes the public to lose confidence in the independence of the Board. And finally, it's probably a waste of the Board's valuable time.

And to follow-up on one of the questions that was asked earlier in a statement by the Board that this litigation support group is separate and independent from the Board members that make the decisions: Based on my personal experience, there is frequently turnover of staff between these Board members—or I should say, the Board members' staff—and the litigation support staff. So there is definitely an overlap and an exchange of staff, and I believe the

Board would be able to confirm that. I would agree with Congressman Filner's statement that these people working down the hall and speaking with each other about cases, I'm sure that occurs. And I noticed the Board did not, in any way, say that this practice does not occur or that there's any rules to prevent that kind of conversation.

With respect to the Court of Veterans Appeals legislation at issue today, we do support that. But we feel that there's additional legislation that would improve the Court's handling of cases. Specifically, we note that the Court very rarely actually grants benefits to a veteran. It's only happened in a handful of cases over these 7 years the Court's been in business. Instead, the Court has usually remanded the case back to the Board. And we give suggestions in our testimony of ways that the Court's authority could be expanded to allow it to more easily grant the benefits outright rather than forcing the veteran to wait while his case is on remand.

In closing, I see that my time is up but, I would like to add that Vietnam Veterans of America feels that a lot of these problems in the appeals system can be improved or even solved if Congress would pass legislation allowing a veteran to hire an attorney of his or her choice at the VA Regional Office level and at the Board of Veterans' Appeals. That is part of what judicial review is all about. Attorneys are not actively representing veterans because there's no incentive to do so. The Court of Veterans Appeals, there is still a pro se rate of over 50 percent, and that's unacceptable.

Thank you very much.

[The prepared statement of Mr. Russo appears on p. 120.]

Mr. QUINN. Thank you, Mr. Russo, and thank you to all five of our witnesses on this panel.

We're discussing H.R. 3212 this afternoon, but the discussion has gone way beyond all of that, that's for certain. I appreciate the discussion on all of these things that deal with veterans. But we started with testimony from Mr. Thomas, this way—I have a question—and I'm going to work the opposite way because, Mr. Russo, your final comments hit on my question. After reading your testimony and the others, while we're talking about the Office of the General Counsel and this counsel and that counsel and court cases and everything else, we've not really talked about when an attorney could become involved.

It's my understanding that in the case of a veteran, at least right now, his or her own attorney can't become involved until after a final Board decision is made. Is that correct, in your opinion?

Mr. RUSSO. Correct.

Mr. QUINN. And so my question was going to be, is it your opinion that veterans should be allowed to involve his or her attorney of choice earlier in the process? You've answered that already, I think. And further, then my question would be, how early in the process before we start wasting veterans or others time and money?

Mr. RUSSO. Yes, Mr. Chairman, our position is that at least after the VA has initially denied a claim.

Mr. QUINN. Say it again, I'm sorry.

Mr. RUSSO. After the VA Regional Office has initially denied a claim that the veteran or their dependent ought to be able to hire

an attorney. That would avoid a situation where an attorney obtains, let's say, a portion of past-due benefits in a case that the veteran could have filed on his own or with a service organization and been automatically granted. But once the VA has denied the claim, that veteran should have the right, if they choose, to hire an attorney.

And we've talked here about all these lawyers having these back-door discussions, the veteran ought to be able to have his own lawyer, too.

Mr. QUINN. Well, and I guess that's where my question came from. And believe me, I'm not a lawyer and I'm not promoting the fact that we ought to be a suit society and that you ought to have lawyers involved in everything you say and do, because in many areas, there's more of that than we need.

But for all of these coziness questions and collusion questions and back-door discussions that the veteran ought to be involved at some point, it seems to me, earlier, than after it's too late it seems almost, to me.

Mr. RUSSO. Well, that's right. If the only time you can get a lawyer is at the court level, at that stage, as we've heard today, it's too late to add any new evidence to the record. And a veteran needs to have a lawyer to assist him in gathering the evidence that can support his claim whether that's at the Regional Office or at the Board level.

Mr. QUINN. Correct. And let me just add—thank you, Mr. Russo. And I would ask if any of the others want to just comment briefly on my question.

Mr. McNeill, should that be allowed to happen sooner, do you think?

Mr. MCNEILL. Mr. Chairman, I think that if a veteran wants to get his next door neighbor as a representative at the beginning stage of a claim, we shouldn't be presumptuous enough to say they should not do that. However, that's a simple answer to a very complex problem. Now you have the concerns about who collects the money? Who collects the fees? Is the VA going to become a collection agency which they are now in a lot of cases? Who is going to provide the FTE to do that? How do you provide safeguards in the system? So many other questions are involved in that process.

The fact is that the veteran now is getting involved very, very early in the adjudication stage with the Decision Review Officer. They do not have to wait to take jurisdiction at the time of NOD. They can go immediately upon the rating decision. So that whole process has been moved up. But the real critical thing what that does is that grabs the veteran and his representative and puts a burden on them to have face-to-face direct communications with the VA decisionmaker. And all three of them now are acting together.

I would prefer that we start working on the appeals and miscommunications earlier in the process before we really became concerned about who does what in the appellate phase.

Mr. QUINN. And in your oral testimony here earlier, too, you did point out that, as bad as parts of it sound, it's probably the best it has been, I guess, in some sense.

Mr. MCNEILL. Oh, yes, I think there's no doubt. I just came back from Seattle, and I spent a day at Fort Louis and they have a commendation from General Shali Kashwili up on the wall because he went through the predischarge program there.

Mr. QUINN. Is that right?

Mr. MCNEILL. But even more important was the "buck" sergeant who said this is the greatest thing that's happened to him.

Mr. QUINN. Thank you.

Mr. Surratt, anything to add?

Mr. SURRATT. Yes, the DAV is opposed to changing the law on admitting attorneys, and the reason for that, is that, first of all, envision the traditional legal process where the fact-finder is passive and it's up to the attorneys on each side to discover the evidence, submit that evidence, and plead the law. The administrative process is really much unlike that. In fact, the processes are designed to allow a veteran to receive benefits to which he's entitled without having to pay a lawyer to get them.

The system is set up where VA has a duty to assist the veteran in gathering the pertinent evidence. VA has the ultimate duty to ensure that all pertinent laws and regulations are applied. So, the VA administrative process is very much unlike the traditional legal setting where the fact-finder is passive and doesn't help in those instances.

We believe this would cause a lot of additional problems. Service Officers, who work for veterans' organizations do a lot of hand holding, if you will. Veterans call up; it's therapeutic. They need help in getting their medications—lots of things that aren't fee producing. They get small awards like non-service connected burial allowance. You would have to wonder if an attorney helped file an application for that if the attorney's fee wouldn't take up all the allowance.

So, quite frankly, we don't think veterans ought to have to pay for attorneys to get their benefits. And, we think, if you were to do that, that would be an admission that the current non-adversarial system has essentially failed.

Mr. QUINN. And is not at work.

Mr. SURRATT. Right. We'd like to see the system fixed.

Mr. QUINN. Rather than put anymore burden financially or timewise on a veteran.

Ms. A'zera.

Ms. A'ZERA. Well, I would just agree with what Rick just said.

Mr. QUINN. Excuse me. You would just agree or disagree?

Ms. A'ZERA. No, I agree with the DAV position on that.

Mr. QUINN. Thank you.

Ms. A'ZERA. And also, in the report of the Chairman on the Board of Veterans' Appeals, if you look in there on statistics in the back, the line for attorneys was pretty much the same outcomes that they got from the VSO's representation. So, it doesn't improve the process, and I think it should be a free process.

Mr. QUINN. Good point. Thank you.

Mr. Thomas.

Mr. THOMAS. I think that I have to agree with Mr. Surratt, also. I believe that our VSO's Service Officers do an exceptional job. From a personal note, I know my Service Officers bent over back-

wards and went to the nth-degree to try to accommodate, and I don't think a law needs to be changed in that area.

Mr. QUINN. Okay. Thanks. Very conclusive responses. I appreciate it.

Mr. Filner. Thanks, very much.

Mr. FILNER. Just a couple of things very quickly. Several of you pointed out that by practice or by their own regulations the Board is not bound by the manual circulares. That sounds strange to me. But why does the VA argue that—what do they say to you when you have told them this is strange?

Mr. SURRATT. They really don't have a good reason.

Mr. FILNER. They have not defended that?

Mr. SURRATT. No, in fact, the Court has ruled in several cases that they are bound by manual——

Mr. FILNER. Should there be a legislative remedy, then, if they are not going——

Mr. SURRATT. Well, it certainly would be preferable if the VA would just voluntarily amend the rule. But, we've asked them to do that, and they've declined. The legislative remedy could certainly fix it.

Mr. FILNER. I'd like to hear what they say because your arguments sound very persuasive.

Mr. SURRATT. You can't have a case decided by two different sets of rules.

Mr. FILNER. Right. It just sounds obvious to me.

On the extensions of time, why has that become the practice? Why have they said that they are doing that?

Mr. SURRATT. Why has the Government said that?

Mr. FILNER. Yes.

Mr. SURRATT. Because of understaffing and——

Mr. FILNER. I was very interested in your defense of the existing system without attorneys. Your conception of the system is, as you phrased it, an advocate of the veteran, a fact-finder and then, an advocate. I don't know what the law says, but let's assume that you're right. And I assume up to the Board level, and including the Board level, the case argues even more strenuously, there should be non-contact between them and the appeal because their's is an adversary process by the way it is set up.

If your conception of the system is accurate as it was designed to be set up, then, you can't have an advocate or a fact-finder be involved, in the telling them what to do later because then, they become adversaries. You have transformed them into adversaries. So it seems that if your conception is accurate—and, I don't know what the others would say—then, it makes an ever stronger case for there to be no collusion or——

Mr. SURRATT. I'd like to comment on that, if I may?

Mr. FILNER. Please.

Mr. SURRATT. I once practiced before the court, and admittedly, this was a long time ago and the Board may have changed its internal procedures. But the attorney for the General Counsel told me that the Board member wouldn't agree to a settlement. Now, again, that may have changed. But, I don't think there's any necessity for a conversation between the Board, in any sense, and the General Counsel because, after all, the Board is supposed to review

the record and render a decision that explains itself well-enough to where anyone can understand it, including the veteran. And if a veteran is supposed to be able to understand the factual and legal bases of the decision, certainly, the General Counsel's attorney should be able to.

Mr. FILNER. I agree. One last question: I'm just amazed at the percentage of remands. Does someone have it at their fingertips what percentage of cases is remanded now?

Mr. SURRATT. From the Board or from the Court?

Mr. FILNER. From the Court to the Board.

Mr. SURRATT. It's a mixture of some remanded in part, and so forth, but it's a very ——

Mr. RUSSO. Over 50 percent, certainly.

Mr. FILNER. And someone else said there's only a handful of cases in favor of the veteran. So, does that mean 40 to 45 percent are against the veteran at the court level—50 percent remanded and 5 percent for the veteran? Is that the case roughly?

Mr. SURRATT. A very few number are really affirmed, that is, the BVA's decision is upheld. I think it's something like—I have the statistics here. I think it's about—I'm looking at the Court's report here——

Mr. FILNER. I guess the only implication or the only conclusion I could draw from those statistics—as I heard, remands are based on errors or misunderstandings or unclarities or whatever—no matter what you all have said, at least, as a courtesy to the Board, the facts do not seem to indicate that the Board is doing a good job. Unless the appeals are such a small percentage of the total cases. What percentage of the total cases are appeals?

Mr. SURRATT. Well, it's a very small number but it's still a representative sample. I think what we're saying is that the Board is much improved with judicial review as compared to before, but it still has a long ways to go, especially when the Court has to remand over 50 percent of the cases.

Mr. FILNER. It seems to me, as a committee, we have to figure-out, and I don't know the answer and you can help us later, but how do we, beside give them more resources how do we exercise our oversight function and try to improve that situation?

Mr. MCNEILL. Well, I think you've already started with getting the 175 FTE increase. I think that's a big start because I think everyone's overworked in the system.

But to answer the question—not to defend the VA—but we've got to understand there's a great time-lag by the time that case gets to the Court and then, going off to the Regional Office for a decision maybe is 2 to 3 years down the road. And they might have made improvements since that time. So we've got to consider there is a significant time-lag involved.

I don't think the issue is so much important for the court remands as it is for the BVA remands. I think that's really the crucial issue.

Mr. FILNER. And what percentage of that——

Mr. MCNEILL. That was 45.7 percent in fiscal year 1997. Now it's down to 41 percent for the first half of this year. But that's far from their BPR goal in 2002 of 20 percent.

Mr. QUINN. The gentleman's time is expired. We're going to yield to Mr. Rodriguez.

Mr. RODRIGUEZ. Let me get back on—my impression was initially that 40 percent of the time the judges would spend on appeals. Is that correct? At least, that's what I heard from them, that 40 percent of their time was spent on appeals. Then, if half of them are errors, if 50 percent is or in errors, then we've got a serious problem there.

The other mention I keep hearing is—and I understand that you might need more support, but I'm entitled to so many workers and I've got about 17 or 18 that we're entitled. Ten of them are just doing casework back home; 25 to 30 percent of them have—they've got over 200 cases a piece; about 30 percent of them are VA cases that, for some reason, the VA staff is not doing the sufficient work that needs to be done if they're coming to us with those problems. And I hear you say you need more resources. I can ask for more resources, but I don't think I'm going to get 10 more staff to handle that.

I'm wondering if maybe putting some time limits in some of the recommendations to let them know that they need to make a decision within a certain period of time when it reaches that court. I don't know what's appropriate, 6 months or a year—versus having—3 years is ridiculous to wait on an appeal, even a whole year for the initial and especially since half of them have some difficulties and problems.

Pardon me?

Mr. QUINN. Excuse me, sir. It's just that you had asked a question to one of the individuals.

Mr. RODRIGUEZ. Yes.

Mr. RUSSO. I'd like to respond to it, if I may. Congressman, the answer is that the law is already on the books with respect to a large part of the problem you talked about. And that is the Veterans' Benefits Improvement Act, Congress required VA to provide expeditious treatment—whatever that means—of remanded cases. It's clear based on the statistics that both the Board of Veterans' Appeals and, in fact, the VA Regional Offices are not complying with that—they're just not.

Mr. RODRIGUEZ. Seem like that is not correct. I'm not an attorney but I know that when a system has failed and when the executive branch—that's your area—has also failed to respond we've got to give them that alternative; go to the judiciary. That is, get an attorney as quickly as possible, if that's the only recourse, unless you can come up with a better system that's more responsive.

Mr. SURRATT. Congressman, I would have to say—I will have to be a little critical of the court here—but, the Court has the authority to compel action unreasonably delayed or unlawfully withheld under the All Writs Act. Several parties have brought cases before the court to force the VA to do something that it wasn't doing or wasn't doing after years. Now, the Court's been very reluctant to exercise that authority. Quite frankly, we think they've been too reluctant.

Mr. RODRIGUEZ. Legislatively, I don't know if we can force the court to when they get a case that it be dealt with within a certain period of time versus the amount of time that——

Mr. MCNEILL. I think a lot of the initiatives by the VA are putting the burden on the VSO's to be better at their jobs, too. And I think that we have to get a three-pointed partnership going here. I think that we've been kind of, in the past, sitting back and kicking our heels up and letting the VA run with the ball and see whether they make a decision.

But, I think, legislating untimeliness can be a very dangerous thing, especially if you want to get an original compensation decision done in 90 days. If you have 91 days, you violate the law. Then also, the VSO representative is violating the law and the rating specialist is violating the law, and it could be good reasons why they don't get it done in 91 days. The veteran, himself, could have missed three C&P examination notices, for example.

We've got to remember too, that the veteran does have a slight burden here to respond to the requests from the VA. So, I think that probably legislating timeliness can be a very dangerous thing.

Mr. RODRIGUEZ. I know it is and I would hate for that to occur. But, there's a great deal of frustration out there. The VA hospital was surprised to hear the frustration of some of them. You're welcome to come to any of my hearings in August. I want to have another 16 like I did last year, and you can hear the darned frustration of some of those individuals in terms of having to deal with this situation.

Somehow, we need to come to grips with that. And I can yell that I need more staff too, to deal with it, but apparently, they're coming to me because the system has failed somewhere in the process.

Mr. SURRATT. The key to solving this whole problem, we've maintained, is quality. And if you get it right the first time the resources they have may very well be adequate to do the job. But when you have to do it four or five times to get it, obviously, you're going to overload the system.

Mr. RODRIGUEZ. And that applies to both the VA documentation and the quick, I presume, judge decision on the case.

Mr. MCNEILL. Our point about additional resources, in fact, is that over the last 3 years the VBA, itself, has suffered well over a 2,000 FTE reduction. So, I think, the pendulum has swung too far, is our point. We've cut too far.

Mr. QUINN. Mr. Reyes.

Mr. REYES. Thank you, Mr. Chairman.

I would just like you to comment on my earlier observation that it seems like there isn't any willingness to give out information to veterans or their attorneys or their representatives in the context of what some of these rights or appeals they might have.

Mr. MCNEILL. I think that's changing a lot. I think with the decision review officers, the whole concept is on direct communications. It's just not me speaking. It's our 12 Service Offices at the Regional Office sites involved in the DRO process who are praising it. The fact is, early involvement and they're doing it by such things as phone calls. They'll call the veteran up and say come on in, let's talk about what you're trying to do here. And the face-to-face communication is a more informalized system that is getting away from the old formal system.

Time will tell. We've still got to the end of November to see how the test program fares for the 12 sites. But I think that we might have something pretty good here.

Mr. RUSSO. I'd like to comment on that. Mr. Reyes, to its credit, the Board of Veterans' Appeals has begun putting out a pamphlet that it sends to every veteran who appeals his case up there. It's called "Understanding the Appeals Process." I'm sure Mr. Standefer can provide a copy of that document. It explains, in very simple language, your appeal rights and, I believe, it includes information on how to expedite your claim if you have important circumstances.

Mr. SURRATT. I would just like to comment on expediting the claim. I know you had a question about that earlier. Unfortunately, most of the appellants before the Board are elderly or very ill. And, a large proportion under a standard that, if you're needy, or you're elderly, or you're very ill, many of them could request expedited decisions. Obviously, in certain cases that's appropriate, but the real thing that would solve all of this is to get the quality straightened out, and thereby, get the timeliness straightened out, and make decisions in a reasonable amount of time rather than let them sit for the years that you heard acting chairman, Standefer, talk about.

Mr. QUINN. Before we go to Mr. Mascara, Mr. Rodriguez, I made mention that some of that paperwork Mr. Russo talks about in terms of pamphlets that have been prepared by the Board of Veterans' Appeals may be helpful to you at some of your meetings in August, may be helpful to some of those staff members of yours that now have over 200 cases, because I've talked to some of them. I think you're trying to send some of them down to me down the hallway there once in a while. (Laughter.)

But we're happy to do that. My Buffalo friends won't mind. But seriously, if there is some paperwork out there that's helpful, pamphlets, mailings, otherwise, I don't want to speak for you, it may be helpful to get to everybody on the subcommittee with what looks like might help you out at some of those town meetings to get some folks doing their own work if they're able to.

Mr. Mascara.

Mr. MASCARA. Thank you, Mr. Chairman.

I resist the temptation to continue to pursue the coziness-bit, but having read Mr. Thomas, your statements and after hearing such words as, "raises suspicion," "collusion," and on page three of Mr. Thomas's statement, one matter that gravely troubles PVA is the involvement of the BVA in defense of its decisions before the CVA.

"Attorneys and VA professional staff, Group 7, cannot agree to a joint motion for remand before the Court without first obtaining the approval of the BVA. Communications between the BVA and Group 7 are in secret, unavailable to veterans and his or her representatives."

I didn't read this portion last night. And I used the word ex parte—and I'm glad to see it here because I used the word properly, apparently—that they were meeting without benefit to the veterans whose case was being decided. As you say here, "the BVA is a quasi-judicial body in its participation in litigation before the CVA can be likened to the United States District Court judge attempting to influence how his or her opinion is decided on appeal

to the circuit court. And this sort of ex parte contact is unacceptable under any judicial standard."

And the judge took umbrage. But there was no direct affront to him and I didn't mean it that way. But, I've read enough last night and while I was here today to give me cause for concern about the entire procedure. Someone needs to address this. Is it or isn't it happening? And if it is happening, how does that affect the veterans in their appeals? Does anybody want to comment?

Mr. THOMAS. Well, we're greatly concerned about that. Those are our beliefs and this is the reason why we brought it forward to this committee in hopes that there will be some investigative process to determine whether or not this, in fact, is true. It is our belief that it is and, as such, we believe it should be stopped.

Mr. MASCARA. I agree, it's reprehensible, it's outrageous, and Mr. Chairman, I think we need to pursue this as a member of this committee.

Mr. QUINN. Thank you, Mr. Mascara. And we appreciate your preparedness for these meetings—all of us do, we really do.

Bob Filner and I have just been having a discussion. Thank you all. This has been a helpful discussion—more of a discussion than a hearing. And I want to say thanks to everybody who was involved here. We follow the rules but sometimes we wander a little bit here and there and ask you for information you didn't come prepared with and ask people to come to the witness table who weren't prepared to do that. But we only have an interest—I think, all of us—and that's to serve veterans who served their country, in the end.

Bob and I have been talking about having an opportunity to meet with the Office of General Counsel over the next couple of weeks or so, in our office, not in a hearing setting. We'll be giving you a call to do that. And I absolutely think that we need some follow-up on a hearing on this topic to go a little bit further, so we'll be in touch with the members of the subcommittee.

Also—and I'll yield to Mr. Rodriguez in just a second—I also want to thank the members, Mr. Standefer and others from your staff who have remained here this afternoon. Sometimes we get those hearings where everybody finishes and runs right out the door. To hear this part of the discussion, I know, is helpful to you. I know, it's helpful to us and we appreciate you and your staff and others who are with you for staying today. Thanks for doing that.

Mr. Rodriguez.

Mr. RODRIGUEZ. I'm not sure exactly where we might be able to get this information but I was wondering—and I hope you take it in the light that it's made—but, I recognize, especially those judges that run for re-election, there's always comments about their work ethic, and I was just wondering if we could assess, in terms of the workload, of maybe some of the judges that are out there and how much work they might be doing or not doing in comparison?

Mr. QUINN. I think staff on the subcommittee could probably help you with that. And according to what the members of the first panel said here today, they seemed very, very willing to work with us for any kind of that information, statistics-wise.

Anything else?

We're thanking everybody who attended and who helped us with questions and answers today.

We're adjourned.

[Whereupon, at 4:15 p.m., the subcommittee adjourned subject to the call of the chair.]

APPENDIX

I

105TH CONGRESS
2D SESSION

H. R. 3212

To amend title 38, United States Code, to revise the provisions of law relating to retirement of judges of the United States Court of Veterans Appeals, to provide for a staggered judicial retirement option, to rename the Court as the United States Court of Appeals for Veterans Claims, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 1998

Mr. STUMP (for himself and Mr. EVANS) (both by request) introduced the following bill; which was referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to revise the provisions of law relating to retirement of judges of the United States Court of Veterans Appeals, to provide for a staggered judicial retirement option, to rename the Court as the United States Court of Appeals for Veterans Claims, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38,**
4 **UNITED STATES CODE.**

5 (a) SHORT TITLE.—This Act may be cited as the
6 "Court of Veterans Appeals Act of 1998".

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(b) REFERENCES TO TITLE 38, UNITED STATES CODE.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADMINISTRATIVE PROVISIONS RELATING TO THE COURT

SEC. 101. AUTHORITY TO PRESCRIBE RULES AND REGULATIONS.

Section 7254 is amended by adding at the end the following new subsection:

"(f) The Court may prescribe rules and regulations to carry out this chapter.".

SEC. 102. CALCULATION OF YEARS OF SERVICE AS A JUDGE.

Section 7296(b) is amended by adding at the end the following new paragraph:

"(4) For purposes of calculating the years of service of an individual under this subsection and subsection (c), only those years of service as a judge of the Court shall be credited. In determining the number of years of such service, that portion of the aggregate number of years of such service that is a fractional part of one year shall be

1 disregarded if less than 6 months and shall be credited
2 as a full year if 6 months or more.".

3 **SEC. 103. LIMITATION ON COST-OF-LIVING ADJUSTMENT TO**
4 **RETIRED PAY.**

5 Section 7296 is amended by adding at the end the
6 following new subsection:

7 "(l)(1) If a cost-of-living adjustment provided by law
8 to be made to the retired pay payable under this section
9 of a retired chief judge of the Court would (but for this
10 subsection) result in the retired pay of that retired chief
11 judge being in excess of the annual rate of pay in effect
12 for the chief judge of the court as provided in section
13 7253(e)(1) of this title, such adjustment may be made
14 only in such amount as results in the retired pay of the
15 retired chief judge being the same as that annual rate of
16 pay (as in effect on the effective date of such adjustment).

17 "(2) If a cost-of-living adjustment provided by law
18 to be made to the retired pay payable under this section
19 of a retired judge (other than a retired chief judge) of
20 the Court would (but for this subsection) result in the re-
21 tired pay of that retired judge being in excess of the an-
22 nual rate of pay in effect for judges of the court as pro-
23 vided in section 7253(e)(2) of this title, such adjustment
24 may be made only in such amount as results in the retired
25 pay of the retired judge being the same as that annual

1 rate of pay (as in effect on the effective date of such ad-
2 justment).".

3 **SEC. 104. SURVIVOR ANNUITIES.**

4 (a) ELECTION TO PARTICIPATE.—Subsection (b) of
5 section 7297 is amended in the first sentence by inserting
6 before the period the following: "or within 6 months after
7 the date on which the judge marries if the judge has re-
8 tired under section 7296 of this title".

9 (b) REDUCTION OF CONTRIBUTIONS OF ACTIVE
10 JUDGES.—(1) Subsection (c) of such section is amended
11 by striking out "3.5 percent of the judge's pay" and in-
12 serting in lieu thereof "2.2 percent of the judge's salary
13 received under section 7253(e) of this title, 3.5 percent
14 of the judge's retired pay received under section 7296 of
15 this title when the judge is not serving in recall status
16 under section 7257 of this title, and 2.2 percent of the
17 judge's retired pay received under such section 7296 when
18 the judge is serving in recall status under such section
19 7257".

20 (2) The amendment made by paragraph (1) shall
21 take effect on the first day of the first pay period begin-
22 ning on or after January 1, 1995.

23 (c) INTEREST PAYMENTS.—Subsection (d) of such
24 section is amended—

25 (1) by inserting "(1)" after "(d)"; and

1 (2) by adding at the end the following new
2 paragraph:
3 "(2) If a judge has previously performed a period of
4 service as a judge, or has performed service as a judicial
5 official (as defined under section 376(a)(1) of title 28),
6 a Member of Congress, or a congressional employee, the
7 interest required under the first sentence of paragraph (1)
8 shall not be required for any period—
9 "(A) during which a judge was separated from
10 all such service; and
11 "(B) during which the judge was not receiving
12 retired pay or a retirement annuity based on service
13 as a judge or as a judicial official.".
14 (d) SERVICE ELIGIBILITY.—(1) Subsection (f) of
15 such section is amended—
16 (A) in the matter in paragraph (1) preceding
17 subparagraph (A)—
18 (i) by striking out "at least 5 years" and
19 inserting in lieu thereof "at least 18 months";
20 and
21 (ii) by striking out "last 5 years" and in-
22 serting in lieu thereof "last 18 months"; and
23 (B) by adding at the end the following new
24 paragraph:

1 "(5) If a judge dies as a result of an assassination
2 and leaves a survivor or survivors who are entitled to re-
3 ceive annuity benefits under this section, the matter in
4 paragraph (1) preceding subparagraph (A) shall not
5 apply.".
6 (2) Subsection (a) of such section is amended—
7 (A) in paragraph (2), by inserting "who is in
8 active service or who has retired under section 7296
9 of this title" after "Court";
10 (B) in paragraph (3), by striking "7296(c)"
11 and inserting "7296"; and
12 (C) by adding at the end the following new
13 paragraph:
14 "(8) The term 'assassination' means the killing of a
15 judge that is motivated by the performance by that judge
16 of the judge's official duties.".
17 (e) AGE REQUIREMENT OF SURVIVING SPOUSE.—
18 Subparagraph (A) of subsection (f)(1) of such section is
19 amended by striking out "or following the surviving
20 spouse's attainment of the age of 50 years, whichever is
21 later".
22 (f) COLA FOR SURVIVOR ANNUITIES.—Subsection
23 (o) of such section is amended to read as follows:
24 "(o) Each survivor annuity payable from the retire-
25 ment fund shall be increased at the same time as, and

1 by the same percentage by which, annuities payable from
2 the Judicial Survivors' Annuities Fund are increased pur-
3 suant to section 376(m) of title 28.".

4 **SEC. 105. EXEMPTION OF RETIREMENT FUND FROM SE-**
5 **QUESTRATION ORDERS.**

6 Section 7298 is amended by adding at the end the
7 following new subsection:

8 "(g) For purpose of section 255(g)(1)(B) of the Bal-
9 anced Budget and Emergency Deficit Control Act of 1985
10 (2 U.S.C. 905(b)(1)(B)), the retirement fund shall be
11 treated in the same manner as the Court of Federal
12 Claims Judges' Retirement Fund.".

13 **SEC. 106. LIMITATION ON ACTIVITIES OF RETIRED JUDGES.**

14 (a) IN GENERAL.—Chapter 72 is amended by adding
15 at the end the following new section:

16 **"§ 7299. Limitation on activities of retired judges**

17 "If a retired judge of the Court (as defined in section
18 7257(a)(2) of this title) in the practice of law represents
19 (or supervises or directs the representation of) a client in
20 making any claim relating to veterans' benefits against the
21 United States or any agency thereof, the retired judge
22 shall forfeit all rights to retired pay under section 7296
23 of this title or under chapter 83 or 84 of title 5 for the
24 period beginning on the date on which the representation

1 begins and ending one year after the date on which the
2 representation ends.".
3 (b) CLERICAL AMENDMENT.—The table of sections
4 at the beginning of chapter 72 is amended by adding at
5 the end the following new item:

"7299. Limitation on activities of retired judges.".

6 TITLE II—STAGGERED RETIRE-
7 MENT AND RECALL PROVI-
8 SIONS

9 **SEC. 201. STAGGERED RETIREMENT.**

10 (a) RETIREMENT AUTHORIZED.—One eligible judge
11 each year shall be eligible to retire under this section start-
12 ing in the year 1999 and ending in the year 2003.
13 (b) ELIGIBLE JUDGES.—
14 (1) DEFINITION OF ELIGIBLE JUDGE.—For
15 purposes of this section, an eligible judge is an indi-
16 vidual who—
17 (A) is an associate judge of the United
18 States Court of Appeals for Veterans Claims
19 who has at least 10 years of service creditable
20 under section 7296 of title 38, United States
21 Code;
22 (B) has made an election to receive retired
23 pay under section 7296 of such title;
24 (C) has at least 20 years of service allow-
25 able under section 7297(*l*) of such title;

1 (D) is at least 55 years of age; and

2 (E) has years of age, years of service cred-
3 itable under section 7296 of such title, and
4 years of service allowable under section 7297(*l*)
5 of such title not creditable under section 7296
6 of such title, that total at least 80.

