VARIANCES IN DISABILITY COMPENSATION CLAIMS DECISIONS MADE BY VA REGIONAL OFFICES; POST-TRAUMATIC STRESS DISORDER CLAIMS REVIEW; AND UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISION ALLEN V. PRINCIPI

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

OCTOBER 20, 2005

Printed for the use of the Committee on Veterans' Affairs

Serial No. 109-26

24-078.PDF

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

COMMITTEE ON VETERANS' AFFAIRS

STEVE BUYER, *Indiana, Chairman*

MICHAEL BILIRAKIS, *Florida*
TERRY EVERETT, *Alabama*
CLIFF STEARNS, *Florida*
DAN BURTON, *Indiana*
JERRY MORAN, KANSAS
RICHARD H. BAKER, *Louisiana*
HENRY E. BROWN, JR., *South Carolina*
JEFF MILLER, *Florida*
JOHN BOOZMAN, *Arkansas*
JEB BRADLEY, *New Hampshire*
GINNY BROWN-WAITE, *Florida*
MICHAEL R. TURNER, *Ohio*

LANE EVANS, *Illinois, Ranking*
BOB FILNER, *California*
LUIS V. GUTIERREZ, *Illinois*
CORRINE BROWN, *Florida*
VIC SNYDER, *Arkansas*
MICHAEL H. MICHAUD, *Maine*
STEPHANIE HERSETH, *South Dakota*
TED STRICKLAND, *Ohio*
DARLENE HOOLEY, *Oregon*
SILVESTRE REYES, *Texas*
SHELLEY BERKLEY, *Nevada*
TOM UDALL, *New Mexico*

JAMES M. LARIVIERE, *Staff Director*

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

JEFF MILLER, *Florida, Chairman*
JERRY MORAN, *Kansas*
JEB BRADLEY, *New Hampshire, Vice Chairman*
GINNY BROWN-WAITE, *Florida*

SHELLEY BERKLEY, *Nevada, Ranking*
TOM UDALL, *New Mexico*
LANE EVANS, *Illinois*

PAIGE MCMANUS, *Subcommittee Staff Director*

CONTENTS

OCTOBER 20, 2005

	Page
Variances in Disability Compensation Claims Decisions Made by VA Regional Offices; Post-Traumatic Stress Disorder Claims Review; and United States Court of Appeals for the Federal Circuit Decision Allen V. Principi	1

OPENING STATEMENTS

Hon. Jeb Bradley	1
Prepared statement of Mr. Bradley	44
Hon. Shelley Berkley, Ranking Democratic Member	2
Prepared statement of Ms. Berkley	46
Hon. Tom Udall	4
Prepared statement of Mr. Udall	50
Hon. Lane Evans	6
Prepared statement of Mr. Evans	57
Hon. Ginny Brown-Waite	48

WITNESSES

Wooditch, Jon A., Acting Inspector General, Department of Veterans Affairs	7
Prepared statement of Mr. Wooditch	58
Bascetta, Cynthia A., Director, Education, Workforce, and Income Security Issues, Government Accountability Office	9
Prepared statement of Ms. Bascetta	66
Garcia, John M., Secretary, New Mexico Department of Veterans Services	22
Prepared statement of Mr. Garcia	79
Brown, Steven H., M.D., Director, Compensation and Pension Examination Program, Department of Veterans Affairs	32
Prepared statement of Dr. Brown	86
Aument, Ronald R., Deputy Under Secretary for Benefits, Department of Veterans Affairs	35
Prepared statement of Mr. Aument	91

STATEMENTS FOR THE RECORD

Gaytan, Peter S., Director, Veterans Affairs and Rehabilitation Division, The American Legion 101
Surratt, Rick, Deputy National Legislative Director, Disabled American Veterans 112
Paralyzed Veterans of America 122
Kinderman, Quentin, Deputy Director, National Legislative Service, Veterans of Foreign Wars of the United States 132
Skwierczynski, Witold, President, National Council of SSA Field Operations Locals, American Federation of Government Employees, AFL-CIO 140

INFORMATION FOR THE RECORD

Letter dated October 13, 2005 from Ranking Member Lane Evans, House Committee on Veterans' Affairs and Ranking Member Daniel Akaka, Senate Committee on Veterans' Affairs to Secretary Jim Nicholson 151
Department of Veterans Affairs Memorandum dated May 2, 2005, regarding the Review of Awards of Total Disability Rating for PTSD 153
Followup from Mr. John Garcia to question asked by Chairman Miller during the hearing, dated November 21, 2005 162

QUESTIONS FOR THE RECORD

From the Department of Veterans Affairs to Subcommittee Chairman Jeff Miller 164
From the Department of Veterans Affairs to Ranking Member Lane Evans and Subcommittee Ranking Member Shelley Berkley 170

OVERSIGHT HEARING ON THE VARIANCES IN DISABILITY COMPENSATION CLAIMS DECISIONS MADE BY VA REGIONAL OFFICES; THE POST-TRAUMATIC STRESS DISORDER CLAIMS REVIEW; AND UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISION ALLEN V. PRINCIPI

Thursday, October 20, 2005

U.S. House of Representatives,
Subcommittee on Disability Assistance and
Memorial Affairs,
Committee on Veterans' Affairs,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:40 a.m., in Room 340, Cannon House Office Building, Hon. Jeb Bradley [Vice Chairman of the Subcommittee] presiding.

Present: Representatives Miller, Bradley, Berkley, Udall, Evans, and Brown-Waite.

Mr. Bradley. [Presiding] Good morning. The hearing will come to order.

Congressman Miller will be here shortly. He has asked for me to pitch in for him. I am going to read his opening statement.

Today we are receiving testimony on several issues: number one, variances in claims decisions throughout the Veterans Benefits Administration's regional offices; two, the ongoing review of certain Post-Traumatic Stress Disorder claims; and, three, a 2001 U.S. Court of Federal Appeals decision, Allen v. Principi, which clarified that the VA may pay compensation for an alcohol or drug abuse condition when it is secondary to a primary service-connected condition such as, in Mr. Allen's case, PTSD.

In late 2004, the Chicago Sun Times' ran a series of articles that focused on the compensation rates of Illinois veterans. As a result, then Secretary Principi asked the VA Inspector General to conduct a review of compensation payments.

The IG reported its findings in May 2005. The IG cited several factors to account for variances in annual disability compensation payments, some of which VA has no control over and others in which

VA has some control.

During the IG's review of 2,100 PTSD claims, it was found that the total number of veterans receiving disability compensation between 1999 and 2004 grew by a little more than 12 percent. However, PTSD claims increased by more than 80 percent. Likewise, PTSD compensation payments increased almost 149 percent while compensation for all other disabilities increased by only 41.7 percent.

It concerns me that the IG determined that Veterans Benefits Administration procedures were not always followed in processing PTSD claims, resulting in error rates ranging from 11 to 41 percent.

Due to the nature of certain disabilities, the adjudication of a claim requires the use of judgment; therefore, inherently, there will be variations in outcomes. I would expect, however, that the VA can mitigate and control for variances in decisions by ensuring that regional offices follow standardized adjudication policies and by developing methods for ensuring consistency.

I look forward to the testimony of Ms. Bascetta, the GAO witness, and Dr. Brown of the Compensation and Pension Exam Program in this regard.

Following an IG recommendation, VBA is currently examining the 2,100 PTSD claims that the IG reviewed. I understand there is some concern within the veterans' community that this review may be adding to veterans' stresses.

At a briefing for the House and Senate committee staff earlier this month, Admiral Cooper, Under Secretary for Benefits, gave every assurance that benefits will be fully paid until a final decision is rendered - a veteran will not lose appeal rights - and that if a grant is overturned, the veteran will not have to repay past benefits.

To date, the majority of the original 2,100 cases under review have been successfully closed without a need for further action. The initial grant was correct. It is my hope that VBA in conjunction with the Veterans Health Administration will educate veterans on the process as necessary.

It is important not to overlook the fact that this review will also help VBA identify weaknesses and improve the quality of the claims adjudication process.

[The statement of Mr. Bradley appears on p. 44]

Mr. Bradley. At this time, I would like to recognize the Ranking Member for her opening remarks.

Ms. Berkley. Thank you, Mr. Bradley. And please thank Chairman Miller for holding this hearing.

I think it is critically important that we explore this issue from the perspective of severely disabled veterans who are being put at risk by a possibly illegal review of post-traumatic stress disorder claims.

This review and the Inspector General's claim that billions of dol-

lars can be saved by terminating benefits to severely disabled veterans places the health and lives of untold veterans and their families at risk.

The Bush Administration says it seeks only to improve compensation and pension claims processing. However, the VBA has embarked upon a course which may very well lead to increased suicides, homicides, and violent behavior by veterans whose PTSD symptoms are so severe that they are unable to work or function in society.

This review is causing some veterans to revisit their traumatic experiences and increase their psychiatric symptoms. Mental health professionals, treating psychiatrists, as well as veterans' advocates say this is simply, dare I say, madness.

As Secretary Garcia states in his written testimony, an attack on one veteran is an attack on all of them. Even those who are unlikely to have benefits terminated are feeling under attack by a report which appears to recommend cutting severely mentally ill veterans from VA compensation rolls. How many veterans' suicide will it take to reverse this course?

While many of our nation's veterans with severe PTSD fear the loss of their disability benefits and their VA health care, I fear the loss of their lives.

Many agree with PVA's testimony that will appear later, written testimony, that the review which is underway may well be illegal. A court may ultimately find this to be so.

Such a finding would be little comfort, however, to families who have already lost a spouse, father, grandfather, or child to suicide as a result of the stress this proposed review is placing upon severely disabled veterans.

Does VBA really believe that it can meet the stringent requirements for clear and unmistakable error in the decisions of veterans whose claims are being reviewed? How can they do that?

Does the IG have any evidence to support the suggestion that all of the claims which reportedly lack adequate stressor verification could be terminated under existing statutes?

How can any review which ignored and continues to ignore the thousands of veterans who have had PTSD claims denied with little or no attempt to adequately develop their claims be viewed with any credibility by the veterans' community?

The GAO recently found that many veterans' claims were rated without adequate medical examinations which may have entitled them to a higher rating and benefit. Will VA be contacting those veterans that were denied benefits and scheduling a new medical examination?

Are we jeopardizing the lives and health of America's severely disabled veterans so that the bureaucracy will have a complete paper file?

Does the government have a moral and ethical responsibility to mitigate the danger to the lives and health of veterans occasioned by this review?

I hope that the witnesses will be able to answer my questions.

And before I concluded, Mr. Bradley, as many people know, and I say this often enough, in Las Vegas, Southern Nevada has the fastest-growing veterans' population in the United States. We have veterans from World War II, Korea, Vietnam, the Gulf War, and now we have many returning veterans from Iraq and Afghanistan.

I have witnessed with my own eyes people in the Vietnam era, that was my era, that came back seriously mentally damaged. And this nation did not do what I think was our moral responsibility to help these kids that came back, while I was sitting in a college classroom, severely mentally disabled from the experiences they had in their theater of war.

Now, I did not appreciate it when I was in college. I appreciate it now when I am sitting here next to you in Congress. And under my watch, I would never forgive myself if we were to implement actions that would create further mental harm to these people who have sacrificed so much in the prime of their lives, who have had their lives completely altered on behalf of this nation. And I think we have a great responsibility to these people.

And I want to hear what is going on, but I cannot imagine systematically reviewing 100 percent PTSD victims when I believe there are so many more out there that need the additional help and need to be taken care of rather than taking away benefits, putting these people in harm's way, sacrificing their families, and ultimately this nation.

And I thank you very much.

MR. BRADLEY. Thank you, Ms. Berkley.

[The Statement of Ms. Berkley appear on p. 46]

MR. BRADLEY. Are there any other members who have opening statements?

Mr. Udall.

MR. UDALL. Thank you, Mr. Chairman.

Mr. Chairman, I would like to recognize and thank New Mexico Veterans' Secretary John Garcia for testifying today. John is going to appear on Panel Number II. We in New Mexico know Secretary Garcia well. We know his dedication and loyalty to veterans.

It is not uncommon for a veteran to walk into his office and to speak directly with him about concerns and issues of importance. And I know that the Secretary is as concerned and angry as I am with the manner in which the VA has proceeded on this PTSD matter.

It seems that time and time again we hear the larger facts about PTSD: How it affects 11.5 percent of all veterans; how nearly nine out of ten veterans with PTSD demonstrate signs of other disorders,

including depression, alcohol and substance abuse, or anxiety; how the number of veterans diagnosed with PTSD has risen while the number of services being offered by the VA has dropped; how the stigma of PTSD is still prevalent throughout the military and prevents many veterans from seeing care until it may be too late.

However, even with all these facts and figures, the individual stories of struggle are sometimes lost, and PTSD has become simply another medical term, another column in the books. And, unfortunately, this became the perspective, I think, of the VA.

In August, it was immediately clear that the VA's review of 72,000 PTSD cases meant something different to them than it did to the veterans suffering from PTSD. To the VA, it was a process for seeking out incomplete cases and finding voids in paperwork that needed to be filled.

The IG report that catalyzed the review included charts and graphs and made suggestions for action.

To veterans, though, the announcement that their case might be reviewed was not seen as simply another bureaucratic process. It was for many a jolting realization that the day-to-day struggle they endure was being questioned and that their quest for help to deal with this struggle needed external validation.