7 (2) MULTIPLE ELIGIBLE JUDGES.—In the case
8 of a year in which more than one eligible judge pro-
9 vides notice in accordance with subsection (c), the
10 judge who is eligible to retire in that year shall be
11 the judge who has the greatest seniority as a judge
12 of the United States Court of Appeals for Veterans
13 Claims of the judges who provide such notice.

14 (c) NOTICE.—A judge who desires to retire under
15 subsection (d) shall provide the President and the chief
16 judge of the United States Court of Appeals for Veterans
17 Claims with written notice to that effect not later than
18 April 1 of any year specified in subsection (a). Such notice
19 shall specify the retirement date in accordance with sub-
20 section (d). Notice provided under this subsection shall be
21 irrevocable.

22 (d) RETIREMENT.—A judge who is eligible to retire
23 under subsection (a) shall retire during the fiscal year in
24 which notice is provided pursuant to subsection (c), but
25 not earlier than 90 days after the date on which such no-

1 tice is provided. Such judge shall be deemed, for all pur-
2 poses, to be retiring under section 7296(b)(1) of title 38,
3 United States Code, except that the rate of retired pay
4 for a judge retiring under this section shall, on the date
5 of such judge's separation from service, be equal to the
6 rate described in section 7296(c)(1) of such title multi-
7 plied by the percentage represented by the fraction in
8 which the numerator is the sum of the number represented
9 by years of service as a judge of the United States Court
10 of Appeals for Veterans Claims creditable under section
11 7296 of such title and the age of such judge, and the de-
12 nominator is 80.

13 (e) DUTY OF ACTUARY.—Section 7298(e)(2) is
14 amended—

15 (1) by redesignating subparagraph (C) as sub-
16 paragraph (D); and

17 (2) by inserting after subparagraph (B) the fol-
18 lowing new subparagraph:

19 "(C) For purposes of subparagraph (B) of this para-
20 graph, the term 'present value' includes a value deter-
21 mined by an actuary with respect to a payment that may
22 be made under subsection (b) from the retirement fund
23 within the contemplation of law.".

1 **SEC. 202. RECALL OF RETIRED JUDGES.**

2 (a) IN GENERAL.—Chapter 72 is further amended by
3 inserting after section 7256 the following new section:

4 **"§ 7257. Recall of retired judges of the Court**

5 "(a)(1) A retired judge of the Court may be recalled
6 for further service on the Court in accordance with this
7 section. To be eligible to be recalled for such service, a
8 retired judge must provide to the chief judge of the Court
9 notice in writing that the retired judge is available for
10 such service and is willing to be recalled under this section.

11 "(2) For the purposes of this section, a retired judge
12 is a judge of the Court of Veterans Appeals who retires
13 from the Court under section 7296 of this title or under
14 chapter 83 or 84 of title 5.

15 "(b) The chief judge may recall a retired judge upon
16 written certification by the chief judge that substantial
17 service is expected to be performed by the retired judge
18 for such period as determined by the chief judge to be
19 necessary to meet the needs of the Court. Any such recall
20 may only be made with the agreement in writing of the
21 retired judge.

22 "(c) A retired judge who is recalled under this section
23 may exercise all of the powers and duties of the office of
24 a judge in active service.

25 "(d) A retired judge who is recalled under this section
26 shall be paid, during the period for which the judge serves

1 in recall status, pay at the rate of pay in effect under sec-
2 tion 7253(e) of this title for a judge performing active
3 service, less the amount the judge is paid in retired pay
4 under section 7296 of this title or an annuity under the
5 applicable provisions of chapter 83 or 84 of title 5.

6 "(e) Except as provided in subsection (d), a judge
7 who is recalled under this section who retired under the
8 provisions of chapter 83 or 84 of title 5 shall be considered
9 to be a reemployed annuitant under that chapter.

10 "(f) Nothing in this section may be construed to af-
11 fect the right of a judge who retired under chapter 83
12 or 84 of title 5 to serve as a reemployed annuitant in ac-
13 cordance with the provisions of title 5.".

14 (b) CLERICAL AMENDMENT.—The table of sections
15 at the beginning of chapter 72 is amended by inserting
16 after the item relating to section 7256 the following new
17 item:

"7257. Recall of retired judges of the Court.".

18 TITLE III—RENAMING OF COURT

19 SEC. 301. RENAMING OF THE COURT OF VETERANS AP-
20 PEALS.

21 (a) IN GENERAL.—The United States Court of Vet-
22 erans Appeals is hereby renamed as, and shall hereafter
23 be known and designated as, the United States Court of
24 Appeals for Veterans Claims.

1 (b) SECTION 7251.—Section 7251 is amended by
2 striking out "United States Court of Veterans Appeals"
3 and inserting in lieu thereof "United States Court of Ap-
4 peals for Veterans Claims".

5 **SEC. 302. CONFORMING AMENDMENTS.**

6 (a) CONFORMING AMENDMENTS TO TITLE 38.—
7 (1) The following sections are amended by
8 striking out "Court of Veterans Appeals" each place
9 it appears and inserting in lieu thereof "Court of
10 Appeals for Veterans Claims": sections 5904,
11 7101(b), 7252(a), 7253, 7254, 7255, 7256, 7261,
12 7262, 7263, 7264, 7266(a)(1), 7267(a), 7268(a),
13 7269, 7281(a), 7282(a), 7283, 7284, 7285(a), 7286,
14 7291, 7292, 7296, 7297, and 7298.
15 (2)(A) The heading of section 7286 is amended
16 to read as follows:

17 **"§ 7286. Judicial Conference of the Court".**

18 (B) The heading of section 7291 is amended to
19 read as follows:

20 **"§ 7291. Date when Court decision becomes final".**

21 (C) The heading of section 7298 is amended to
22 read as follows:

23 **"§ 7298. Retirement Fund".**

24 (3) The table of sections at the beginning of
25 chapter 72 is amended as follows:

1 (A) The item relating to section 7286 is
2 amended to read as follows:

"7286. Judicial Conference of the Court.".

3 (B) The item relating to section 7291 is
4 amended to read as follows:

"7291. Date when Court decision becomes final.".

5 (C) The item relating to section 7298 is
6 amended to read as follows:

"7298. Retirement Fund.".

7 (4)(A) The heading of chapter 72 is amended
8 to read as follows:

9 **"CHAPTER 72—UNITED STATES COURT OF**
10 **APPEALS FOR VETERANS CLAIMS".**

11 (B) The item relating to chapter 72 in the table
12 of chapters at the beginning of title 38 and the item
13 relating to such chapter in the table of chapters at
14 the beginning of part V are amended to read as fol-
15 lows:

"72. United States Court of Appeals for Veterans Claims ..... 7251.".

16 (b) CONFORMING AMENDMENTS TO OTHER LAWS.—
17 (1) The following provisions of law are amended
18 by striking out "Court of Veterans Appeals" each
19 place it appears and inserting in lieu thereof "Court
20 of Appeals for Veterans Claims":
21 (A) Section 8440d of title 5, United States
22 Code.

1 (B) Section 2412 of title 28, United States
2 Code.
3 (C) Section 906 of title 44, United States
4 Code.
5 (D) Section 109 of the Ethics in Govern-
6 ment Act of 1978 (5 U.S.C. App.).
7 (2)(A) The heading of section 8440d of title 5,
8 United States Code, is amended to read as follows:
9 **"§ 8440d. Judges of the United States Court of Ap-**
10 **peals for Veterans Claims".**
11 (B) The item relating to such section in the
12 table of sections at the beginning of chapter 84 of
13 such title is amended to read as follows:

"8440d. Judges of the United States Court of Appeals for Veterans Claims.".

14 (c) OTHER LEGAL REFERENCES.—Any reference in
15 a law, regulation, document, paper, or other record of the
16 United States to the United States Court of Veterans Ap-
17 peals shall be deemed to be a reference to the United
18 States Court of Appeals for Veterans Claims.

○

Honorable Jack Quinn
Remarks
Oversight Hearing
on the operations of the
Court of Veterans Appeals, the Board of Veterans Appeals and
H.R. 3212

Good Morning. The Subcommittee will come to order.

We are here today to receive testimony relating to the operations of the court of veterans Appeals and the Board of Veterans Appeals.

These are two institutions that generate significant interest when the topic of claims processing arises. The Board is empowered to provide de novo review of any case and the Court functions as an appellate body, reviewing records as designated by the Board.

It is no secret that there are problems with claims processing. The VA has recently recalculated its accuracy and processing times at the Regional Offices and has concluded that things are worse than previously thought. In short, it is taking longer to work a claim and the error rates are significant. Part of this issue is that VBA does not have sufficient personnel to do the job. That is why the VA Committee has opposed the President's proposal to cut 125 FTEE in FY 1999 and recommended funding for an additional 175 personnel to the Budget Committee.

The upshot of the problems at the regional offices is more people file appeals to the Board, and by extension, the Court. As a result, the waits for a case under appeal have been enormous, taking several years. We must figure a way to do the job right the first time. I suspect if there were no remands because of poor development or outright mistakes, the Regional Offices would not

be facing the current untenable situation. I believe VBA must automate its decision process, get the service officers more involved up front and communicate better with the veteran. Let's face it; a veteran may disagree with a decision, but if that decision has been timely and done by an organization noted for the quality of its work, that veteran is less likely to appeal.

I would note that the Board's statistics have improved over the dark days of 1993 and 1994. Congress has provided them with additional personnel and they have reorganized to what appears to be a more efficient and accountable system of deciding claims.

From a Member's perspective, we don't hear much about the Court. I note we have a bill before us today that will make some changes to the way the Court manages itself and I am eager to hear from all the witnesses about H.R. 3212, the Court and the Board.

I know the Ranking Member is interested in this issue and I will now yield to him for any remarks he may have.

Do any other members have opening remarks?

Could we have the first panel please. We are honored to have the Honorable Frank Q. Nebeker, Chief Judge of the Court of Veterans Appeals appearing today, as well as the Honorable Richard Standefer, Acting Chairman of the Board of veterans Appeals. Welcome, and Could we begin with Judge Nebeker.

Thanks to each of you.

I will now yield to Mr. Filner for any questions he may have.

Do any other members have questions?

Our second panel is composed of representative of several veterans service organizations. Mr. Rick Surratt is here from the DAV, Mr. Bill Russo is from the VVA, Ms. Veronica A'Zera will testify on behalf of AMVETS, Mr. Sid Daniels represents the VFW, and finally, Mr. Harley Thomas will speak on behalf of the PVA. Please proceed in any order you desire.

Thank you.

I will now yield to Mr. Filner for any questions he may have.

Do any other members have questions?

I want to thank each of today's witnesses for appearing. Congressional hearings are difficult to prepare and I am sure I speak for all of the members in expressing our gratitude. I would remind Members that on the 18th we will hold a combined hearing and markup of several bills, including H.R. 3212. The hearing is adjourned.

OPENING STATEMENT OF HONORABLE BOB FILNER SUBCOMMITTEE ON BENEFITS HEARING ON THE BOARD OF VETERANS APPEALS, THE COURT OF VETERANS APPEALS, AND REVIEW OF H.R. 3212

JUNE 10, 1998 – 2:00 PM – 334 CHOB

Thank you, Mr. Chairman. I'm looking forward to hearing about the operations of the Court of Veterans Appeals and the Board of Veterans Appeals and to any actions needed to assure our veterans that their claims are being handled in a just, fair and timely manner. I also understand that we will be hearing some suggestions for changes regarding the retirement benefits for the judges of the Court of Veterans Appeals. It is important that the benefits provided to judges of this court be comparable to those of other similar judges, if we are to attract high quality candidates for these important positions.

I am particularly interested in hearing from the Board of Veterans Appeals with regard to issues raised by

representatives of the veterans' service organizations who will be testifying today. Veterans deserve to have their cases decided fairly. They also deserve to be served by a system which is perceived as fair, timely and just. Many years ago, General Omar Bradley stated "We are dealing with **Veterans**, not with procedures; With their problems, not ours." The procedures, which are used to adjudicate claims, are designed to achieve justice for our Nation's veterans. They must be employed in a way which will achieve that end.

Therefore, I am concerned when I read testimony alleging that Members of the Board of Veterans Appeals becoming actively involved, albeit behind the scenes, in the litigation of cases at the Court of Veterans Appeals. I am concerned when I hear that it takes several years to adjudicate an appeal filed with the Board of Veterans Appeals, and that recommendations for implementing changes in procedures are ignored. I am concerned when I hear that attorneys are reluctant to represent

veterans because of the perceived unfairness and delay in paying attorney's fees which the veteran has agreed to pay a properly retained attorney.

I hope that today's hearing will address these concerns as well as concrete steps to addressing them.

I thank you all for being here today and look forward to today's testimony.

OPENING REMARKS FOR BENEFITS SUBCOMMITTEE ON 6/10/98

Thank you Mr. Chairman. As the son of a World War I veterans who won a silver star for gallantry in action and the brother of four who served in World War II and my own service in the United States Army, I am truly troubled by the excruciating process a veteran must be subjected to when trying to receive service connected disability compensation.

My office receives a high number of requests from veterans who need assistance with the process. The initial application process at the regional office for benefits is usually followed by several denials and appeals. A possible hearing at the local level, and appeal to the Board of Veterans Appeals and other delays as the case wends its way through the bureaucratic maze could lead to many years of frustration before a final resolution.

So after waiting as many as four years for a decision, the case is back at the local level, where it began. Chances are great, in that time period, that the veteran's medical condition has worsened and new medical evidence will need to be obtained. And in some cases the veteran has died while awaiting a decision.

This painful process frustrates me and frustrates my staff. I can only imagine what my constituent feels. And I shudder to think of the veterans who try to work through the system on their own, with no assistance.

I am also concerned that the staff of the Board of Veterans' Appeals and the staff of the Court of Veterans Appeals might have a relationship that has been said to be too cozy. I understand when the veteran files a claim the Board is sympathetic to his claim, but if a denial of the claim leads to an appeal, the veteran and the Board become adversaries. I find it hard to believe that there is no discussion between the two staffs about the cases, without the presence of the veteran and/or his attorney.

Throughout this process, let's ask ourselves, how many lawyers, doctors, government staff, and other personnel have touched this case? How much time, money and effort have been exhausted while the veteran still waits for a resolution? THIS IS INTOLERABLE! We must improve the process and rise above what appear to be, at minimum, an appearance of collusion in the process.

QUESTIONS FOR PANEL ONE-THE BVA AND CVA

Why can't a higher tier of review be established at the local level to avoid cases going to the BVA?

Will you explain in detail what the process is of a case from the time it is filed at the county level until its final resolution?

What is the relationship between the staff of the Court of Veterans Appeals and the staff of the Board of Veterans' Appeals?

What can be done to make the regional center more conducive to making final decisions? Why can't regional offices have more flexibility in reaching decisions?

FOR RELEASE ON DELIVERY
Expected at 10:00 A.M. EDT
June 10, 1998

STATEMENT OF
HONORABLE FRANK Q. NEBEKER
CHIEF JUDGE, U.S. COURT OF VETERANS APPEALS
FOR PRESENTATION BEFORE THE
SUBCOMMITTEE ON BENEFITS
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
JUNE 10, 1998

MISTER CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

On behalf of the Court, I appreciate the opportunity to provide this statement on H.R. 3212, a bill to revise provisions of law relating to the judges on the Court, and for other purposes. The proposed legislation would make the retirement and survivors' annuity plan for Court of Veterans Appeals judges comparable to that available to other federal judges, ensure institutional continuity by providing for staggered retirement for judges who meet certain eligibility criteria, institute a mechanism which would permit the recall of any retired judge in the event of a caseload crisis, and rename the Court as the "United States Court of Appeals for Veterans Claims." I will briefly set out the rationale for the major provisions of these legislative changes.

First, I believe that the proposed legislation is required to place Court of Veterans Appeals judges on a comparable footing in relation to the judges of other federal courts, as concerns a retirement and survivors' annuity plan. In so doing, this legislation would carry out the intent expressed by Congress when it established the Court, which is that the Court function as a part of the federal judiciary.

The Court was created nearly ten years ago under Article I of the U.S. Constitution, and it is beyond dispute that Congress intended the Court to function as an independent judicial entity. That intent is reflected in the language of the Veterans' Judicial Review Act of 1988 (VJRA) and subsequent amendments. Furthermore, both the House and Senate reports accompanying the

compromise bill that became the VJRA, as well as statements on the floor of both Houses on that bill, demonstrate clear legislative intent to establish the Court of Veterans Appeals as "a truly independent [A]rticle I, specialty court." 134 Cong. Rec. 31,461 (1988) (floor statement of Sen. Cranston on compromise measure that became VJRA)); *see also* 134 Cong. Reg. 31,465-66 (statement of Sen. Cranston containing further references to Court as "independent entity" and "independent tribunal"); 134 Cong. Rec. 31,770 (1988) (statement of Rep. Montgomery on compromise measure stating that bill, as crafted, "will allow an independent review by a court"); 134 Cong. Rec. 31,788 (1988) (statement of Rep. Edwards concerning nature and powers of Court of Veterans Appeals). In short, the Court has judicial powers and its judges have judicial responsibilities, comparable to those throughout the federal judiciary.

Furthermore, the stated intent of Congress was that, commensurate with these powers and responsibilities, a retirement and survivors' annuity plan be established "comparable to that available to other Federal judges" (House Committee Report), which would place the new Court "on a comparable footing in this regard in relation to other Federal courts" (Senate Committee Report). *See* H.R. Rep. No. 189, 101st Cong., 1st Sess. 4 (1989); S. Rep. No. 86, 101st Cong., 1st Sess. 23 (1989). The proposed legislation would achieve that goal. The legislation, while not selecting the most favorable elements of the various plans, would permit the Court's judges to achieve parity with Bankruptcy and Magistrate Judges.

For example, the changes to the Court's survivors' annuity program would make it comparable to the Joint Survivors' Annuity System (JSAS) available to the judges of four different courts, including Bankruptcy and Magistrate Judges. None of the changes, including that relating to the contributions required of judges, would make the Court's survivors' annuity program more favorable than JSAS. Because the Court's present system provides too few benefits at too much cost, only one judge has ever elected participation and only upon the unfortunate circumstance of learning, before his death in 1996, that he had a short-term terminal illness. In only such a circumstance, where a judge's survivor could receive benefits after just a brief period of participation, does enrollment make sense. Besides encouraging enrollment by other judges of the

Court, enactment of section 104 of H.R. 3212 would be of particular benefit to the widow of the deceased judge because it would rectify the disparity between her survivor annuity and the annuities of survivors of other federal judges, including Bankruptcy and Magistrate Judges.

I will turn now to the reason for the staggered retirement provision contained in section 201 of H.R. 3212. I think it was well expressed by my newest colleague, Judge William Greene, in a talk he gave a few days ago to the Veterans Law Section of the Federal Bar Association. The Section's members had expressed an interest in hearing him talk about his confirmation process. He outlined its steps and noted that the process of filling the vacancy created by Judge Hart Mankin's death had taken eighteen months. He then commented that the five other associate judges and the Chief Judge would all have terms that expired at about the same time. He said that he could envision a day, sometime in 2005, when he would walk into the Court, look around, and realize that he was there all by himself.

He got a chuckle from his audience, but he was not speaking for comic effect. In fact, my fifteen-year term and those of five of the Court's associate judges all expire within approximately fifteen months of each other, between May 2004 and August 2005. I want to state first that I intend to complete my term. Assuming that all of these judges complete their terms, and that none of the three judges who will be under age 65 at that time is reappointed, the Court could have at least five and very possibly six simultaneous vacancies during 2005. Given the length of time likely to be involved in the nomination and confirmation process, and the fact that 2004 is a presidential election year, the vacancies could be lengthy.

There are several other possible scenarios that could occur. I will outline the most likely. Assuming the application of the "Rule of 80" (age plus years of service equals 80; this is the general standard governing retirement of federal judges), and no reappointments, four associate judges would retire within 11 months of each other, between September 2004 and August 2005. (The fifth associate judge will be eligible for retirement under the Rule of 80 in November 2002.) Put another way, three of the Court's judgeships would be vacated in 2004 (my term and those of

two associate judges), and two additional associate judgeships would be vacated during the first 8 months of 2005. Thus, under this assumption, it is quite possible that the Court would have five simultaneous vacancies in 2005.

Alternatively, assuming the reappointment of the three judges who will not be 65 years of age at the expiration of their 15-year terms, under the application of the Rule of 80, they would be eligible to retire between May 2006 and July 2007, thus likely creating three simultaneous vacancies.

The provisions of title II of H.R. 3212 would permit staggered retirement and provide a practical incentive to judges who became eligible to exercise that option. Under the provisions of H.R. 3212, eligibility would be staggered. Precedent exists in three other Article I Courts for retirement based on completion of less than the full statutory term of service, and there are a number of other provisions applicable to Article III and to other Article I courts that permit retirement where less than a full judicial term has been completed. The staggered retirement of associate judges presently participating in the Court's retirement system would create an estimated actuarially accrued liability of approximately $270,000 in the judges' retirement fund, amortizable under actuarial methodology at approximately $24,000 per year over 20 years.

Moreover, the provision permitting recall would allow me to call upon retired judges, with their consent, when need arose. With the Court's increasing caseload and the potential problems surrounding near simultaneous retirements of judges, such as would be more likely without the proposed legislation, this provision makes sense. All Article III and Article I judges, except Bankruptcy and Magistrate Judges and this Court's judges, have specific provisions for both senior status and postretirement judicial service. Bankruptcy and Magistrate Judges, as is the case with judges of the U.S. Court of Appeals for the Armed Forces, have a specific provision for recall upon consent. This provision would be both a further step toward the goal of comparability that Congress intended, and an option that would enable me or any future Chief Judge to deal expeditiously with a temporary spike in caseload.

Finally, I will briefly address the provisions of Title III, which would rename the Court as the United States Court of Appeals for Veterans Claims. The name change, I believe, would give full voice to the express intent of Congress by making it crystal clear that the Court is an independent judicial entity, completely separate from the Department of Veterans Affairs. Misconceptions concerning the Court's nature are still widespread, as was emphasized during a recent oral argument before the U.S. Court of Appeals for the Federal Circuit where the three-judge panel seemed to be proceeding on the assumption that this Court is an entity within the Department of Veterans Affairs.

In conclusion, I appreciate this opportunity to present the Court's testimony on H.R. 3212. On behalf of the Court's judges and staff, I thank you for your past support. I, or those with me, will be pleased to answer any questions you may have.

STATEMENT OF RICHARD B. STANDEFER, ACTING CHAIRMAN, BOARD OF VETERANS' APPEALS

BEFORE THE

SUBCOMMITTEE ON BENEFITS COMMITTEE ON VETERANS' AFFAIRS HOUSE OF REPRESENTATIVES

June 10, 1998

Good morning, Mr. Chairman. It is a pleasure to be with you and other Subcommittee members and staff to discuss the operations of the Board of Veterans' Appeals.

In preparing for this hearing, I had occasion to review the Board's testimony before this Subcommittee in February 1994, a little over four years ago. We were testifying then in connection with our budget request.

At that time, Mr. Chairman, the Board's average response time was on its way to 781 days. We decided only 22,000 cases. We were still deciding those cases with three-member panels. Our backlog of cases stood at 47,000, and was on its way to 60,000. We were losing our most experienced Board members at an alarming rate to Administrative Law Judge positions.

I recall that former Chairman Slattery asked us in early 1994 what it would take to return in three years to the "good old days" of 1992, when the response time was 240 days. Frankly, Mr. Chairman, that seemed a nearly unreachable goal.

But today, I'm pleased to report that the Board's response time is down to around 250 days. Our backlog is less than 30,000 cases. We are retaining our Board members.

What's behind this remarkable success? A number of remarkable people.

- This Subcommittee has been outstanding in its support of the appellate rights of veterans and their families. You gave us the legislative tools we desperately needed, particularly the authority to have decisions made by single members, the authority to conduct hearings by electronics means, and the restoration of pay equity between Board members and administrative law judges. You championed the Board in budget negotiations, enabling us to increase the number of decision-makers.

- Our partners in the veterans service organizations provided the Board with unparalleled support. As you know, Mr. Chairman, 85% of our appellants are represented by VSOs. As our decision-making capability increased—doubling from 1994 to 1997—these dedicated men and women have matched us step for step.

- Our VA leadership ensured that dealing with the backlog at the Board was a top priority. At the Board itself, we reorganized so that we could take advantage of our new authority. We greatly increased the use of technology to improve our productivity, including videoconferencing to provide timely hearings for veterans, and we emphasized training to produce more and better decisions.

- But most of all, we have been fortunate to have an extraordinary group of women and men—Board members, counsel, administrative support personnel—who spend every working day of their lives assisting veterans and their families in the appellate process. The pressure and responsibility on these individuals has been enormous. And they have responded magnificently. The average number of decisions per employee has increased by 75% since 1994, while the cost per case has actually declined by 25%.

So we have a success story, Mr. Chairman: All of the stakeholders in this process working together to achieve a goal that none of us could have done on our own.

Before I discuss some of the challenges facing the Board, I'd like to outline some specific things we've been doing recently.

- As you know, VA recently published proposed regulations to implement Public Law 105-111, which provides for review of prior Board decisions on the grounds of clear and unmistakable error. It's been a very complex task. We are grateful to the Office of the General Counsel for its expert assistance and to this Subcommittee for its patience. We've done our best to get it right, and look forward to thoughtful comments from all quarters.

- We have continued to strengthen our partnership with the Veterans Benefits Administration, both through cooperation at the Central Office level and with frequent contact between our geographically-oriented Decision Teams at the Board and the regional offices.

- We have instituted new quality-review procedures to evaluate Board decisions, and are using information gathered in that process to institute appropriate training.

- We have implemented special quality-review activities to monitor the cases remanded from the Court of Veterans Appeals. Even though those 657 cases in 1997 represent about 3 percent of the Board's appealable decisions in 1996, we are committed to quality and want to ensure the fairest result for all appellants.

But we know we have more to do.

In our view, Mr. Chairman, the challenge facing the Board at this point is this: Although we have reduced the time it takes for a veteran to have his or her appeal adjudicated at the Board, we need to reduce the "total system processing time," in other words, the time beginning with the filing of an appeal and ending with a *final* Board decision. Not a remand to the regional office to develop more evidence, but an allowance or disallowance of the appeal.

In 1992—before VA really began to feel the effects of judicial review—the average processing time for final decisions was 512 days. What that means is that, on the average, a veteran could expect an allowance or denial about a year and a half after filing the substantive appeal. By 1995, that number had doubled, and today stands at 1,032 days—close to three years.

We are very proud of what we've accomplished at the Board. And this Subcommittee should be proud as well. Working together, we have managed to reduce by two-thirds the time a veteran must wait for the Board to adjudicate his or her appeal. But the fact is that more than 40% of those adjudications continue

to be remands: cases returned to the regional office, typically to gather and evaluate more evidence. Those are not final decisions. And unless the regional office grants all the benefits sought—something that happens about 25% of the time—the case comes back to us to be worked again.

So remands cause two difficulties:

First, they mean that the veteran has to wait, in essence, through another appeal cycle, which means, on the average, more than 700 additional days. The regional office must gather the evidence, evaluate it, and make a new decision. Three out of four times, that new decision will either deny the claim again, or grant less than what the veteran sought. That means the regional office must prepare a supplemental statement of the case, allow the veteran time to respond, and then send the case back to the Board.

Second, when the remand rate is very high, as it has been for a number of years, remands become a major factor in the backlog. For example, in FY 1997, the Board remanded about 19,600 cases. We expect to see about 14,700—75%--of those cases again. In other words, if the Board receives 40,000 cases for adjudication, more than 35% of those cases would be remands returned from the regional offices. Not original appeals, but cases that have already been through the entire system at least once.

What we want to do, Mr. Chairman, is reduce the number of remands. We believe that if we can accomplish that, we can give the veteran—who sees "VA," not the regional office and the Board—a quality decision which is more timely.

Reducing the number of remands—just as reducing the response time at the Board—is going to require cooperation by all our stakeholders: this subcommittee, the VSOs, VA leadership, the Veterans Benefits Administration, and the Board itself.

- We need to increase training within the Board to improve quality. For example, where there are alternatives to remand—such as requesting a medical opinion from the Veterans Health Administration--or where a closer review of the record may obviate the need for a remand, we need to employ those alternatives or make that closer review. We intend to continue using our quality review processes as our chief guide to training needs.

- We need to capitalize on our business partnership with VBA—the regional offices—by continuing to share some of the experience we have gained as VA's final arbiter of veterans' claims and VA's closest contact with the jurisprudence of the Court of Veterans Appeals. Our experience so far suggests that when we invest the time to establish effective dialogues with individual regional offices and share our experience directly with them, remand rates decrease.

At the same time, we know that reducing the number of remands could have effects that may, on the surface, be perceived as negative consequences—

- It will probably result in some reduction in the total number of decisions we make annually, simply because it takes longer to draft a final decision—subject to judicial review—than it does to draft a remand.

- Reducing the number of remands will mean an increase in the number of allowed cases. But it will also mean an increase in the number of disallowed cases.

We are going to need the understanding of our stakeholders during any such transition.

In conclusion, Mr. Chairman, I think it's clear that there is much to be proud of in the Board's current performance, and many who share in the credit for that performance. As I've indicated, we do not intend to rest, but to seek out new ways to fulfill our statutory mandate of providing timely *final* decisions. We think that reducing the number of remands will make the appellate system even better for veterans and their families.

I would be pleased to answer any questions you or your colleagues might have.

STATEMENT OF

HARLEY THOMAS, ASSOCIATE LEGISLATIVE DIRECTOR

PARALYZED VETERANS OF AMERICA

BEFORE THE

SUBCOMMITTEE ON BENEFITS

OF THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING

H. R. 3212, THE "COURT OF VETERANS APPEALS ACT OF 1998"

AND

OVERSIGHT ISSUES FACING THE BOARD OF VETERANS' APPEALS

AND

THE COURT OF VETERANS APPEALS

JUNE 10, 1998

Chairman Quinn, Ranking Democratic Member Filner, Members of the Subcommittee, on behalf of the Paralyzed Veterans of America (PVA) I appreciate this opportunity to testify regarding the Board of Veterans' Appeals (BVA), the Court of Veterans Appeals (CVA), and H.R. 3212, the "Court of Veterans Appeals Act of 1998."