For those who live with PTSD, the review did not mean a paperwork review as much as it meant a personal attack on what is already a sensitive issue.

Last week, a veteran in my district took his life after dealing with PTSD for years and years. He can certainly be perceived as one statistic within the larger, tragic figure of those veterans who contemplate or act on suicidal thoughts.

But he can also be seen as he should be, as a Vietnam vet decorated with the Purple Heart and other commendations. He was a soldier who fought bravely and honorably for his country. Involved in local veterans' organizations, he helped out at events and with other veterans and all the while he struggled to deal with PTSD.

Even though his case was well-documented and he was in no danger of finding his compensation or medical assistance benefits revoked, he was greatly shaken by the announcement of the VA review and frequently inquired whether he would be losing the support he had received.

He believed, as so many veterans do, that he was being forced to prove himself yet again. It is that belief that makes veterans so angry and so frustrated with this process.

I believe the VA's intentions to bring clarity and accountability to PTSD cases were not in any way meant to harm our veterans. But I believe the manner in which they proceeded with the review, without any input from mental health professionals concerning the risk of harm to veterans with severe psychiatric symptoms, has done far

more harm than good.

It is important that we compile facts and figures and that we be concerned with the larger picture. It is more important that we not forget veterans who have borne the battle and now struggle with PTSD, and how our actions affect then.

I have called and will continue to call for a halt to the review. The VA must reevaluate the process it is using in this review and must take into account how it is affecting veterans. It is better that we stop this review before more lives are lost rather than continue with troublesome and tragic consequences.

Again, Secretary Garcia, thank you for your presence. We look forward to your testimony today on Panel II. And I thank you for your tireless work on behalf of New Mexico's veterans.

Thank you, Mr. Chairman. Look forward to our witnesses today.

MR. BRADLEY. Thank you, Mr. Udall.

[The statement of Mr. Udall appears on p. 50]

MR. BRADLEY. Mr. Evans.

MR. EVANS. Thank you, Mr. Chairman.

I would like to thank the Ranking Member, Ms. Berkley.

I requested a review of VA practices which have resulted in low benefits for service-disabled veterans in Illinois and throughout the nation. We certainly did not expect the lop-sided IG review that we received.

My staff reviewed PTSD claims in Chicago. These are some of the veterans whose claims were denied: a World War II veteran with a Combat Infantry Badge, a Vietnam veteran who participated in the 1969 Tet Counter-offensive, a peacetime veteran who witnessed the extremely traumatic death of a co-worker, and an Iraq veteran with PTSD noted on compensation and pension examination form. The VA IG review completely ignored such claims.

I hope today's hearing will lead to the end of the VA's destructive action against veterans with severe PTSD. The veterans' advocates are right. We must stop this process before any more veterans take or lose their lives.

Mr. Chairman, I ask that a letter that Ranking Member Akaka and I sent to Secretary Nicholson concerning this matter be included in the record.

I want to thank you and your staff. And I have this statement for the record. Thank you.

MR. BRADLEY. So ordered.

[The statement of Mr. Evans appears on p. 57]
[The attachment appears on p. 151]

MR. BRADLEY. Will panel one please come to the table.

Mr. Jon Wooditch is the Acting Inspector General, Department of

Veterans Affairs. He is accompanied by Mr. Michael Staley, the Assistant Inspector General for Auditing. Next, Ms. Cindy Bascetta, the Director of Education, Workforce, and Income Security Issues represents the Government Accountability Office.

Welcome to you all. Your full statements will be included in the printed record of the hearing and we will hold our questions until each of you has testified.

Please proceed.

STATEMENTS OF JON A. WOODITCH, ACTING INSPECTOR GENERAL, DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF THE INSPECTOR GENERAL; ACCOMPANIED BY MICHAEL L. STALEY, ASSISTANT INSPECTOR GENERAL FOR AUDITING, DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF THE INSPECTOR GENERAL; CYNTHIA BASCETTA, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF JON A. WOODITCH

MR. WOODITCH. Thank you.

Mr. Chairman and other distinguished members of the Subcommittee, I am pleased to be here today to address the Office of Inspector General report, Review of State Variances in VA Disability Compensation Payments.

I am pleased to be joined by Mike Staley, Assistant Inspector General for Audit.

Last December, the VA Secretary asked the IG to conduct this review in response to concerns raised by several Members of Congress over the wide variance in average annual disability compensation payments by state.

For Fiscal Year 2004, veterans in New Mexico received over $5,000 more per year than veterans in Illinois. To determine the cause of the variance, we analyzed six years worth of benefit claims' data, surveyed over 1,900 rating specialists, examined 2,100 claims' folders, and reviewed medical examination reports.

Our review identified a number of factors that influenced the variance. Two key reasons highlighted in the report are veteran demographic factors and benefit rating decisions.

Demographic factors are variables beyond VA control. For example, Vietnam veterans receive over $2,300 more than the next highest period of service. Enlisted personnel receive more than officers and military retirees receive more than nonretirees.

Our review demonstrated that there was a direct correlation be-

tween these factors and those states with the highest average annual payments. This supports the position that some part of the variance is predictable and nonproblematic.

Conversely, factors such as benefit rating processes over which the VA has direct influence are problematic in that they are not always consistently applied nationwide.

Our analysis of rating decisions shows that for disabilities that can be independently validated on physical measurements, such as amputations, ratings were consistent. However, for other disabilities, such as mental disorders, much of the information needed to make a rating decision is not physically apparent.

As such, these cases are more difficult to develop and document and are inherently more susceptible to variations in interpretation and judgment. This subjectivity leads to inconsistency in rating determinations.

We selected the mental disorder system for further analysis because it had the highest overall average disability rating nationwide and it included PTSD, which is the fastest-growing condition.

To illustrate, from fiscal years 1999 to 2004, the number of PTSD cases grew by 80 percent and PTSD payments increased from $1.7 to $4.3 million. There was also a dramatic rise in the number of PTSD cases rated 100 percent. In fact, data shows that differences in the number of 100 percent PTSD cases by state accounted for 34 percent of the variance.

To understand why this variance may be occurring, we reviewed 2,100 PTSD cases at seven VBA regional offices. We found that 25 percent of the 2,100 cases needed further development to support the claimed stressor in order to verify that the PTSD was caused by an event related to military service.

The 25 percent error rate is not an indicator of fraud. It reflects noncompliance with VBA regulations concerning required documentation to develop and support rating decisions. These requirements are essentially internal controls designed to ensure veterans receive everything they are entitled to under the law and to serve as a basis for denying claims when the evidence does not exist.

To address this issue, we recommended that VBA do a review of all PTSD cases rated 100 percent. The intent of this recommendation is to ensure the VBA rules and regulations are fully complied with, that the processes for case development are consistently applied nationwide, and to ensure that benefits are being paid properly.

In closing, I would like to add that the variances by state have existed for decades and that the factors that influence these payments are complex and intertwined. Yet, there are opportunities to improve the consistency of rating decisions.

The impact of underlying factors such as medical examination reports that do not consistently provide sufficient data for rating pur-

poses, incomplete case development, and a rating schedule that is subject to different interpretations will have to be fully studied and understood if the VBA is to be successful in detecting, correcting, and preventing unacceptable payment patterns.

That concludes my statement. Thank you again, Chairman Bradley, and those members of the Subcommittee for this opportunity. I welcome any questions you may have.

[The statement of Mr. Wooditch appears on p. 58]

MR. BRADLEY. Ms. Bascetta.

STATEMENT OF CYNTHIA A. BASCETTA

MS. BASCETTA. Good morning, Mr. Chairman, and other members of the Subcommittee. Thank you for inviting us to testify today on the consistency of decisions made by VA on veterans' claims for disability compensation.

Ensuring that disability decisions are consistent across the nation is vital to the integrity of the VA Disability Programs which GAO designated as high risk in January 2003.

As you requested, my comments today are based on our two most recent reports on decisional consistency.

Our November 2004 report concluded that VA still does not systematically assess consistency across its regional offices and the report we issued last week shows one important way for VA to improve consistency involving joint and spine impairments.

We made recommendations in both reports that underscore the need for VA to routinely monitor consistency to ensure that veterans get the benefits they deserve for disabilities connected to their military service.

Building on previous work, we reported last November that the need for adjudicator judgment results in inherent variation in the decision-making process. Examples where judgment is required include claims with conflicting medical opinions and claims for which disability standards are not entirely objective, such as those involving mental impairments or pain.

In these cases, different adjudicators could reach different decisions about the severity of a veteran's disability depending on how they weigh various pieces of evidence. But it is still reasonable to expect that the extent of variation would be confined within an acceptable range as agreed to by knowledgeable professionals.

Yet, we have reported and you have just heard the IG comment on why the state-to-state variations and average compensation payments per disabled veteran raise questions about consistency.

Because of the need to reduce the risk of decisional inconsistency, we recommended that the Secretary develop a systematic, data-driv-

en approach to identifying potential inconsistencies among VA's 57 regional offices and then to study those inconsistencies in detail with regard not only to awards but denial of benefits for specific impairments.

VA concurred with our recommendation, but has not yet implemented it.

The report we issued last week assessed VA's progress in improving consistency of the quality of medical information provided by VA physicians to regional offices for their use in deciding joint and spine claims.

As you know, in the DeLuca case, the court held that VA claims adjudicators must consider whether range of motion is further limited by factors such as pain and fatigue during flare-ups or following the repetitive use of the impaired joint or spine.

VA itself reported in a baseline study conducted in 2002 that fully 61 percent of exam reports on joint and spine impairments did not provide sufficient information to comply with DeLuca.

We found that VA has made substantial progress since its 2002 study, decreasing the number of deficient exams from 61 to 22 percent. Three factors contributed to this progress: Creating the Compensation and Pension Exam Project Office to improve the disability exam process; providing extensive training to both VHA and VBA personnel; and establishing a performance standard for the quality of medical center exam reports.

Nevertheless, more than one in five joint and spine exam reports still do not comply with DeLuca. And more improvement is needed to reduce the wide variations among VA's health care networks where deficient DeLuca exams range from eight percent in the best networks to forty-three percent in the worst.

As a result, VA cannot reasonably assure that these veterans, no matter where they live, receive fair and equitable decisions on their disability claims.

To continue the progress made so far, we recommended that VA use a strategy focused on improvement efforts within its health care networks, an additional performance measurement. VA concurred in principle with this approach.

In conclusion, it is incumbent on VA to implement all of our recommendations relating to consistency. Until assessments of consistency become a routine part of VA's oversight decisions made by its regional offices, veterans may not consistently get the benefits they deserve for disabilities connected to their service, and taxpayers may lack confidence in the effectiveness and fairness of VA's disability program.

While it would be unreasonable to expect that no decision-making variations would occur, we continue to urge VA to measure and limit inconsistency through systematic study, targeted improvements, and

concerted performance measurement.

And I would be happy to answer any questions you might have.

MR. BRADLEY. Thank you.

[The statement of Ms. Bascetta appears on p. 66]

MR. BRADLEY. Mr. Staley, do you have an opening statement?

MR. STALEY. No, sir.

MR. BRADLEY. In that case, we will go right to questions.

Mr. Wooditch, you indicate that one of the factors in the variances of decisions is insufficient medical exam reports.

What is your sense of the working relationship between VBA and VHA? Are there clear guidelines between the two on what is needed to adjudicate a claim?

MR. WOODITCH. I believe that VHA and VBA have made a lot of progress in the last few years to standardize templates in order to do medical examinations for rating purposes.

As our report points out, very few people have access to these templates, but I know they are working together to improve the omission of data that has existed in past examination reports that is needed for rating purposes. And I think that they are making progress.

MR. MILLER. [Presiding] I apologize for being late. We have been at a hurricane briefing for the State of Florida.

Ms. Berkley, would you like to go ahead and ask your questions.

MS. BERKLEY. Thank you, Mr. Chairman.

I spent a lot of time with my veterans in Las Vegas, one, because I want to and, two, because they trust me and because of my position here on this Committee. They have grown to know that they can trust me and that I have their best interest at heart at all times.

I meet with my disabled veterans a lot and I have had occasion to meet with those that have really suffered severe mental illness because of their service to this country.

I admit one of the first veteran's cases that we took when I first came to Congress was at a town hall meeting where a Vietnam vet came to me with a stack of correspondence he had had with my predecessors who kept kicking back to him the same letters that we were getting from the VA that he was only 50 percent disabled as opposed to 100 percent disabled.

And when he came to see me, it was very apparent within the first five minutes that this guy really had a serious problem and that we were doing a tremendous disservice to him because we never reviewed his case. We never looked at his case. We just kicked back the same stuff that was initially put in his file and nobody took the time to look behind that and see what was going on with this person.

And after a whole lot of effort, we ended up ensuring that he was 100 percent disabled and I think that should have been the appropriate diagnosis from the beginning.

And that was the first of many veterans that I have tried to help when it came to their rating for disability, especially when it comes to their mental health. This is an area that people do not like to acknowledge. It is an area that is subjective in many ways.

I mean, you do not see an open wound. You do not see blood. You do not see broke bones. But you have a broken person in front of you. So I think it is a little more difficult to adjudicate.

I do not know how much time you have spent with veterans, especially those with PTSD, but I have spent a considerable time.

Did the IG expect that the VA would terminate benefits of veterans whose claims were reviewed? I mean, walk me through this. When we do this review of the 72,000 veterans that are 100 percent disabled, how do we do this and what do we expect from the veterans? And did we expect to terminate their benefits that they were accustomed to receiving? What was the thinking?

MR. WOODITCH. The review started with trying to understand why the variance existed. We determined that 100 percent PTSD ratings was a primary contributor to that. When we looked behind it, we found what we called a 25 percent error rate in 2,100 cases.

As I mentioned in my opening statement, the error rate is not an indicator of fraud. It is just an indicator of VBA not complying with its rules and regulations.

The basis in doing the 72,000 review is to find out what the magnitude of the total population is with respect to this error rate.

MS. BERKLEY. Are you going back and looking at cases where they were denied or people that have been adjudged 50 percent and maybe they are entitled to 100 percent?

MR. WOODITCH. We did not look at denials. Denials did not contribute to the average payments in the state, so denial was not an issue for us. We just looked at approved claims.

We did not look at the rating level to see whether or not it was an accurate rating level. All we looked at was whether or not the documentation that was required by law was, in fact, in the claims' folder to support the rating.

MS. BERKLEY. And under what legal authority did we do that?

MR. WOODITCH. The IG, under the "IG Act" authority, has the mandate to look at compliance with rules and regulations. So it was a compliance issue.

MS. BERKLEY. Well, according to 38 USCS Section 511, it says that the Secretary shall decide all questions of law and fact and that the Secretary's decision shall be final and conclusive except with a few exceptions. But I do not see how this fits into any of the exceptions.

So how are we going about it? After these cases are adjudged and they are final, how do we go back and add additional stress to these veterans who are barely getting by on a day-to-day basis and tell them that they may not be entitled to this? How do you do that? Why

would we be doing that?

MR. WOODITCH. To go back and answer one of your earlier questions, our intent was never to terminate benefits. Our intent was to work with the veterans and their representatives to review unit records and other sources of information in order to come up with the documentation that was required by law in order to justify their ratings.

MS. BERKLEY. Now, people with PTSD have high rates of suicide. We just heard of a tragic case in New Mexico.

In recommending the review of finally-decided claims, did the IG take into account the risk of potential suicide or other violent behavior by asking the veterans to revisit their stressors?

MR. WOODITCH. First of all, I am sorry to hear about that. It is a tragic incident. I think the problem here is information control. Our recommendation to review 72,000 cases was not intended to go out to all veterans and say we are going to review 72,000 cases.

A lot of the review work can be done by looking at data systems or records within VA. In doing so, many of those cases could be eliminated from review. It is unfortunate that that impression is out there, this misinformation needs to be dealt with.

MS. BERKLEY. Rather than go back and have these veterans who have already suffered serious stress because of their service in the military, why not develop the appropriate indicators for future cases?

It would seem to me that the VA has the issue, not the veterans who have already been adjudicated to have PTSD at a 100 percent level. I mean, does it matter that they would be 95 or 90 percent? Does it save this country that much money that we would create additional burdens on these people who have already suffered so much?

MR. WOODITCH. I agree with what you are saying. I think maybe if you just reviewed the 2,100 cases that VBA is doing, it would help to identify parameters for how we look at future cases. I think that the issue is worthy of discussion. we need to make a decision what we are going to do.

MS. BERKLEY. And I would join with my colleagues in New Mexico and call for a halt to this. I think you have enough information and we have caused enough anguish.

Thank you very much.

MR. WOODITCH. Thank you.

MR. MILLER. Mr. Bradley.

MR. BRADLEY. Thank you very much, Mr. Miller.

Ms. Bascetta, how do your findings regarding inconsistencies with VBA's decisions compare to the Social Security Disability system?

MS. BASCETTA. We have spent an equal amount of time looking at both systems and in both cases, we find that neither SSA nor VA has tackled the consistency problem adequately in our view.

In the Social Security case, it is a little bit different because their focus has been on looking at inconsistency between their appellate and their initial level. But we find in earlier work that they also among their disability determination services experience considerable inconsistency at the initial award level.

The bottom line is that both agencies tell us that they are doing things to improve consistency such as improving training or tightening guidance to their offices. But neither one of them has actually measured how consistent their decisions are. And until they do that, we believe that program integrity just is not where it should be.

MR. BRADLEY. You indicate that in applying the DeLuca criteria there have been substantial improvements in the joint and spine medical examination reports.

Do you have recommendations as to how similar improvements can occur in PTSD exams?

MS. BASCETTA. We actually looked at the CPEP report because in the DeLuca case, what the CPEP report shows is that the quality of medical exams certainly is an input that could be contributing to inconsistency.

Actually, in the PTSD case, the data from CPEP show that they are doing pretty well in that domain with a couple of exceptions. At the initial review level, 25 percent of exams had problems in assessing the DSM-IV criteria and at the subsequent review level, almost two-thirds were inadequate with regard to an assessment of remission or readjustment capacity.

So there is certainly something to look at in the medical exam area. But overall in that area, they were at 89 and 92 percent adequacy.

So we think that to the extent that there is inconsistency in the PTSD decisions, something else, some other root cause must be driving it. So we go back to our broader recommendation and suggest that VA take a look at both awards and denials to find out where adjudicators may be weighing information differently or using different factors in ways that would create inconsistent outcomes.

And perhaps the use of performance measures or other impairment-specific strategies would be helpful in eliminating or reducing the inconsistency.

MR. BRADLEY. Thank you very much.

MR. MILLER. Mr. Udall.

MR. UDALL. Thank you, Chairman Miller.

I'm trying to understand, Mr. Wooditch, first of all, what was your motivation for looking at PTSD and stressors? Was there some indication that came to you that there was some problem here or was this just something that was dreamed up in your shop?

I mean, did somebody come forward and say we have a serious problem with the way the VA is doing this and that's what initiated it or was it an internal issue with your operation?

MR. WOODITCH. It was an internal issue with the IG. We reviewed data from the 15 major body systems that disability ratings occur in. And as I mentioned earlier, we determined that in the mental disorder system --

MR. UDALL. I am trying to say what inspired. So it was an internal issue, you are saying, that you were looking at things to review? It wasn't that somebody from the outside came and told you there is a big problem here with the way the documentation is working on stressors in the file?

MR. WOODITCH. That is true.

MR. UDALL. Okay. I just want that one part established.

Now what I am trying to figure out is, you did your look into it and you found there wasn't adequate documentation on the stressors, correct?

MR. WOODITCH. Yes, sir.

MR. UDALL. And after you did that, was your expectation that the VA under the current legal authority and how they are required to review these cases that they were going to go out and reopen 72,000 cases based on your report or was your intent more to tell them, look, you have got problems with what you have done in the past, you ought to try and look at future cases and make the documentation better?

MR. WOODITCH. I think our intent was to cover both of those areas. I think our intent was to go look at cases that have been approved and if the documentation was not available and it was determined that the individual receiving the benefits was not entitled to the benefits under law, an appropriate review process should take place.

MR. UDALL. And you are aware of the legal authority, aren't you?

Congresswoman Berkley read to you the legal authority with which the Secretary has the ability to review cases. And just let me cite that again. It says the decision of the Secretary as to any such matter shall be final and conclusive and may not be reviewed by any other official.

And so if you have a decision that has been made to grant PTSD, unless there is fraud or unless there is what is called in the law a clear and unmistakable error, then the Secretary cannot touch that decision at all; isn't that correct?

MR. WOODITCH. Yes, sir.

MR. UDALL. And so really the standard here is very, very high for the Secretary in terms of his ability to open this up. I mean, we have set a very high barrier in the law and in the regulations basically telling the Secretary, after you decide one of these cases, unless there is fraud or a clear and unmistakable error, you should not be opening these things up.

And, yet, what they have done is they have gone back to the individual veterans and said to the veteran, you have a problem with your documentation in your file. You come forward as a veteran and

prove to us that these stressors which occurred to cause the PTSD maybe ten and fifteen years ago, that they have to prove the Veterans' Administration that there was actually a stressor.

I mean, under the legal standard, don't you find that a little bit incredible what the agency is doing and how they are abusing veterans?

MR. WOODITCH. I was not aware that VBA had reached out and opened up any of these cases. Again, our intent was to basically comply with the rules and regulations for documentation.

And I agree with the citation that you just mentioned, that the only basis for denying payment is under clear and indisputable evidence that the individual is not entitled to the benefits or fraud. But in doing the review, in order to gain the documentation to meet the rules and regulation compliance procedures in the department, if they do find instances where an individual is not entitled to the benefits or fraud, then we do expect that that be dealt with. But our intent was not to have any other benefits terminated.

MR. UDALL. And, you know, your kinds of reports, I think, are very valuable to agencies. I am not attacking that in any way.

But I think the thrust of what you have said is that we should look forward and as we do documentation, rather than going back based on the legal standards that are there and force veterans to dredge up incidents ten and fifteen years ago and come in and prove to the Veterans' Administration when they don't have to do that unless there is fraud or clear and unmistakable error.

Sorry to run a little bit over, Mr. Chairman. Appreciate it.

MR. MILLER. You were 34 seconds over.

MR. UDALL. You can take it out of my hide the next time around.

MR. MILLER. Ms. Brown-Waite, do you have any questions?

MS. BROWN-WAITE. Yes, I do, Mr. Chairman. Thank you very much for holding this hearing.

You know, one of the things that I have heard in the south is that northerners are very quick to say, well, this is the way we did it up north and we need to get over that.

Well, one of the things that I regularly hear and that I believe is that in other parts of the country that the various disabilities are treated much differently than what they happen to be in Florida, particularly the VA disabilities.

And when you are talking about reopening or reviewing 72,000 cases, I think the natural question has to be, what is this going to do to those already in the pipeline? That would be question number one.

Question number two, when I walked in and my colleague, Ms. Berkley, was telling the story, I believe, about where, you know, nobody would go back and really review the veteran's disability case, I had exactly the same situation where I had to say, listen, this guy really was a Navy Seal.

I actually got the VA to issue a letter of apology because of all the grief they put him through because as he said, he said, yes, the money would be helpful, yes, the 100 percent disability rating. He said but more importantly, I think that the VA owes me an apology. And I insisted that they write a letter of apology to him and they did.

But how are the ongoing cases which are already so long in the pipeline, are they going to be affected at all by this review?

MR. WOODITCH. I don't know how extensive the 72,000 case review will be. I know that there is a lot that could be done by looking at information that is currently in VBA's information systems to eliminate the great majority of those cases. I mean, the evidence exists in the systems. So I don't suspect that they will reopen 72,000 cases. I think it will be a much smaller number than that.

And I know there is a quality concern as well and that any additional workload obviously has an impact on VBA, but timeliness of processing is not the only issue that the IG is involved in. We also want quality of rating decisions.

MS. BROWN-WAITE. And I think uniformity of rating systems sure would help.

MR. WOODITCH. Yes, ma'am.

MS. BROWN-WAITE. Let me ask another question. I had another veteran that the staff just totally were beating their head against the wall contacting VA. It was a disability claim that we had sent in and I finally reached somebody in VA Disability who was able to really help me to understand what the problems were.

Initially when I called, he said I am sorry, we don't have that document. I said, no, you do have that document because we sent it in. He said, ma'am, hold on. Let me go to another program. He went to a second program and he said, well, it is not there, but let me go to another program.

After four different programs, he told me, oh, yes, we did receive that document. He had to each time -- it was not just another screen. It was another program. This is part of the frustration, I believe, in the whole disability system.

I said to him, so you mean to tell me that when my staff was calling in or when a veteran was calling in that depending on what screen they first pulled up, they may or may not have the information, that there is no consolidation of this information. The information is held in different programs.

I only got to four. I do not know. Maybe there is eight or twelve. I do not know. But it is, like, it is no wonder that veterans cannot get answers because depending on what screen the person that they happen to call pulls up, sometimes it has the information there.

From what he said -- and I will never reveal his name because he was so darn helpful, you would probably consider him a whistleblower -- but from what he said that, you know, a lot of people just

do not go to the other screens. And so sometimes this information is kind of lost out there.

Help me to put together why you cannot have or why the VA -- and maybe I should be asking this to, you know, auditor of the Inspector General -- why isn't there a consolidated system there that is going to help with those disability benefits?

MR. WOODITCH. The IG and as well as the Veterans' Benefits Administration knows that the IT systems are out of date. They need to be updated. We need to have consolidated systems that have veteran benefits' files that are easily accessible electronically. But --

MS. BROWN-WAITE. Sir, answer me this. Was he correct? Is that part of the problem? I think you did not answer my question. Are there, like, at least four different programs that the disabilities people have to deal with and it is not consolidated? Is that an accurate statement?

MR. WOODITCH. I do not know. You will have to ask the Veterans' Benefits Administration. I do not know how many systems there are.

MS. BROWN-WAITE. Okay. I would ask that staff follow-up on that. It is no wonder, Mr. Chairman, that, you know, veterans who truly have disabilities who filed claims are frustrated over this.

As I said, you know, he told me there were at least four systems and that does not work very well without some sort of integration of those systems.

MR. MILLER. Very good.

MS. BROWN-WAITE. I have a submission.

MR. MILLER. Your time is expired.

[The statement of Ms. Brown-Waite appears on p. 48]

MR. MILLER. There is a vote that has been called. I would like to go ahead and finish the questioning for this panel. So, Ms. Berkley, if you would like to go ahead.

MS. BERKLEY. Let me ask Mr. Wooditch first. Do you have any idea how much the cost of conducting these reviews are?