The Board of Veterans' Appeals

Many of PVA's concerns regarding the BVA are the same concerns that PVA has raised year after year. Every year we point out the delays faced by veterans, and although these

delays have improved, they are still intolerable. Although many of the statistical indices have shown improvement over the last few fiscal years, we are still seeing remand rates that are too high, processing times that are too long, and productivity that is too low. BVA still seems to be more concerned with quantity over quality. As we have stated in the past, we believe that an approach which highlights the quality of the decision-making process will lead to fewer remands and will markedly reduce the intolerable time delays still faced by veterans seeking benefits Congress has promised them.

Decisions must be done right the first time. A step in this direction would be VA's correction of 38 C.F.R. § 19.5, which provides that "the Board is not bound by Department manuals, circulars, or administrative issues." PVA believes that this regulation is not in accord with statute or case law. This regulation, which provides that BVA will not be bound to the same rules as VA field offices, subjects claims decisions to two different interpretations and applications of law.

Congress has delegated to the Secretary the authority to prescribe rules, regulations, and guidelines "which are necessary or appropriate to carry out the laws administered by the Department."[1] VA Manuals are binding on adjudicators under this authority. BVA is statutorily required to be "bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department."[2]

VA's refusal to amend its regulation to be in accordance with law and with the interpretation of law by the courts is untenable, and we ask that you take appropriate actions to insure that the VA regulations follow the statutes.

One matter that gravely troubles PVA is the involvement of the BVA in defense of its decisions before the CVA.[3] Attorneys in VA Professional Staff Group VII (Group VII) cannot agree to a joint motion for remand before the Court without first obtaining the approval of the BVA. Communications between the BVA and Group VII are in secret and unavailable to the veteran and his or her representative.

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[1] 38 U.S.C. § 501.
[2] 38 U.S.C. § 7104 (c).
[3] PVA Assistant General Counsel William Mailander has addressed this issue recently in *TOMMY, A Lawyers Guide to Veterans Affairs*, Fall 1997, page 4, the Federal Bar Association Veterans Law Section ("Does the Functus Officio Doctrine Apply to the BVA?").

The BVA is a quasi-judicial body, and its participation in litigation before the CVA can be likened to a United States District Court judge attempting to influence how his or her opinion is decided on appeal to a Circuit Court. This sort of *ex parte* contact is unacceptable under any judicial standard. By statute, a BVA decision may not be appealed to the CVA until it is final. Once the decision is final the BVA ceases to have an interest in it – the BVA decision must stand on its own. The BVA's insistence on continued involvement only raises suspicion about the adequacy of its decision-making.

BVA is a subsidiary part of the VA, and Congress clearly intended the VA General Counsel to represent the entire VA and its interests.[4] Congress has made no provision for BVA participation before the CVA.[5] In a matter before the Court the BVA does not represent the VA, nor is it a party to the litigation, and its role in the process should end once it has rendered a decision, a decision that must be final before a veteran can appeal to the CVA.

Remanding a decision is traditionally a tool that courts employ in agency litigation, and courts generally favor settlement as a resolution to litigation. A joint motion for remand encompasses both of these desirable elements. The BVA's untenable involvement delays the negotiating process or prevents resolution, forcing the veteran and the agency into needless, more costly litigation, in which the Court often ultimately orders a remand anyway.

The BVA's clandestine participation harms veteran appellants, is not authorized by law or statute, and leads to concerns over the impartiality of the process. PVA asks that you address this troubling situation.

Court of Veterans Appeals

An issue facing the CVA is the large number of requests for time extensions moved by the Secretary. As Chief Judge Nebeker stated in an order recently, "[w]hile repeated motions for extension by the Acting Secretary delay the appellate process, the primary

[4] 38 U.S.C. § 7263(a) -- "The Secretary shall be represented before the Court of Veterans Appeals by the General Counsel of the Department."
[5] 38 U.S.C. § 7263(a).

disservice is not to the Court, but to the community of people who seek redress in the Court. Consequently, the Acting Secretary should view adequate staffing and efficient organization of [General Counsel] Group VII to be a necessary service to veterans and other claimants . . . ."[6] PVA asks this Subcommittee to assist us in remedying this "primary disservice . . . to the community of people who seek redress in the Court."

PVA is concerned with the practice of the CVA of granting multiple extensions. These extensions often result in inordinate delays to veteran appellants. PVA is not entirely convinced that the solution lies in amending Rule 26(b)[7] of the Court.[8] The court already possesses the power to deny extensions where "good cause" is not shown. The Court may decide that workload, in and of itself, is not sufficient cause for granting time extensions. PVA calls on the Court to be more sensitive to the often-detrimental effects that time extensions can have on veteran appellants.

PVA believes that the biggest hurdle facing timely appellant decisions, and the cause of many of the VA's requests for extensions is a lack of resources within Group VII. The Secretary must be accorded sufficient resources to enable the VA to meet its responsibilities before the Court.

Group VII has also begun an early intervention program, designed to identify cases immediately after appeals have been filed which are most suited for early action. PVA supports this initiative. Again, more resources need to be provided to insure the fairest, and quickest, resolution of a veteran's appeal.

H.R. 3212, the "Court of Veterans Appeals Act of 1998"

In general, PVA does not oppose H.R. 3212, the "Court of Veterans appeals Act of 1998." Sections 102 through 105 of this legislation relate to the court's retirement program and appear to be in the nature of technical changes to that system. PVA professes no specific expertise on retirement systems in general, nor specifically on systems affecting judges. In our view the guiding principle with respect to the Court's

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[6] Kolman v. Gober, No. 96-428 (Aug. 7, 1997) (single judge order).
[7] Rule 26(b) – "The Court, on its own initiative or on motion of a party for good cause shown, may extend the time prescribed by these rules for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not extend the time for filing a Notice of Appeal."
[8] See Memorandum and Order (No. 98-425). In Re: A Proposed Amendment to Rule 26(b), April 24, 1998, *per curiam*.

retirement system is that the system must be equitable and comparable to the retirement systems for other Article I courts. To the degree that the retirement provisions in Title I of H.R. 3212 fulfill this principle, PVA supports them.

Section 103 of this bill relates to a limitation on cost-of-living adjustments (COLA) for retired judges. To the extent that there is any confusion about the availability of COLAs for retirees from the Court, we urge that this matter be clarified. In keeping with our guiding principle, we urge that COLAs for retired CVA judges be the same as for other Article I judges.

PVA supports Title II of H.R. 3212, a title that provides for staggered retirement of one eligible judge per year starting in 1999 and ending in 2003. If this legislation is enacted, PVA asks that you urge the speedy appointment and confirmation of new judges for the Court when vacancies occur. Enactment of this provision will insure that there is always an experienced cohort of judges sitting on the Court.

PVA has no fundamental opposition to Title III of this legislation, that would rename the Court of Veterans Appeals, to the United States Court of Appeals for Veterans Claims. We have never had any problems with the current name of the Court, and foresee no problems if the Court is renamed.

Conclusion

Mr. Chairman, Members of the Subcommittee, PVA appreciated the opportunity to present our views in this oversight hearing. I will be happy to answer any questions that you, or the Members of the Subcommittee, may have.

Testimony of
Veronica A'zera
National Legislative Director

Subcommittee Benefits
House Veterans Affairs Committee
On the
Court Board of Veterans Appeals

Wednesday, June 10, 1998
334 Cannon
2:00 PM

Mr. Chairman, AMVETS appreciates the opportunity to testify to the House Veterans Affairs Subcommittee on Benefits on the operations at the Board of Veterans' Appeals and Court of Veterans Appeals. We believe it is very important for your committee to conduct oversight hearings on these issues. We are also prepared to give testimony on H.R. 3212, a bill to revise the provisions of law relating to the retirement on judges on the Court.

Neither AMVETS nor myself have been the recipient of any federal grants or contracts during FY98 or the previous two fiscal years.

The Board of Veterans' Appeals

The Board of Veterans' Appeals (BVA) is the component of the Department of Veterans Affairs (VA) that is responsible for entering the final decision on behalf of the Secretary in each of the many thousands of claims for entitlement to veterans' benefits that are presented annually for appellate review. The Board's mission, as set forth in 38 U.S.C.§ 7101(a), is "to conduct hearings and dispose of appeals properly before the Board in a timely manner" and to issue quality decisions in compliance with the requirements of the law, including the precedential decisions of the United States Court of Veterans Appeals.

The Board renders final decisions on all appeals for entitlement to veterans' benefits, including claims for entitlement to service connection, increased disability ratings, pensions, insurance benefits, educational benefits, home loan guarantees, vocational rehabilitation, dependency and indemnity compensation, and many more. About 90 percent of the claims before the Board involve medical subject matter.

President Franklin D. Roosevelt created the Board on July 28 1933. The Presidential mandate creating the BVA established that the Board would:

- Sit at the Central Office of the VA.
- Be directly under the Secretary of Veterans Affairs.
- Provide one review on appeal to the Secretary of Veterans Affairs.
- Afford every opportunity for full and free consideration and determination.
- Provide every possible assistance to claimants.
- Have final authority.
- Take final action that would be fair to the veteran as well as the Government.

There have been many changes to the BVA operations over the years, which have mostly improved the process. As we have stated in the Independent Budget for the last several years, there are no quick fixes for the problems BVA faces. Congress has provided BVA with the resources to hire and train enough employees to adjudicate appeals in a timely manner. To ensure that decisions are properly decided, Board members must be held accountable for the decisions they sign.

Additionally, regional offices must be held accountable for the quality of their decisions and ensure that each case is properly developed prior to its transfer to BVA. The VA has adopted the idea that adjudicators will also be

held accountable for their decisions. We believe this was a step in the right direction.

According to Chairman Board of Veterans' Appeals' annual report, Roger Bauer, FY 1997 was a landmark year for the Board. In terms of both the number of decisions issued and decisions per FTE (Full Time Equivalent), FY 1997 was the Board's most productive year since 1991. The Board issued 43,347 decisions, which exceeded the previous year's total by 27.7 percent. The 88.1 decisions issued per FTE in 1997was 21.5 percent more than the previous year. He credited these increases to innumerable initiatives that have positioned the Board to operate more efficiently. We hope this is the case, but remain on alert and encourage continued oversight.

AMVETS has supported the idea of an intensive training program for attorney staff and Board members. Last year, under the direction of the Vice Chairman, a committee of key personnel acting as a Board of Regents conducted a training program using a university model. This is a big step and we applaud their efforts.

We were also heartened by the passage of "clear and unmistakable error" bill last year. AMVETS has been a long time supporter that claimants should have a way of challenging an otherwise final BVA decision on the basis of "clear and unmistakable error."

We have one recommendation for an improvement to BVA. VA should amend 38 C.F.R.§19.5 to remove its provision exempting BVA from VA manuals, circulars and other Department directives.

Under 38 U.S.C. §303, the Secretary of Veterans Affairs is the head of VA and is responsible for administration of the laws governing the programs under the jurisdiction of the Department. In 38 U.S.C. §511, Congress expressly delegated decision-making authority to the Secretary. Section §501 also delegates to the Secretary the authority to prescribe forms of application; methods of making investigations; manner and form of adjudications and awards; and rules, regulations, guidelines or other published interpretations or orders. Additionally, in accordance with §512, the Secretary may subdelegate authority to perform functions and duties. The actions of VA officials under this authority delegated by the Secretary have the same force and effect as though performed by the Secretary. Moreover, the courts have repeatedly held that agencies are bound by their own internal procedures.

VBA operates under various manuals. VBA Manual M21-1, for example, governs compensation, pension, and several ancillary benefit determinations. The manual itself provides that the agency of original jurisdiction is bound by it. Also, 38 C.F.R.3100 provides that decisions be based on instructions of the Department. Thus, if the agency of original jurisdiction does not follow M21-1, that is an error in law. BVA is charged with correcting errors in law in cases before it.

Under 38 U.S.C. 7104©, VA regulations and instructions of the Secretary bind BVA. Consequently, BVA can cite no reasonable theory to support its claim that M21-1 and other VA manuals do not bind it. Yet, 38 C.F.R. 19.5

provides that the "board is not bound by Department manuals, circulars, or similar administrative issues."

We believe that this provision is contrary to the law and therefore invalid. Without furnishing any reasons for maintaining this provision in the regulation, VA has refused to remove it. We continue to urge VA to amend it so as to comply with the statutes and well-established case law.

Court of Veterans Appeals

On November 18, 1988, President Ronald Reagan signed the Veterans Judicial Review Act (VJRA) into law. This law created an Article I court with exclusive jurisdiction to review final Board of Veterans' Appeals decisions. The court's mission is to review final BVA decisions for errors of law and erroneous findings of fact.

The court is composed of a chief judge and at least two and not more than six associate judges. The President, with the advice and consent of the Senate, appoints these judges for terms of 15 years. We welcomed the appointment of the Honorable William P. Greene to the court last year.

This appointment brings up one of our major concerns about the court, which is also addressed in the bill H.R.3212. Because six of CVA's current judges were all appointed within one year of each other, their 15-year terms will expire near the same time. This will result in the retirement of most of the judges and appointment of their successors within the same year. Provisions for early retirement will stagger the turnover and allow the retention of experienced judges on the court during a more orderly retirement and replacement process. AMVETS supports H.R.3212, which amends the law to permit early retirement of CVA judges.

Another major problem at CVA is the undue delays of veterans' appeals. Under CVA's rules of practice, an appellant has 30 days from court's notice of filing of the record on appeal to file the brief of appellant. The appellee, the Secretary of Veterans Affairs, has 30 days after he is served with an appellant's brief to file the brief of appellee. Courts typically enforce their rules and time limits strictly. Under CVA's rules, an appellant or the appelle may be granted an extension of time for filing a brief for "good cause."

The courts have held that the Government's excuse of a heavy caseload is not a "good cause." Yet, the General Counsel has continued to routinely request extensions of time. In fact, the General Counsel has requested multiple extensions in most cases. The court does not enforce its own rulings and has granted General Counsel extensions of time, even over the objections of appellants who point out the lack of any valid grounds.

This regrettable situation has continued for years, and the abuse has gotten worse. All of this serves the system first and the veteran last. It ignores the immediacy of the veteran's needs and disregards the fact that the veteran's case has already been pending for years before it reaches the CVA.

To correct this problem, we believe the Office of General Counsel needs additional staffing to assign to representation of the Secretary in appeals before the court. We have been suggesting this corrective measure for many

years. It is apparent, that corrective action will never likely be taken unless CVA enforces its own rules and orders. This is an issue that Congress can take up in its oversight hearings.

H.R. 3212

As mentioned in the CVA segment of this testimony, AMVETS supports H.R.3212 and congratulates Congress for their support on this important issue. As far as Title III of the bill, we are not against renaming of the court. This issue of renaming the court has never come up with our veterans, but we do like the fact that it puts in the word "veteran."

Mr. Chairman, this concludes my statement and I will be happy to answer any questions.

STATEMENT OF
RICK SURRATT
ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON BENEFITS
UNITED SATES HOUSE OF REPRESENTATIVES
JUNE 10, 1998

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you on behalf of the more than one million members of the Disabled American Veterans (DAV) and its Women's Auxiliary to present our views on the operations of the veterans' appeals processes, namely, the Department of Veterans Affairs (VA) Board of Veterans' Appeals (BVA or Board) and the United States Court of Veterans Appeals (CVA or Court). Because benefits and services for veterans and their eligible family members cannot fulfill their purposes until properly delivered, these two appellate tribunals are vital to the assurance of lawful dispensation of benefits and are therefore integral to the system of benefits administration. They serve not only to remedy incorrect decisions in individual cases but also to set standards of quality, foster uniformity, and guide VA in all its claims processing and benefits decisions. Thus, their role is to serve the purposes of justice on an individual and system-wide basis.

With the establishment of judicial review, the decade of the '90s brought a dramatic change in the appellate process for veterans' claims and a consequent profound effect upon the way VA does business. Throughout most of this century, veterans had no solid guarantee of justice because VA was immune to judicial enforcement of the law and operated in an environment virtually free of outside scrutiny or influence, described by the Supreme Court and other commenters as "splendid isolation." Many viewed BVA as merely a biased mouthpiece of VA, unwilling or unable to enforce the letter of the law where institutional practices had out of convenience or arbitrariness evolved and ingrained to contravene veterans' procedural rights and pervert the substantive intent of the law. Without independent review of VA decisions, the process was considered incomplete and ineffective, even illusory and productive of only the appearance of justice. As was assumed in theory, judicial review of BVA decisions in actual practice has vindicated the concerns and criticisms of those who advocated it and reinforced the general recognition of the benefits of effective appellate processes. As stated by John W. Davis, a noted master of appellate practice and constitutional expert, in his October 22, 1940, address to the Association of the Bar of the City of New York:

> The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at their best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice or infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which all ordered society rests.

While judicial review has positively impacted on the claims processing and administrative appellate systems, it has not been a complete solution, nor has it fully succeeded in shaking loose an entrenched bureaucracy and its old ways. The Court itself has contributed to and acquiesced in some continuation of counterproductive practices. Therefore, this oversight is both timely and appropriate.

THE BOARD OF VETERANS' APPEALS

The Board of Veterans' Appeals is authorized and operates by statute and under its own procedural regulations and rules of practice codified in 38 C.F.R. at parts 19 and 20. It is directed by a Chairman who is directly responsible to the Secretary of Veterans Affairs and is authorized a Vice Chairman and such number of members and support personnel as are necessary

to conduct hearings and timely dispose of appeals. The positions of Chairman and Vice Chairman are both currently vacant. The Secretary reports annually to Congress on the Board's activities, plans, staffing levels and assignments, and case processing times.

Until Congress authorized judicial review of VA decisions and created CVA to hear those appeals, BVA was the final authority on veterans' claims. As a statutory board, BVA was created in 1993 after experiments with several variations of appellate review resulted in persisting problems from too much decentralization. By consolidating and centralizing the appellate board in Washington, DC, under the authority of the agency head, then the Administrator of the VA, the problems of decentralization, lack of uniformity, and the lack of finality were addressed through a clearer sense of direction. President Franklin D. Roosevelt's Executive Order establishing the Board, which was promulgated in Veterans Regulation No. 2(a) and became law through operation of a statutory provision, mandated that this Board would sit at VA's Central Office, be directly under the Administrator, provide one review on appeal to the Administrator, afford "every opportunity" for a "full and free consideration and determination," provide "every possible assistance" to appellants, have final authority, and take final action that would be "fair to the veteran as well as the Government."

The Board has evolved through various organizational changes and refinements since then. In the early 1960s, due process was improved by the enactment of two laws in particular. Public Law 87-97, enacted in July 1961, required BVA to include "Findings of Fact" and "Conclusions of Law" in its decisions. Obviously, requiring BVA to articulate specific factual and legal points responsible for its ultimate determination improved the prospects that its decision would be well-reasoned. Public Law 87-666, enacted in September 1962, required field offices to furnish a "Statement of the Case" to a claimant who expressed disagreement with a decision. The Statement of the Case was to contain a summary of the pertinent evidence considered; a citation or discussion of the pertinent laws, regulations, and provisions of the Schedule for Rating Disabilities where applicable; and a decision on the issue in dispute with a summary of the reasons for the decision. The Statement of the Case was part of a four-stage appellate process. The claimant initiated the appeal by filing a Notice of Disagreement. This was followed by the Statement of the Case from VA. The claimant, if not satisfied with the explanation, filed a formal appeal. If, after review, the field office continued to deny the claim, the appeal was certified and considered by BVA.

The Statement of the Case was designed to better inform veterans of the bases of VA decisions. This reduced the number of cases referred to BVA because a significant portion of claimants, having VA's action explained, did not "perfect" and continue their appeals by filing the formal appeal required, known as the "substantive appeal." This process also resulted in more allowances at field offices without need for BVA review because it required them to take a more methodical and analytical approach and afforded them greater opportunities to discover their own errors.

Interestingly, it was dissatisfaction with the appellate process and the consequent 1962 hearings on judicial review that prompted Congress to enact the law requiring the inclusion of findings of fact and conclusions of law in decisions and the law requiring the issuance of a Statement of the Case. Of course, these improvements did not resolve public dissatisfaction with and distrust of the VA's administrative appeals system and did not end the call for judicial review for veterans' claims. The call for judicial review intensified in 1975, and legislation was considered several times after that. The Subcommittee on Oversight and Investigations of the House Veterans' Affairs Committee held extensive hearings on this issue in July 1983. Further hearings were held, and judicial review legislation was finally passed in the 100th Congress in 1988.

No other factor has revealed more about the shortcomings in nor impacted more on VA's decision-making at the field office and administrative appeals levels than the independent review of BVA decisions by the CVA. Beginning with its earliest decisions, the Court's analyses exposed arbitrariness and identified VA's departure from fundamental requirements of law and VA's own procedures. What the Court found was shocking but not surprising to those familiar with VA practices and the VA's institutional mindset. Initially, BVA resisted judicial pronouncements, and VA officials complained loudly about the Court and the effects of judicial

review. However, for the first time, veterans had an effective remedy for BVA decisions that were not in accordance with the law or clearly contrary to the evidence.

The effects of judicial review—most directly upon BVA and to a similar extent on VA field offices—are well documented. Because BVA had to be concerned that its decisions withstand outside scrutiny, it had to be more thorough, accurate, and justified in its decisions. As BVA was reacting and adjusting to this new reality, the volume of cases it decided dropped precipitously, and this caused increasing case backlogs and longer waits for claimants seeking benefits. At the same time, however, BVA was forced to markedly increase its allowance rates and, in addition, send around half of all the cases it reviewed back to the field offices to correct inadequate record development or other deficiencies. As we said in the *Independent Budget* for fiscal year (FY) 1997, "[t]he degree of the Court's impact on VA is a measure of the quality of decision-making before judicial review."

BVA's production dropped from 46,556 cases in FY 1990 to 22,045 in FY 1994. It rose to 43,347 cases in FY 1997. BVA's allowance rate rose from 13.4% in FY 1990 to 19.9% in FY 1996. Remands grew from 22% in FY 1990 to 50.5% in FY 1992, and the remand rate has remained above 40% since. The average "Total Appellate System Processing Time" grew from 323 days for cases involving no remands in FY 1991 to 939 days in FY 1995, but dropped to 815 days in FY 1997 and has continued to drop in FY 1998. For cases involving 1 remand, this measure has increased steadily from 746 days in FY 1991 to 1,481 days in FY 1997 and continues to increase in FY 1998. Similarly, for appeals involving more than 1 remand, the processing time has grown steadily from 1,125 days in FY 1991 to 2,021 days in FY 1997 and is averaging 2,178 days through April 30, 1998. The total number of appeals pending on BVA's docket grew from less than 50,000 cases in FY 1993 to 88,979 in February 1996. That number was down to 66,441 at the end of April 1998, and from those totals the number of the cases pending at BVA or certified for review has dropped from 60,120 in September 1996 to 29,070 in April 1998. The number of decisions annually per full-time employee (FTE) dropped from 114.7 in FY 1990 to 49.9 in FY 1994 but rose to 88.1 in FY 1997.

Over the past several years since 1988 when Congress, in Public Law 100-687, made hearings before traveling Boards a matter of right, the Board has increased substantially the number of hearings it conducts at field office locations. In FY 1997, traveling Board members conducted 4,564 hearings at field office locations compared to 873 in FY 1991. Public Law 103-271, enacted in 1994, expressly authorized BVA to conduct hearings via electronic media. The Board conducted 41 video hearings in FY 1995. That number rose to 233 in FY 1997, and 631 video hearings have already been conducted in FY 1998. Hearings by electronic media appear promising. They are convenient for veterans, provide the personal interaction of a regular hearing, are more quickly scheduled, and expend less personnel time and BVA resources. The Board also conducted 1,297 personal hearings at Washington offices in FY 1997.

One organizational reform that appears to have benefited overall case production is the 1994 change in the Board's structure. Previously, three member panels decided appeals. Public Law 103-271 provided authority for decisions by a single Board member. This also allowed the Board to convert from 21 Board sections to four semiautonomous "decision teams," each comprised of a Deputy Vice Chairman, Board members, and staff attorneys, with the team supported by administrative personnel. Each decision team has some discretion as to how to most efficiently perform its work, is accountable for results, and is essentially in competition with the other decision teams. Unlike the prior situation in which Board sections reviewed decisions from all field offices, each decision team is assigned to review decisions only from its designated field offices. Cases are supposed to be decided in docket order, however.

With the enactment of Public Law 103-446 in November 1994, Congress required the Chairman to establish a performance review panel and performance standards along with a recertification process for Board members. Each Board member's performance must be reviewed at least once every 3 years. Where the member's performance is found satisfactory, the Chairman shall recertify the member's appointment to the Board. Where the member's performance does not meet BVA's standards, the Chairman must either grant a conditional recertification with a progress review scheduled within a year or must recommend to the Secretary that the member be noncertified. The Secretary may either grant the member a

conditional recertification or terminate the member's appointment to the Board. The Chairman formulated performance criteria "to ensure that high standards of decisional quality and productivity are maintained." The criteria require demonstrated proficiency in all areas of responsibility, particularly legal writing and analysis. Sources of information on an individual member's proficiency include court reviews of the Board member's decisions, quality reviews, statistical data on quality and timeliness, and comments of supervisors, appellants and their representatives, and other interested parties. The former Board Chairman determined that performance reviews would be done on an annual basis for every member. The most recent cycle of evaluations was completed in February 1998, with all members recertified.

With the exception of Total Appellate Processing Times involving remanded cases, BVA's production and timeliness statistics are improving after suffering substantial declines following the period when the CVA began full production of appellate decisions. Much of the increased processing time for remanded cases appears attributable to field office delays. With the increase in production, the number of appeals to CVA is again on the rise, however, and despite the generally longer and more formally worded BVA decisions, our appellate representatives unfortunately continue to see repetition of the same types of errors the Court has identified in its published decisions.

In addition to the review of the BVA decision by the individual representative who presented the case, a single DAV employee reviews each BVA denial to determine whether an appeal to the Court is warranted. Through that review process, we continue to see widespread and common deficiencies in substantial numbers of BVA decisions. For example, despite the statutory and judicial requirement that the Board state its specific "reasons or bases" for the determination it made, we still see decisions based on summarily stated conclusions and broad generalizations without any supporting analysis or without any evidence to support the finding. We still see selective reading of the record, where the decision cites and discusses only the evidence that supports a denial while ignoring evidence that supports allowance. We see cases that are decided contrary to well-known, well-established lines of court precedents, and sometimes even directly contrary to clear statutory and regulatory provisions. Although the Board remands large numbers of cases because of inadequate VA examinations and other record defects, we nonetheless still see significant numbers of decisions based on examinations that clearly do not include the diagnostic tests or findings necessary to asses the disabilities in accordance with the rating criteria. Thus, while it is true that BVA now allows and remands more cases because of error than it did before judicial review, too many cases are still erroneously denied or denied without proper, well-reasoned decisions that conform to the requirements of law.

From its product, we believe the Board still emphasizes quantity too much and true quality too little. The Board needs to improve its quality control, place more emphasis on quality, and measure Board member performance by the actual technical accuracy of member's decisions. We need only to point to the high percentage of cases in which error is still found by the Court to support this assertion. The lack of quality we see regularly in the decisions of some of the Board's high producing members leads us to believe that the performance review and recertification process is perhaps overly dependent on quantity and too lenient as to quality. If we are able to discover such patterns and trends in our review, BVA's quality and performance review processes should have also detected them. Much in the Board's official reports and plans talks of quality, and the Board has undoubtedly improved, but its improvement does not yet approach its stated goals and intentions. The Board has now had several years to adjust and to conform to the Court's enforcement of the law, and continuing failure to sufficiently raise the quality of its product—decisions of vital importance to veterans—should not be tolerated. Unfortunately, because veterans are harmed by poor decisions, these persisting problems tend to overshadow the dedication and fine product of many of the Board's conscientious and fair-minded members and staff attorneys.

Other problems also persist with the Board despite our continued efforts to have them corrected. One such problem is VA's refusal to correct 38 C.F.R. § 19.5 to remove its unlawful provision that the Board is not bound by VA directives.

In a 1995 study entitled *Veterans Benefits: Effective Interaction needed Within VA to Address Appeals Backlog*, the General Accounting Office (GAO) cited as a factor contributing to the backlog of appeals the lack of uniformity between BVA and VA's field offices in the interpretation and application of the law. GAO noted that, while both are bound by the same laws and regulations, they issue independent policy and procedural guidance and sometimes interpret legal requirements differently. Observing that "hundreds of individuals within these organizations interpret and apply laws, regulations, and guidance in adjudicating claims," GAO said: "This legal and organizational structure makes consistent interpretation of VA's responsibilities essential to fair and efficient adjudication but difficult to achieve." GAO noted that although "at least four studies have made recommendations" that VA coordinate its decision-making to avoid these types of problems, "we found evidence that existing mechanisms do not always identify or are slow to resolve" such problems with adjudication. Assessing the effect of the lack of uniformity in interpretation and application of the law, GAO said: "These types of differences not only contribute to inefficient adjudication, but also inhibit VA's ability to clearly define its responsibilities and the resources necessary to carry them out."

Despite good reason to do so, VA has inexplicably declined to correct § 19.5, which erroneously provides: "The Board is not bound by Department manuals, circulars, or administrative issues." Section 19.5 thus provides that BVA will not operate under the same rules as VA field offices and therefore subjects claims decisions to two different interpretations and applications of law. This provision is contrary to statute and a well-established line of case law which holds that VA, like other Government agencies, is bound by its own internal procedures and rules.

In 38 U.S.C. § 501, Congress delegated to the Secretary the authority to prescribe rules and regulations, and issue "guidelines, or other published interpretation[s] or order[s]" on the nature, extent, and methods of submission of proof; application forms; methods of medical examinations; and manner and form of adjudication and awards. VA Manuals are official Department instructions, which are binding on adjudicators under 38 C.F.R. § 3.100 and under provisions of the manuals themselves. Many of VA's actions such as claims decisions and other official acts are carried out by the Secretary's subordinates and do not carry the Secretary's personal signature. They are nonetheless his acts for purposes of law. Under 38 U.S.C. § 512, Congress authorized the Secretary to subdelegate the authority it delegated to him. Under that section, he may assign functions and duties to his officers and employees, and "all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary." The issuance of manuals as binding instructions must be an authorized and proper act and must be deemed instructions of the Secretary. Otherwise, they would not be legal and valid. Under 38 U.S.C. § 7104(c), the Board "shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department."

Another point makes it clear that BVA is bound by law to follow VA manuals and circulars. Regulations and instructions of the Secretary have the force and effect of law. Because VA field offices are clearly bound by VA manuals and circulars, the failure of a field office adjudicator to follow them would constitute an error in law. Under statute, § 7104(a), BVA is charged with and legally obligated to correct errors in law. When BVA refuses to follow, enforce, or apply a manual provision to correct its omission by a field office, BVA itself commits legal error. This has required veterans to appeal to CVA to obtain enforcement of rules in manuals in some cases.

VA's refusal to amend § 19.5 to require BVA to follow and enforce VA manuals and other departmental instructions is indefensible. Congress should take appropriate measures to ensure that this counterproductive problem is corrected.

Another problem is VA's refusal to discontinue the practice in which BVA members participate in the defense of their decisions before the Court. Attorneys defending the Secretary's decisions in CVA often consult with the Board member that made the decision. Also, when the Secretary's counsel before the Court contemplates settlement of a case, the General Counsel's office seeks the concurrence of the Board. This type of discussion and consultation between appellate counsel and the BVA creates a situation in which the Board member has gone beyond decision maker to being a partisan player with a position on one side of the issue. When the case

is then returned to BVA on remand from the Court, the Board cannot function as an unbiased decision-maker in that case. An impartial decision-maker is a fundamental and essential element of due process.

In a similar situation, the United States Court of Claims, whose precedents have been adopted by the Federal Circuit, held that an administrative judge's "endeavors to influence and participate in the defense before [the Court of Claims] of the decision he wrote for the [Armed Services Board of Contract Appeals] overstepped the bounds of proper judicial conduct." *Gulf & Western Indus. v. United States*, 671 F.2d 1322, 1326 (Ct. Cl. 1982). The *Gulf & Western* court explained that his interest in the defense of his decision and his ex parte contact with the appellate counsel for one of the parties was improper and created at least the appearance of bias. 671 F.2d at 1325-26. The Court also held that, although canons of judicial conduct did not technically apply to members of administrative boards, the sensitive nature and adjudicatory duties of such boards require that the same principles should govern their conduct. *Id.* at 1326. We therefore believe that BVA personnel should have no role in defending or settling cases, or otherwise consult with the Secretary's counsel relative to the merits or strategies for serving the Secretary's interests in opposition to veterans' interests when the relationship between the Secretary and veterans is adversarial.

Veterans are also harmed by BVA's practice of unnecessarily suspending action on or remanding every case within a group that involve issues on which there has been some change in law. For example, BVA suspended action on all cases involving compensation for disabilities suffered as a result of VA medical treatment pending VA's appeals to the Federal Circuit and Supreme Court. Some appellants died during this extended period.

BVA typically remands any case involving the evaluation of a disability for which the rating criteria has been amended subsequent to the regional office decision under appeal. In situations where the amendments do not make substantive changes or where there is no liberalization of law that could possibly benefit the veteran, there is no valid purpose for returning the case to the regional office for another decision. If the amendment made no material change or liberalization in the rating criteria that could affect the veteran's disability evaluation, the regional office adjudicator is prohibited by law from changing the decision on the same factual basis. If the new criteria is less liberal, the veteran is entitled to keep the more favorable existing rating. The regional office adjudicator cannot reduce the rating, nor can it be increased on remand on the same evidence. Remands under such circumstances accomplish nothing other than to allow the Board member to avoid the work of making a decision on the merits. Such inappropriate remands cause completely unnecessary delay and additional work for VA because the case must be returned to BVA for resolution of the veteran's disagreement.

In November 1997, Congress enacted Public Law 105-111, which established as a matter of right a process for BVA review of its decisions on grounds of clear and unmistakable error. This law changed nothing about the character of clear and unmistakable error, which is well-defined in long-standing law. The Board has held all of the cases that may be subject to this new law pending VA's promulgation of rules to govern the procedures for such review. VA did not publish the proposed rule for notice and comment until May 19, 1998. The 60-day comment period ends July 20, 1998. The publication of final rules often takes months or, in VA's case, years after the receipt of comments. While the potential overlap between BVA's statutory reconsideration process and the clear and unmistakable error review complicates the matter procedurally, we do not see why BVA would be prevented from deciding these cases in such a way as to ensure the claimant receives all consideration due under either or both procedures. Procedures aid in the efficient disposition of issues, but they do not determine the outcome. BVA could find clear and unmistakable error where present or reconsider its decision where other grounds exist without any prejudice to the veteran or the Government, notwithstanding the lack of the convenience of procedural rules. Procedural rules are often not issued or finalized before implementation of new law begins. We believe this long delay is unnecessary and unfair to veterans whose needs are in many cases immediate. We also believe it violates the requirement that cases be decided in docket order.

THE UNITED STATES COURT OF VETERANS APPEALS

The Court of Veterans Appeals is an Article I court. Article I courts are often referred to as "legislative courts" because they are created through powers of the Legislative Branch rather than in accordance with the requirements of Article III of the Constitution. By landmark legislation enacted on November 18, 1988, Congress created the United States Court of Veterans Appeals to hear veterans' appeals from benefits decisions by the VA, and ended the long-standing statutory preclusion of judicial review.

The Court has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not appeal from the decision made by the Board on his behalf. Under its scope of review, CVA is empowered to overturn BVA decisions or VA rules which are contrary to the Constitution or a statute, or which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court can set aside a factual finding if it is "clearly erroneous." The Court has the power to compel action of the Secretary unlawfully withheld or unreasonably delayed. The Court may hear cases by judges sitting alone or in panels of not less than three judges. Appellants may be represented by attorneys admitted to the bar, nonattorneys employed by recognized veterans service organizations and admitted to practice under the Court's rules, or other practitioners working under the direct supervision of an attorney admitted to the Court's bar. The Court's decisions are subject to limited review by the United States Court of Appeals for the Federal Circuit.

The Court began deciding cases in late 1989. The number of cases filed with the Court rose from 1,261 in FY 1990 to 2,223 in FY 1991, declined to 1,142 in FY 1994, and then increased again every year, to 2,229 in FY 1997. From filings so far in FY 1998, the Court expects a small increase this year. The number of dispositions, or terminations, rose from 297 in FY 1990 to a peak of 2,197 cases in FY 1993. Since then, the terminations have ranged from a low of 1,168 in FY 1995 to a high of 1,611 cases in FY 1997. The appellate explosion predicted by VA when judicial review legislation was being debated never occurred.

Of the 1,118 cases terminated on the merits in FY 1997, 439 were reversed or vacated and remanded; another 218 were affirmed in part, reversed or vacated & remanded in part; 47 were denied extraordinary relief; and 414 were affirmed. VA entered into settlements with other appellants, which were among the 138 cases voluntarily dismissed. An additional 230 cases were dismissed for lack of jurisdiction, and 121 were dismissed for default. Thus, the percentage of cases being reversed, vacated, remanded, or settled because of error remains high.

Although the Court has overall performed and served the purposes of justice for veterans well, some of its actions seem designed to serve itself and the system first, and veterans second. Other actions of the Court create the appearance of a pro-Government bias. Beyond that, there is general belief among veterans' advocates that the Court's interpretation of "well-grounded claim" contradicts what Congress intended and that the Court's fact review under its interpretation of the "clearly erroneous" standard essentially renders the statutory benefit of the doubt requirement unenforceable and meaningless.

Appellant's representatives have on more than one occasion been exceptionally displeased with the role the Central Legal Staff played in predecisional conferences between the Central Legal Staff member and the parties. During these occasions, Central Legal Staff members have been known to make arguments against appellant's positions and in favor of the Government in an effort to persuade the appellant's representative to agree to a joint motion for remand so the Court will not have to decide the case on the merits. In at least one such instance I personally recall, the Central Legal Staff member was pressing hard for me to agree to a joint motion for remand to allow BVA to revisit its factual determinations, which had no chance of resolving the appeal because the ultimate disposition of the issue depended on an interpretation of law about which the appellant and VA were in disagreement. The Board had interpreted and applied the law in a way the appellant believed was erroneous, and in his brief, the Secretary's appellate counsel argued against the appellants' interpretation. The appeal rested on that question of law. Apparently wishing to avoid a decision on that question, the Secretary's counsel injected other questions into the appeal, which the veteran had not raised, and argued for remand to resolve these questions. After it was pointed out that another decision by BVA would inevitably apply the law in the same way as before and require a new appeal by the veteran, the

Central Legal Staff member terminated the conference, but not without indicating his unhappiness with my resistance. He had earlier in the conversation told me that I should accept a remand because that is all I could hope to get if the Court had to decide the case on the merits. Not only is this an inappropriate role for Central Legal Staff to play, it suggests a decision has already been made before the case ever reaches the Court's judges, who are the only Court personnel with authority to render decisions on the merits of a case. Fortunately, we have not heard recent complaints about this type of heavy-handed tactics by the Central Legal Staff.

The Court's practice of routinely granting the Secretary's counsel multiple extensions of time to file briefs and other documents is a more widespread and persistent problem. Early in the Court's operations, attorneys for the Secretary began to move for extensions of time to file their briefs in cases they were having a hard time defending. Eventually they began routinely filing motions for extension in every case. Even worse, they began to file not one but three or more successive motions for extension in most every case. The Court has been exceptionally tolerant of this practice even though it violates the Court's own rules and delays resolution of disabled and elderly veterans' appeals for protracted periods of time. We have discussed this problem and the Court's actions at length in the FY 1999 *Independent Budget.*

In response to a proposed amendment to the rule on extensions of time by the Court's Rules Advisory Committee, the Court issued an order on April 24,1998, taking the Committee's recommendation under advisement. In its discussion, the Court acknowledged that the Secretary's attorneys had filed more than 4,000 extension motions in the past year alone. The Court observed that "the resolution of appeals is being unduly and unreasonably delayed by the thousands of motions filed by the Secretary for extensions of time based on the demands of caseload assignments on the appellate attorneys assigned to representation duties by the General Counsel." The Court observed that the "delays occasioned by these motions can serve to frustrate meaningful judicial review." Under a section of the order with the heading "Future Consideration of Extension Motions," the Court, in announcing its plans to address the problem, said: "Over the last several months, as a result of the Court's increasing concern about excessive delays in the completion of appeals and the tendency on the part of many counsel for appellants to object to the Secretary's extension motions, certain factors have emerged in connection with the Court's consideration of such motions as well as extension motions filed by appellants." The Court listed the factors it would consider in determining whether there is good cause to grant extension motions. What the Court said is quite troubling.

Where the demands of a heavy caseload have not been viewed as good cause for extending the time permitted for completing an action required under rules of appellate procedure, CVA now states that the determination of good cause for extension will be subject to caseloads. The Court said it will employ "closer scrutiny of whether good cause is shown in motions for extensions based on overall caseload demands."

Similarly troubling is the Court's statement: "In evaluating another party's opposition to an extension motion, the Court will take account of the extent to which that party has been granted extensions of time in the case." That statement is troubling for two reasons. First, it suggests that the court will base its decision on whether to grant a motion on the other party's conduct, not the validity of the grounds for the current motion. Each party's motions should be granted only on good cause. Neither party should be entitled to an inappropriate extension because the other party was granted one. Every motion should be decided only on its own merits. This also hints that the Court might retaliate against appellants for opposing the Secretary's motions for extension. Appellants often must file requests for extension of time to file their briefs because they are awaiting a decision by the General Counsel's office on whether it will settle the case without briefing. Second, basing the decision on whether to grant or deny motions on the conduct and convenience of counsel disregards the needs and rights of veterans, who would be harmed by the delays.

Congress certainly has an interest in ensuring that veterans' appeals are fairly and timely decided by the Court. This Subcommittee should continue to watch closely the Court's actions on this serious and ongoing problem. It would be entirely inappropriate for the Court to issue a rule that condones delay on the excuse of a heavy caseload. Appellant's representatives have an ethical responsibility to maintain manageable caseloads. It is doubtful that the Court would have extended the same considerations to them had the situation been reversed. The Secretary has a

responsibility to devote sufficient resources to the representation of his interests in the Court. He should not be allowed to delay veterans' appeals for his own purposes and convenience. The Court should be concerned primarily with the timely and efficient administration of justice and not the convenience of the parties.

Although courts must enjoy judicial independence, Congress changes laws to override judicial interpretations that do not comport with the legislative will. Two areas that deserve congressional attention are the Court's interpretation and application of the concept of a "well-grounded claim" and the Court's standard and practice in fact review of BVA decisions.

Under the law as construed by the Court, VA is not obliged to assist the veteran in prosecuting or required to consider the merits of a claim that is on its face not well grounded. Therefore, veterans have the burden of meeting the well-grounded threshold to trigger VA's duty to assist and to receive a decision on their entitlement. Claims that are not well grounded may be denied summarily on that basis.

"Well grounded" has essentially meant that the claim is founded on the fundamental elements requisite to entitlement if proven. Well grounded is defined by the third edition of the *American Heritage College Dictionary* as "having a sound basis." It is defined by *Webster's New Universal Unabridged Dictionary* as "based on good reasons." The Court held in one of its early decisions, *Murphy v. Derwinski*, 1 Vet.App. 78, 81(1990), that a well-grounded claim "is a plausible claim, one which is meritorious on its own or capable of substantiation." However, the Court's jurisprudence on this standard has evolved to require that the veteran's claim be accompanied by evidence sufficient to essentially establish a prima facie case to meet the well-grounded threshold and trigger the duty to assist. Once the veteran has practically proven his case on his own, there is no need for Government assistance.

Under 38 U.S.C. § 5107, it is provided that "a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." This section also provides that the Secretary shall assist a claimant in developing the facts pertinent to the claim and does not distinguish between facts of basic eligibility and other material facts. The Secretary's own regulation, 38 C.F.R. § 3.159(b), provides that VA will assist the veteran in obtaining public or private records "[w]hen information sufficient to identify and locate necessary evidence is of record." Because "evidence sufficient to justify a belief by a fair and impartial individual" seems to apply more appropriately to a finder of ultimate fact than one screening for the preliminary elements, it suggests that "well grounded" applies here to the ultimate quality of the claim and proof rather than an initial threshold. Although the legal duty to submit evidence sufficient to meet the burden of proof is the veteran's, and the consequences of failure to submit such evidence are to the veteran, the VA has a duty, when evidence is available, to assist in obtaining it regardless of whether it pertains to basic elements of eligibility or other material facts. The meaning given this language by the Court has led to a departure from the way the system operated before judicial review.

Congress made it clear in enacting judicial review that it did not intend to change the informal and helpful nature of the administrative process. Certainly, Congress did not intend to place such burdensome procedural hurdles in the path of veterans seeking benefits. Congress should consider correcting this problem. We suggest that it could be corrected by a simple amendment. The definition statute, 38 U.S.C. § 101, could be amended to add a subsection as follows: "A well-grounded claim means one based on grounds which if proven would establish entitlement to the benefit sought." Alternatively, § 5107 could be amended to delete the term well grounded.

The Court upholds VA's factual findings unless they are clearly erroneous. Clearly erroneous is the standard for appellate court reversal of a district court's findings. When there is a "plausible basis' for a factual finding, it is not clearly erroneous under the case law from other courts, which the CVA has applied to BVA findings. Under the statutory "benefit of the doubt standard," BVA is required to find in the veteran's favor when the veteran's evidence is at least of equal weight as that against him, or stated differently, when there is not a preponderance of the evidence against the veteran. Yet, the Court will uphold a BVA finding when it only has a plausible basis. This renders the statutory benefit of the doubt meaningless because veterans'

claims can be denied and the denial upheld when supported by less than a preponderance of evidence against the veteran. The statutory standard is not enforceable. We believe that there should be a more exacting review of VA findings. There is no practical necessity to defer to professional VA fact-finders, who repeatedly deal with specialized and limited subject matter, in the same manner we do to judges or juries, who are typically confronted with a greater breadth of variables and intangible elements. Congress should amend the Court's scope of review to require the Court to reverse a factual finding when it determines the finding is not reasonably supported by a preponderance of the evidence.

Congress should also make a legislative change to override a judicial construction of the law on fees under the Equal Access to Justice Act (EAJA). One of the several fee shifting statutes, EAJA primarily allows small businesses, people of moderate incomes, and nonprofit organizations to challenge unreasonable Government actions. This law requires the Government to pay the party's attorney fees when the party prevails in an action in which the Government's position was not substantially justified. The goal of shifting the costs of legal fees to the Government in cases where citizens prevail in action against the Government is twofold: (1) to encourage citizens who may not otherwise have the financial means to assert their legal rights against the Government to do so, and, (2) to serve as a disincentive for the Government to use its resources for unwarranted defenses of its actions. Although EAJA fees may be awarded for nonattorneys who assist or are supervised by attorneys in CVA cases, such fees cannot be awarded for veterans' service organization representatives and other nonattorneys who are admitted to practice and who successfully represent appellants before CVA without attorney supervision. This anomaly is the result of a judicial interpretation of the term "attorney fees" as being broad enough to include fees for services of paralegals, law clerks, and other nonattorneys who assist or are supervised by lawyers but not broad enough to include the services of unsupervised nonattorneys who perform the same services as lawyers before CVA. This puts veterans' service organization representatives at a distinct disadvantage and potentially harms the veteran or other appellant because it removes the incentive for VA to settle the meritorious cases of these appellants. VA is free to prolong the litigation in these cases even though the Government's position is not substantially justified. This situation is extremely unfair. Moreover, provisions that discourage participation of qualified nonattorneys in the representation of appellants before CVA are certainly inappropriate given the added burden a high proportion of nonrepresented appellants currently places on the Court. Congress should change the law to permit EAJA fees in cases where appellants are successfully represented by nonattorneys.

Enactment of the provision in H.R. 3212 to permit staggered retirement of CVA's judges would also benefit the Court. This could prevent the situation in which there is a turnover of several judgeships within a short span of time. Because their terms began close together, several of the Court's judges might otherwise retire near the same time at the expiration of their 15-year terms. The DAV supports this provision in H.R. 3212. The DAV has no position on the other provisions of the bill.

CONCLUSION

Despite some substantial correctable problems that persist in the administrative and judicial appellate processes for veterans appeals, these systems handle large numbers of cases quite well overall. The persisting problems can and must be remedied, however. Despite some institutional resistance and problems of adjustment, judicial review has given the administrative system greater integrity and benefited veterans in ways nothing else could. With more emphasis on accurate and quality decisions and demonstrable improvement in its product, BVA will gain more public trust and confidence. BVA's success also depends on how well VA improves its decision-making in field offices.

We appreciate the Subcommittee's interest in these issues and the opportunity to present our views. Given the importance of a well-functioning appellate system for veterans, we believe annual oversight hearings on the operations of the Board and Court would be worthwhile. This concludes DAV's statement.

Curriculum Vitae
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Biographical Data

Birth Date: May 22, 1949
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Military Service

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Relevant Experience

Assistant National Legislative Director, Disabled American Veterans (DAV), January 1996 to present.

Associate National Legislative Director, DAV, March 1994 to January 1996.

Judicial Appeals Representative before the United States Court of Veterans Appeals, DAV, September 1989 to March 1994.

National Appeals Officer before the Board of Veterans' Appeals, DAV, June 1989 to September 1989.

National Service Officer, DAV, September 1976 to June 1989.

Other Information

Principal author of DAV's portion of *Independent Budget*

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Disabled American Veterans (DAV) does not currently receive any money from any federal grant or contract.

During fiscal year (FY) 1995, DAV received $55,252.56 from Court of Veterans Appeals appropriated funds provided to the Legal Service Corporation for services provided by DAV to the Veterans Consortium Pro Bono Program. In FY 1996, DAV received $8,448.12 for services provided to the Consortium. Since June 1996, DAV has provided its services to the Consortium at no cost to the Consortium.

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STATEMENT OF

JOHN J. McNEILL, ASSISTANT DIRECTOR FOR VETERANS BENEFITS POLICY
NATIONAL VETERANS SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE
SUBCOMMITTEE ON BENEFITS
COMMITTEE ON VETERANS AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

DEPARTMENT OF VETERANS AFFAIRS BOARD OF VETERANS' APPEALS,
COURT OF VETERANS APPEALS IMPACT ON VA CLAIMS PROCESSING, AND
H.R. 3212 -- *COURT OF VETERANS APPEALS ACT OF 1998*

WASHINGTON, DC JUNE 10, 1998

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you, Mr. Chairman, for inviting the Veterans of Foreign Wars of the United States (VFW) to participate in this hearing to discuss legislation pertaining to revisions in the law on the retirement of judges of the Court of Veterans Appeals, the renaming of the court, and the institution of a staggered judicial retirement option. We are also to discuss the very important topic of the impact of the court and the Board of Veterans' Appeals on the processing of claims with the Department of Veterans Affairs (VA).

We agree fully with all aspects of H.R. 3212. The provision to stagger the eligibility for retirement of the judges beginning in 1999 is especially needed. That will ensure that a complete turnover of the court will most likely not occur at one time, which is a strong possibility under the current law. Accordingly, an orderly retirement and replacement system will help maintain necessary judicial experience. A staggered retirement system is a recommendation in the fiscal year 1999 *Veterans Independent Budget and Policy* and I refer you to that document for more discussion on this issue.

The second subject, concerning the impact on claims processing by the court and the board, is more elaborate and complex. Quite simply, the impact has been tremendous, probably beyond any imagination at the time of the "Veterans' Judicial Review Act of 1988" which established the court. Literally from their inaugural court case in 1989, the court has been steeped in controversy. Many have opinions whether the court has been good or bad for the veteran. Let us be unequivocal in our opinion -- the "Veterans' Judicial Review Act of 1988" has been, and is, one of Congress' most important pieces of legislation ever for veterans. It is nearly comparable to the GI Bill in its impact.

Some will argue otherwise. Their debate is based on a premise that the court is responsible for introducing an "element of the adversarial process" never intended in the "paternalistic" veterans' entitlements system. That makes for good drama but it is not an accurate assessment. Actually, the VA claims processing system was far more adversarial to veterans prior to 1988. Adjudicators and rating specialists were autonomous and arbitrary in their decision-making. For instance, rating specialists commonly ignored medical opinions supporting a veteran's claim, regularly substituting instead their own biased, contrary, unsubstantiated opinion justifying a capricious denial on what was a legitimate claim for benefits. Nowhere was this more prevalent than when these actions by rating specialists led to illegal reductions in compensation ratings. Such

reductions were all too common prior to 1988 and they, by far, form the bulk of our current "clear and unmistakable error" claims.

Thus, the VA's system before the court's existence was already very adversarial to veterans because of this just mentioned autonomy in decision-making. The court has not created new laws or regulations, but has only highlighted past VA failures to equitably process claims, mainly from an inability to correctly apply the statutes and regulations of record through misinterpretation, selective interpretation or unawareness. Further, it took a few years of the court's existence for the VA to realize this and that lack of realization formed the core of the claims processing timeliness and quality difficulties.

That is the negative. The positive is that, because of the court, a veteran now has the best chance ever for a proper and correct decision on a claim, as Congress has always intended the system to be. Further, the VA is now making great strides toward changing that historical and entrenched culture of autonomy. But, we all know that it has come at a great cost -- the past horrendous backlog of over 500,000 claims, average processing times over 200 days for original compensation claims, Board of Veterans' Appeals initial appeal decision time approaching three years, and board decisions dropping to approximately half the previous annual rate. The question now is not so much the assessment of the court's impact (and by reference the board's) but the present status of the VA in resolving these past problems. The endeavor for that answer is, of course, what this hearing is all about.

The VFW has long-held -- and we have so testified in the past -- that the focus must be on three major areas: quality decision-making at the regional office on compensation claims; reduction of the Board of Veterans' Appeals decision time-lag; and, the high BVA remand rate. (The two BVA appellate review problems are almost entirely integrated in decision quality at the regional office.) Solve these and all other claims processing problems will essentially resolve. Our assessment is that the first is presently very questionable, thus disturbing; the second is rapidly resolving; and, the third is improving but not as fast as we prefer.

Statistics support our statement that BVA decision timeliness will soon be resolved. (Last year, the acting Chairman established a fiscal year 2000 timeliness goal of six months from docket date to BVA appellate decision.) In fiscal year 1997, the board nearly doubled the number of decisions from the previous year to a total of 43,347. (That figure was also nearly a historical high.) Further, the average response time, from docket date to decision, was reduced from 595 days to 334. Even better is the recent statistic that once an appeal case arrives at the board, a decision is being rendered in an average 150 days. (The VFW currently averages 28 days in presenting an appeal argument to the board.)

Our figures on our representation confirm these good numbers. In the first three months of fiscal year 1998, 365 of our 891 represented appeals were decided in less than 90 days with 201 of those in less than 30 days. Thus, we feel the achievement of the BVA timeliness goal of six months looks very promising.

Integral to the VA's approach on quality decision-making at the regional office level will be the successful accomplishment of the goals and initiatives espoused in the Veteran Benefits Administration's Business Process Reengineering (BPR) plan submitted as part of the VA's fiscal year 1998 budget and, more recently, incorporated in the VA's Strategic Plan. Specifically, it is the fiscal year 2002 vision to process all claims in an average 60 days, with a 97 percent accuracy rate, and no greater than a 20 percent BVA remand rate. (While not an actual factor in the Compensation and Pension Service BPR, the BVA fiscal year 2000 timeliness goal of six months from docket date to decision is nonetheless linked.) We have reviewed in detail the BPR plan and find that vision ambitious but obviously commendable for veterans. The VBA's BPR plan is now integrated into the Under Secretary for Benefits' *Roadmap for Excellence*.

(The BPR Implementation Plan includes another solid "vision" on how the veterans services organizations will, and should, operate in the future claims processing system. Indeed, it projects the VSOs toward better, more comprehensive representation. We welcome the challenge and its inherent increased responsibility that comes with this expanded role.)

That rapid resolution of the BVA decision time-lag has now focused our attention on the

problems of initial claim quality decision-making and the BVA remand rate. Both of these issues are regional office responsibilities. (The fact that the board nearly doubled their annual output in one year had the reciprocal effect of a large increased appellate workload at the regional offices.) Despite all the efforts put forth by the VA, both are still major concerns. The BVA remand rate of 45.2 percent for fiscal year 1997 is relatively constant from previous years (although the report for the first half, fiscal year 1998 shows a sizable reduction to 41.7 percent, that is still far from the fiscal year 2002 goal of 20 percent). And, last November's Systematic Technical Accuracy Review (STAR) undertaken by the VBA indicated a 36 percent error rate for the core, rating-related adjudicative work done at the regional offices. Both of these figures certainly have caused us to pause from our previous optimistic assessments on the possibility of the VA achieving their BPR goals.

However, our real dilemma in reviewing the quality of VA regional office decision-making has been that our opinions are relatively subjective in nature; that is, we have had to rely on VA reports and analysis. Consequently, we recently decided that the best course of action to attain more objectivity is through our own program of VA rating decision review. While it is impossible for us at the VFW's National Veterans Service staff to review all VA regional office rating decisions, we feel a reasonable assessment and analysis can be made by having VFW department service officers forward to us, for our review, rating decisions on seven important issues: (1) Gulf War Undiagnosed Illnesses; (2) Spina Bifida; (3) total (100%) compensation ratings with an associated special monthly compensation; (4) Prisoner of War; (5) rating decisions in response to a BVA or CVA remand; (6) claims related to tobacco use; and, (7) sexual trauma.

But, we still have hope for the VA. This optimism resides primarily in the many initiatives the VBA has undertaken to correct both quality and timeliness deficiencies. Four are absolutely critical to us. They are the pre-discharge examination program for our active duty military, the post-decision review process (and, particularly, the Decision Review Officer program), the Partner Assisted Rating and Development System (PARDS), and the out-basing of rating veterans service representatives in the VA medical centers.

After what everyone agrees was a successful test program at three Army installations, the VA has now decided to expand the pre-discharge examination program to all military services at an additional 15 sites. This is a project that is already paying dividends for the government. There is little doubt that, in the long term, it will make a significant dent in reducing timeliness of claims processing. For example, the program between the Seattle Regional Office and Fort Lewis has been able to establish an average completion rate of less than 60 days from the discharge date for a final compensation rating. That figure is expected is go much lower as the regional office continues to refine the program. The ultimate goal is to give a rating to a veteran immediately upon his discharge. (One major disappointment is the Department of Army has decided to withdraw the participation of their physicians performing the combined DoD/VA separation examinations. That now requires the Seattle Regional Office to perform the examinations at American Lake VA Medical Center and means soldiers must arrange their own transportation to that location.)

Even more important is the quality of the rating decisions as part of the pre-discharge program. That quality is easy to achieve because the VA, through the ready cooperation of the military, has a captive audience for their outreach briefings, immediate and fresh access to the service medical records, and direct communication with the applicants in assisting them in the proper techniques for filing a claim. This outreach also includes vocational rehabilitation counseling, Montgomery GI Bill processing, and loan guaranty eligibility certificate issuance. You have to look no further than the written commendation from General Shalikashvili on his own experience as to the efficiency of the Seattle Regional Office's program at Fort Lewis for an indication of the promise the pre-discharge program has for the government in the quest for excellent "customer" satisfaction.

The VA has also instituted "post discharge" programs. PARDS was initiated at the St. Petersburg Regional Office with the idea of rendering very quick decisions on claims submitted with accompanying complete evidentiary documentation. The initial goals were 19 days for claims not requiring a compensation and pension examinations and 45 days for those that do. Both timeliness standards obviously exceed the BPR goal. The program has now progressed so well that the average decision time for a PARDS claim is now five days! Even better, less than three percent (3%) of PARDS claims at St. Petersburg continue to the beginning appellate stage with a Notice of

Disagreement. This figure has grabbed the attention of other regional directors and PARDS is beginning to expand throughout VBA.

The most significant initiative that will eventually impact the most on the high remand rate and quality of regional office decision making is, in our opinion, the post decision review process instituted as part of the VBA's BPR. This included the important, related decisions to delegate difference of opinion authority to the regional offices and the establishment of the Decision Review Officer (DRO). While it is too early to form a conclusive opinion on the possible success of the program -- the DROs were established on December 1, 1997 and it is an one-year test -- our service officers at the 12 regional office test-site locations are already universally praising the potential of the program as a means to drastically reduce the amount of appeals on VA rating decisions. That is because of the earlier involvement by the DRO in informally communicating with the veteran and the representative the proper requirements for successfully supporting a claim and, if need be, direct explanation of the reasoning for a denial of any claimed issues. This is really an expansion of the widely successful hearing officer program as suggested by both the Veterans' Claims Adjudication Commission in their 1997 report and Congress in their review of that report.

The fourth initiative is one being done essentially on some regional office directors own volition and that is the out-basing of rating and adjudication personnel in VA medical centers. This initiative, which was first started by the Chicago regional office director, has objectively shown to basically eliminate the problem of inadequate and/or incomplete compensation and pension examinations. With inadequate examinations being the significant issue for most BVA remands, it would seem reasonable that all regional office directors will soon adopt this initiative.