I mean, we have witness after witness, including the VA Secretary, sitting where you are begging us for more money because there is not enough money in the VA budget. We are not adequately treating the veterans we have.

Are we taking desperately needed resources that could go to the veterans and spending it on reviewing cases that do not much matter anyway?

MR. WOODITCH. I do not know what the cost of these reviews will be, but obviously it will be something. We do not know how many cases will need to be reopened, so we do not have an estimate for that.

MS. BERKLEY. Why do we need to reopen any more cases?

MR. WOODITCH. I think that 25 percent error rate and lack of docu-

mentation is pretty significant and --

MS. BERKLEY. Wouldn't it make sense for us to start to direct the VA to fix the way they do their adjudication rather than going back over 72,000 cases? Isn't that a better use of our time and resources and efforts given the fact that the VA does not have enough personnel anyway? Doesn't that make sense to you?

MR. WOODITCH. It seems like it makes a lot of sense. It is a viable option which should be pursued.

MS. BERKLEY. And I would love to ask more. So you agree with me that we should just move on with it and fix the problem without possibly endangering the lives and mental health of our veterans, PTSD veterans?

MR. WOODITCH. With the caveat that if there are veterans who are receiving benefits that they are not entitled to under the law, I think that we need to identify those and take appropriate action.

MS. BERKLEY. Yes. But according to the law, the Secretary's decision is final and conclusive unless you can establish fraud. And how are you going to do that unless you reopen every single case? It makes no sense.

We are not dealing with people that are 100 percent well, that are 100 percent adjudged mentally disabled or with PTSD. I mean, we are dealing with a nuance that does not seem to make any sense to me.

Let me ask you something. Your testimony raised an antenna for me. You said that you had recommended that they review not only those that were receiving benefits but those that had been denied benefits?

MS. BASCETTA. That is correct.

MS. BERKLEY. Then how come that is not taking place?

MR. WOODITCH. How come we are not reviewing claims that were denied? Well, it is because it was not part of our review. Again, we are trying to understand what caused the variances in payments. Denied claims have no impact, so it just was not a factor in our review.

MS. BERKLEY. Explain to me what you are suggesting.

MS. BASCETTA. Well, I can understand why the administration would want to look at awards because of the impact on not only the total proportion of people on the rolls with that diagnosis but the proportion of payments.

But we do not know, for example, what the total increase was for applications for PTSD. There could have been a disproportionate number denied. So for program integrity purposes, we would be very concerned about a review that only looked at awards. You would want to know about the denials as well.

MS. BERKLEY. Thank you.

MR. MILLER. Mr. Udall.

MR. UDALL. So, Ms. Bascetta, basically what you are saying is to

just look at the awards without looking at the denials is an effective way in which to move forward? To be balanced about it, you ought to be looking at the denials also?

MS. BASCETTA. Looking at the awards is only one part of the story. You want to see that awards are consistently awarded and that denials are consistently denied.

MR. UDALL. And the VA is not looking at the denials?

MS. BASCETTA. I believe I heard at one point that they thought that they should look at denials at some point, but I do not think they have made a commitment to do that. They are definitely starting with the awards.

MR. UDALL. You know, our understanding that the announcements that they have made is with regard to the awards and the 72,000. There is no suggestion that they are taking a look at denials or moving forward with denials at this point. At least that is, I think, our understanding.

I mean, your agency looks at good governance and how to deal with things. I mean, here you are dealing with veterans that have a severe set of psychological problems. They are given 100 percent disability.

And then the government comes in when it has no legal authority and basically starts sending people out to talk to these veterans without, as far as I can tell, consulting psychologists on how to deal with this situation. And they send them out and start challenging them and saying you have to come forward and prove the stressors because there is not adequate documentation even when this is ten and fifteen years ago.

Does that sound like a good policy to you?

MS. BASCETTA. Well, no, it certainly does not. The issue of stressors raises something else in my mind. And, you know, this is a good example of why you really have to be fact based and data driven in your analysis of what is going on here.

Our look at the CPEP data actually showed that the medical exams were, you know, up in the low 90s for compliance with documentation of a stressor. So there is a disconnect somewhere between what the IG is finding in their documentation and what the CPEP report indicates. It is another good reason why you have to dig deeper for the root cause of what the inconsistency is.

Is it that in the totality of the evidence, the stressor that the adjudicator is looking at is being weighed differently or not carrying as much weight as something else? Is that what is driving the inconsistency? And, again, for both awards and denials.

MR. UDALL. How do we get to the bottom of that inconsistency? What is the best way to do that?

MS. BASCETTA. Well, in the absence of an administrative database, it would help -- you know, they do not have the automated systems to do quick analysis. So I think they have to pull case files and get

adjudicators together and find out what their decision-making process was and how they arrived, what their rationale was for those decisions.

It is a very difficult problem. We are not trying to, you know, minimize how hard this is. Disability decisions, particularly those that are less objective, are hard decisions.

But in the absence of measuring consistency on hard cases like PTSD and pain and other impairments that are less objective, the department is vulnerable to exactly these kinds of problems, that, you know, there are allegations of fraud, that there are allegations, you know, that there are people who are unfairly awarded or unfairly denied because they simply do not have the data to prove that they are doing a good job in this area.

MR. UDALL. And there is no doubt these are hard decisions. And it just seems to me when you are dealing with a veteran with severe psychological problems, trying to go back ten or fifteen years and figure out what went on with a stressor even makes it more difficult and more complicated. And I do not know how it moves the process forward in any way.

I mean, these veterans take this personally. I mean, these veterans are -- and it is not just the ones that have been asked. All of them take this on a personal basis. And I think you are going to hear that from Secretary Garcia and some of the other witnesses.

Thank you, Mr. Chairman.

MR. MILLER. Thank you very much. I appreciate the panel coming in and testifying today.

What we will do now is recess until 12:45 and give folks an opportunity to take a break and we will come back.

Again, thank you again very much.

MR. WOODITCH. Thank you, sir.

[Recess.]

MR. MILLER. Thank you, everybody, for your indulgence. I hope you were able to maybe get out and have a slight break. I would like to go ahead and proceed with the next panel. Panel two is a one-person panel.

Mr. Garcia, thank you for being with us today. He is the Secretary of New Mexico's Department of Veterans' Services. You can proceed with your testimony, sir.

STATEMENT OF JOHN M. GARCIA, SECRETARY, NEW MEXICO DEPARTMENT OF VETERANS' SERVICES

MR. GARCIA. Mr. Chairman, members of the Committee, on behalf of Governor Bill Richardson and the veterans of the great State of New Mexico, as a Vietnam veteran, it is an honor and opportunity to testify regarding the U.S. Department of Veterans' Affairs' review process of posttraumatic stress disorder, PTSD, claims.

In 2003, the New Mexico Service Commission became the New Mexico Department of Veterans' Services, a cabinet-level agency tasked with serving and ensuring that our veterans are receiving the benefits that they have earned.

New Mexico has 180,000 veterans. During the Vietnam War, we were number one in drafting percent, third highest in casualty rate. Half of our Vietnam veterans in the State of New Mexico are combat veterans. And just last year, approximately 59,000 veterans received some form of health care from the VA.

The veterans in New Mexico are strongly supported by the benefits they have earned through their service. And I and my staff are proud to serve them.

Unfortunately the recent action taken by the VA has been a great disservice to these men and women. In the original VA IG report, 2,100 PTSD claims were reviewed of which 300 were from the State of New Mexico.

After being identified for further review, letters were sent to each veteran. The letters that were sent threatened two possibilities for benefit losses.

First, the letter implied benefits would be lost unless specific proof of PTSD was presented, a proof that for many veterans requires reliving horrific events during times of war and combat.

Second, the letter implied that benefits would be lost if a veteran was not under current treatment.

This policy of retroactive inspection has been received by the entire veteran community as an assault on every veteran, not just those for review. And it is clearly seen by both individual veterans and by veteran service organizations as yet a further requirement of proof of their service and their dedication to our nation. And it is being inflicted upon these veterans who have experienced tremendous traumas, stress, and pain.

Make no mistake about it. This is a serious problem.

On October 8th, last week, a brother Vietnam veteran of New Mexico committed suicide. He was a 100 percent service connected PTSD, unemployability combat veteran who had earned and been awarded a Purple Heart.

While he was not one of New Mexico's veterans selected for review, the issue was on the forefront of his mind. He was found with infor-

mation of the retroactive report which was laying in front of him next to his Purple Heart medal. And one of the last discussions he had with other veterans was about the review process.

He is clearly a casualty of this flawed process.

Why is it that the entire veteran community is being affected by this review when it is directed at only a small percentage of them? The answer is because an attack on one veteran is an attack on all of us.

And let me make this clear. This review policy is perceived as an attitude, an attack, and a personal assault on the honorable service of all veterans. It has forced veterans with PTSD, who have suffered and sacrificed because of their service to our nation, to yet again prove themselves to the VA. And I believe that this is wrong, it is horrible, it is a travesty, and it is an insult to the veteran and to his family.

Last week, Mr. Chairman, members of the Committee, I received a letter from a Mrs. Lane De Priest, the wife of another brother Vietnam veteran who is suffering from PTSD. Her letter was a plea for help that expressed concern, sadness, and outrage with the PTSD review. And she spoke with passion on how this was so directly affecting their lives.

And if I may, I would like to read you excerpts of this letter. The letter is dated October the 7th, 2005. She writes, "Recently my husband received a letter from the Department of Veterans' Affairs. This letter indicated that he was under determination for his benefits. He was given 60 days to respond. He was, in effect, asked to prove all over again what he has spent the last 36 years trying to prove. At this time, he is receiving 100 percent benefits for his PTSD."

"As a result of this letter, I have spent the last three nights watching him walk the floor, scared his benefits are going to be cut off. He turned in all of his paperwork as asked on Monday, October the 3rd, and was told by representatives at the VA Regional Office in Albuquerque that he would receive a call from that office on Monday afternoon. He is still waiting for that call."

"Many attempts to contact that office have been futile. The young lady who was to call him back this afternoon is either not in, away from her desk, or unavailable. And I find this unacceptable."

She continues to write, "This morning, I went to work and when I called my husband to inform him that I was safe at work, he told me he was going to fix everything. I left work and when I returned home, he had called his brother to pick two guns that he owned."

"I immediately contacted the VA hospital and spoke to Dr. Mike Burger. He calmed my husband down and promised he would look into the VA Administration and gather information. Then he would call us back."

"I guess what I want you to know is that there are a large number of veterans in New Mexico who have received this same letter.

They and their families are going through much the same thing that my family is. This has affected me, our children, and our grandchildren."

"Something needs to be done to stop this madness. Our veterans are feeling they are worthless and they are being called liars. How many veterans will succeed where my husband did not this morning? This is very painful and I can't stress enough how important these veterans are to us. This is my life, my husband's life, and our family."

Mr. Chairman, distinguished members of the Committee, on behalf of veterans in the State of New Mexico and over 26 million veterans of this country, I thank you for allowing me to express our concerns.

This concludes my statement and I am happy to respond to any questions.

MR. MILLER. Thank you very much.

[The statement of Mr. Garcia appears on p. 79]

MR. MILLER. Mr. Udall, I will let you ask the first questions and then I will have some of my own.

MR. UDALL. Thank you very much, Mr. Chairman. I appreciate that courtesy.

Let me just say once again how happy we are that Secretary Garcia is here. He has a distinguished record of service. He served in the U.S. Army in the Central Island of South Vietnam and received a number of citations.

We very much appreciate your service and appreciate having you here today.

Secretary Garcia, I want to first of all ask you about the disconnect between the facts and the figures. You sat here and listened to the testimony and people talking facts and figures.

And the human element, the veterans' side, could you comment on the effect on families, on the impact in these communities where these things are occurring?

MR. GARCIA. Yes, sir. Mr. Chairman, Mr. Udall, I think what people are forgetting is that there is a human element involved here. For years when Vietnam veterans -- and I would suspect, I would bet the 72,000 cases being reviewed are probably 90 percent or more Vietnam veterans.

As a Vietnam veteran, coming home from Vietnam, it took me over 30 years myself to get enough nerve and courage to go to the VA. And many of the Vietnam veterans came home from Vietnam and did not go to the VA because the VA of my father was not taking care of my needs nor my brother's needs.

And many veterans finally had enough courage and nerve to go back to the VA, the Vietnam era veteran, and his needs were starting to be taken care of.

And the word came out about 15 years ago that veterans are going to be looked at that are suffering from PTSD because when Vietnam veterans came home from Vietnam, the VA did not know what to call this PTSD syndrome.

When they finally figured it out, veterans were encouraged to go to the VA for service and treatment. If you received a Bronze Star, Silver Star, Combat Infantry Badge, it was almost an automatic for PTSD.

An administrative error more than likely, yes, has been created, but you cannot fix it on the backs of the veterans. It is causing veterans to kill themselves. We had a veteran fortunately who did not kill himself. But how many other veterans of the country are going to be doing that?

And that is the question I have. I had a veteran in my office before I came here who just got 50 percent of a PTSD disability and, yet, he has the Combat Infantry Badge and a Bronze Star, and he was asking me why didn't they give him his 100 percent. All I could tell him is they are afraid to give you the 100 percent now, and just to hang in there.

We are working very closely with the Vet centers, the VA Regional Office, the VA Hospital, trying to inform the veterans that your benefits are not going to be taken from you.