Accordingly, these four initiatives have put the VA on the edge of a major breakthrough toward making the agency a model of government efficiency and service to its clientele. After all, these are programs geared to the theory of improving the access of veterans to the system. However, there is one major obstacle that can -- and will, if not checked -- sidetrack any further forward movement to this objective. The BPR initiatives just described have occurred, for the most part, through internal diversion of FTE resources and at a time when the Veterans Benefits Administration has also been suffering significant FTE reductions. (As an example, lack of available resources is the only reason given by regional office directors precluding their ability to out-base rating personnel in VA medical centers.) This was recognized by the National Academy of Public Administration when they recommended, in their August 1997 report on the VA claims processing problems, that the recent "FTE drain" in the VBA must be stopped by at least stabilizing at the fiscal year 1997 level. Yet, the Administration now recommends a further overall 125 FTE reduction in VBA as part of the fiscal year 1999 budget proposal. If Congress accepts that FTE reduction recommendation, it is our opinion that BPR will have no chance of succeeding as currently envisioned. Indeed, a recommendation in the 1999 *Veterans Independent Budget and Policy* is for an increase of 500 FTE for the compensation and pension business line and stabilization in the other VBA programs. That recommendation is not whimsical: the additional 500 FTE must be used to expand the out-basing of rating veterans service representatives to those VA medical centers that perform a significant number of C&P examinations, to enhance the DRO program by providing adequate administrative support staff and additional DROs, and to recruit new veterans service representatives to rectify the past hiring freezes.

Mr. Chairman, Congress must now immediately act and provide the necessary appropriated funding to reverse this deleterious FTE reduction in the VBA if we hope to have any further success toward the BPR goals of reduced claims timeliness, improved rating decision quality, and lower BVA remand rate. If that occurs, the impact of the court and the board on VA claims processing will only be felt in a positive manner by our veterans. And, that feeling will occur even prior to the fiscal year 2002 goals as outlined in the BPR plan.

Mr. Chairman, this concludes my statement and I will be happy t respond to any questions you may have.

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

Statement of

VIETNAM VETERANS OF AMERICA

Presented By

WILLIAM F. RUSSO
DIRECTOR, VETERANS BENEFITS PROGRAM

Before The

House Veterans' Affairs Subcommittee on Benefits

Regarding

Board of Veterans' Appeals & Court of Veterans Appeals

June 10, 1998

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Introduction

Chairman Quinn and members of the subcommittee, on behalf of Vietnam Veterans of America (VVA), I am pleased to have this opportunity to present our views on the current issues facing the Board of Veterans' Appeals and the U.S. Court of Veterans Appeals. VVA was the earliest and strongest advocate of veterans judicial review amongst the veterans organizations. On this tenth anniversary of the passage of that legislation, it is worth looking at the impact of judicial review, and how the veterans appeals system can be improved even further.

Prior to 1988, the Board of Veterans' Appeals (BVA) stood as the final adjudicatory body for all decisions and appeals made on behalf of veterans' claims. The law generally barred court review of all VA decisions. In addition, a law dating back to the Civil War prohibited a claimant from paying an attorney more than $10 for representation in a VA benefits claim. Veterans judicial review was not easily achieved. After years of intense debates within Congress, the VA and the veterans service organizations, Congress passed the Veterans Judicial Review Act, which created the U.S. Court of Veterans Appeals, an Article I court with exclusive jurisdiction over appeals of decisions by the BVA. The Act law allows attorneys to charge a fee for representing a claimant in any appeals process, only after a final, adverse BVA decision. The Act contains other complex restrictions on attorney fees, as well.

Board of Veterans' Appeals Operations

At the Judicial Conference of the U.S. Court of Veterans Appeals in 1996, Charles L. Cragin, then Chairman of the BVA, stated, "The Board of Veterans' Appeals has undergone more significant changes in roughly the past six years than in its entire history... judicial review of VA benefits decisions and the evolving 'veterans common law' of precedent decisions of the U.S. Court of Veterans Appeals and other federal courts have drastically changed the way VA does business."

For the first time in its history, Board Members' decision were reviewed by an outside authority. In the words of Chairman Cragin, "The expanded 'reason or bases' requirement of the VJRA, the expanded 'duty to assist' as defined by the Court, expanded due process requirements and constantly evolving case law" resulted in the need for better BVA decisions. Also, Board Members' performance began being evaluated based on the Court's rulings in their individual decisions, which appears to have a healthy effect on their decisions.

The BVA's statistics show that the Court has indeed had a major impact on the BVA's decisions. During the decade prior to judicial review, BVA's allowance rate was consistently 12%-14%. In the years since judicial review began, this rate has risen to 15%-20%. The BVA remand rate

has gone from less than 25% to nearly 50%. The denial rate has dropped from over 70% to less than 40%.

VVA believes that the staff of the BVA is generally competent and dedicated. Nevertheless, the past year without a permanent Chairman seems to have caused it to loose focus on its mission of providing prompt, fair decisions to our nation's veterans.

This past April, BVA staff confirmed our assessment that when a case is remanded by the U.S. Court of Veterans Appeals, it was taking 10 months for BVA to render a decision. This is much longer than the time BVA takes to render a decision in a new case on appeal from the VARO. This discrepancy is inexplicable, since most court remands are based on joint motions or short orders issued by the Court, and the instructions for BVA and/or VARO are clearly laid out by the Court. These decisions should generally require only a few hours of a BVA attorney's time, not 10 months.

After VVA discussed this situation with Acting BVA Chairman Richard Standeffer, the BVA division which had been assigned to draft decisions in Court remands was soon disbanded. Now such cases are assigned to individual Board members, just as new appeals coming from the VARO would be. While VVA applauds this prompt action, we are concerned that this was allowed to occurr in the first place. Such inaction by the Board seems to clearly violate the Veterans Benefits Improvements Act of 1994, which requires BVA to provide "expeditious treatment" to remanded cases. The next BVA Chairman must ensure that such widespread violations of Congressional intent do not recur.

BVA Creating Unnecessary Work for Itself

BVA may be falling behind on cases, as described above, because it is devoting significant staff resources to tasks which appear outside the scope of its duties, and its authority.

The first example of this involves BVA review of attorney fee agreements, in which VA pays the attorneys fee out of a retroactive benefits award. Title 38 U.S.C. Sec.5904(c)(2) states that BVA, "upon its own motion or the request of another party, **may** review such a fee agreement" to determine if it is excessive or unreasonable, and if so, "may order a reduction in the fee." In 1992, without going through the notice and comment rulemaking process required by the Administrative Procedures Act, VA issued a circular which requires that all such agreements be reviewed by BVA. (See VBA Circular 20-92-14, Par. 18.b (May 29, 1992). This policy change was approved by BVA in Chairman's Memorandum 01-92-19 Par. 2.b (June 29, 1992).

There is no law or regulation requiring BVA to spend its limited staff resources in this

manner, and we are not aware that BVA is finding any significant number of the these fee agreements to be unreasonable. BVA routinely takes six months or more to review even simple fee agreements. The effect of this policy is to significantly delay attorneys getting paid fees they have earned, (which discourages them from representing more veterans). BVA's rationale for this policy is that they are preventing litigation by reviewing fee agreements and asking the attorney to make corrections where appropriate. But BVA has failed to provide actual cases where this scenario has occurred. Moreover, claimants have the option of filing complaints directly to BVA, if they believe an attorney's fee agreement is improper; unless BVA receives a complaint, it should not the agreement. The private veterans law bar views BVA policy as obstructionist. VVA believes it wastes tax dollars, delays veterans claims by using BVA staff time, and serves no useful purpose. In addition, BVA's practice creates a disincentive for attorneys to represent veterans, by delaying their receipt of fees they have earned by winning their client's case.

The second example of BVA wasting resources, stems from the first. Ironically, a decade after Congress allowed veterans to hire attorneys in their claims, BVA is trying to make it more difficult for veterans to hire an attorney. BVA has proposed regulations which will force VA to stop paying veterans attorneys their fees out of past due benefits, which will make attorneys less likely to represent veterans. These regulations are extensive, and they engendered dozens of negative responses in the notice and comment process. Simply reading and responding to these comments will unnecessarily waste a large amount of BVA attorney time.

One of the champions of veterans judicial review, Rep. Lane Evans (D-IL) has introduced legislation requiring VA to pay these fees. VVA strongly supports this legislation and the hard fought right of veterans to get attorney representation, if they so choose.

The third example involves Group VII of VA Office of the General Counsel, which represents the Department at the U.S. Court of Veterans Appeals. While we are unaware of the origin of the policy, Group VII now requests BVA's permission before agreeing to settle any case. (Such settlements usually do not entail granting the claim, but are joint motions for remand to allow BVA to correct some adjudication error). BVA also appears to dictate the terms of any such settlements. This practice has been alleged to violate the Code of Judicial Conduct and Model Rules of Professional Conduct for attorneys. (See attached articles from the Federal Bar Association's veterans law newsletter, *Tommy*.) It also causes the public to loose confidence in the independence of the BVA, since BVA now takes part in defending its own decisions, which may be remanded by the Court for BVA to work on again. Lastly, it is a waste of BVA's and the General Counsel's resources.

Impact of Judicial Review on the VARO

It is the VA Regional Offices' (VARO's) implementation of the Court's decisions that has generated the most controversy over the years. As the BVA began to enforce the Court's mandates, it naturally influenced the VARO's to do the same, by both reversing and remanding decisions. In addition, the VA created a judicial review staff to analyze, summarize and disseminate Court decisions to VARO staffs. Nevertheless, as stated in a 1994 article (coauthored by Robert White, then chief of VA's judicial review staff), "compliance with the Court's mandates was initially slow." This was because VA's "many organizational divisions and subdivisions" made it "difficult at first to disseminate information, implement Court decisions, and monitor results, particularly in the regional office level..."

That article turned out to be extremely prescient, given the heated criticism by Chief Judge Nebeker of VA's failure to implement the Court's decisions, which he expressed in September 1994, in his opening remarks at the Judicial Conference of the U.S. Court of Veterans Appeals. It is interesting to note that despite VA Secretary Jesse Brown's promise at the conference, to improve VA's implementation, Chief Judge Nebeker testified to Congress in April 1997 that VA had made no significant improvements in implementing the Court's decisions at the VARO level.

On a widespread basis, the VARO's continue to fail to follow the Court's decisions. What will the Court ultimately do if the VA continues to fail to implement its decisions consistently ? The Court could use its contempt authority to fine the VA for failure to follow the Court's decisions. Given the length of time VA has failed in this regard, and the high stakes involved for needy, disabled VA claimants, the Court may choose such a course.

U.S. Court of Veterans Appeals Operations

Vietnam Veterans of America supports the proposed legislation to stagger the terms of the Court's judges, and to change the Court's title. But we believe more legislation is needed to allow the Court to fulfill its potential.

After passage of the VJRA, two of its sponsors, Sen. Alan Cranston (D-CA) and Rep. Don Edwards (D-CA), made statements in the Congressional Record that the Act's "clearly erroneous" standard of review for factual findings would allow the Court to reverse VA when appropriate. Senator Cranston was "confident that the 'clearly erroneous' standard... will permit that court to carry out a more complete analysis of factual matters than would be appropriate under an 'arbitrary and

capricious' standard... the Court of Veterans Appeals might apply the clearly erroneous standard even more broadly than the substantial evidence test," which is the standard applied by U.S. District Courts reviewing Social Security Administration findings of fact.

At his May 1989 confirmation hearing, Chief Judge-designee Frank Q. Nebeker was asked by Sen. Cranston, "Would you ever have any hesitancy in reversing an unlawful VA action ...?" Nebeker responded, "Not at all, sir." If both parties were referring to "outright reversals" ordering the VA to grant the claim, then this prediction obviously has not come true.

The Court has not been at all reluctant to find substantive and procedural errors in the BVA decisions it reviews. However, its practice in nearly all these cases is to remand the case for the BVA to readjudicate the case. If the BVA then denies the claim again, the veteran must appeal to the Court again. Of the thousands of cases the Court has reviewed, it has outright reversed the VA-- ordering VA to grant benefits-- less than 200 times.

Veterans and their advocates have been frustrated by the Court's reluctance to outright reverse the BVA and order VA to grant the veteran's benefits. These remands often take years for the BVA and VARO's to process. Sick veterans have died while their cases are on remand from the Court. In the Veterans Judicial Review Act, Congress has provided that the Court may outright reverse a BVA finding in a factual issue of a case only if the Court determines it was "clearly erroneous." 38 U.S.C. þ 4061(a)(4) (1988). The Court has ruled that it cannot overturn a BVA finding of fact if there is any "plausible basis" to support it. Several observers have suggested that this standard is too strict, and that it should be broadened. An example of such a change would be to allow the Court to reverse a BVA finding of fact if it is "not reasonably supported by the evidence of record." VVA supports this expansion of the Court's authority, which would allow the Court to promptly order the VA to grant benefits in meritorious cases.

Attorney Representation for Veterans

VVA has reason to be proud of its nationwide network of veterans' service representatives, all of whom are lay advocates that assist veterans in navigating the often labyrinthine processes of the VA adjudicatory system. VVA provides a comprehensive training program to those committed individuals seeking to become accredited service representatives, provides newsletters updating them on developments before the VA, and conducts periodic refresher training. VVA service representatives help veterans complete forms, gather and marshal evidence, represent them at hearings, and otherwise assist veterans in developing their claims. By and large, VVA's field representatives and those of other service organizations have done an excellent job in assisting

veterans and should play a continuing part in the adjudicative process.

However, the time has come for Congress to broaden the scope of proceedings before the VA in which veterans can engage attorneys on a fee basis. The Veterans Claims Adjudication Commission Report states that fewer than one percent of represented applicants designate attorneys at the Regional Office and five percent are represented by attorneys at the BVA level, while 87.9 percent of represented appellants designate private attorneys before the court. This disparity between attorney representation at the court and administrative proceedings stems from the fact that attorneys are prohibited from charging fees until a veteran's claims have first been denied at the BVA.

Both federal and state officials have recognized that involvement of attorneys at even the lowest levels of adjudication results in more effective presentations and thus more improved and fairer dispositions by the administrative bodies. Accordingly, both Social Security and state workmen's compensation programs, neither of which is more complex than VA disability programs, encourage attorney participation throughout various levels of adjudication by providing fees to be paid out of past-due benefits.

The VJRA should be modified to encourage the participation of attorneys on a fee basis before the VA at the early stages of the claim process, at least after an initial denial by the VARO. Sound policy reasons support such a structural change. First of all, lawyers are trained and skilled to understand and apply regulations governing eligibility to veterans disability benefits and in the evidentiary means by which a claim can be established. The presence of such lawyers within the ranks of VA advocates will improve the speed and quality of adjudication and the overriding need for the VA to get it right the first time.

Introduction of lawyers at the VARO will have other beneficial results. Accredited veterans service officers are usually located in VARO's and VA medical facilities, where they can provide on-the-spot assistance to disabled veterans who need assistance in navigating the VA benefits system. Veterans living in places distant from a VARO, and who are often prevented from traveling to such facilities due to their disability or lack of funds, are prevented from receiving face-to-face assistance from a service officer. There are very few locations, however, that do not have an attorney who will handle Social Security and workman's compensation claims. Adding veterans benefits to the disabilities which can be represented by counsel will mean that veterans will not have to travel to VARO's or to VA medical centers to receive assistance, since there could be shortly in place a system of attorneys skilled in veterans benefits proceedings, just as there already is a base of competent attorneys willing to represent claimants before the Social Security Administration and workman's compensation proceedings.

In addition, bringing attorneys into the process will relieve the caseloads of service organizations. Many service officers are so overwhelmed by their existing caseloads that they are unable to provide personal assistance to every claimant through each step of the process. An attorney who seeks to be compensated from a veteran's retroactive payment will have significant incentives, both financial and ethical, to assist his client in a way that will expedite the maximum payments allowable by law -- a goal that the VA has explicitly adopted. Thus, the presence of attorneys at the regional level will also relieve overworked adjudication officials in discharging their duty to assist veterans presenting a well-grounded claim. Attorneys specializing in disability cases in other areas are skilled in marshaling often complex medical evidence to present to the adjudicators, and their presence in the VA process will provide a service to a represented veteran and to the system as a whole.

Will attorneys put the veterans organizations out of business? Clearly not. These organizations have accepted judicial review, and realize its potential to help their members. In fact, most of the major organizations have hired attorneys, who work alongside their non-attorney service representatives, to represent claimants at the Court.

Have lawyers improperly taken advantage of VA claimants since the passage of the VJRA as predicted by some? There is no evidence that this has occurred. Certainly, the U.S. Court of Veterans Appeals' decisions have not revealed any widespread ethics violations by attorneys. Likewise, the 1996 study by Professor William Fox (Catholic University Law School, Washington, DC) of attorney practice at the Court did not reveal any negative impact of attorney representation of veterans. To the contrary, his data indicated that attorney representation greatly improved a claimant's chances of winning his case. In fact, Prof. Fox urged Congress to pass legislation allowing lawyers to practice at the VARO and BVA level, in order for the VA and Court decisional process to be "truly legitimate" and "truly accepted... within the mainstream of federal administrative law."

Chief Judge Nebeker offered his views on attorney representation of VA claimants in his testimony to Congress in April 1997. Addressing the current law which prohibits an attorney from charging a claimant a fee until after BVA has denied the claim (at which point the claimant is generally prohibited from submitting any more evidence), he agreed with the frequently cited problem that a criminal defendant is more able to hire an attorney than a disabled veteran claimant, and said he would support legislation allowing claimants to hire an attorney at the VARO level. He made similar remarks in his testimony this past February, although that testimony has not yet been transcribed and published.

VVA has always fought for the right of a veteran to hire an attorney if they so choose. VVA

took the lead in abolishing the $10 fee limit. Nearly a decade after its passage, it appears, that the VJRA has not provided enough freedom or incentive for attorneys to represent many veterans in their claims. Congress should now allow attorneys to be compensated for providing representation at the VARO level, or at least at the BVA, where evidence can still be added to the record. In addition to helping claimants at the VA level, such a change would encourage more lawyers to represent veterans at the Court level, where about two-thirds still go unrepresented.

Conclusion

VVA believes that the VA claims system is no more adversarial than it was before judicial review. In fact, to the extent VA is now more attentive to its duty to assist, it is less adversarial. VARO and BVA decisions are certainly more clear and informative. These doctrines, and many others handed down by the Court, have forced the VA to grant benefits in thousands of claims which would have been denied before judicial review. For many disabled veterans and their families, this has meant the difference between a life with dignity and a life without it.

On its 20th anniversary, Vietnam Veterans of America, is proud of its role supporting passage of judicial review legislation in 1988. We believe that the above suggestions can improve the veterans appeals process to make it even more fair, an effort which our nations veterans surely deserve.

VVA is very pleased to serve as a resource to you and your staff as the Committee considers the operations of the BVA, the Court and VA in administering benefits to veterans. VVA's network of service representatives has a great deal of experience at all levels of the original claims filing and appeal processes. Thank you for the opportunity to present VVA's views. This concludes our statement. We would be pleased to respond to any questions.

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

WILLIAM F. RUSSO
Director, Veterans Benefits Program

Since 1994, Bill Russo has served as Director of the Veterans Benefits Program of Vietnam Veterans of America (VVA). In this position, he is responsible for the training and management of more than 300 accredited Service Representatives nationwide, and supervises VVA's representation at the Board of Veterans' Appeals, Court of Veterans Appeals and military discharge review boards. In addition, Mr. Russo oversees VVA's production of publications on VA benefits which are provided to veterans and their representatives.

Previously, Mr. Russo worked from 1987 to 1990 for VVA Legal Services/National Veterans Legal Services Project, advising VVA Service Representatives and representing claimants at the BVA. From 1990 to 1991, he then served as a staff attorney with the U.S. Court of Veterans Appeals Central Legal Staff, analyzing veterans' cases for the Court's judges. . From 1991 to 1994, he practiced civil litigation for a private law firm and spent his spare time successfully representing a number of veterans *pro bono*.

In 1991, Mr. Russo received a Special Service Award from the U.S. Court of Veterans Appeals, for his work on the American Bar Association's study on *pro se* appellants at the Court. In 1994, he was selected by the American Bar Association's Young Lawyers Division for the "Profiles of the Profession" issue of *Barrister* magazine, for his *pro bono* work on behalf of veterans. In 1997, he was presented with the VVA Government Affairs Distinguished Service Award for his legal advocacy work for veterans. During his career, Bill has testified to the U.S. Senate and House of Representatives Committees on Veterans Affairs, published numerous articles regarding veterans law, and trained hundreds of attorney and non-attorney veterans advocates around the country.

Mr. Russo is a 1985 graduate of the University of Maryland and a 1989 graduate of The George Washington University Law School. He is admitted to practice law in the District of Columbia, Maryland and Pennsylvania.

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

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Does the Functus Officio Doctrine Apply to the BVA?

by William S. Mailander

Functus officio means "a task performed; having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority." *Black's Law Dictionary*, West Publishing Co., 5th ed., 1979, pg. 606.

Once the Board of Veterans' Appeals (BVA) has rendered a decision on a claim for VA benefits, is its statutory function fulfilled and does it have the authority to participate in the defense of those cases appealed to the U.S. Court of Veterans Appeals (CVA)? And, perhaps equally as important, does the BVA's continued involvement in a case after it is decided cause the public to lose confidence in the integrity of the VA administrative appeals system and create a perception of injustice?

Readership response to these issues is invited.

BVA was created to render final administrative decisions on appeals by claimants for VA benefits. 38 U.S.C. §§ 7103, 7104. Authorized BVA personnel include a chairman; a vice chairman; such a number of members as necessary to conduct hearings and dispose of appeals in a timely manner; and other personnel necessary in conducting hearings and considering and disposing of appeals properly before the Board. 38 U.S.C. § 7101(a).

An appeal is not properly before the BVA when the BVA decision is appealed to the CVA. *Cerullo v. Derwinski*, 1 Vet.App. 195, 196-97 (1991). It appears that, once the BVA has rendered its decision, it should be functus officio.

The BVA, however, does not consider itself functus officio after an appeal has been filed. Indeed, it regularly participates, through its Litigation Support Division, in the defense of its decisions. Such

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The Court Rules

Federal Circuit Issues Major NOD Decision

By Bill Russo, Esq.

Just when veterans law practitioners thought the extensive litigation on what constitutes a valid Notice of Disagreement (NOD) for U.S. Court of Veterans Appeals (CVA) jurisdiction was over, a new decision by the U.S. Court of Appeals for the Federal Circuit proves us wrong. This new litigation over NODs began more than two years ago, when the CVA issued its opinion in *West v. Brown*, 7 Vet.App. 329 (1995).

In that en banc decision (written by Associate Judge Holdaway), the CVA determined that the pro se appellant's VA claim for an earlier effective date for a compensation award, and his claim for a rating increase, are not claims separate and distinct from the original claim that sought service connection. Instead the CVA held that they are merely "elements" of the original claim for service connection. Therefore, the Court concluded, the appellant's original NOD filed in connection with the service-connection claim (filed before enactment of the Veterans Judicial Review Act (VJRA)) is the controlling NOD for purposes of CVA jurisdiction. Likewise, it held that the appellant's NODs on the effective date and rating increase issues are irrelevant for purposes of CVA jurisdiction.

The *West* decision created a great deal of controversy within the veterans law community. In its pleadings filed with the CVA in *West*, VA General Counsel actually opined that the appellant's effective date claim and rating increase claim were each separate and distinct from the service-connection claim, and therefore these post-VJRA NODs gave the Court jurisdiction.

Moreover, Associate Judge Steinberg wrote an impassioned dissenting opinion in *West*, joined by Associate Judge Kramer, reaching the same conclusion. Some commentators also raised the concern that the Court failed to obtain either representation for Mr. West or an amicus brief, even though the case involved an important jurisdictional issue.

Mr. West himself did not appeal the CVA's dismissal of his case. However, within the next few months, two other CVA appellants dismissed under *West* appealed to the Federal Circuit. The appellant in *Barrera v. Brown*, Fed. Cir. No. 95-7045, was represented by Carpenter Chartered, a law firm in Topeka, Kansas. The appellant in *Johnson v. Brown*, Fed. Cir. No. 95-7057, was represented by the Law Office of Wildhaber & Associates on behalf of Vietnam Veterans of America. Since these cases involved similar issues, both appellants filed motions to consolidate the appeals, which the Federal Circuit granted.

In *Barrera/Johnson v. Brown*, appellants noted that instead of recognizing that a "claim" is a request for a specific VA benefit, the *West* court held that a claim is composed of several "elements" including veterans status, existence of a disability, service connection, degree of disabillty, and effective date. Appellants argued that the *West* court's definition of the term "claim" contradicts both the regulatory and statutory definitions and agency practice, which have been in place for decades.

They also asserted that the CVA had already held in *Hamilton v. Brown*, 4 Vet. App. 528 (1993), *aff'd.* 39 F.3d 1574 (Fed.Cir. 1994), that an NOD which *initiates agency appellate review* is no different than the one that confers jurisdiction on the CVA. Therefore, they asserted that the *West* court's conclusion that appellant's post-VJRA NODs *only* initiated agency appellate review violates the rule of *Hamilton*.

After appellants filed their briefs, the Department of Justice filed a motion to stay proceedings in *Barrera/Johnson* pending the outcome of *Ephraim v. Brown*, 82 F.3d 399 (Fed.Cir.1996), which the Court granted. The appellant in *Ephraim* filed two separate NODs (one pre-VJRA and the other post-

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Readership response to these issues is invited.

participation includes reviewing and commenting on substantive matters in proposed joint motions for remand and settlement proposals, providing assistance to the VA General Counsel in preparing for oral argument, and drafting briefs and other legal memoranda to be filed with the Court.

BVA participation in matters of litigation before the CVA raises several interesting issues, such as:

- *Is BVA participation in defense of its decisions appealed to the CVA ultra vires?*
- *Does the BVA's participation in the defense of its decisions appealed to the CVA through its Litigation Support Division violate applicable standards of conduct, including the American Bar Association Code of Judicial Conduct and the Administrative Procedure Act?*
- *Does VA General Counsel's unilateral contact with the BVA through its Litigation Support Division constitute unethical ex parte contact with a lower quasi-judicial body?*
- *How should the CVA, VA General Counsel, and BVA treat the written memoranda prepared by the Litigation Support Division as a result of the ex parte contact? Should the memorandum be part of the record of proceedings? Should it be made available to the claimant and the CVA? Does the CVA have the authority to order release of the memorandum? Could it be obtained through a Freedom of Information Act request? Are the memoranda ever available on remand to the BVA member or the staff attorney drafting the proposed decision?*
- *Does the Litigation Support Division's participation in reviewing and commenting upon proposed joint motions for remand, even assuming that it is segregated from the rest of the BVA and that its personnel never discuss the details of a particular case, still result in this office performing quasi-judicial functions when the advice provided appears in the joint motion containing the BVA instructions ordered by the Court upon remand?*
- *Does the Litigation Support Division's participation in reviewing and commenting upon proposed joint motions for remand result in the BVA improperly prejudging a claim that it will later be called upon to decide, because advice provided by the Litigation Support Division appears in the joint motion containing the BVA instructions ordered by the Court upon remand?*
- *Does the BVA's continued involvement in a case after it has rendered its final decision cause the public to lose confidence in the integrity of the VA administrative appeals system and create a perception of injustice?*

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records on appeal know how often veterans fail to clearly or properly articulate the issues. It now appears that attorneys who apply their skills to more adequately frame the issues, and in so doing are successful in winning a case for the veteran, will now be deprived of any fees for their efforts. One must wonder how many attorneys will be willing to undertake *any* veteran's case in this system.

Suffice it to say that in my case, the counsel to the chairman of the BVA eventually backed down and the objections to my acceptance of the fee I had earned ceased. However, it took several letters from me and strong argument to win the VA's grudging acquiescence, and the chilling effect of that VA action remains.

The saga of this case continues. It is the only case I currently have in the system, and unless things change drastically (revocation of this arbitrary and oppressive statutory fee limitation would be a good start), it will be my last. I am acutely aware of the Court's efforts to have more civilian attorneys enter into representation in this system, and to reduce the pro se rate before the Court. From my perspective, having tried to be one of those attorneys, I now conclude that the risks outweigh the potential benefits.

This is a system in which VA is too often perceived to operate against the interests of veterans. It is now increasingly apparent that VA's long-standing disfavor for attorneys continues unabated. If the system is to become more effective, both at the VA and the CVA level, substantial change regarding both perceptions will be needed.

Captain Kevin J. Barry, USCG (Ret.), served on active duty from 1966 until his retirement in 1990. While on active duty he served in various positions including that of chief trial judge and appellate military judge. He is a member and a past-chair of the ABA's Standing Committee on Armed Forces Law and has served as Chair of the Committee on Admissions and Practice of the United States Court of Veterans Appeals. He practices military and veterans law in Chantilly, VA.

Does the Functus Officio Doctrine Apply to the BVA?... A Reader Responds

by Kenneth M. Carpenter

Introduction

I read with interest your article in the last publication of *Tommy* that questioned whether the doctrine of functus officio applies to the BVA. I would very much like an opportunity to respond to the several issues that you raised in that article. I have been, for some time, aware of the activities of the BVA following the appeal of their decisions to the United States Court of Veterans Appeals. In my view, the BVA cannot maintain its independence or its quasi-judicial role if it participates in such post-decision activities in the very court that was created by Congress to review their decisions. This activity is inconsistent with the nonadversarial nature of the proceedings at the administrative level.

The VA General Counsel is counsel to the Secretary. The VA General Counsel does not have a role and did not participate in the administrative decision-making process, either before the Regional Office or the Board of Veterans' Appeals. Neither then should the Board, its agents, or attorneys, insinuate itself into the post-decision judicial review process. Such activities are clearly adversarial in nature and directly conflict with the independence and the nonadversarial posture contemplated by regulation and statute.

When the BVA acts in concert with the Secretary and his General Counsel to negotiate the terms of remands and the settlements of claims previously denied by the Board, it has become an advocate and a defender of its prior decisions. This is unseemly and inappropriate and creates a clear impression of impropriety based upon the fact that the BVA has moved from an independent fact finder to an advocate for specific language, terms, or conditions in Court-ordered remands or negotiated settlements of claims.

Response to Specific Issues

I would now like to respond to the specific issues raised and offer my perspective on each issue.

Is the BVA's participation in the defense of its decisions appealed to the CVA ultra vires?

Yes. Not only is there no authority for such involvement in statute or regulation, but such involvement clearly compromises the independence and impartiality of the Board in both its initial decision making as well as post-CVA decision making.

Does the BVA's participation in the defense of its decisions appealed to the CVA via their Litigation Support Division violate the standards of conduct of the Code of Judicial Conduct?

Yes. Canon One of the Judicial Code of Conduct of the Judicial Conference of the United States, states, "A judge should uphold the integrity and independence of the judiciary." The BVA is an administrative tribunal that functions as a fact finder in a manner similar to that of a trial court, although, for the most part, in a nonadversarial setting. *Gilbert v. Derwinski*, 1 Vet.App. 49, syl. 2 (1990). Canon Two indicates that, "A judge should avoid impropriety and the appearance of impropriety in all activities." Such extrajudicial activity by the Board of Veterans' Appeals in post-decision judicial review of their decisions creates a clear impression of impropriety and eliminates the guise of the nonadversarial nature of the BVA's fact-finding functions and implicates the BVA directly in an adversarial and advocacy role in the defense of their own decisions.

Does the VA General Counsel's unilateral contact with the BVA through its agents and attorneys in the form of the Litigation Support Division constitute unethical ex parte contact with a lower quasi-judicial body?

Yes. The Litigation Support Division of the Board of Veterans' Appeals acts in the capacity of agents and attorneys for the Board in their contacts with the VA

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General Counsel. In doing so as federal lawyers, by having such ex parte contact, they violate the provisions of the Model Rules of Professional Conduct for federal lawyers, Rule 3.5(a) and (b), which deal directly with the need to maintain the impartiality and decorum of the tribunal. The Code of Judicial Conduct of the Judicial Conference of the United States, Canon Five, provides that, "A judge should regulate extrajudicial activities to minimize the risk of a conflict of interest with judicial duties." The involvement of the BVA with the VA General Counsel in matters pending before the CVA, which are involved exclusively in the review of the decisions of the BVA, obviously maximizes the risk of a conflict of interest with their judicial duties when those cases are returned to the BVA by the CVA upon remand. This matter is additionally compromised by the Litigation Support Division personnel who clearly become advocates for the BVA in a matter before the CVA. This practice would be comparable to the CVA's Central Legal Staff participating in concert with the Department of Justice when it represents the government in defense of a decision appealed to the Federal Circuit Court of Appeals.

How should the CVA, VA General Counsel, and the BVA treat written memoranda prepared by the Litigation Support Division as a result of the ex parte contact?

The practice of the Litigation Support Division of the BVA generating written memoranda regarding post-decision analysis and comment is not merely ex parte, it is adversarial. It cannot be perceived by a veteran or his representative in any other light.

Should the memoranda be a part of the record of the CVA proceedings?

No, they should not be a part of the record because they are clearly generated post-decision of the BVA and, therefore, are outside the record that the Court is to consider. Such a practice by the Litigation Support Division of the BVA is inappropriate and should be eliminated voluntarily or by the express direction of the Secretary or, if necessary, by Court order.

Should such memoranda be available to the claimant and the CVA?

No, these memoranda are inappropriate and the practice should be terminated immediately.

Does the CVA have authority to order release of the memoranda?

I do not think so, because such memoranda are extrajudicial and outside the record, but this fact does not make these memos appropriate or legitimate. An obvious defense to an order to compel the release of such memoranda would be that they are part of the attorney work product of the VA General Counsel. This defense adequately makes the point of the perception of collusion between the BVA and the VA General Counsel's office regarding the defense of BVA decisions before the Court.

Could such memoranda be obtained through the Freedom of Information Act?

Probably, and they may need to be in order to secure a cease and desist order from an appropriate court to prevent such clearly inappropriate extrajudicial activity.

Are the memoranda either available on remand to the BVA member or the staff attorney drafting the proposed decision?

It is quite likely that they are; however, whether they are or not is irrelevant to the question of their propriety. This practice, whether formalized by written memoranda or not, must be eliminated.

Does the Litigation Support Division participation in the review and comment upon proposed remands and terms of settlement result in the Litigation Support Division performing a quasi-judicial function in such post-decision judicial review?

I would not characterize such activities as quasi-judicial functions but as extrajudicial functions, which are clearly in violation of the Judicial Code of Conduct, Canon Five. But, since the code has not been adopted by the BVA or the Secretary of the Department of Veterans, the violation is with the spirit of such a code and not an express violation. But, these activities clearly require that such a Code of Conduct should be imposed upon the BVA by the Secretary of the Department of Veterans Affairs.

Does the Litigation Support Division's participation in CVA proceedings prejudice the subsequent decision following a CVA remand?

It most certainly does. No veteran or his or her representative can have any confidence that these remand decisions will be either impartial or independent. This type of extrajudicial activity jeopardizes the perception of the BVA as a non-adversarial tribunal and casts them in the role of advocates defending, justifying, manipulating, and prejudicing the veteran's claim to secure a predetermined result—a result that was not participated in by the veteran or the veteran's representative.

Does the continued involvement of the BVA in the veteran's case following an adverse decision by the BVA, which is subject to judicial review by the CVA, cause the public to lose confidence in the integrity of the VA administrative appeals system and create a perception of injustice?

Without question or qualification, it most certainly does. Regardless of the "good intentions" or "noble purposes" that have motivated the Board of Veterans' Appeals to create a Litigation Support Division, to be so involved in the post-decision judicial review process is a poorly disguised effort to control, minimize, and manipulate the impact of the terms, conditions, and parameters of CVA remands. The BVA has overreached and interposed itself into extrajudicial activities that imperil its independence and that create a perception of advocacy and defense of its own decisions in a behind-the-scenes manipulation of the judicial review process.

Conclusions and Recommendations

- The Legislative Support Division of the Board of Veterans' Appeals should be disbanded and the involvement of the BVA with the VA General Counsel's office in matters pending before the CVA should be discontinued forthwith and eliminated in any form or context in the future.

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- The BVA should voluntarily adopt, or the Secretary of the Department of Veterans Affairs should impose upon the BVA, the Judicial Code of Conduct of the Judicial Conference of the United States.
- The BVA should voluntarily adopt, or the Secretary of the Department of Veterans Affairs should impose upon the members of the BVA, their staff attorneys, and the attorneys of the VA General Counsel's office, the Model Rules of Professional Conduct for Federal Lawyers that was adopted by the Federal Bar Association in 1990.

The integrity, independence, and impartiality of the Board of Veterans' Appeals must be restored. If the Litigation Support Division is disbanded and the extrajudicial activities of the BVA cease, it will go a long way toward restoring such public confidence. If the expectation of Congress is that a "non-adversarial" administrative appeals system is to be something more than mere illusion, such affirmative steps for restoration must be taken.

Kenneth M. Carpenter is President of Carpenter Chartered, a professional legal corporation located in Topeka, Kansas. His major areas of practice are Veterans Law and Criminal Law. He has been in private practice since 1973. He is founding member of the National Organization of Veterans' Advocates and currently serves as treasurer on the Board of Directors; chairman of the Seminar Program Committee; and chairman of Advocate Referral Service. His firm currently provides representation to more than 400 veterans at various stages of adjudication, including more than 100 cases pending before the U.S. Court of Veterans Appeals.

Court Rules

by Diane Boyd Rauber

Court Addresses EAJA Offset

The U.S. Court of Veterans Appeals recently considered the reasonableness of an attorney fee agreement under 38 U.S.C. § 7263. *Shaw v. Gober*, U.S. Vet. App. No. 96-496 (November 6, 1997).

In October 1996, on its own motion, the Court initiated a review of the fee agreement between Mr. Shaw and his attorney. The Court questioned the reasonableness of the fee agreement because it appeared "improvidently to allow the attorney a right of first recovery of EAJA fees in derogation of Section 506(c) of the [FCAA]...which provides that where the attorney was paid under a fee agreement, 'EAJA fees...go first to reimburse the appellant the amount paid to the attorney pursuant to that fee agreement.'"

The appellant subsequently filed an addendum to the agreement. In addition to providing for a 20 percent contingency fee from past-due benefits to be paid by Mr. Shaw, the addendum stated that the attorney would offset the award of past-due benefits with EAJA fees awarded if the Court granted an award of past-due benefits and subsequently awarded EAJA fees. If the Court remanded the case and the attorney ultimately recovered past-due benefits on remand, then "no offset will be made against the entitlement" paid under the contingent agreement by an EAJA award. The addendum further provided that costs and expenses advanced would not be repaid to Mr. Shaw if the EAJA award was less than the full amount requested.

Upon review of the addendum, the Court issued an order requesting memoranda regarding the reasonableness of (1) the contingent payment "to the attorney out of past-due benefits as compensation for postremand work," without an offset under EAJA for work before the Court; (2) the stipulation that Mr. Shaw would not be reimbursed for costs and expenses if the EAJA award was less than the full amount requested; and, (3) the requirement under the initial fee agreement that any award for the litigation of the EAJA application was "exclusively compensation" to Mr. Shaw's attorney.

The parties filed a joint motion for remand, which the Court granted, and Mr. Shaw filed an EAJA fee petition. Specifically, he requested fees in the amount of $38,470 for 331.3 hours of time at the rate of $125 per hour for attorney time and $100 per hour for nonattorney representative time.

The Secretary objected to three aspects of the petition: (1) 3.6 hours of nonattorney time charged for the preparation of a motion for extension of time; (2) 6.5 hours of attorney time charged for preparation of the "EAJA brief"; and, (3) approximately $19,000 in fees requested for work done to "demonstrate the reasonableness of the fee agreement with the veteran" as part of the Court-initiated review under 38 U.S.C. § 7263(c).

Regarding the time charged for the motion for extension of time, the Court found that 3.6 hours "for filing a routine one-page extension motion is inherently 'unreasonable' on its face" and rejected the request for fees for that time.

As to item 2, the Secretary argued that the request should be rejected because 10.8 hours already was charged for preparation of the EAJA application and no "EAJA brief" ever was filed. The Court, noting a lack of clarity regarding the term "EAJA brief" and the itemization itself, ordered a conference with the Court's Central Legal Staff to clarify the issues.

The Court denied the $19,000 requested for work done on the § 7263(c) review. While acknowledging that an attorney generally is entitled to "EAJA fees for representation in litigation over the EAJA application itself," the Court distinguished those fees from fees for litigating fee agreement issues. "The issues pertaining to the fee agreement in this case relate to the EAJA application in only a collateral way. Regardless of the outcome of the instant fee agreement litigation, the identical EAJA fee award will be made as to the underlying case

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STATEMENT OF PHILIP R. WILKERSON, DEPUTY DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION
TO THE
SUBCOMMITTEE ON BENEFITS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATE HOUSE OF REPRESENTATIVES
ON
THE OPERATIONS AT THE BOARD OF VETERANS' APPEALS AND THE COURT OF VETERANS APPEALS

JUNE 10, 1998

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates the opportunity to provide comment on the operations of the Board of Veterans Appeals (BVA or the Board) and proposed legislation pertaining the retirement of judges of the U.S. Court of Veterans Appeals (the Court).

It has been sometime since the Subcommittee last held a hearing on the specific subject of the Board's activities. We wish to commend you, Mr. Chairman, for holding this timely oversight hearing to consider the Board's efforts to improve its response time as well as to examine those factors which we believe contribute to the continuing overall high level of appellate activity. We believe this examination should take into consideration the level of service and the quality of decision-making at the regional office level as these relate directly to the number of appeals filed each year, the number of cases remanded, and the number of personal hearing requests received by the Board. Actions taken by the Veterans Benefits Administration (VBA) to improve "customer service" and "customer satisfaction" include initiatives intended to reduce their appellate workload. These also have a direct impact on the workload and resource needs of the regional offices as well as the Board of Veterans Appeals.

Although described as paternalistic and non-adversarial, the VA claims adjudication and appeals process is not nor has it ever been simple or particularly "user friendly." Lately, there has been a growing recognition and public acknowledgment by VA of the system's true complexity. It is a system which is heavily dependent upon the individual adjudicator's judgment and technical expertise. However, repeated cuts in regional office personnel and training budgets in the face of a growing volume of new and reopened claims have resulted in a current backlog of over 437,000 pending claims and over 96,000 pending appeals. Fundamental changes continue to

decisions of the U.S. Court of Veterans Appeals which adds further to the overall workload. These changes relate to such basic issues as what is a well-grounded claim and the nature and extent of VA's duty to assist claimants in the development of their claims, the requirement to provide adequate reasons and bases in explaining a decision, inferred claims, proper issue identification, etc.. Veterans seeking benefits from the Department of Veterans Affairs (VA) are entitled to a decision on their claim that is fair, proper, and timely. The American Legion believes more must be done by the Veterans Benefits Administration to improve the quality of regional office decision-making so that veterans and other claimants are not arbitrarily forced into an appeal as a matter of expediency. In addition, to ensure resources of the Board and the regional offices are used in the most efficient and cost effective manner possible, VBA must ensure that only those cases that have been thoroughly developed and fully considered are sent forward for consideration by the Board.

One of the most important "customer service" issues for the Board continues to be the amount of time it takes to make a decision on an appeal once it has arrived at the BVA. Over the past two years, a variety of additional resources have been provided to the Board that has enabled it to significantly increase the number of decisions rendered and, thereby, reduce the response time. In FY 1996, the Board produced about 33,900 decisions with a response time of 595 days. In FY 1997, the Board produced approximately 43,300 decisions with a response time of 334 days. For the first half of FY 1998, the Board has issued about 23,200 decisions with a response time of 255 days.

The Board's improved production and response time does not, in our opinion, necessarily mean that claimants are being better served. We are concerned that fundamental inequities still persist at the heart of the claims process and these cause many cases to unfairly and unnecessarily drag on for years at the regional office level and through the remand process wasting the time and effort of all concerned. As an example, under the law, a claimant is required to submit a claim which is "well-grounded", i.e., one that is plausible. If this standard is met, VA has the duty to assist the claimant in developing additional supporting evidence in order to fairly adjudicate the claim. If the claim, as submitted, is determined to be "not well- grounded", i.e. not plausible, VA's duty to assist is not triggered.

However, the Court has held in **Robinette v. Brown**, 8 Vet. App. 69 (1995), VA does have a duty to inform the claimant what information or evidence would be necessary to make the claim well-grounded. In reality, we find that VA's letters and notices do not adequately explain what the real rules of the game are. They frequently are not very forthcoming, truthful, fair, or correct. Not well-grounded claims are often denied for the

wrong reason, but the claimant never knows it was not well-grounded and what would be needed to overcome this deficiency. In their appeal, they are responding to an erroneous determination rather than the correct issue(s). The Board, however, which has de novo review authority, is not bound by the regional office's action. The Board has been able to complete action on increasing number of cases because they are found to be not well-grounded and, thus require less analysis time. Under **Edenfield v. Brown**, 8 Vet. App. 384 (1995), the regional office error is considered harmless. This is despite the fact that the regional office mislead the claimant and denied them the opportunity to develop evidence which would have made the claim well-grounded which ultimately results in years of lost benefits.

The veterans' reliance on VA to "do the right thing" can have unanticipated, adverse financial consequences. As an illustration of what often happens - a claim was filed for service connection for a right knee problem in January 1996. The veteran indicated an incident in basic training with treatment at a military clinic and post-service treatment by several private physicians. In adjudicating the claim, the regional office obtained the veteran's service medical records (SMRs) and sent him forms for the release of medical information from the private physicians. The SMRs indicated a right knee sprain in 1952. Treatment records from the private physicians show complaints and treatment in 1994 and 1995 for arthritis of the right knee.

The regional office denied the claim on the basis that arthritis of the knee was not found in service or within one year of separation from service. The denial of this case was correct, but for the reasons stated. The veteran did not submit a well-grounded claim which requires: an incident in service; and a diagnosis of a current disability; and a medical opinion linking the current condition to what happened in service. The veteran did not have evidence of linkage, but the decision makes no mention of this fact. It provided erroneous information as to the reasons for the denial. The veteran responded to this decision by filing an appeal and stated his belief that his recurrent severe knee pain is related to service.

After waiting two years, the case came before the Board in January 1988. In February 1998, the Board denied the appeal not on the merits, but because the claim was not well-grounded, since evidence of linkage was lacking. The Board did not have to go through any extensive analysis, since under **Edenfield**, the claim was, in fact, not well-grounded and the regional office's "error" is deemed "harmless error. An appeal to the Court would be a complete waste of time. The veteran's only recourse was to start all over again. He reopened the claim in March 1998 with a medical opinion stating the arthritis is related to the initial in-service injury. In June 1998, disability compensation benefits are granted but payable only from March 1998, the

date of the reopened claim, not January 1996 when the original claim was filed.

The American Legion is not satisfied with the way the well-grounded claim rule is being applied. We believe that until VA can properly deny a claim, it should continue to pend and the claimant provided adequate notice and the opportunity to submit the evidence required to make the claim well-grounded. While we do not want to create any new burdens for VA, we believe the Veterans Affairs Committee should consider whether a change in law may be necessary to ensure that claimant s are fairly treated by the system.

Mr. Chairman, there are other quality-related problems of concern. The findings of VBA's Systematic Technical Accuracy Review (STAR) program were released in January 1988. This program was developed in conjunction with VBA's' Business Process Reengineering (BPR) and the Government Performance and Results Act (GPRA) in order to assess the accuracy and quality of compensation and pension claims' processing. The results of this review showed, " In brief, of the 384 case reviewed, 139 had at least one error in terms of service to the claimant, for a baseline accuracy rate of 64 percent." According to the report, "The baseline national accuracy rate found by this special review is decidedly lower than the 90 percent that had been estimated. This estimate was in part based on extrapolations of the historic from C&P's Quality Assurance review program. While the accuracy rate is less than estimated, it is more in concert with the generalization of various stakeholders and representatives from oversight organizations, who have expressed a concern about the level of accuracy of the core compensation work. Given the ever growing complexity of the core compensation and pension work, reduced staffing, and a myriad of other factors, the lower accuracy rate is not totally unexpected." While we appreciate the report's candor, such poor quality is unacceptable by any standard. A dramatic improvement must be among VBA's highest priorities.

In FY 1996, the Veterans Benefits Administration processed almost 474,000 original and reopened claims for disability compensation and in FY 1997, there were 486,000 such claims. In addition, there were thousands of other types of claims for pension, medical, insurance, death, education, training, loan guaranty, etc. as well as several million annual award adjustments for COLAs, beneficiary and dependency changes, etc.. In FY 1996, approximately 74,400 Notices of Disagreements (NODs) were filed and in FY 1997, there were approximately 66,500 NODs. This means a substantial number of veterans have been very dissatisfied with the decision rendered on some part or all of their claim.

One of the most important "customer service" concerns for VBA has been and continues to be the increasing backlog of pending claims and the amount of time it takes for the regional offices to process and adjudicate these claims. Over the past several years, VBA has continued to emphasize increased production by the regional offices in order to reduce claims processing times. More recently, as part of their strategic management plans, a variety of administrative and procedural improvement initiatives have been either implemented or in the pilot phase. These include such changes as the merging of the adjudication and veterans service divisions to make available additional resources to support the adjudication function and initiatives focused on improved quality assurance, personnel accountability, and communication with claimants.

The Decision Review Officer Program (DRO) which is currently piloted at 12 field stations is intended to try and resolve appeals at the field station level first and then, if this cannot be done, to ensure the case is ready for final action by the Board. Other changes and improvements are in the planning stage. In addition, there has been increased cooperation between VBA and the Board to try and reduce the overall number of appeals and remands. While it may be to early to fully assess their impact on the adjudication and appeal process, we believe these are much needed changes to a system which has been unresponsive in many ways to the needs of those whom it is, by law, mandated to serve.

The American Legion believes this Subcommittee must exercise continued oversight of the way in which both claims and appeals are handled by the regional offices and the Board of Veterans Appeals and to monitor, in particular, the quality and timeliness of the service being provided to veterans and other claimants, resource utilization, and the effectiveness of changes intended to improve overall service.

The appellate process is intended to afford the claimant not only their right to due process, but several opportunities to have the claimed issue(s) satisfactorily resolved at the regional office level without recourse to the Board of Veterans Appeals. The first step in this process is the claimant's Notice of Disagreement which is a written communication expressing general dissatisfaction or specific disagreement with the determination(s) made on a claim. In response, the law requires the issuance of a Statement of the Case providing a summary of the specific evidence considered, a discussion of the applicable provisions of the law and regulations including the right to a personal hearing, and a summary of the reasons and bases for the regional office's determination(s).

A case is placed on the Board of Veterans Appeals docket upon receipt of the appellant's Substantive Appeal form (VA Form 9) which must

be filed within 60 days to continue the appeal process. The form includes blocks for the appellant to request a personal hearing before the Board of Veterans Appeals either in Washington, DC or before a traveling section of the Board. On this form, the appellant is required to not only set out specific allegations of error of fact or law either in the determination or the Statement of the Case, but to also clearly identify the benefit sought by the appeal. Only the Board, however, has the authority to determine if the Substantive Appeal or Notice of Disagreement was inadequate or not timely filed.

Upon receipt of the completed Substantive Appeal, if the appellant has representation, the case will be referred to an accredited representative for a statement on the appellant's behalf on VA Form 646. At any time during the development of the appeal, the appellate can submit additional evidence or request a personal hearing before a regional office Hearing Officer and receive a Supplemental Statement of the Case (SSOC). Upon completion of all required action, the regional office certifies on VA Form 1-8 that the case is ready to be transferred to the Board for final appellate consideration.

In FY 1996, it took the regional offices 1145 days to process an appeal and send the case to the Board of Veterans Appeals. In FY 1997, the processing time had declined to 1027 days and, for the first half of FY 1998, it was 977 days from the time the NOD is submitted until the case is certified by the regional office as being ready for consideration by the Board. According to data from the BVA, it continues to take over 600 days from the time the filing of the Substantive Appeal until the regional office notifies the Board the case is ready for final appellate consideration. We recognize there has been some improvement in the overall appeals processing time at the regional office level. However, The American Legion believes it is still taking far too long to complete this phase of the appeal process which imposes a severe personal and financial hardship on many veterans and their families.

The fact that it is now taking two to three years for the regional offices to complete development action on appeals raises several questions concerning this delay. Is the problem due to insufficient resources? Is it due to poor quality decision-making on the claim and poor communication with the claimant at various stages in the appeal? Is it a reflection of the likelihood of mistakes given the increasing legal complexity of claims adjudication and appeals process? Or, is it due to piecemeal action by the claimant which lengthens the development of the appeal? We believe each of these factors contributes, in varying degrees, to the increasing amount of time it takes to process an appeal. However, in our opinion, until there has been a fundamental improvement in the quality of regional office decisions

and adjudicative actions, the volume of new appeals and remands will remain at an unacceptably high level.

Even though provided an explanation as to the reasons and bases for a denial, a substantial number of claimants feel they did not receive a fair or proper decision and exercise their right to appeal to the BVA. Data on decisions of the Board over the past six years tend to confirm this belief. Regional office decisions have been affirmed in only about thirty three percent of all appeals, i.e., denied by the BVA. The Board has completely overturned the regional office in about eighteen percent of the cases and partially overturned the regional office over forty percent of the time by remanding cases back to the regional for additional development and readjudication. Until quality and customer service improves, VBA management cannot accurately determine the resource needs of the regional offices or justify current and future budget requests.

Of particular concern is the fact that the current regional office certification process is essentially meaningless. It allows far too many cases to be sent to the Board when they are not ready for final action by the Board on whether to grant or deny the benefit sought. A remand is not a final decision and is not appealable to the Court. Because the regional office failed to address or correct some error or deficiency in the course of developing the appeal, some 16,700 cases were sent back for further development and readjudication in FY 1996.

In FY 1997, there were approximately 19,500 remands and, in the first half of FY 1998, out of 19,500 decisions, there have already been 8,100 remands. This "churning" of cases through the remand process takes up the Board's valuable time and resources which could otherwise be used in making final decisions. Remands also require the regional offices to divert critically short resources away from processing the massive backlog of pending benefit claims to give priority handling to remands and completing action which should have done correctly the first time. In our view, this is neither due process nor good service.

In FY 1996, the Board issued 38,400 decisions with an elapsed response time of 595 days. In FY 1997, 32,900 decisions were issued with an elapsed response time of 334 days and, as of the end of the first half of the current fiscal year, the elapsed response time was down to 255 days. These trends reflect various changes and improvements implemented by the Board, during this period. It should be noted that the Board still does not have a permanent Chairman. We hope the Senate will complete confirmation action on a new Chairman of the Board of Veterans Appeals as quickly as possible.

Despite this, The American Legion believes Roger Bauer (who previously served in the capacity of Acting Chairman) and Richard Standefer, the (current Acting Chairman), should be commended for their leadership and management efforts, including allocating additional resources to the Board's quality assurance function and increased cooperation with VBA to try to reduce the number of unnecessary appeals and remands.

Mr. Chairman, we have discussed a number of issues affecting the Board's current and projected future caseload. There is, however, a new workload factor which must also be considered. PL 105-111 was enacted on November 21, 1997. It included a provision which permits a claimant to file with the Board of Veterans Appeals a claim based on a clear and unmistakable error (CUE) in a previous Board decision no matter when the decision in question was rendered. If the results of the new review would be unfavorable, the claimant would have the right to appeal to the U.S. Court of Veterans Appeals.

On May 19, 1998, the Board published in the Federal Register proposed regulations which set forth the specific application procedures and the legal standard for review of such claims. They also propose the elimination of the Chairman's discretionary authority to order reconsideration of Board decision on the basis of obvious error. Comments by the public have to be submitted by July 20, 1998. Pending the issuance of final regulations, claims filed under this change in law as well as motions for reconsideration are being held in abeyance.

The American Legion has a number of concerns with the way in which the Board would implement this legislation under its proposed regulations. 38 USC 7103(c) currently provides the Chairman of the Board of the Board of Veterans Appeals with the discretionary authority to order reconsideration of a decision for the purpose of correcting an obvious error in a case. However, the Board cites several precedent decisions of the Court of Veterans Appeals interpreting the term "clear and unmistakable error" as synonymous with "obvious error of fact or law." As such, the Board believes the current reconsideration process provides a duplicative remedy and should, therefore, be eliminated, according to the Federal Register notice. The American Legion does not agree.

The American Legion believes the nature and purpose of the reconsideration process is different from the clear and unmistakable error claim process provided for by PL 105-111. It should be specifically noted that the CUE legislation added new section 7111, rather than amending or deleting the reconsideration provision in 38 USC 7103(c). We believe that Congress intended to preserve a veteran's opportunity to raise allegations of error through a less formal procedure that than a claim for CUE. As such,

we are opposed the Board's efforts to get rid of this means of redress. Under reconsideration, the allegation of "error" must involve more than a general disagreement with the Board's decision. There must be a showing of deficiency, such as a failing in the duty to assist or to follow applicable regulations, a denial of due process, or in the application of the doctrine of reasonable doubt under 38 USC 5107(b). We recognize that the reconsideration process, while beneficial and advantageous to the claimant, is constrained by the fact that there are no appellate rights to the denial of a motion for reconsideration and, when a motion for reconsideration is accepted, the new Board decision is only appealable if the Notice of Disagreement was filed subsequent to November 18, 1988.

The legal standard for "clear and unmistakable error", under 38 CFR 3.105(a), is different than that which permits favorable action based on the resolution of reasonable doubt in favor of the veteran. It is, as noted by the Court in **Fugo v. Brown**, 6 Vet. App. 40, 43 (1993), a very specific kind of error which had it not been made would clearly have resulted in a different decision. Even where there may have been an error in a VA decision, if it is not manifestly clear that the outcome would have been different, the criteria for a "clear and unmistakable error" claim would not be met. Under this process, a claim of clear and unmistakable error in a prior BVA decision can now be submitted directly to the Board or be instituted on the Board's motion. The new decision would be subject to review by the Court of Veterans Appeals, the date of the original Notice of Disagreement notwithstanding.

It should be noted that VA opposed the enactment of the CUE provision of PL 105-111 as being unnecessary and asserted it would add substantially to the Board's already heavy workload resulting in longer delays for all appellants. The American Legion supported this legislation as a necessary extension of the Judicial Review Act of 1988 to include individuals who were previously denied access to the Court. We believe the number of motions for reconsideration received by the Board historically is a reasonably good indicator of the expected volume of claims based on clear and unmistakable error.

Since 1990, there have only been only some 1,260 formal reconsideration decisions by a single member or panel of members of the Board. There were about another 2,500 requests which were dismissed by letter without formal action by the Board. To date, according to the BVA, approximately 1,000 cases involving a claim of clear and unmistakable error are being held in abeyance. If this trend continues, we do not believe the Board's workload and response time will be seriously affected, despite the Board's prediction. From a workload perspective, reconsiderations take

considerably less time and effort for the Board than would a CUE claim with the potential of more appeals to the Court.

Mr. Chairman, while the Board of Veterans Appeals is the final appellate authority within the Department of Veterans Affairs, their decisions are subject to appellate review by the U.S. Court of Veterans Appeals. Since the Court was established in 1988, the Board has issued about 338,000 decisions of which approximately 145,400 were final denials or about forty-three percent. During this same time period, only 12,761 or twelve percent of these decisions have been appealed to the Court. In only a relatively small number of appeals has the Court granted the benefit sought. Of greater significance and importance is the fact that over the past ten years the Court has continued to find prejudicial error in well over fifty percent of all appeals considered. The precedents established in the resulting remand continue to profoundly effect the VA claims adjudication and appeals process and procedures as well as the workloads, timeliness, and resource needs of the Veterans Benefits Administration and the Board of Veterans Appeals.

We are particularly concerned by the upward rather than downward trend of the remand rate. For 1996, the remand rate was sixty six percent and 1997, it was sixty seven percent. This is essentially a snapshot of what had happened in the claim a year or two previously. It generally reflects an environment where VBA and BVA management policies and priorities were focused production and speed rather than quality, where the number of errors was covered up, and where there was no accountability for the quality of work performed. At this point, we believe it is too early to see the results of the recent quality improvement and quality assurance initiatives now underway as well as those planned for the future. We are hopeful the Court's remand rate will soon begin a long-term downward trend.

With respect to HR 3212 relating to the U.S. Court of Veterans Appeals, Mr. Chairman, The American Legion is supportive of the provision to allow staggered retirement of the judges. This was not a totally unforeseen problem, since five of the current judges were appointed within a one year time period and their terms by law will expire in the period 2004-2005. Clearly, there is a need to provide for the orderly appointment of new judges to continue the important work of the Court. We also believe there is a need to make the survivor benefits program for judges comparable to those of judges of other courts. We have no objections to the proposed change in the name of the Court. It will help eliminate the misperception that the Court is in anyway a part of the Department of Veterans.

Mr. Chairman, in conclusion, appellate workload and the resources needed by both VBA and BVA to support this activity are at unacceptably high levels. Fundamental problems relating to the quality of the decisions being made by the regional offices and the Board must be attacked directly and aggressively, if VA is to meet its obligation to its "customers" - the veterans, their families, and survivors, and its budgetary responsibilities. It remains to be seen if changes now underway and planned will result in the promised efficiencies and service improvements. The American Legion believes this Subcommittee's continued interest and oversight are essential to the success of these initiatives.