But the veteran community, as you know, it is a very tight community. It is a brotherhood that you do to one, you do to all of them. And in my opinion, this effort has to stop.

MR. UDALL. Secretary Garcia, when you talk about the brotherhood and how tight the community is, even though the numbers that are being reviewed are a small amount of the 72,000, do you think the, I guess, the 2,100, but the additional subtract out from the 72,000, the additional veterans in this group, that they are feeling this personally?

MR. GARCIA. I believe so. Mr. Chairman, Mr. Udall, they are feeling it personally.

In New Mexico, we have 180,000 veterans. Thirty-one thousand are receiving some form of comp and pen right now. That means I have got at least 150,000 of the veterans out there that my service officers who have been trained to go out and reach out these veterans to get them to file for the disability probably have a fear factor of not filing now.

And I just think there is going to be major ripples of repercussions. One, discouraging the veterans to come into the VA. But I think more outreach needs to be done. Yes, sir.

MR. UDALL. Secretary Garcia, you said in your testimony that you had to get up the nerve to go in. The Veterans' Administration for Vietnam veterans was not viewed as a friendly Veterans' Administration, right?

MR. GARCIA. Mr. Chairman, Mr. Udall, that is correct.

MR. UDALL. And so now what we have happening the Veterans' Administration, I think, did work very hard to build back the trust and put these programs in place and get disability to veterans.

And now, I think what is coming back to veterans it sounds like is their memories of the way the Veterans' Administration used to be with this kind of behavior by the Veterans' Administration.

MR. GARCIA. Mr. Chairman, Mr. Udall, I would say that is correct. It has taken years, I think, for -- the VA today is not the same VA as it was for our fathers. It is not the same VA when I got home from Vietnam in 1970.

And there has been great strides and effort for the VA to be user friendly to our veterans. And there was great outreach done to encourage our veterans to come in and file for the PTSD disability on their comp and pen.

And for most veterans, this is all the income they have in the family. And when you start challenging that and taking it away from them, you are not just impacting the veteran. You are hurting the family and you are hurting the family members.

You know, awarding a PTSD disability to some veterans, and I am talking about the Vietnam era veteran, it is more a validation of his service to country. You all know what the Vietnam veterans went through when they came home from Vietnam.

All of a sudden now, after 30 years of going back to the VA and they are getting their PTSD claim, only to be reevaluated again, and when they did receive that, it was a validation to them that what they did was honorable. It has nothing to do with the money. But when you take that away from that spouse and those children, what is the veteran left with?

In our case in New Mexico, we had a veteran commit suicide, leaving the Purple Heart on his bed and documentation of this review analysis. That is wrong. That is totally wrong. And it is an insult to the integrity of the men that served honorably with me in Vietnam.

MR. UDALL. Thank you very much. Appreciate the courtesy, Mr. Chairman.

MR. MILLER. Mr. Secretary, following up on the veteran who committed suicide, you said clearly he was a casualty of the PTSD review. Is it the same person?

MR. GARCIA. Yes, sir.

MR. MILLER. And this person had paperwork in his possession and that leads you to make that statement that the fact was he was not up for review? His case was not going to be reviewed?

MR. GARCIA. Mr. Chairman, members of the Committee, this veteran that killed himself with his Purple Heart next to him was not under review. He felt the same pain that many Vietnam veterans feel. And this gentleman should not have killed himself. When you

hurt one veteran, you hurt them all.

And this gentleman was not under review, but he felt the process of the review was wrong. He felt that they were going to take his disability away.

And the conclusion we come to why he felt that was because just prior to the day he committed suicide, he was talking about the review process. And near him was documentation about this review analysis of the PTSD claims to be withdrawn. So to me, he is a casualty of this process.

So whether you are receiving at 50 percent or you are 100 percent or you are one of the 300 cases in New Mexico that is being reviewed, you are being challenged all over again. You have to revalidate what you did as a service to your country.

It goes deeper than just trying to fix an administrative error. I believe fix administrative error but not on the backs of the veterans. Fix it from here on out.

But I also believe what is happening is the regional offices, there is probably a fear factor going on where most veterans, most cases are probably being looked at more carefully and more stringent where proof of burden again is on the veteran.

MR. MILLER. Can you explain to me what your office is doing -- and you kind of alluded to this -- as far as letting the veterans know what the PTSD review process is and that, you know, why they are doing it?

MR. GARCIA. Mr. Chairman, members of the Committee, my office, Department of Veterans' Services, works very closely with the veteran centers in Albuquerque and in Santa Fe. We have been working closely with the regional office and the VA and the veterans' service organizations explaining to veterans when they e-mail me, when they call me, or when they call the vet centers, telling them your PTSD benefits are not going to be withdrawn.

We are trying to calm the veterans down. They are upset. Their e-mails are flying back and forth across the state and across the country. The network is pretty tight as a lot of you are probably aware of with the veterans in your own region.

We are doing our best to inform the veteran community based on the information that we are picking up. I have not had any particular briefing, though, regarding this particular status of the PTSD benefits.

MR. MILLER. Would you provide this Committee the evidence of what your organization is doing in regards to letting the veterans know?

MR. GARCIA. Yes, sir.

MR. MILLER. I would appreciate seeing how the state would be handling that.

And you talked about that this may be an administrative error.

MR. GARCIA. Yes, sir.

MR. MILLER. In your office, if somebody was awarded a salary increase or some type of an increase and you found out later that it was an administrative error, how would you handle that?

MR. GARCIA. Again, you are looking at apples and oranges. If this was a bank, if this was a business --

MR. MILLER. I am talking about you.

MR. GARCIA. Well, in my office, I do make the adjustment. It is either that or I have to eat the error myself and pay the penalty myself.

MR. MILLER. And would the error that you are eating yourself, if you will, would that affect others and could it affect other employees in their ability to get future increases?

MR. GARCIA. No, because then I would correct my error from there on out.

MR. MILLER. But the person, they would no longer have that raise though? They would go back to --

MR. GARCIA. That would be correct. I would correct that. Well, I would correct that error. But here again with the PTSD issue, you are dealing with people with mental disorder.

MR. MILLER. Wait. And please understand that I understand the subject very well and we all know people personally.

You are drawing a conclusion that every single one of them has PTSD. The fact of the matter is they may not. And that is what the review is all about, is it not, to find out if they were, in fact, adjudicated correctly to receive their benefits?

So you are saying without question that they all suffer from PTSD at 100 percent. And we do not know that. You yourself --

MR. GARCIA. No. That is correct. We do not know that.

MR. MILLER. Okay.

MR. GARCIA. Right. But you are also talking about trying to fix an administrative error on the backs of veterans that are very sensitive that have some form of PTSD.

MR. MILLER. Some form, but maybe not 100 percent.

MR. GARCIA. Maybe not 100 percent, but veterans that have 50 percent, 20 percent, 30 percent, I have had them in my office with a fear factor that they are going to lose their benefits. And that is wrong.

MR. MILLER. And then your explanation back to them --

MR. GARCIA. Is they are not.

MR. MILLER. -- is that you only adjudicate -- no. I heard you say that you were only adjudicating 50 percent because VA is afraid to give you 100 percent. Did you actually say that to a veteran?

MR. GARCIA. In the case of the veteran that came into my office before I got here, who was a combat veteran with a Combat Infantry Badge, it surprised me that the VA gave him a 50 percent evaluation when in most cases, I have seen veterans with a Combat Infantry

Badge at 100 percent.

MR. MILLER. You mean everybody that has a Combat Infantryman's Badge should be 100 percent disabled with PTSD?

MR. GARCIA. The word that we have gotten is that if a veteran suffers from PTSD or has a CIB, a Combat Infantry Badge, a Bronze Star, Silver Star, it is almost an automatic that he will be given or granted 100 percent. If he does not have that, he has to go through the process where he has to do his statement.

MR. MILLER. That is a question that I certainly will ask the Veteran Benefits Administration.

MR. GARCIA. Yes, sir.

MR. MILLER. That is hard to believe. But thank you. Thank you for your service.

MR. GARCIA. And I would be glad to, if my statement is incorrect, to get the right answer.

MR. MILLER. Well, a lot of times, statements are made to this Committee in particular --

MR. GARCIA. Yes, sir.

MR. MILLER. -- in ways to try to move the discussion in one direction or another. And all we are trying to do as members of this Committee from both sides of the aisle is to fix a problem that may or may not be out there. There may not be a problem. I mean, nobody on this Committee has said that there is.

But for you being down at the state line, it is very important. And we appreciate the work that you do and the people that work with your agency do. And, again, thank you for your service to our country.

Ms. Berkley, you are next.

MS. BERKLEY. Thank you very much, Mr. Chairman.

Let me ask you a quick question because there seems to be a little confusion here. Doesn't the rating depend on the veteran's symptoms?

MR. GARCIA. Yes, ma'am.

MS. BERKLEY. All right. So they are rated according to how they show during their evaluation?

MR. GARCIA. As I understand it, yes.

MS. BERKLEY. When I was in law school, we were taught that you take the victim as they are. And there are times that you say, well, how could this little accident have caused such a catastrophic problem in this person. And the reality is every person is different.

With our veterans, there are some veterans like my dad who went to the World War II, he came home. He never thought about it again. He has got friends. He is 80 years old now and he has never looked back. He has got friends that I know very well from my childhood until now that their World War II service and what they experienced was a defining moment in their lives.

I see it time and again with our Vietnam veterans when they come home mentally damaged. They either saw their friends torn apart, they experienced or seen things that most of us do not get to see, thank heavens, and they have come back and they are adversely affected in a very serious way.

So when they are adjudicated 100 percent disabled because of PTSD, there are those that when they hear that there may be some sort of review, that they would not think twice about it. There are others who because of what they have experienced and because of who they are would commit suicide because of their fear of having their benefits and their validation taken away from them.

Would you agree with that?

MR. GARCIA. I would, yes, ma'am.

MS. BERKLEY. Now, before the Chairman came in, I mentioned that I had an experience when I first came to Congress with a Vietnam veteran who was 50 percent disabled PTSD from the Vietnam era.

And he came to me with a stack of papers, Mr. Chairman, this big, notebooks of correspondence he had with my two predecessors explaining his condition, explaining that he had only been interviewed for 20 minutes, only examined for 20 minutes, and after that 20 minute examination was given 50 percent disability.

He believed all these years since he could not work, he had flashbacks, he could not sleep, he wet his bed, he was dysfunctional, that he should be 100 percent disabled.

And all the computer kept doing, the VA computer, whenever any of my predecessors contacted them on behalf of this veteran was kick out the same information they had because nobody takes the time to go beyond what is in the files. And we were able to get him 100 percent disabled.

So the fact that they are disabled, I think 100 percent indicates, since that is such a difficult rating to acquire, that they have got some serious problems.

So when this particular group of people hear that they are going to be readjudicated or rereviewed or they have to provide information about their stressors, I think it has in many instances an adverse effect.

Now, do you think there might be some others, judging from your experience with your veterans and those that have PTSD and the experience with the veteran that committed suicide with his Purple Heart and his information next to him, do you think there is a possibility if we continue these evaluations that that might happen again?

MR. GARCIA. Yes, I do.

MS. BERKLEY. And on what do you base that?

MR. GARCIA. As I stated earlier, whether a veteran is receiving his 100 percent PTSD disability or a 70 percent PTSD or 50 percent, the veterans that I am seeing, that is calling me are 50, 60, 70 percenters

as well as 100 percenters that are asking me the same question, are they going to lose their benefits. We reassure them they are not.

We had 300 veterans in New Mexico receive these letters. I have got 180,000 veterans. I have got veterans in my state that are afraid that they are going to lose their benefits because of this.

The gentleman that committed suicide, he was not even on the list, but he is that percentage that you just talked about. But there are other veterans out there that I just want to make sure that they do not get into that box.

Ms. Berkley. May I just ask one more question?

Mr. Miller. We have only 35 minutes; we have a full Committee hearing that we need to move to. So we will come back around again.

Ms. Berkley. Then I would want to speak to Mr. Garcia.

Mr. Miller. Can you explain or do you know that the veteran who committed suicide, since he keeps getting brought up in conversation, what treatment he was receiving?

Mr. Garcia. No, sir, I do not. I know he was going to the Vet center for PTSD counseling. He was very active in the veteran community is what I know. He came by our office several times, volunteered to help in Northern New Mexico on some veteran activities. He was involved with his Veterans' Service organization.

Mr. Miller. I do not know if there is a way we can, but I would like for staff to find out for the members of the Committee this particular case and maybe it is an issue that we cannot. But maybe there is a way that we can find out because it is obviously a compelling story.

Mr. Udall, do you have any other questions, because Ms. Berkley really wants to ask --

Mr. Udall. No.

Ms. Berkley. And thank you, Mr. Chairman, for your courtesy.

How long have you been doing what you are doing?

Mr. Garcia. I was appointed in 2003 and I have been involved in veterans since I came home from Vietnam, but more actively in 1980 when I put together and found with other veterans the Vietnam Veterans of New Mexico and Vietnam Veterans of America that came into our state. I was the Deputy Director for a program called the Vietnam Vet Leadership Program here in Washington, D.C. that worked from 1982 to 1985.

Ms. Berkley. So I would say that at least half of your life has been spent in the service of veterans.

Mr. Garcia. Yes, ma'am. I believe I am who I am because of my service.