That concludes our statement.

WRITTEN COMMITTEE QUESTIONS AND THEIR RESPONSES

CONGRESSMAN EVANS TO UNITED STATES COURT OF VETERANS APPEALS

Follow-up questions for the Court of Veterans Appeals

Subcommittee on Benefits Hearing - June 10, 1998

1) Q: How many Board decisions were appealed to the Court of Veterans Appeals in FY97?

   A: In FY97, 2182 Board decisions were appealed to the Court and 47 petitions for extraordinary relief were filed, for a total of 2229 new cases.

2) Q: How many cases were decided by the Court in FY97? How many cases were decided by the Court on the merits in FY97? How many precedential decisions were rendered by the Court in FY97?

   A: In FY97, the Court terminated 1611 cases. Of those, 1118 were terminated on the merits. The Court issued 77 precedential decisions.

3) Q: How many Board decisions which were decided by the Court of Veterans Appeals in FY97 were affirmed? How many Board cases which were decided by the Court of Veterans Appeals in FY97 were remanded?

   A: In FY97, the Court affirmed 414 Board decisions, and remanded 657 in whole or part for prejudicial error in the Board's decision. (The figure for remands also includes the small number of reversals where, as a matter of law, the appellant is entitled to the relief sought.)

4) Q: Please provide a copy of the Court rule and/or instructions concerning expedited appeals.

   A: Rule 47, Expedited Consideration, of the Court's Rules of Practice and Procedure provides:

   (a) Motion and Order. On motion of a party for good cause shown, on written agreement of the parties, or on its own initiative, the Court may order that any matter before the Court be expedited.

   (b) Filing and Service of Papers. Expedited proceedings will be scheduled as directed by the Court. Unless otherwise ordered, the appellant's principal brief shall be served and filed within 25 days after the date of the Clerk's notice that the record on appeal has been filed. The Secretary's brief shall be served and filed within 15 days after service of the appellant's brief. Any reply brief shall be served and filed within 10 days after service of the Secretary's brief.

   (c) Form and Length of Briefs. Briefs filed under this rule must comply with Rules 28 and 32, except that principal briefs must be limited to 10 pages, reply briefs must be limited to five pages, and a table of authorities is not required.

   (d) Supplementation of the Transmitted Record. If expedited proceedings are ordered, any motion for supplementation of the record on appeal must be served and filed before the date on which the appellant's brief is due. See also Rule 11(b). Such supplementation does not extend the time for filing any brief.

Post-hearing Questions
Concerning the June 10, 1998 Hearing

for
Mr. Richard B. Standefer
Acting Chairman, Board of Veterans' Appeals
Department of Veterans Affairs

from
Hon. Lane Evans
Ranking Democratic Member
House Committee on Veterans' Affairs

1. What number and percentage of Board decisions in FY97 were appealed to the Court of Veterans Appeals?

Response: Because appeals of Board decisions are filed directly with the Court, 38 U.S.C. § 7266(a)(2), the Board does not directly track Board decisions appealed to the Court. The Court may have such statistics.

However, in its annual report for FY 1997 (*Attachment 1*), the Court of Veterans Appeals indicates that 2229 cases were filed with the Court in FY 1997. BVA decided 43,347 appeals in FY 1997. While not all of the Board appeals filed with the Court during FY 1997 were 1997 Board decisions (i.e., some earlier Board decisions were among those filed), and while some of the cases filed were not Board cases at all (EAJA applications, motions for extraordinary relief), the 2229 Court filings equate to 5.1 % of BVA's FY 1997 decision-making activity.

2. What number and percentage of Board decisions which were decided by the Court of Veterans Appeals in FY97 were affirmed? What number and percentage of Board cases which were decided by the Court of Veterans Appeals in FY97 were remanded?

Response: According to its annual report, the Court of Veterans Appeals disposed of 1,611 cases in FY 1997. Of those cases, 1,560 were Board decisions which had been appealed. We have attached a copy of that report.

The Court reported that, of those 1,560 appeals—

- 489—31%--were dismissed;
- 414—27%--were affirmed;
- 218—14%--were affirmed in part, reversed or vacated & remanded in part; and
- 439—28%--were reversed or vacated and remanded.

3. On average, how many reasons did the Court of Veterans Appeals give for the cases it remanded in FY97?

Response: Based upon analysis of information collected by the Board, each FY 1997 Court remand involved an average of 1.97 remand reasons.

4. What were the most common reasons which the Court of Veterans Appeals gave for remanding cases in FY97?

Response: As noted in our previous response, there typically is more than one reason for a Court remand. Based on our analysis of Court remands, the most common reasons for remand given by the Court in its decisions of FY 1997 were as follows:

Remand Reason	Percentage of Cases Containing Remand Reason
Inadequate Reasons or Bases	26.8%
Medical Examination	9.8%
Failure to Address Credibility of Evidence	8.6%
New Legislation/Regulation	8.2%
Failure to Apply Court Precedent	7.4%
Failure to Apply Law or Regulation	7.1%
Failure to Address Issues	6.7%

5. How long (in days) does it typically take for a case which has been remanded to a VA regional office to return to the Board? Is this consistent among the various VA regional offices?

Response: BVA records indicate that for cases returned to the Board during FY 1997 following remand development, an average of 538 days elapsed between the date of the originating remand decision and the date of BVA receipt. *Attachment 2* is a breakdown of BVA post-remand case receipts for FY 1997, detailing the number of post-remand cases received from each VA regional office and the average time elapsed between the dates of the originating remand decisions and the dates that the cases were received at BVA.

6. The language of 38 C.F.R. § 19.5 provides that "[t]he Board is not bound by Department manuals, circulars, or administrative issues." How has the Board interpreted this regulation in deciding cases?

Response: As provided by 38 U.S.C. § 7104(a) and (c), the Board is bound in its decisions by applicable statutes, the regulations of the Department, instructions of the Secretary, and the precedent opinions of the VA General Counsel. Consistent with this statutory mandate, 38 C.F.R. § 19.5 provides that the Board is not bound by Department manuals, circulars, or similar administrative issues. Inasmuch as Department manuals, such as the VA Adjudication Procedure Manual M21-1, contain the internal operating policies and methods pertaining to the administration of benefit programs by the particular department or staff office, and because such manuals are not promulgated in accordance with the notice and comment rulemaking procedures of the Administrative Procedure Act (APA), they may not constitute binding authority on the Board except in those circumstances in which a particular manual provision has been identified by the U.S. Court of Veterans Appeals or VA General Counsel as constituting a favorable, substantive rule. Accordingly, the Board, in deciding cases, has interpreted 38 C.F.R. § 19.5 as providing that it is not bound by Department manuals or circulars, except in those circumstances where a particular manual provision has been identified as constituting a binding, substantive rule that must be followed in all cases.

7. In *Cohen v. Brown*, 10 Vet. App. 128, 138-39 (1997), the Court of Veterans Appeals held that VA manual provisions are the equivalent of VA regulations and that "the veteran is entitled to have his case adjudicated under whichever regulatory or [m]anual ... provision would be more favorable to him in light of regulatory change ... while his case was on

appeal to the BVA." How has the Board implemented this holding in its decisions?

Response: In *Cohen*, the U.S. Court of Veterans Appeals (Court) reiterated its holding in an earlier decision, *Hayes v. Brown*, 5 Vet. App. 60, 67 (1993), that *a* particular VA manual provision concerning the adjudication of claims for service connection for post-traumatic stress disorder (PTSD) is the equivalent of a VA regulation. The Court has never held that *all* VA manual provisions are the equivalent of VA regulations.

Indeed, it is well established that provisions in internal agency manuals, circulars and similar issuances, which are intended to convey internal procedures and which are not issued pursuant to the agency's rule making authority, do not constitute binding substantive rules. *See Schweiker v. Hansen,* 450 U.S. 785, 789-90 (1981) (Social Security claims manual); *Capuano v. National Transp. Safety Bd.*, 843 F.2d 56, 58 (1st Cir. 1988) (FAA manual); *Horner v. Jeffrey*, 823 F.2d 1521, 1529-30 (Fed. Cir. 1987) (Federal Personnel Manual); *United States v. Fifty-Three (53) Eclectus Parrots,* 685 F.2d 1131, 1136 (9th Cir. 1982) (Customs Manual); *Rank v. Nimmo,* 677 F.2d 692, 698 (9th Cir.), *cert. denied,* 459 U.S. 907 (1982) (VA circulars and handbook); *First State Bank v. United States,* 599 F.2d 558, 564 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (FDIC manual); *Flynn v. Brown,* 6 Vet. App. 500, 504 (1994) (VA circular). As the United States Court of Appeals for the Ninth Circuit has stated, to hold such documents binding on the VA "would 'hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means of written directives.'" *Rank*, 677 F.2d at 698 (quoting *Chasse v. Chasen,* 595 F.2d 59, 65 (1st Cir. 1979) (Campbell, J. concurring)). This established principle of administrative law is subject to a limited exception, as acknowledged by the CVA, only when a particular provision establishes substantive rules, rather than merely interpretive rules or procedural instructions, beyond those contained in the applicable statutes and regulations.

In the particular facts of *Cohen*, the Department promulgated a regulation setting forth specific criteria for establishing service connection for PTSD. This regulation, 38 C.F.R. § 3.304(f), which was the first of its kind in the C.F.R. for PTSD, became effective on May 19, 1993. This regulation was not in effect and applicable when the veteran first took his appeal to the Board of Veterans' Appeals in 1991. However, the Court found that provisions of the VA Adjudication Procedure Manual, M21-1, which were in effect at the time of the veteran's appeal, had essentially identical requirements as those contained in the subsequently promulgated regulation. Accordingly, because the Court had earlier held in *Hayes* that the Manual M21-1 provisions in Part VI, paragraph 7.46 dealing with PTSD are substantive rules that are "the equivalent of [VA] [r]egulations", it concluded in *Cohen* that the adoption of the specific PTSD regulation in May 1993—38 C.F.R. § 3.304(f)—rendered moot the Manual M21-1 provisions regarding PTSD adjudications except where the Manual M21-1 is more favorable to the claimant.

This unremarkable conclusion is entirely consistent with the Court's opinion in *Kamas v. Derwinski*, 1 Vet. App. 308, 312-13 (1991), which held that "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to [the] appellant should ... apply unless Congress provided otherwise or permitted the Secretary ... to do otherwise and the Secretary did so." Consequently, for purposes of

adjudicating claims for service connection for PTSD, *Cohen* holds that the Board must take into consideration both 38 C.F.R. § 3.304(f) and any Manual M21-1 provisions dealing with PTSD that are more favorable to the claimant than the section 3.304(f) regulatory provision.

8. How has the Board reconciled the requirements of 38 C.F.R. § 19.5 and the *Cohen* requirements concerning manual provisions favorable to the veteran?

Response: As stated above in response to question number 7, the Court did *not* hold in *Cohen* that all VA manual provisions, whether or not they are more or less favorable to the appellant, are the equivalent of VA regulations. The CVA has recognized that "'not all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court.'" *Flynn v. Brown*, 6 Vet. App. 500, 504 (1994) (quoting *Rank v. Nimmo,* 677 F.2d 692, 698 (9th Cir.), *cert. denied,* 459 U.S. 907 (1982)). Rather, "in order for VA handbooks, circulars, and manuals to have the 'force and effect of law' they must 'prescribe substantive rules—not interpretive rules.'" *Buzinski v. Brown,* 6 Vet. App. 360, 369 (1994) (quoting *Rank,* 677 F.2d at 698). Hence, it appears that the holding in *Cohen* and the requirements of 38 C.F.R. § 19.5 are not inconsistent. In the relatively infrequent situation in which a manual provision has been held to be substantive in nature by the Court, the Board follows the precedent of the Court and treats the manual provision as having the force and effect of a regulation. Otherwise, the Board is not bound in its decisions by manual provisions. If it appears in a particular case that a manual provision may constitute a substantive rule, the Board may seek an opinion from the General Counsel, as it has done in the past (see VAOPGCPREC 7-92).

As set forth in 38 U.S.C. § 7104(a), the Board is required to decide all appeals "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." Further, 38 U.S.C. § 7104(c) more specifically provides that "[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." For purposes of reiterating and implementing these statutory provisions, the Secretary of Veterans Affairs has promulgated a regulation, 38 C.F.R. § 19.5, which provides as follows: "In the consideration of appeals, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues."

In view of the plain and unambiguous language of 38 U.S.C. § 7104(c), it is clear that the implementing regulation, 38 C.F.R. § 19.5, is fully consistent with this statutory provision. The "Department manuals" and other similar material referred to in section 19.5 are not within any of the enumerated categories set forth in section 7104(c), and therefore cannot be binding on the Board. Moreover, unlike the categories of binding authority set forth in the statute, each of which is binding not only on the Board but on the Department as a whole, "Department manuals" are intended to apply only to the specific component of VA which issued the manual. More specifically, "Department manuals" are manuals issued by specific components of VA, such as the Veterans Benefits Administration (VBA), for the purpose of communicating operating policies and procedures for carrying out provisions of statutes and regulations

administered by those components. The manuals are not intended to apply to persons outside the VA component issuing a particular manual—and the Board is an administration separate from VBA, 38 U.S.C. §§ 301(c)(3) and (5); 7101(a)--and their purpose is not to establish any substantive standards affecting rights and obligations. For example, the manual issued by the VBA, VA Adjudication Procedure Manual, M21-1, is supposed to contain only directions unique to that component and substantive requirements which are directly derived from applicable statutes, regulations, or precedent court or VA General Counsel opinions, each of which is binding on the Board in its own right.

Because VA manuals, by definition, are not supposed to contain substantive rules, the prohibition against the Board being bound by them in 38 C.F.R. § 19.5 is entirely consistent with the provisions of 38 U.S.C. § 7104(c). Moreover, there is no statutory authority allowing or providing for the issuance of substantive rules in Department manuals. Rather, the authority to issue rules and regulations affecting the rights of claimants is vested solely in the Secretary of Veterans Affairs pursuant to 38 U.S.C. § 501, and this authority has not been delegated. Further, pursuant to 38 U.S.C. § 501, promulgation of such substantive rules must be accomplished in accordance with the publication and notice-and-comment procedures of the Administrative Procedure Act (APA). As to what constitutes a "substantive" rule, as opposed to an "interpretive" rule exempt from APA notice and comment procedures, a substantive rule generally is one that has the force of law and narrowly limits agency discretion, or that effects a change in existing law or policy which in turn affects individual rights and obligations. In contrast, an interpretive rule is one that merely clarifies or explains an existing regulation or statute. VA O.G.C. Prec. Op. No. 7-92 (Mar. 17, 1992); *see also Fugere v. Derwinski*, 1 Vet. App. 103, 107 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992).

In *Fugere v. Derwinski*, 1 Vet. App. 103, 107-10 (1990), the Court of Veterans Appeals held, in light of the requirements of the APA, that substantive rules, those which have the force of law and narrowly limit administrative action, in the VA Adjudication Procedure Manual, M21-1, are the equivalent of Department regulations. As a result, the Court concluded in that case that the VA's attempted rescission of a manual provision determined to be a substantive rule, but without complying with APA rulemaking procedures, rendered such action unlawful and without legal effect. Subsequent to *Fugere*, the Court has held in a number of cases that *particular and discrete* rules found in the M21-1 manual are substantive and therefore must be followed and uniformly applied by VA in its claims adjudication process. *See, e.g., Montalvo v. Brown*, 7 Vet. App. 312, 314 (1995) (furnishing of improved pension election cards); *Grovhoug v. Brown*, 7 Vet. App. 209, 214-16 (1994) (outpatient dental treatment); *Beaty v. Brown*, 6 Vet. App. 532, 538 (1994) (definition of "substantially gainful employment" for purposes of adjudicating claims for a total disability rating based on individual unemployability under 38 C.F.R. § 4.16(a)); *Hayes v. Brown*, 4 Vet. App. 353, 360-61 (1993) (construing what evidence may be considered to be of record at time of death for accrued benefits purposes). In situations where a particular manual provision is adverse to an appellant, however, the Court noted in *Earle v. Brown*, 6 Vet. App. 558, 562 (1994), that it has been the Court's practice to "invalidat[e], on a case-by-case basis, those substantive provisions of the M21-1 Manual, adverse to an appellant, which have not been adopted in accordance with the APA."

It is important to note that the CVA's conclusion that certain manual provisions have the force and effect of regulations applies only to provisions which establish substantive rules and which, therefore, have been improperly placed in a manual rather than in a regulation. The VBA Adjudication Procedures Manual, M21-1, is designed to convey procedural requirements specific to the VBA and substantive requirements directly derived from existed statutes or other binding authorities, and is not intended to establish substantive rules. Accordingly, under 38 U.S.C. § 7104(a) and established principles of administrative law, the Board is not bound by the provisions which are properly included in the manual. The CVA has concluded that the Board is required to adhere only to specific substantive provisions which have been erroneously placed in the manual.

Thus, in those situations where the Court or the VA General Counsel has identified a particular, favorable manual provision as being substantive and binding on the Department, such as the PTSD service connection manual provisions in *Cohen*, the Board follows and complies with those manual provisions in deciding the cases before it. In all other situations, however, the Board adheres to the rule, set forth in 38 C.F.R. § 19.5, that the Board is not bound by Department manuals. Further, to the extent that VA manuals may purport to affect substantive rights other than as contemplated by statute and regulation, the Department is committed to removing such provisions from the manuals, and to preventing the issuance of such provisions in the future other than through appropriate rulemaking procedures.

9. Please provide copies of information provided to veterans and their representatives concerning proceedings before the Board and copies of notices informing veterans of their right to appeal decisions to the Court.

Response: We have attached copies of *Understanding the Appeals Process* (*Attachment 3)* and VA Form 4107, "Notice of Procedural and Appellate Rights" (*Attachment 4).* A copy of *Understanding the Appeals Process* is mailed to each appellant at the time his or her appeal is added to the Board's docket. An electronic version of this pamphlet is also available on VA's Internet home page. The VA Form 4107 is attached to each final decision made by the Board and mailed to appellants and their representatives.

Attachment 1

USCVA ANNUAL REPORT, FY 1997
(as of 10/21/97)

RECEIVED
DEC 0 2 1997
BVA (01C2)

2229 CASES FILED

73% PRO SE AT INITIAL FILING

1611 CASES TERMINATED

48% PRO SE AT TERMINATION

493 PROCEDURAL TERMINATIONS (31%):

230 DISMISSED FOR LACK OF JURISDICTION
121 DISMISSED FOR DEFAULT
138 DISMISSED VOLUNTARILY (INCLUDES SETTLEMENTS)
4 EXTRAORDINARY RELIEF DISMISSED

1118 MERITS TERMINATIONS (69%):

414 AFFIRMED
218 AFFIRMED IN PART, REVERSED OR VACATED & REMANDED IN PART
439 REVERSED OR VACATED AND REMANDED
0 EXTRAORDINARY RELIEF GRANTED
47 EXTRAORDINARY RELIEF DENIED

0 OTHER (FEE AGREEMENT CASES)

TIME FROM INITIAL FILING TO DISPOSITION: 349 DAYS *[See note]*

NONDISPOSITIVE ACTIONS:

5 EAJA APPLICATION GRANTED

3 EAJA APPLICATION DENIED

383 EAJA APPLICATION DISMISSED

10 ORAL ARGUMENTS

83 APPEALS TO CAFC

Note: Processing time for FY 97 not yet available; reported time is for cases terminated in Sep 97.

Attachment 2

Post-remand Appeals Received by BVA during FY 1997

VARO	Number of Post-Remand Receipts	Average of Remand Time (days)
San Juan, PR	143	1134
Washington, DC	70	900
Atlanta, GA	244	782
Anchorage, AK	3	775
Philadelphia, PA	106	735
New York, NY	114	713
Oakland, CA	56	697
Waco, TX	156	697
Indianapolis, IN	127	695
Chicago, IL	169	690
Los Angeles, CA	218	665
Montgomery, AL	447	665
Reno, NV	111	638
Boston, MA	127	632
Newark, NJ	114	632
Phoenix, AZ	92	631
San Diego, CA	93	624
New Orleans, LA	346	621
Seattle, WA	229	603
Albuquerque, NM	100	601
Muskogee, OK	168	589
Nashville, TN	159	584
Houston, TX	267	567
Pittsburgh, PA	102	565
St. Paul, MN	85	565
Portland, OR	197	560
Roanoke, VA	201	526
Little Rock, AR	223	521
Detroit, MI	196	514
Cheyenne, WY	21	507
St. Petersburg, FL	1400	498
Baltimore, MD	85	490
Cleveland, OH	324	487
Lincoln, NB	89	478
Ft. Harrison, MT	41	463
St. Louis, MO	236	462
Honolulu, HI	19	445
Jackson, MS	307	443
Denver, CO	133	442
Huntington, WV	204	428
Buffalo, NY	221	426
Louisville, KY	215	425
Salt Lake City, UT	32	418
Columbia, SC	375	417
Sioux Falls, SD	46	401
Des Moines, IA	58	392
Providence, RI	70	384
White River Junction, VT	41	384
Togus, ME	77	377
Wichita, KS	126	373
Milwaukee, WI	121	371
Hartford, CT	138	362
Winston-Salem, NC	366	361
Fargo, ND	31	354
Manchester, NH	39	348
Boise, ID	53	340
Wilmington, DE	19	331
Manila, PI	139	319
Grand Total	9689	538

Attachment 3

Department of Veterans Affairs

Board of Veterans' Appeals

Understanding the Appeal Process

PUTTING VETERANS FIRST

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20420

May 1998

Dear BVA Customer:

We have prepared this pamphlet to help you understand how the appeal process works and to provide answers to the most commonly asked questions about appeals in a logical, easy to understand way. It is not a "how to" guide for obtaining a favorable decision in an appeal. We could never write such a guide, because the facts involved in each case are different. The appeal *process*, however, is basically the same for most cases, so the more you know about that process, the better you will know what to expect.

An on-line version of this pamphlet can be found on the World Wide Web at

http://www.va.gov/appeals/index.htm

If you have any suggestions for how we can make this pamphlet better, please let us know.

Sincerely,

Richard B. Standefer
Acting Chairman

Who Should Read This Pamphlet?

Anyone who is not satisfied with the results of a claim for veterans' benefits (determined by a VA regional office, medical center, or other local VA office) should read this brochure. It is intended to explain the steps involved in filing an appeal and to serve as a reference for the terms and abbreviations used in the appeal process.

How Do I Find The Answers To My Questions?

There are several ways to use this pamphlet. You can simply read it from start to finish — it discusses the steps in the appeal process in the order they normally occur. The Table of Contents on the next page is arranged in the same order. The Index at the back of the pamphlet lists topics in alphabetical order using key topic words. Some common abbreviations are listed on page 28 and a glossary that explains many of the terms used in the pamphlet also begins on page 28.

Representation

This pamphlet discusses the appeal process in detail, but it should not be considered a complete checklist for filing an appeal. Think of it as "one more tool in the toolbox" for understanding the benefit claims system. While it is possible to "go it alone," most people have found the assistance and experience of appeals representatives to be very helpful. Many Veterans' Service Organizations as well as state and county veterans' departments will represent you free of charge. We strongly urge you to consider contacting one of these organizations to help you with your appeal.

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User Tips

The appeal process uses certain terms and phrases you should become familiar with in order to understand the process better. As you follow through this guide, refer to the glossary near the back of the pamphlet anytime you see an unfamiliar term or abbreviation.

For many items, we have provided the United States Code (U.S.C.) or Code of Federal Regulations (C.F.R.) number, followed by the section (§) number in an information box to the side of the text. If you would like to read the actual codes, you can find them in the legal section of your local library or on the World Wide Web (WWW). The "Internet Law Library" section of the U.S. House of Representatives WWW page (**http://www.house.gov/**) is an excellent source for the entire U.S. Code and Code of Federal Regulations. If you have a representative, the representative should also be able to help.

Words or phrases that are explained in the glossary or listed in the index are printed in *italic* type the first time they are used or discussed in detail in this pamphlet. For example, the first time "VA Form 9" is used, it is printed as *VA Form 9*.

The "Notes" section inside the back cover is a good place to jot down any questions you have for VA or for your representative, if you have one.

What is the Board of Veterans' Appeals?

The *Board of Veterans' Appeals* (also known as "*BVA*" or "the *Board*") is a part of VA, located in Washington, D.C. "*Members of the Board*" review benefit claims *determinations* made by local VA offices and issue decisions on appeals. These *Board members*, attorneys experienced in veterans' law and in reviewing benefit claims, are the only ones who can issue Board decisions. Staff attorneys, also trained in veterans' law, review the facts of each appeal and assist Board members.

38 U.S.C. § 7104

What is an appeal to the Board of Veterans' Appeals?

An *appeal* is a request for a review of a Department of Veterans Affairs (*VA*) *decision* on a *claim* for benefits issued by a VA *regional office* (*RO*) or VA medical facility.

Who can appeal?

Anyone who has filed a claim for benefits with VA and has received a determination from a local VA office is eligible to appeal to the Board of Veterans' Appeals. (See "What can't I appeal to the Board?" on page 7.)

When can I file an appeal?

You can *file* an appeal **up to one year from the date the VA regional office or medical center mails you its**

initial decision on your claim. After that, the decision is considered final and cannot be appealed unless the decision involves clear and unmistakable error by VA.

What can I appeal to the Board?

You can appeal any decision issued by a VA regional office on a claim for benefits. Some decisions, such as eligibility for medical treatment, issued by VA medical centers can also be appealed to the Board of Veterans' Appeals.

You can appeal a complete **denial** of your claim or you can appeal the **level** of benefit granted. For example, if you filed a claim for disability and the local office awarded you a 10% disability, but you feel you deserve more than 10%, you can appeal that determination to the Board.

What can't I appeal to the Board?

Decisions concerning the need for medical care or the type of medical treatment needed, such as a physician's decision to prescribe (or not to prescribe) a particular drug, or whether to order a specific type of treatment, are not within the Board's jurisdiction. (Occasionally, the Board receives an appeal of this nature, but since it doesn't have the legal authority to decide this type of case, the Board must dismiss it.)

38 C.F.R. § 20.101(b)
38 U.S.C. § 511(a)
38 U.S.C. § 7104(a)

How do I file an appeal?

No special form is required to begin the appeal process. All that is initially needed is a written statement that you disagree with a claim decision. This statement is known as the ***Notice of Disagreement,*** or ***NOD***. The Notice of Disagreement should state why you disagree with a regional office decision. For example, if you believe that the office issuing the decision overlooked or misunderstood some evidence, or misinterpreted the law, your NOD should address that. If you received a decision for more than one claim issue, your NOD needs to be specific about which issue or issues you wish to appeal.

While the NOD is all that is needed to begin the appeal process, you will eventually need to complete a *VA Form 9*, which is discussed on the next page.

Where do I file my appeal?

Normally, you file your appeal with the same VA office (regional office or medical facility) that issued the decision you are appealing, because that is where your *claims file* (also called a *claims folder*) is kept. However, if you have moved and your claims file is now maintained at a VA office other than the one where you previously filed, you should file your appeal at the new location, so that your appeal can be kept with your file.

What happens with the NOD?

When the local VA office reviews your Notice of Disagreement, it is possible that the local office will change its original decision.

If the local VA office does not change its decision and grant the benefit you claimed, it will prepare and mail to you a ***Statement of the Case*** (*SOC*), which includes a VA Form 9. (The VA Form 9 is discussed in the next section.) This SOC will summarize the evidence and applicable laws and regulations, and provide a discussion of the reasons for arriving at the decision.

What follows the Statement of the Case?

Within 60 days of the date when the local VA office mails you the Statement of the Case, you need to submit a ***Substantive Appeal.*** However, if the one year period from the date the VA regional office or medical center mailed you its original decision is later than this 60-day period, you have until that later date to file the Substantive Appeal. (See the box on the next page.)

To file a Substantive Appeal, simply fill out and submit a VA Form 9, which is attached to the Statement of the Case that the RO sends you. An important part of the VA Form 9 is the section used to request a *BVA hearing*. (Hearings are covered in more detail on pages 15 through 17.)

The VA Form 9 is very important to your appeal. On this form, you should make sure that you clearly state the benefit you are seeking and that you point out any mistakes you think VA made when it issued its decision. You should also identify anything in the Statement of the Case that you disagree with.

If you submit new information or evidence with your VA Form 9, the regional office will prepare a

Supplemental Statement of the Case. A Supplemental Statement of the Case (*SSOC*) is similar to the Statement of the Case, but addresses the new information or evidence you submitted. If you are not satisfied with the SSOC, you have 60 days from date when the SSOC is mailed to submit, in writing, what you disagree with.

What if I don't want BVA to examine a particular issue listed in the SOC or SSOC?

If, for some reason, you don't want BVA to examine an *issue* listed in the Statement of the Case or the Supplemental Statement of the Case, simply state (on the VA Form 9) that you are withdrawing that specific issue (or issues) from the appeal.

Can I get an extension of the date for filing?

You can ask for an extension of the 60-day period for filing a Substantive Appeal or the 60-day period following a Supplemental Statement of the Case by writing to the local VA office handling your appeal. You

Caution: Don't delay submitting the VA Form 9 to the local VA office. If you don't file the VA Form 9 on time, you could lose your right to appeal. Use the following to figure out when the VA Form 9 is due.

RO determination mailing date + 1 year

or

SOC + 60 days

Whichever date is later is the date when the **VA Form 9 must be received at the local VA office.**

should explain why you need the extra time to file (called "showing good cause").

38 U.S.C. § 7105(d)(3)
38 C.F.R. § 20.303

Do I need a lawyer or other representative to help me with my appeal?

You can represent yourself if you wish. However, about 90 percent of all people who appeal to the Board do obtain representation. Most *appellants* (about 85 percent) choose to be represented by *Veterans' Service Organizations* (*VSO*) or their state's veterans department.

Many VSOs have trained personnel who specialize in providing help with claims and appeals. VSOs do not charge for this service and do not require you to be a member of their organizations. Many state and county governments also have trained personnel in their veterans departments who can help. Your RO can provide a list of approved veterans' appeal *representatives* in your area.

You can hire a lawyer to represent you. There are strict guidelines about what a lawyer may charge for services, and restrictions on fees a lawyer may charge you for work performed before BVA issues its final decision.

In addition to the representatives and attorneys just discussed, some other agents are recognized by VA to represent appellants. Fill out a VA Form 21-22 to authorize a VSO to represent you, or a VA Form 22a to authorize an attorney or recognized agent to represent you. Your local VA office can provide these forms.

38 U.S.C. § 5904
38 C.F.R. part 20, subpart G

What kind of information do I need to include in my appeal?