Ms. Berkley. Then with your life breadth of experience and knowledge of how veterans think and feel and having experienced it yourself as a Vietnam veteran, have you --

Mr. Garcia. Let me just clarify. I am not the VA. I am the State

Director of Veterans' Services. And I do not understand all the VA and I am trying to understand it.

MS. BERKLEY. Okay. Thank you for that clarification.

Have you seen any evidence in the veterans you assist that they are exaggerating their symptoms of PTSD to gain monetary compensation benefits as suggested by the IG?

MR. GARCIA. I have had veterans in my office exaggerating symptoms, yes, I have. But I do not make a judgment on them. My job is to provide service to all my veterans.

I have trained service officers. I have 20 field officers out in the State of New Mexico that work directly with our veterans that help them just file their forms. And then they are assigned a Power of Attorney with the National Veterans' Service Organization that represents the National Service Organization and the VA that helps the veteran process his claim properly through the regional VA office. We do not make any judgment on any veteran that walks in my office. And I have had some doozies walk in.

MS. BERKLEY. Okay. Thank you.

MR. MILLER. Thank you very much, Mr. Garcia.

MR. GARCIA. Mr. Chairman, members of the Committee, it is an honor to be here. And thank you again, sir.

MR. MILLER. Thank you, sir.

If the last panel could come forward and we will get name cards out in front of you.

But while we are doing that, I would like to just go ahead and let the Committee know and for the record, Steven Brown is the Director of the VA Compensation and Pension Examination Project based in Nashville. Mr. Ron Aument is the Deputy Under Secretary for Benefits at the Veterans Benefits Administration. He is accompanied today by Ms. Renèe Szybala, Director of VBA's Compensation and Pension Service.

Dr. Brown, if you would, please proceed.

STATEMENTS OF STEVEN H. BROWN, DIRECTOR, COMPENSATION AND PENSION EXAMINATION PROGRAM, DEPARTMENT OF VETERANS AFFAIRS; RONALD R. AUMENT, DEPUTY UNDER SECRETARY FOR BENEFITS, VETERANS BENEFITS ADMINISTRATION; ACCOMPANIED BY RENEÉ SZYBALA, DIRECTOR, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION

STATEMENT OF STEVEN H. BROWN

DR. BROWN. My name is Steven Brown. I have been the Director of the Compensation and Pension Exam Program, or CPEP, since its inception in 2001 when the Under Secretaries for Benefits and Health

executed a Memorandum of Agreement which established, staffed, and funded a joint initiative to improve C&P exams.

The goal of improving compensation and pension exam quality fits hand in glove with the goal of reducing variation among the exams. CPEP's strategy is to reduce variation by continuously improving quality. Our goal is to ensure that VHA provides consistently high-quality exams.

CPEP has adopted a pragmatic approach to quality improvement based on reliable and actionable baseline and ongoing performance data, accountability, and prioritization of effort. We targeted the top ten most frequently requested exam types which account for approximately two-thirds of our workload.

These exam types are General Medical, Joints, Spine, Foot, Skin, Mental Disorders, both the Initial and the Review PTSD, Audiology, and Eye.

CPEP initially developed reliable and valid methodologies for measuring C&P exam quality based on the VBA Compensation and Pension Service's exam worksheets and the rating regulations and used these methodologies to measure baseline C&P exam quality.

CPEP data were generated by a structured, standardized quality review process. Our reviewers answered specific questions about each exam. We refer to these specific questions as quality indicators. An example of a quality indicator is, "does the exam describe noise exposure during military service?"

Once an exam has been reviewed, we gave it a score, exactly like a test in school. Exams that scored 90 percent or better were considered to be of "A" quality, just like in school. And the more "A's," the better. CPEP used quality indicators and the idea of "A" quality work to determine the baseline quality of VHA C&P exams.

In the August 2003 VISN-level report, CPEP found that the baseline percentage of "A" quality exams for all VISNs was 53.5 percent with a range from 46 to 67 percent. This information was shared with the examining sites and VISNs as well as VHA and VBA leadership.

In response to these results, CPEP, with the strong support of senior VHA and VBA leadership, implemented a number of quality improvement initiatives. These initiatives have, over time, contributed to a decrease in variation in VHA C&P exams and an improvement in quality.

I would like to outline for you a number of the initiatives that VHA, CPEP, and the examining sites undertook to improve performance.

CPEP began by taking steps to ensure that all sites were provided with the tools necessary for process improvement.

All sites conducting C&P exams were required to participate in a "Collaborative Breakthrough Series" in which sites formed teams that were guided through a multi-month quality improvement ex-

ercise by subject matter experts and quality improvement coaches. The CPEP Program was assisted in this effort by the VHA Quality Scholars Program.

Each collaborative project included two two-day learning sessions separated by a six-month work period. During the first learning session, the teams were taught how to improve the quality of their exams and how to develop specific action plans to implement improvements.

In the six months between learning sessions, support was provided to participants through monthly conference calls, monthly coaching calls, and an electronic chat room.

At the final learning session, the teams shared with each other specific strategies and the results of their efforts via presentations and posters. The collaborative teams improved overall quality scores for each of the top ten exams and improved overall timeliness at the same time.

To help sites strategically organize and prioritize their improvement initiatives, all VHA facilities performing C&P exams were required by senior management to submit a Facility Quality Improvement Plan using a CPEP template which was based on the principles and techniques they learned during the collaborative breakthrough series.

Plans included mandatory sections regarding implementation of quality monitoring via CPEP quality indicators, clinician orientation and ongoing education, clinician feedback, organizational reporting, leadership and resource support.

Facility QI plans required the approval and signature of the VISN Director, the Facility Director, and the Chief of Quality Management. CPEP reviewed each plan and provided constructive feedback as appropriate.

To further support the exam sites, CPEP developed and distributed videos and computer-based training to all VHA facilities on General Medical, Musculoskeletal, Foot, Heart, Diabetes, Skin/Scar, Muscle, and Respiratory exams.

CPEP conducted video conferences on topics such as DeLuca v. Brown, exam templates, and quality measurement techniques. We conducted face-to-face training sessions for quality improvement teams, clinicians, administrators, and template super users. We have made these educational tools available to every site that conducts C&P exams.

Finally, we coordinated a conference for VBA and VHA on "Improving the C&P Exam Process Together."

CPEP is collaborating with the VHA Office of Information and the VBA C&P Service and Office of Field Operations to computerize all 57 disability worksheets in order to eliminate errors of omission via structured data entry. As of April 2005, an initial version of each of

the templates have been installed at all exam facilities.

Finally, VHA leadership has set higher goals for the quality of exams by establishing a performance target in the Network Directors' performance plans. For Fiscal Year 2004 and 2005, the performance measure targets were 64 percent of exams being of "A" quality to be fully successful and 75 percent to be exceptional. In 2006, the proposed targets have been increased to 83 percent and 86 percent.

In support of leadership's decision to establish performance targets, CPEP developed routine monthly reports on the quality of C&P exams utilizing the same structured quality review process that was developed for baseline review.

This information has helped the VISNs and examining sites by providing immediate feedback on performance. This information is used by the sites to identify specific areas needing improvement.

The efforts I have just outlined have led to dramatic improvements in the quality of C&P exams. Improvements of VHA C&P exam quality have increased over the last two years. Since CPEP began monthly monitoring in October of 2003, the national average performance measure score has improved. The national average percentage of "A" quality exams for all VISNs was at 80 percent in June of 2005, an increase of 32 percent.

The positive results noted in this testimony come as the result of a concerted effort at all levels of VA, including clinicians in the field, the CPEP staff, and VHA and VBA leadership. Much has been accomplished and additional gains can be achieved. We look forward to the opportunity to face these challenges.

Mr. Chairman, this concludes my statement. I am now available to answer any questions that you or other members of the Committee may have. Thank you.

Mr. Miller. Thank you, Dr. Brown.

[The statement of Dr. Brown appears on p. 86]

Mr. Miller. Mr. Aument, we will go to you and then we will ask questions.

STATEMENT OF RONALD R. AUMENT

Mr. Aument. Mr. Chairman, members of the Subcommittee, thank you for the opportunity to review with you the issue of variance of VA disability compensation claims decisions.

I am pleased to be accompanied by Ms. Renee Szybala, Director of VA's Compensation and Pension Service.

In October 2001, the Secretary's Claims Processing Task Force delivered its report containing 34 recommendations to improve VA claims processing.

The Task Force, which was chaired by Admiral Cooper, found that

the most significant issue to be addressed was the need for greater accountability and consistency in our benefit delivery operations.

Over the last three and a half years during Admiral Cooper's tenure as Under Secretary for Benefits, the Veterans' Benefits Administration has worked hard to address this need.

Through the implementation of the Task Force recommendations, VBA has achieved major improvements in the delivery of benefits, including the quality of our benefits decisions, and we have laid the basic groundwork that will continue to bring more consistency in our decisions.

We have made all regional offices consistent in organizational structure and work processes. Specialized teams were established to reduce the number of tasks performed by decision makers and to incorporate a triage approach to incoming claims.

We are also consolidating processes in certain types of claims to provide better and more consistent decisions. We have established an aggressive and comprehensive program of quality assurance and oversight to assess compliance with VA policy and procedures and assure consistent application. Included are regular oversight reviews by Headquarters' staff.

Training is also key to improving decision quality and consistency. New hires receive comprehensive training through a national centralized program. Standardized computer-based tools have been developed for training decision-makers and training letters and satellite broadcasts on the proper approach to rating complex issues have been provided to all field stations.

Over the past year, new articles, particularly those of the "Knight-Ridder News Service" and the "Chicago Sun Times," highlighted the existence of variations in the amount of annual compensation paid to veterans by state. As a result, the IG was asked to review this issue.

The IG did not identify a single causative factor to explain the variance in the amount of compensation paid among the different states. Rather, the IG found a number of factors, including demographic factors, that directly contribute to compensation variances.

The IG also identified PTSD, its prevalence and its evaluation, including the grant of individual unemployability ratings based on PTSD, as a major contributor to variability in compensation.

The IG found insufficient evidence to support the grant of service connection for PTSD in some cases; thus, VA's decision to award benefits was premature.

Where VA had not fully developed the cases and verified the stressors as required, the IG was not able to validate entitlement to the service-connection awards.

VBA has agreed, because of the strong recommendation of the IG, to conduct a review of PTSD claims in which the veteran was award-

ed a 100 percent disability rating or IU rating in the past five years. In that review, we expect that the majority of the claims will be found sufficient and will not require further development.

We acknowledge and are concerned that there are variances across the system with respect to average annual benefit payments. We do not, however, agree that average annual payments should be the singular measure by which we judge consistency. Measurement of consistency is complex and cannot be discerned based upon a single measure of state-by-state comparisons of average disability payments.

We will continue our efforts to better understand this complex and difficult issue and to identify and reduce inappropriate variability in our decisions. Our objective is to ensure that all regional offices are generating consistently accurate decisions that provide the maximum benefits to which veterans are entitled.

We believe that veterans should get the same treatment and same result based upon the same set of facts regardless of the state in which they reside or the regional office that decides the claim. Our efforts are directed to that end.

Mr. Chairman, this concludes my testimony. I respectfully request that my complete written statement be included in the record. I greatly appreciate being here today and look forward to answering your questions.

MR. MILLER. Thank you, sir. Without objection, both of your statements will be placed in the record in full as well.

[The statement of Mr. Aument appears on p. 91]

MR. MILLER. Dr. Brown, we will go back to you. You had said that during the IG's review that a majority of the raters, I think, that were surveyed were unfamiliar with CPEP's template being used.

What efforts are being done now to provide outreach to the regional offices to make sure that they are familiar with the templates?

DR. BROWN. The first thing that we are doing is we now have the templates rolled out. And, of course, they had not seen it because at that time, we were just finishing getting the product into the field for the first version. So it does not come as a terrible surprise that they had not seen the cases come by that were done using the templates.

We also now have a group, the OFO, reviewing the template formats so that they also become more familiar and give us more feedback on how they want it structured.

It really is an issue of they did not see it because it was just getting out there.

MR. MILLER. What is OFO, please?

DR. BROWN. I am sorry. It is the Office of Field Operations within VBA.

MR. MILLER. But still my question is, what now is being done to ensure that they are familiar with the template?

DR. BROWN. We are working on the VHA side to increase use and use is increasing. We are now up to about ten percent. We do not have specific educational effort within VBA to see the reports that come out from the templates.

We are working with the VHA. We have a Clinical Advisory Board that is helping us get the word out about the templates as well as providing us with feedback to make them better..

MR. MILLER. Thank you.

Ms. Berkley.

MS. BERKLEY. Is there a requirement that the doctors use the templates? They are being provided, but is there a requirement that the doctors actually use them?

DR. BROWN. There is no national mandate to do that. My understanding is that in a couple of medical centers, that has gone forward.

MS. BERKLEY. In your experience, do medical examinations which follow a recommended format show more consistency than examinations that do not?

DR. BROWN. All of our examinations should be following the recommended format.

MS. BERKLEY. So there is a written format that the doctors use --

DR. BROWN. Yes.

MS. BERKLEY. -- in evaluating patients?

DR. BROWN. Yeah. Now the C&P Service maintains something called worksheets which are one- to three-page textual descriptions of what is expected of the doctors.

MS. BERKLEY. And how long do evaluators usually spend with PTSD, possible PTSD patients?

DR. BROWN. I do not have any data on what that would really be around the country.

MS. BERKLEY. But there is no consistency with that? It could be 20 minutes? It could be two hours? There is no --

DR. BROWN. Again, I really do not have any data to say one way or the other. I would be surprised if it were 20 minutes. But, again, no data.

MS. BERKLEY. Well, from what I understand, best practices say that there should be a minimum of three to four hours before any determination is made.

Between November of 2004 and March of 2005, the Board of Veterans' Appeals remanded almost 10,000 claims for problems involving medical examinations.

Have you looked into any correlation between VISNs in which you found poor quality examinations and regional offices with large numbers of medical examination remands? And I say that with Las Vegas being part of VISN 22 that has the fourth highest remand rate.

DR. BROWN. No. We have not looked into a correlation between the

matrix of exam quality and remand rate.

And one important thing to keep in mind is that by the time it gets to remand, that would have taken a pretty long time. So it could be a couple of years. So we better have process measures that are a little bit more actionable.

Also it is a filtered group that gets to remanded exams. And, you know, there are folks who appeal. It has gone through a number of filters by that time too. So I think there are more direct ways to approach it.

Ms. Berkley. Mr. Aument, if I may ask you. It is my understanding that neither a disagreement as to the sufficiency of the evidence nor a change in diagnosis are adequate to support a determination of CUE.

What legal authority does the VA have for requesting additional information from veterans whose claims for service connection have been finally decided?

Mr. Aument. Congresswoman Berkley, before we even began planning for any sort of a review, one of the first steps we had taken was to seek guidance from our general counsel as to the legal authority for undertaking that type of review.

The primary focus of this review is going to be looking at whether or not the evidence was sufficient, whether or not the required documentation was in place.

The General Counsel informed us again that if we exhausted all efforts to make sure that documentation was available that could verify the stressor, then that could constitute a finding of clear and unmistakable error.

I would defer right now saying I am not the attorney on this issue, but we did seek and obtain guidance from general counsel.

Ms. Berkley. If they are not supposed to reopen cases that the Secretary has adjudicated final and there are four exceptions and none of these reasons fall into the exceptions, I realize you are not the legal authority --

Mr. Aument. Right.

Ms. Berkley. -- but I am having trouble finding the legal authority to force veterans to provide this information.

Mr. Aument. I think we just recently brought to the Committee the legal opinion that we obtained from general counsel on this. I might turn to my colleague, Ms. Szybala, to amplify that somewhat, but indeed they have given us an opinion citing a legal authority.

Ms. Berkley. One final question. Are you aware of any assessment made by the VA as to the risk of increased suicides as a result of the current and proposed review?

Mr. Aument. I am aware of no such assessment, no.

The event that we have just discussed today in New Mexico certainly was tragic. And I know my heart goes out to the veteran's

family and friends on this. But, again, this veteran, as Mr. Garcia mentioned, was not, in fact, contacted by us.

The one thing that I think this has brought to our attention is that before we would undertake any larger review, we probably need to do a better job of outreach to individuals, informing them of the facts and what the review consists of, who would be subjected to review, and what it would mean to individuals.

I am afraid much of the information that has gone out to date has been a combination of fact and opinion. And at the same time, we realize we need to do a better job.

We have recently had conversations with the Veterans' Health Administration, including the leadership of the Vet Center Program. And I think that before undertaking any further review, we would try to put the information out that would help assuage any concerns that veterans might have.

MS. BERKLEY. I appreciate your sensitivity to this because I think it is a potential --

MR. AUMENT. Yes.

MS. BERKLEY. -- tragic problem. And I would hope that they would stop at 2,100 and move forward and not condemn our veterans to any more stress than they have already had. Thank you.

MR. MILLER. Mr. Udall, any other questions?

MR. UDALL. Thank you, Mr. Chairman.

Mr. Aument, it appears that in your review of these cases that you have come up with this figure 90 percent have an adequate stressor and then the IG has come up with 75 percent had an adequate stressor in the file, which is a significant variance or significant discrepancy.

How do you explain this discrepancy? Do you think the IG is just flat wrong or --

MR. AUMENT. Well, Congressman, we have not really completed our review. When we did our first cut, looking at the 2,100 cases that the Inspector General had reviewed, we pretty much substantiated the Inspector General's findings by looking strictly at the ratings. And we found that roughly 25 percent of the cases we looked at had stressor deficiencies.

Since going back to the individual regional offices for the next steps and further development, we have eliminated a number of those cases from further review for a number of reasons.

For example, we have found in roughly 20 to 25 percent of the cases that the Inspector General looked at, the ratings were protected, which means that the time period between today and the day in which they received their determination of service connection was of sufficient duration that this case was no longer subject to any review. So those cases were immediately closed.

We found in a number of other cases that the file itself contained missing evidence, but it was just not reflected in the rating decision.

So that particular group of cases was closed.

It is my guess that we are going to find something closer to the 90 percent figure that we have spoken of, but we are not there yet because the review has not yet been completed.

MR. UDALL. And do you plan to review all 72,000 cases?

MR. AUMENT. Well, as it stands right now, we are acting in accordance with the Inspector General's very strong recommendations.

The IG brought to our attention failure on the part of the Veterans' Benefits Administration to adequately support these cases where we have already made grants of service connection.

As administrators of this particular program, and in the interest of the program integrity, we need to move forward until somebody tells us to stop.

MR. UDALL. When would that be?

MR. AUMENT. Well, I understand that the Congress is looking at it very closely, number one. And I think we have already heard the Inspector General today suggest that they would revisit that decision if, after completion of our review of the 2,100 cases, they believe that would change their recommendation.

MR. UDALL. And you are right about the Congress moving forward. There is a provision in one of the bills in the Senate prohibiting you from moving forward.

I would hope that the administration would step out in this situation and say we have reviewed the 2,100. That is enough. Let us stop the review and let us deal with the future situation.

So you did not answer the question. Do you have the authority to say I am only going to look at the 2,100 or does it go up to the next level?

MR. AUMENT. I believe that would be a decision that would be made collectively by the leadership of VA. Sitting at this table today, I do not have the authority to say that we are going to stop that review.

MR. UDALL. This is just my personal view. I would just urge you to take a very hard look at what you have seen today and what you have done in the review of the 2,100.

You realize you are dealing with a very, very sensitive situation. These veterans and the other ones that are not included in the 2,100, all of them at this point, I think, have been alerted and they are under extreme psychological stress anyway.

So I think it is the right thing to do to terminate it with the 2,100 and then move forward with new procedures if you believe that is warranted based on the 2,100, but to not subject these veterans to that. So I hope you take that message back.

In light of this sensitive situation, when you decided to go out and have these regional offices ask veterans to document their stressors and to step forward, did you consult psychiatrists, psychologists, people within your agency about how to properly do this and how to do

it in a way that would lessen the impact on not only those veterans personally but the other veterans that are being swept in here, the 72,000?

MR. AUMENT. I do not believe that we did perceive the widespread breadth of interest that you have just described, Congressman.

Let me say again with respect to the Albuquerque regional office, acting in very good faith, I believe they got ahead of the program somewhat and wrote letters on their own prior to being given complete guidance that later followed from our Compensation and Pension Service. We believe that the communications, the letters, formats, etc. that were provided by C&P Service are much more sensitized to these types of concerns.

So I think that there were a number of letters that came out of the Albuquerque office that probably unduly alarmed the veterans upon their receipt.

And, as part of the learning process, learning as we go, I believe, is one of the reasons why we are undertaking this 2,100 case review before moving on to any larger group.

MR. UDALL. Thank you.

And thank you, Mr. Chairman.

MR. MILLER. Thank you very much for everybody's testimony today.

I would like to enter into the record a memo from General Counsel 022 to the Under Secretary for Benefits, subject: Review of Awards of Total Disability Rating for PTSD.

[The attachment appears on p. 153]

MR. MILLER. There is no doubt that we all play a large role in assuring the claims adjudication process from beginning to end serves our core constituency with accurate rating decisions.

This Subcommittee expects to see VBA and VHA work very closely together because we often hear the term "one VA." But sometimes when we get out in the field, that is not exactly what is taking place.

We owe it to the sick, to the disabled veterans to not just provide them with a check, but rather we must make certain the VBA works with VHA to treat the veteran so he or she may live their life to their fullest potential.

I have concerns not about the quality of staff of VBA's regional offices, but they may not have the resources and the training necessary to achieve the mission that they have been tasked with. We will explore this more fully at next week's Subcommittee hearing.

Without objection, the statements from the following organizations will be entered into the record: The American Legion; the Disabled American Veterans; Paralyzed Veterans of America; and Veterans of Foreign Wars.

[The statement from the American Legion appears on p. 101]

[The statement from the Disabled American Veterans appears on p. 112]

[The statement of the Paralyzed Veterans of America appears on p. 122]

[The statement of the Veterans of Foreign Wars of the United States appears on p. 132]

MR. MILLER. And with nothing further, this hearing is now adjourned.

[Whereupon, at 1:50 p.m., the Subcommittee was adjourned.]

APPENDIX

Honorable Jeb Bradley

Opening Statement

Oversight hearing on the variances in disability compensation claims decisions made by VA Regional Offices; the Post Traumatic Stress Disorder claims review; and United States Court of Appeals for the Federal Circuit decision *Allen v. Principi*

October 20, 2005

Good morning. The hearing will come to order.

Chairman Miller will be here shortly.

Today we are receiving testimony on several issues: (1) variances in claims decisions throughout the Veterans Benefits Administration's (VBA) regional offices; (2) the ongoing review of certain Post Traumatic Stress Disorder claims; and (3) a 2001 U.S. Court of Federal Appeals decision, *Allen v. Principi*, which clarified that VA may pay compensation for an alcohol or drug abuse condition when it is secondary to a primary service-connected condition such as, in Mr. Allen's case, PTSD.

In late 2004, the *Chicago Sun Times* ran a series of articles focused on the compensation rates of Illinois veterans. As a result, then Secretary Principi asked the VA Inspector General (IG) to conduct a review of compensation payments; the IG reported its findings in May 2005.

The IG cited several factors to account for variances in annual disability compensation payments – some which VA has no control over and others in which VA has some control.

During the IG's review of 2,100 PTSD claims, it was found that while the total number of veterans receiving disability compensation between 1999 and 2004 grew by a little more than 12 percent, PTSD claims increased by more than 80 percent. Likewise, PTSD compensation payments increased almost 149 percent, while compensation for all other disabilities increased by only 41.7 percent. It concerns me that the IG determined that VBA procedures were not always followed in processing PTSD claims, resulting in error rates ranging from 11 percent to 41 percent.

Due to the nature of certain disabilities, the adjudication of a claim requires the use of judgment; therefore, inherently there will be variations in outcomes. I would expect, however, that VA can mitigate and control for variances in decisions by ensuring that regional offices follow standardized adjudication policies and by developing methods for insuring consistency. I look forward to the testimony of Ms. Bascetta, the GAO witness, and Dr. Brown, of the Compensation and Pension Exam Project, in this regard.

Following an IG recommendation, VBA is currently examining the 2,100 PTSD claims that the IG reviewed, and I understand there is some concern within the veterans' community that this review may be adding to the veterans' stresses.

At a briefing for House and Senate committee staff earlier this month, Admiral Cooper, Under Secretary for Benefits, gave every assurance that benefits will be fully paid until a final decision is rendered – a veteran will not lose appeal rights – and that if a grant is overturned, the veteran will not have to repay past benefits. To date, the majority of the original 2,100 cases under review have been successfully closed without a need for further action; the initial grant was correct. It is my hope that VBA, in conjunction with the Veterans Health Administration, will educate veterans on the process as necessary.

I think it's important not to overlook the fact that this review will also help VBA identify weaknesses and improve the quality of the claims adjudication process.

I look forward to hearing from the witnesses.

Statement of Congresswoman Shelley Berkley
Subcommittee Hearing on Disability Compensation Claims Decisions Made by VA Regional Offices
October 20, 2005

First, I would like to thank Chairman Miller for holding this hearing. It is critically important that we explore this issue from the perspective of severely disabled veterans who are being put at risk by the possibly illegal Review of Post-traumatic Stress Disorder claims.

This review and the Inspector General's claim that billions of dollars can be saved by terminating benefits to severely disabled veterans places the health and lives of untold veterans and their families at risk.

While the Bush Administration purports to seek only to "improve compensation and pension claims processing," VBA has been thrust upon a course which may well lead to increased suicides, homicides and violent behavior by veterans whose PTSD symptoms are so severe that they are unable to work.

Mental health professionals, treating psychiatrists, as well as veterans' advocates tell us that this review which is already forcing some veterans to revisit their traumatic experiences and increase their psychiatric symptoms is "madness."

As Secretary Garcia states in his written testimony, an attack on one veteran "is an attack on all of them." Even veterans who are unlikely to have benefits terminated are feeling under attack by a report which appears to recommend cutting severely mentally ill veterans from VA's compensation rolls. How many veteran suicides will it take to reverse course?

While many of our Nation's veterans with severe PTSD fear the loss of their disability benefits and their VA health care, I fear the loss of their lives.

I agree with PVA's testimony that the review which is underway may well be illegal. A court may ultimately find that it is so. Such a finding would be cold comfort to families who have lost a spouse, father, grandfather or child to suicide as the result of the stress this proposed review is placing upon severely disabled veterans.