If you've filed a completed VA Form 9, you are not required to submit any more paperwork. BVA will decide your appeal based on the same evidence used by the local office when it made its determination on your original claim, along with your VA Form 9 and the SOC (and the SSOC, if there is one). If, however, you have additional evidence such as records from recent medical treatments or evaluations that you feel make your case stronger, you can submit the evidence to the office holding your claims folder. (See "Where is my claims folder kept?" on page 17.) An appeal representative can also submit additional written information in support of your claim.

If, after considering the new evidence, the regional office still does not allow your claim, you will be provided a SSOC. The new evidence you submitted will be included in your claims folder and considered when the Board reviews your appeal.

As your Substantive Appeal (the completed VA Form 9) discusses specific issues in the Statement of the Case, you should be sure to include any evidence that supports your argument that the decision of the local VA office was wrong. (See "Why are some appeals remanded?" on page 21, and "What SHOULD I do?" and "What should I AVOID?" on pages 26 and 27.)

What happens to my VA Form 9?

Your VA Form 9 becomes part of your claims folder and is the basis for adding your appeal to BVA's *docket*.

What is the Board's docket?

The Board's docket is the record of all appeals awaiting BVA's review, listed in the order that appeals (VA Form 9) are received by the Department.

What is a docket number?

When an appeal is placed on the Board's docket, it is assigned the next higher number than the one received before it.

This is important because the Board reviews appeals in the order in which they were placed on the docket. The lower the *docket number*, the sooner the appeal will be reviewed.

38 U.S.C. § 7107
38 C.F.R. § 20.900(b)

How do I obtain the information needed to make my case as strong as possible?

In most instances, you can obtain civilian medical records and other non-government documents supporting your case by calling or writing directly to the person or office that keeps those records. VA regional office personnel and VSO representatives are experienced in locating many items that can support your case, such as service medical records, VA treatment records, and other government records. While VA has a duty to assist you in developing your case, it is a "two-way street" — you need to help identify the evidence that can prove your case.

How long does the appeal process take?

It is difficult to say just how long it will take from the time you file your appeal until you receive the Board's decision. As of the Spring of 1998, it took an average of about two years from the time an appeal was placed on the Board's docket until a BVA decision was issued.

Is there any way to have the Board decide my case more quickly?

If you believe your case should be decided sooner than others that were filed before yours, you can request to have your case *advanced on the docket.* To submit a *motion to advance on the docket,* write directly to the Board, explaining why your appeal should be moved ahead of the appeals of others who filed earlier than you.

Because most appeals involve some type of hardship, you need to show convincing proof of exceptional circumstances before your case can be advanced. Some examples of exceptional circumstances are terminal illness, danger of bankruptcy or foreclosure, or an error by VA that caused a significant delay in the docketing of an appeal. Over the years, BVA has granted fewer than 3 out of every 20 requests for advancement on the docket.

To file a motion to advance on the docket, send your request to:

Board of Veterans' Appeals (014)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

What is a personal hearing?

Basically, a personal *hearing* is a meeting between you (and your representative, if you have one) and an official from VA who will decide your case, during which you present testimony and other evidence supporting your case. There are two types of personal hearings: *Regional office hearings* (also called *RO hearings* or *local office hearings*) and BVA hearings.

As its name implies, a "local office hearing" is a meeting held at a local VA office between you and a "hearing officer" from the local office's staff. To arrange a local office hearing, you should contact your **local** VA office or your appeal representative as early in the appeal process as possible.

In addition to a local office hearing, you also have the right to present your case in person to a member of the Board. Appellants in most areas of the country can choose whether to hold this "BVA hearing" at the local VA regional office, called a *Travel Board hearing*, or at the BVA office in Washington, D.C. Some ROs are also equipped to hold BVA hearings by videoconference. Check with your regional office to see if a videoconferenced hearing is a possibility in your area.

When deciding where to hold a BVA hearing, please keep in mind that VA cannot pay for any of your expenses — such as lodging or travel — in connection with a hearing.

The VA Form 9 has a section for requesting a BVA hearing.

38 U.S.C. § 7105(a)
38 U.S.C. § 7107(d)(e)

The Form 9 is the usual way to request a BVA hearing, but is **not** used to request a local office hearing. However, if you didn't ask for a BVA hearing on the VA Form 9, you can still request one by writing directly to the Board. (This is subject to the "90-Day Rule," which is explained on pages 17-18.) If you want a BVA hearing, be sure you clearly state whether you want it held at the RO **or** at the Board's office in Washington, D.C. You cannot have a BVA hearing in both places.

When will my personal hearing be held?

When a hearing will be held depends on what type of hearing you requested and where you requested that it be held. Local office hearings are generally held as soon as they can be scheduled on the hearing officer's calendar.

The scheduling of Travel Board hearings — BVA hearings held at regional offices — is more complicated, since Board members must travel from Washington, D.C., to regional offices to conduct the hearings. (Travel Board hearings may not be available at regional offices located near Washington, D.C.) Factors that affect when Travel Board hearings can be scheduled include the docket number, the total number of requests for hearings at a particular regional office, how soon the Board will be able to review the cases associated with the hearings, and the resources, such as travel funds, available to the Board.

Because videoconferenced hearings do not involve travel by Board members, they are less complicated to arrange and can be scheduled more frequently than Travel Board hearings.

38 U.S.C. § 7107
38 C.F.R. § 20.702
38 C.F.R. § 20.704

Hearings held at the Board's offices in Washington, D.C., will be scheduled for a time close to when BVA will consider the case — ideally about three months before the case is reviewed.

Where is my claims folder kept?

If you do not request a BVA hearing, your claims folder will stay at the local VA office until it is transferred to BVA shortly before the Board begins its review.

If you request a Travel Board hearing, your claims folder will stay at the local VA office until the hearing is completed and will then be transferred to the Board.

If you request a videoconferenced BVA hearing or a hearing held at the Board's office in Washington, D.C., your claims folder will stay at the local VA office until shortly before the hearing is held. It will be transferred to BVA in time for your hearing and the Board's review.

What is the 90-Day Rule?

When your claims folder is transferred from the local VA office to Washington, D.C., the local VA office will send you a letter letting you know that you have **90 days** remaining **(from the date of that letter)** during which you can add more evidence to your file, request a hearing, or select (or change) your representative.

The Board can accept items submitted within the 90-day period. However, the Board cannot accept items submitted

38 U.S.C. § 7104
38 U.S.C. § 7105
38 C.F.R. § 20.1304(

after the 90-day period has expired, unless you also submit a written explanation (called a "*motion*") of why the item is late and showing why the Board should accept it (called "showing good cause"). A motion to accept items after the 90-day period will be reviewed by a Board member who will issue a ruling either allowing or denying the motion.

How do I find out the status of my appeal?

To check on the status of your appeal, you should call the office where your claims folder is located. Your claims folder will remain at the office where you filed your appeal until about three to four months before the Board reviews it, after which it is transferred to the Board's office in Washington, D.C. VA will notify you in writing when that is about to happen. (See "What is the 90 Day Rule?" on page 17.) You will also be notified in writing when your file is received at the Board. Until your file is transferred to the Board, your local VA office is the best place to get information about your appeal.

If your file is at the Board, you can call (202) 565-5436 to check on its status. Board employees cannot discuss the legal merits of a case or predict the outcome of an appeal. Also, because every case is different, it is impossible to give you a precise estimate of when your appeal will be decided.

To learn the current status of your appeal, call:

(202) 565-5436

Be sure to have your claim number handy.

What happens to my appeal when it gets to the Board?

The Board will notify you in writing when it receives your appeal from the local VA office. The Board examines the claims folder for completeness and provides your representative (if you have one) with an opportunity to submit additional written arguments on your behalf. Your case is then assigned to a Board member for review. (If you requested a "BVA hearing," the Board member assigned to your case will conduct the hearing before reaching a decision.)

When the docket number for your appeal is reached, your file will be examined by a Board member and a staff attorney who will check for completeness, review all your evidence and arguments, as well as the regional office's SOC (and SSOC, if there is one), the transcript of your hearing (if you had one), the statement of your representative (if you have one), and any other information included in the claims folder. The staff attorney, at the direction of the Board member, may also conduct additional research and prepare recommendations for the Board member's review.

Before a decision is reached, the Board member will thoroughly examine all of the material in the claims folder along with the recommendations prepared by the staff attorney. The Board member will then issue a decision.

How will I be notified of the Board's decision?

Your decision will be mailed to the home address that the Board has on file for you, so it is extremely important that you keep VA informed of your correct address.

> If you move, or get a new home or work phone number, you should notify the office where your claims folder is located. (See "Where is my claims folder kept?" on page 17.)

BVA tries to make its decisions as understandable as possible. However, as legal documents, decisions may contain information that can be confusing, such as references to laws and court cases. Many BVA decisions also contain detailed medical discussions. If your appeal is denied, the Board will send you a "Notice of Appellate Rights" that describes additional actions you can take.

What is a remand?

A *remand* is an appeal that is returned to the local VA office, usually to perform some additional development of the case. After performing the additional work, the RO may issue a new decision. If a claim is still denied, the case is returned to the Board for a final decision. The case keeps its original place on BVA's docket, so it is reviewed soon after it is returned to the Board.

Depending on why your case was remanded, the RO may provide you with a Supplemental Statement of the Case (SSOC). You have 60 days from the date when the local VA office mails you an SSOC to comment on it.

Why are some cases remanded?

Some cases are remanded for reasons you can't control, such as new rulings by the *United States Court of Veterans Appeals* that require the Board to return them for the RO's review or some other action. However, some remands might be avoided if you do — or don't do — certain things.

The "What SHOULD I do?" and "What should I AVOID?" sections on pages 26 and 27 are based on the many years of experience of Board members and other BVA employees. These lists do not include every possible situation, but they do include the most frequent "do's and don'ts" and should prove helpful as you prepare your case.

What if I disagree with the Board's decision?

If you are not satisfied with the Board's decision, you can appeal to the United States Court of Veterans Appeals (the Court). The Court is an independent court that is not part of the Department of Veterans Affairs.

Normally, to appeal a BVA decision, you must file the Notice of Appeal with the Court within 120 days from the date when the Board's decision is mailed.

To appeal a Board decision to the Court, you must **file an original Notice of Appeal directly with the Court** at:

United States Court of Veterans Appeals
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004

If you filed a *motion to reconsider* with the Board within the 120 day time frame and that motion was denied, you have an additional 120 days to file the Notice of Appeal with the Court. This 120 day period begins on the date the Board mails you a letter notifying you that it has denied your motion to reconsider. A "Notice of Appellate Rights" will be mailed to you if the Board denies your motion to reconsider your appeal. (Motions to reconsider are also discussed in "What else can I do if I disagree with the Board's decision?" on the next page.)

If you appeal to the Court, you should also **file a copy** of the Notice of Appeal **with the VA General Counsel** at the following address:

Office of the General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

The original Notice of Appeal you file with the Court is the only document that protects your right to appeal a BVA decision. The copy sent to VA's General Counsel does not protect that right or serve as your official filing.

To obtain more specific information about the Notice of Appeal, the methods for filing with the Court, Court

The first day of the 120-days you have to file an appeal to the Court of Veterans Appeals is the day the Board's decision is postmarked, not the day the decision is signed. This is different than the "90-Day Rule" for submitting new evidence discussed on page 17.

filing fees, and other matters covered by the Court's rules, you should contact the Court directly at the Indiana Avenue address given on page 21. You may also contact the Court by telephone at 1-800-869-8654.

What else can I do if I disagree with a Board decision?

If you can demonstrate that the Board made an obvious error of fact or law in its decision, you can file a written "motion to reconsider" your appeal. If you were represented at the time of the decision, you may wish to consult with your representative for advice about whether you should file a motion (and for assistance in preparing one). If you do file a motion to reconsider, it should be sent directly to the Board, not to your local VA office. A motion to reconsider should not be submitted simply because you disagree with BVA's decision — you need to show that the Board made a mistake and that the Board's decision would have been different if the mistake had not been made.

38 U.S.C. § 7103
38 C.F.R. § 20.1000
38 C.F.R. § 20.1001

If you have "new and material evidence," you can request that your case be re-opened. To be considered "new and material," the evidence you submit must be information related to your case that was not included in the claims folder when your case was decided.

38 U.S.C. § 5108
38 U.S.C. § 7104(b)
38 C.F.R. § 20.1105

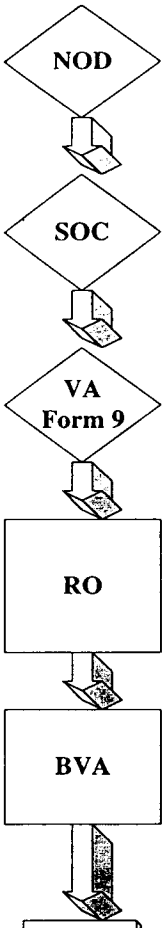
To re-open an appeal, you need to submit your new evidence directly to the local VA office that handled your claim.

What happens to an appeal if the appellant dies before a decision is issued?

According to the law, the death of an appellant generally ends the appellant's appeal. So, if an appellant dies, the Board normally dismisses the appeal without issuing a decision. The rights of a deceased appellant's survivors are not affected by this action. Survivors may still file a claim at the RO for any benefits to which they may be entitled.

38 U.S.C. § 7104(a)
38 C.F.R. § 20.1302

The Appeal Process



Notice of Disagreement
RO/Medical Center grants or denies benefits claim

Statement of the Case
Appellant receives summary of evidence and reasons for VA's denial of benefits
(A "Supplemental Statement of the Case" (SSOC) will be provided by the RO if an appellant submits new information or evidence with the VA Form 9, below.)

Substantive Appeal
Appellant files VA Form 9 within 60 days of SOC or within 1 year from date of local VA office decision

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RO:
- adds appeal to BVA's docket
- holds claims folder RO until called for by BVA
- notifies appellant when 90 days remain for submitting additional evidence
- sends claims folder to BVA

BVA:
- calls for claims folder from RO when ready for active review
- conducts hearing, if requested (Travel Board hearing will be held at RO, if requested)
- reviews appeal
- issues decision (grant/remand/deny)

BVA Grants Appeal or **BVA Remands Appeal** or **BVA Denies Appeal**

BVA Remands Appeal
Appeal returned to RO for development, decision, and possible return to BVA

BVA Denies Appeal
Appellant has 120 days to file appeal to Court of Veterans Appeals

What *SHOULD* I do?

If you intend to appeal:

- ***Do*** consider having an appeal representative assist you.

- ***Do*** file your NOD and VA Form 9 as soon as possible. (Because so many appeals are filed, delaying could add months to your wait for the Board's decision.)

- ***Do*** be as specific as possible when identifying the issue or issues you want the Board to consider.

- ***Do*** be specific when identifying sources of evidence you want VA to obtain. For example, provide the full names and addresses of physicians who treated you, when they treated you, and for what they treated you.

- ***Do*** keep VA informed of your current address, phone number, and number of dependents.

- ***Do*** be aware that clinical treatment records are generally more helpful than just a statement from a physician.

- ***Do*** be clear (on your VA Form 9) about whether or not you want a BVA hearing and where you want it held. (See pages 15 through 17.)

- ***Do*** provide all the evidence you can that supports your claim, including additional evidence or information requested by VA.

- ***Do*** include your *claim number* on any correspondence you send to VA and have it ready if you call.

What should I *AVOID?*

- ***Don't*** try to "go it alone." Consider getting a representative to assist you.

- ***Don't*** submit material if it doesn't have anything to do with your claim. This will only slow down the process.

- ***Don't*** use the VA Form 9 to raise issues (new claims) for the first time. The VA Form 9 is only used to appeal decisions on previously submitted claims.

- ***Don't*** use the VA Form 9 to request a local office hearing.

- ***Don't*** raise additional issues for the Board to consider late in the appeal process, especially after your claims folder has been sent to the Board in Washington, D.C. This may cause your case to be sent back to the RO for additional work there and could result in a longer wait for a BVA decision.

- ***Don't*** submit evidence directly to the Board unless you include a written or typed statement saying that you waive consideration by the RO and clearly indicating that you want the Board to review the evidence even though the RO has not seen it. If you submit evidence directly to the Board without such a waiver, the case may be remanded to the RO for review and could result in still more delays.

- ***Don't*** submit a last minute request for a hearing or a last minute change to the type or location of a hearing unless it is unavoidable. This almost always results in a delay in getting a final decision.

- ***Don't*** miss a scheduled VA examination or hearing.

Abbreviations

The following abbreviations are used in this brochure. Complete definitions of the terms are given in the Glossary.

AOJ Agency of Original Jurisdiction

BVA Board of Veterans' Appeals

RO Regional Office

NOD Notice of Disagreement

SOC Statement of the Case

SSOC Supplemental Statement of the Case

VA The Department of Veterans Affairs

VSO Veterans' Service Organization

Glossary

This glossary contains many of the terms commonly used in the appeal process. 38 U.S.C. § 101 also defines many claim and appeal terms.

Advance on the Docket -- A change in the order in which an appeal is reviewed and decided — from the date when it would normally occur to an earlier date.

Appeal -- A request for a review of an AOJ determination on a claim.

Appellant -- An individual who has appealed an AOJ claim determination.

Agency of Original Jurisdiction -- The office where a claim originates.

Glossary

Board -- The Board of Veterans' Appeals.

Board of Veterans' Appeals -- The part of VA that reviews benefit claims appeals and that issues decisions on those appeals.

Board Member -- See Member of the Board.

BVA Hearing -- A personal hearing, held at the BVA office in Washington, D.C., or at a regional office, that is conducted by a member of the Board. These hearings can be held by videoconference from some regional offices. Also see Travel Board Hearing.

Claim -- A request for veterans' benefits.

Claim Number -- A number assigned by VA that identifies a person who has filed a claim; often called a "C-number."

Claims File -- Same as claims folder.

Claims Folder -- The file containing all documents concerning a veteran's claim or appeal.

Court of Veterans Appeals -- See United States Court of Veterans Appeals.

Decision -- The final product of BVA's review of an appeal. Possible decisions are to grant or deny the benefit or benefits claimed, or to remand the case back to the AOJ for additional action.

Glossary

Determination -- A decision on a claim made at the AOJ.

Docket -- A listing of appeals that have been filed with BVA. Appeals are listed in numerical order, called docket number order, based on when a VA Form 9 is received by VA.

Docket Number -- The number assigned to an appeal when a VA Form 9 is received by VA. By law, cases are reviewed by the Board in docket number order.

File -- To submit written material.

Hearing -- A meeting, similar to an interview, between an appellant and an official from VA who will decide an appellant's case, during which testimony and other evidence supporting the case is presented. There are two types of personal hearings: Regional office hearings (also called local office hearings) and BVA hearings.

Issue -- A benefit sought on a claim or an appeal. For example, if an appeal seeks a decision on three different matters, the appeal is said to contain three issues.

Local Office Hearing -- See Regional Office Hearing.

Member of the Board -- An attorney, appointed by the Secretary of Veterans Affairs and approved by the President, who decides veterans' benefit appeals.

Motion -- A legal term used to describe a request that some specific action be taken.

Glossary

Motion to Advance on the Docket -- A request that BVA review and decide an appeal sooner than when it normally would based on the appeal's docket number order.

Motion to Reconsider -- A request for BVA to review its decision on an appeal.

Notice of Disagreement -- A written statement expressing dissatisfaction or disagreement with a local VA office's determination on a benefit claim that must be filed within one year of the date of the regional office's decision.

Regional Office -- A local VA office; there are 58 VA regional offices throughout the U.S. and its territories.

Regional Office Hearing -- A personal hearing conducted by an RO officer. A regional office hearing may be conducted in addition to a BVA hearing.

Remand -- An appeal returned to the regional office or medical facility where the claim originated.

Representative -- Someone familiar with the benefit claim process who assists claimants in the preparation and presentation of an appeal. Most representatives are Veterans' Service Organization employees who specialize in veterans' benefit claims. Most states, commonwealths, and territories also have experienced representatives to assist veterans. Other individuals, such as lawyers, may also serve as appeal representatives.

RO Hearing -- See Regional Office Hearing.

Glossary

Statement of the Case -- Prepared by the AOJ, this is a summary of the evidence considered, as well as a listing of the laws and regulations used in deciding a benefit claim. It also provides information on the right to appeal an RO's decision to BVA.

Substantive Appeal -- A completed VA Form 9.

Supplemental Statement of the Case -- A summary, similar to an SOC, that VA prepares if a VA Form 9 contains a new issue or presents new evidence and the benefit is still denied. A Supplemental Statement of the Case will also be provided after an appeal is returned (remanded) to the RO by the Board for new or additional action.

Travel Board Hearing -- A personal hearing conducted at a VA regional office by a member of the Board.

United States Court of Veterans Appeals -- An independent court that reviews appeals of BVA decisions.

VA Form 9 -- This form, which accompanies the SOC, formally initiates the appeal process. The "Form 9" must be completed and turned in to the RO within 60 days from the time period shown on page 10.

Veterans' Service Organization -- An organization that represents the interests of veterans. Most Veterans' Service Organizations have specific membership criteria, although membership is not usually required to obtain assistance with benefit claims or appeals.

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Words such as "appeal" that appear on the majority of the pages of this pamphlet are not listed in this index.

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How Can We Make This Pamphlet Better?

This pamphlet was produced by the Board of Veterans' Appeals at the request of veterans. If it doesn't help — or if it could be better — please let us know how we can improve it.

Send your comments to:

Board of Veterans' Appeals (01E)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Department of Veterans Affairs
Board of Veterans' Appeals
Washington, DC 20420

Understanding the Appeal Process
(VA Pamphlet 01-98-1)
May 1998
Depot Stock No. P92422

Attachment 4

Department of Veterans Affairs

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

IF YOU DO NOT AGREE WITH THIS ACTION

We have based our determination on the evidence of record and the applicable law. If you do not agree with the action we have taken, you have two choices. (1) You may reopen your claim by sending VA new and material evidence which we have not considered. (2) You may appeal to the Board of Veterans' Appeals (BVA).

REOPENING YOUR CLAIM

NEW EVIDENCE. You may give us evidence we do not have to strengthen your claim. Testimony may be that kind of evidence. To have a hearing before regional office personnel, see the instructions below. It is in your interest to send us any new evidence as soon as possible. We will consider it and let you know whether it changes our determination. You may also submit additional evidence, with some time limitations, if you appeal to the BVA.

HEARINGS BEFORE REGIONAL OFFICE PERSONNEL. We do not require you to have a hearing. You may testify in your own behalf before regional office personnel. You may also bring witnesses. To request a hearing before regional office personnel, send a letter to this office. We will arrange a time and place for the hearing. You can request a hearing before regional office personnel at any time. VA will furnish the hearing room, provide hearing officials and make a transcript of the hearing. The transcript will be placed in your claims folder. Regional office personnel will decide, based on the testimony and other evidence, whether your claim is successfully reopened and whether it can be granted. If your claim remains denied, you may appeal to the BVA. The record sent to the BVA will include the transcript of the hearing. If you appeal our decision, you may also request a hearing before the BVA. See Your Appellate Rights below. You may have a hearing before both regional office personnel and the BVA.

YOUR APPELLATE RIGHTS

This notice summarizes your procedural and appellate rights. For complete information, refer to the Rules of Practice of the Board of Veterans' Appeals (38 CFR Part 20).

APPEAL OF THIS DETERMINATION. You may appeal our determination to the BVA. To appeal, send this office a Notice of Disagreement within 1 year from the date of the letter which accompanies this form. A Notice of Disagreement is a letter telling this office that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. After you have filed a Notice of Disagreement, we will send you a Statement of the Case containing the facts, the applicable laws and regulations, and the reasons for our determination.

HEARINGS. You may still have a hearing before regional office personnel even after you file a Notice of Disagreement. If you want a hearing before regional office personnel, see the instructions above. In addition, you may have a hearing before the BVA after you appeal the determination contained in the letter which accompanies this form. The BVA does not require a hearing. You may present evidence and argument, and bring witnesses. The testimony will be a part of the record. VA will set the time and date of the hearing, provide the hearing room and hearing officials, and record the hearing. VA cannot pay any other expenses of a hearing. The BVA holds hearings in Washington, D.C., or at a VA regional office. If you request a hearing before the BVA in Washington, D.C., the BVA will tell you the time and date of the hearing. To request a hearing before the BVA at a regional office, write to this office. We fill these requests in the order of receipt. This office can tell you the expected waiting period for a BVA hearing at this office.

REPRESENTATION. An accredited representative of a recognized service organization may represent you without charge. An agent or attorney, such as a legal aid attorney or one in private practice, may also represent you. VA cannot pay fees of agents or attorneys.

ATTORNEY OR AGENT FEE LIMITATION. Except in loan cases, no fee may be charged, allowed, or paid for services provided by agents or attorneys before the BVA first makes a final decision in your claim. After the first final BVA decision in your claim, an attorney or accredited agent may charge you a fee under certain circumstances for representing you before VA, including the BVA, or the United States Court of Veterans Appeals. An attorney or agent may charge you a reasonable fee in writing in connection with any proceeding in a case arising out of a loan made, guaranteed, or insured under chapter 37 of title 38, United States Code for services provided after October 9, 1992. For more information, refer to Section 5904, Title 38, United States Code. If an attorney or accredited agent represents you before VA, a copy of any agreement between you and the attorney or accredited agent about the payment of the attorney's or agent's fees must be filed at the following address: Counsel to the Chairman (01C3), Board of Veterans' Appeals, 810 Vermont Avenue, N.W., Washington, D.C. 20420.

APPEAL OF BVA DECISION. You may appeal a final BVA decision to the United States Court of Veterans Appeals (the Court). You must file a Notice of Appeal with the Clerk of the Court within 120 days from the date on which the BVA mailed the notice of the BVA decision.

Congressman Evans to Paralyzed Veterans of America

House Committee on Veterans' Affairs Subcommittee on Benefits Hearing

June 10, 1998

Follow-Up Questions for VSOs

Question

1) In Cohen v. Brown, 10 Vet. App. 128, 139 (1997), the Court of Veterans' Appeals held that VA manual provisions are the equivalent of VA regulations and that "the veteran is entitled to have his case adjudicated under whichever regulatory or [m]annual . . . provision would be more favorable to him in light of regulatory change . . . while his case was on appeal to the BVA." In your experience, how has the Board of Veterans' Appeals complied with this holding in its decisions?

Answer – Paralyzed Veterans of America (PVA)

1) It is our experience that there has been an appropriate level of compliance with the holding of the Court of Veterans' Appeals in Cohen on both increased evaluation and service-connection issues. The vast majority of PVA cases being considered in light of the Cohen decision relate to Post-Traumatic-Stress-Disorder (PTSD). The Board, in general, is remanding cases which were adjudicated only under the old psychiatric rating criteria when the question is one of increased evaluation. In cases where PTSD is being alleged as service-connected, the Board, in most instances, has also remanded where there is a *bona fide* diagnosis of PTSD of record and there is a question as to the adequacy of a stressor. This is especially true of those cases at the local VA level that have not been fully developed or when the alleged stressor was held by a rating personnel not to be of such severity as to present evidence of a valid stressor. The rating criteria amendments, which went into effect in November, 1996, liberalized the criteria for determining the adequacy of a stressor. When there is a diagnosis of PTSD of record, and the local VA office has denied the adequacy of a stressor, the Board has remanded for adequate reasons and bases since the question as to adequacy is a medical determination outside the realm of a rating specialist's expertise.

July 10, 1998

The Honorable Lane Evans
United States House of Representatives
2335 Rayburn House Office Building
Washington, DC 20515-1317

Dear Representative Evans:

Below, I have provided DAV's answer to your follow-up question from the June 10, 1998, oversight hearing on the operations of the Board of Veterans' Appeals and the Court of Veterans Appeals.

> ***Question***: In *Cohen v. Brown*, 10 Vet.App. 128, 139 (1997), the Court of Veterans Appeals held that VA manual provisions are the equivalent of VA regulations and that "the veteran is entitled to have his case adjudicated under whichever regulatory or [m]anual . . . provision would be more favorable to him in light of regulatory change . . . while his case was on appeal to the BVA." In your experience, how has the Board of Veterans' Appeals complied with this holding in its decisons?
>
> ***Answer***: No BVA cases have come to our attention which involve this precise application of the M21-1 since the Court's holding in *Cohen*. However, we do know that the Board fails to follow M21-1 provisions, as evidenced by decisions of the Court enforcing manual provisions in cases where they were not followed by BVA.

Thank you for your interest in this issue. Please let us know if we can provide any additional information.

Sincerely,

RICK SURRATT
Assistant National Legislative Director

In *Cohen v. Brown*, 10 Vet.App. 128, 139 (1997), the Court of Veterans Appeals held that VA manual provisions are the equivalent of VA regulations and that "the veteran is entitled to have his case adjudicated under whichever regulatory or [m]anual ... provision would be more favorable to him in light of regulatory change ... while his case was on appeal to the BVA." In your experience, how has the Board of Veterans' Appeals complied with this holding in its decisions?

We have noticed very minimal cases at the Board of Veterans' Appeals addressing or citing the *Cohen v. Brown* (1997) holding regarding "instructions" to apply a more beneficial manual or regulatory provision in a case. In fact, very little reference to the Manual M21-1 is shown in BVA decisions, with the exception of some Post-traumatic Stress Disorder and Individual Unemployability claims (M21-1, Part VI, paragraphs 7.46 and 7.53), most notably when a remand is directed for additional development.

But, more importantly, the question is misleading in the selective citation to *Cohen v. Brown* where one can read as implying equivalency of VA "regulations" (in this case, M21-1 with Title 38 Code of Federal Regulations). The court actually stated that only in reference to a specific section (paragraph 7.46, as pertaining to a specific claim for Post-traumatic Stress Disorder) of the M21-1 and not the entire manual. A continued reading of the court's analysis in that section of the *Cohen* decision certainly reinforces previous court findings of an inequity between the two documents (as it should be): "Where the Manual M21-1 imposes requirements not in the regulation that are unfavorable to a claimant, those additional requirements may not be applied against the claimant ... [t]hey are not for further consideration and should not be used ... [w]here the Manual 21-1 and the regulation [38 C.F.R.] overlap, the Manual 21-1 is irrelevant ... [i]n view of these principles, the Court generally will discuss the Manual M21-1 ... only where it might be read as more favorable to the veteran." (Emphasis added.) *Cohen v. Brown*, 10 Vet.App. 139 (1997). (A precedent analogy is in *Hayes v. Brown*, 5 Vet.App. 67 (1993).)

We view the M21-1 as an "administrative supplement" to the Title 38 Code of Federal Regulations. The former does not carry "force of law" as the latter. Nor, should it. Redefining all the administrative instructions contained in M21-1 into regulations will make too cumbersome and unwieldy the C.F.R.

The description of M21-1 by the court in *Cohen* is fully appropriate. We are fully satisfied with the current inferior status of M21-1 to the C.F.R.

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