Does VBA really believe that it can meet the stringent requirements for "clear and unmistakable error" in the decisions of veterans whose claims are being reviewed?

Does the IG have any evidence to support the suggestion that all of the claims which reportedly lacked adequate stressor verification could be terminated under existing statutes?

How can any review which ignored and continues to ignore the thousands of veterans who have had PTSD claims denied with little or no attempt to adequately develop their claims be viewed with any credibility in the veterans' community?

The GAO recently found that many veterans' claims were rated without adequate medical examinations which may have entitled them to a higher rating and benefit. Will VA be contacting those veterans and scheduling a new medical examination?

Are we jeopardizing the lives and health of America's severely disabled veterans so that the bureaucracy will have a complete paper file?

Does not the government have a moral and ethical responsibility to mitigate the danger to the lives and health of veterans occasioned by this review?

I hope that the witnesses will be able to answer my questions. Again, thank you for being here today and I look forward to your testimony.

Congresswoman Brown-Waite Opening Statement
Subcommittee on Disability Assistance and Memorial Affairs:
October 20, 2005/ 10:30 AM/ 340 Cannon
Aaron Gilbride

I would like to thank Chairman Miller for holding this hearing today.

He brings attention to a significant problem for our nation's veterans- the woefully inadequate system for determining VA disability claims.

As we all know, the current system is plagued by problems.

This includes the lack of uniform and effective standards for veterans' advocates, geographically inconsistent claims decisions, and a lengthy appeals process.

These problems hurt our veterans, and in some cases, prevent them from ever seeing a dime of the money we promised.

My district is home to nearly 107,000 veterans- the highest in the nation.

I have become quite familiar with the mounting frustration these veterans feel when dealing with the extensive bureaucracy within the VA.

My constituents have brought to my attention countless instances of inefficiency, ineptitude, and unfairness.

For example, a veteran applying for disability compensation in Florida might receive a different benefit than someone in Nebraska or California for the same condition; due to differences in the manner each jurisdiction diagnoses a disability.

It is essential that we maintain our promises to our nation's veterans.

These brave men and women have made substantial sacrifices to ensure that we can all enjoy our freedom.

These individuals answered the call in our time of need; it is only fitting that we take care of them in theirs.

I look forward to hearing from today's witnesses.

It is my sincere hope that their testimony will shed light on these problems and assist us in improving the manner in which our veterans receive their disability compensation.

Mr. Chairman,

I would like to recognize and thank New Mexico Veterans' Services Secretary John Garcia for testifying during today's hearing. We in New Mexico know Secretary Garcia well, and know of his dedication and loyalty to our veterans. It is not uncommon for a veteran to walk into his office and to speak directly with him about concerns and issues of importance. And I know that the Secretary is as concerned and angry as I am with the manner with which the VA has proceeded on the PTSD matter.

It seems that time and again we hear the larger facts about PTSD: how it affects 11.5 percent of all veterans; how nearly nine out of ten veterans with PTSD demonstrate signs of other disorders, including depression, alcohol and substance abuse, or anxiety; how the number of veterans diagnosed with PTSD has risen while the number of services being offered by the VA has dropped; how the stigma of PTSD is still prevalent throughout the military and prevents many veterans from seeking care – until it may be too late.

However, even with all the facts and figures, the individual stories of struggle are sometimes lost, and PTSD become simply another medical term, another column in the

books. And unfortunately, this became the perspective of the VA. In August, it was immediately clear that the VA's review of 72,000 PTSD cases meant something different to them than it did to the veterans suffering from PTSD. To the VA, it was a process for seeking out incomplete cases and finding voids in paperwork that needed to be filled. The IG report that catalyzed the review included charts and graphs and made suggestions for action.

To veterans, though, the announcement that their case might be reviewed was not seen as simply another bureaucratic process. It was, for many, a jolting realization that the day-to-day struggle they endure was being questioned and that their request for help to deal

with this struggle needed external validation. For those who live with PTSD, the review did not mean a paperwork review as much as it meant a personal attack on what is already a sensitive issue.

Last week, a veteran in my district took his life after dealing with PTSD for years and years. He can certainly be perceived as one statistic within the larger, tragic figure of those veterans who contemplate or act on suicidal thoughts. But he can also be seen as he should be, as a Vietnam Vet, decorated with the Purple Heart and other commendations. He was a soldier who fought bravely and honorably for his country. Involved in local veterans' organizations, he helped out at events and with other veterans – and all the

while he struggled to deal with PTSD. Even though his case was well documented and he was in no danger of finding his compensation or medical assistance benefits revoked, he was greatly shaken by the announcement of the VA review, and frequently inquired whether he would be losing the support he did receive. He believed, as so many veterans do, that he was being forced to prove himself yet again. It is that belief that makes veterans so angry and so frustrated with this process.

I believe the VA's intentions to bring clarity and accountability to PTSD cases were not in any way meant to harm our veterans. But I believe the manner in which they proceeded with the review – without any input from mental health professionals

concerning the risk of harm to veterans with sever psychiatric symptoms - has done far more harm than good. It is important that we compile facts and figures and that we be concerned with the larger picture. It is more important that we not forget veterans who have borne the battle and now struggle with PTSD, and how our actions affect them. I have called, and will continue to call, for a halt to the review. The VA must reevaluate the process it is using in this review and must take into account how it is affecting veterans. It is better that we stop this review before more lives are lost, rather than continue with troublesome and tragic consequences.

Thank you again, Secretary Garcia, for your presence and testimony today, and a personal thank you for your tireless work on behalf of our New Mexico veterans.

Thank you, Mr. Chairman.

Hearing Statement of the Honorable Lane Evans
October ~~19~~ 20, 2005

I requested a review of VA practices which have resulted in low benefits for service-disabled veterans in Illinois.

I certainly did not expect the lop-sided IG review we received.

My staff reviewed PTSD claims in Chicago. These are some of the veterans whose claims were denied.

- A World War II veteran with a Combat Infantry Badge.
- A Vietnam veteran who participated in the 1969 Tet Counter-offensive.
- A peacetime veteran who witnessed the extremely traumatic death of a coworker.
- An Iraq veteran with PTSD noted on a compensation and pension examination.

The IG review completely ignored such claims.

The IG's recommendation fails to take into account the devastating impact his allegations of fraud are having upon the lives of these veterans.

I hope that today's hearing will lead to the end of VA's illegal and destructive action against veterans with severe PTSD.

The veterans' advocates are right.

We must stop this process before any more veterans take or lose their lives.

Mr. Chairman, I ask that a letter Ranking Member Akaka and I sent to Secretary Nicholson concerning this matter be included in the record.

I thank all of the witness and look forward
to your testimony.

STATEMENT OF
JON A. WOODITCH
ACTING INSPECTOR GENERAL
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
HEARING ON VARIANCES IN DISABILITY COMPENSATION CLAIMS DECISIONS
OCTOBER 20, 2005

Mr. Chairman and other distinguished members of the Subcommittee, I am pleased to be here today to address the May 2005 Department of Veterans Affairs (VA), Office of Inspector General (OIG) report, *Review of State Variances in VA Disability Compensation Payments*. Last December, the VA Secretary asked the Inspector General to conduct this review. His request was in response to a letter which he received from several concerned Members of Congress.

EXECUTIVE SUMMARY

Variances in average annual disability compensation payments by state have existed for decades. The factors that influence these payments are complex and intertwined. Our review concluded that some variance in average annual disability compensation payments by state is to be expected. For every state to have similar average payments, every factor that affects payments would have to be virtually similar. This is not the case.

Compensation payments by state are affected by veteran demographics and benefit rating decisions. Underlying factors, such as – medical examination reports that do not consistently provide sufficient data for rating purposes, incomplete case development, a rating schedule that is subject to differing interpretations, and other factors – can also impact average annual disability compensation payments by state.

Demographic factors – such as the percentage of veterans whose claims are represented by veterans service organizations, rank, military retiree population, and the numbers of dependents – not only vary by state, but are generally beyond VA influence. On the other hand, factors such as disability compensation rating decisions over which VA has direct influence also impact average disability compensation payments.

Our analysis of rating decisions shows that for disabilities that can be independently validated based on physical measurements, such as amputations, the assigned degrees of disability are consistent nationwide. However, other disabilities are inherently more susceptible to variations in rating determinations. For example, conditions involving mental disorders, such as post-traumatic stress disorder (PTSD), where much of the information needed to make a rating decision is not physically apparent and, as such, much more difficult to document, are more susceptible to interpretation and judgment. This subjectivity leads to inconsistency in rating decisions which, in turn, contributes to variances in average annual disability compensations payments by state.

BACKGROUND

For fiscal year (FY) 2004, approximately 2.5 million veterans in the 50 states received disability compensation benefits totaling $20.9 billion. These benefits reflect claims decisions made during the past 60 plus years by VA employees located at 57 regional offices nationwide. As of the end of FY 2004, the national average annual payment per veteran was $8,378. Average annual payments by state ranged from a low of $6,961 in Illinois to a high of $12,004 in New Mexico. Essentially this means that, on average, veterans in New Mexico receive $5,043 more per year than veterans in Illinois. For analysis purposes, we extracted 6 years of data (FY 1999 through FY 2004) from VBA information systems. We grouped the highest six average payment states and the lowest six average payment states, which we referred to as the "high cluster" and the "low cluster."

Recognizing that some variance in average annual compensation payments by state is expected, we conducted our review to determine why the variance exist and whether there is cause for concern. Our review included:

- An examination of demographic and claims processing factors
- A review of 2,100 claims folders
- A survey of 1,992 Veterans Benefits Administration (VBA) rating specialists and decision review officers
- A review of the quality of disability medical examinations
- A review of the VBA Statistical Technical Accuracy Review (STAR) program
- Impact of legislated pay increases
- A review of past studies and reports completed during the past 50 years that addressed issues relevant to the viability of a rating schedule created in 1945

Our report identified a number of factors that influence the variance in disability compensation payments. Two key reasons highlighted in the report are demographic and claims processing factors and rating decisions.

DEMOGRAPHIC AND CLAIMS PROCESSING FACTORS

We analyzed various demographic and claims processing factors to determine which factors impact the variance in average annual payments. Demographic factors are variables that are beyond VA control. The following demographic factors influence the variance in state average annual disability compensation payments.

- Representation – Veterans whose claims are represented by veterans' service organizations receive, on average, $6,225 more per year than those without representation. The high cluster of states shows an average representation of about 70 percent, while the low cluster averages 55 percent.

- Enlisted versus Officer – Data indicates that enlisted veterans receive $1,775 more per year than veterans who served as officers. The high cluster shows an average of 63 percent enlisted personnel receiving benefits compared to 44 percent for the low cluster.

- Retirees versus Non-Retirees – Data indicates that military retirees receive $1,438 more per year than non-military retired claimants. The high cluster averages 28 percent retired military veterans receiving compensation benefits compared to the low cluster, which averages 17 percent.

- Participation of Veterans Receiving Benefits – Data indicates a correlation between the state ranking and the percentage of veterans who reside in a state and who receive disability compensation from VA. For example, the high cluster shows an average of 12 percent of the veterans in those states receiving VA benefits compared to only 8 percent in the low cluster.

  One explanation for this is the rate at which veterans submit new disability claims. Essentially fewer veterans file for benefits in the low cluster of states. For example, the rate of new claims for the high cluster was 103 claims per 1,000 veterans in the state, compared to only 44 claims per 1,000 veterans in the low cluster.

- Period of Service – Vietnam veterans receive, on average nationwide, $2,328 more in annual compensation payments than veterans in the next highest period of service; and there is a correlation between the percentage of recipients who are Vietnam veterans and the state rankings. For the high cluster, 39 percent of the veterans receiving compensation are Vietnam veterans, compared to 34 percent in the low cluster.

  The impact of period of service on the variance is more definitive when analyzing the mix of different periods of service. For example, states with a high percentage of Vietnam veterans and a low percentage of World War II veterans will have higher average annual compensation payments.

- Dependents – Nationally, veterans with dependents receive more per year than veterans without dependents. The percentage of veterans with dependents in the high cluster averaged 44 percent compared to 30 percent in the low cluster.

Brokered claims, transferred cases, and grant and denial rates are claims processing factors that might impact average annual disability compensation payments by state, but VA did not collect and report this information. Brokered claims are cases that are transferred to other states for adjudication due to workload demands. In FY 2004, 13.3 percent, or more than 91,000 cases, were brokered to other states. Transferred cases involve cases originally adjudicated in one state and later transferred and paid out in another state. The concern here, as with brokered cases, raises the issue that average annual disability awards by a particular state can be influenced by rating decisions made in other states. The other factor that might impact the variance would be grant and denial rates for compensation claims. Although VBA published grant rates for a period of years through FY 2002, it discontinued the practice because the data was determined to

be incomplete and misleading. Since this data is no longer collected, we were unable to determine the impact these rates had on the variance, if any.

Our concern over the lack of information is consistent with the November 2004 Government Accountability Office report, *VA Needs Plan for Assessing Consistency of Decisions,* which reported that VA does not systematically assess decision-making consistency among the 57 regional offices because data collected by VA does not provide a reliable basis for identifying indications of inconsistencies.

Our review of demographic factors helped to explain that some variance in average annual compensation payments by state is to be expected. To determine whether the magnitude of the variance was acceptable or problematic, we performed an analysis of ratings data nationwide.

DISABILITY COMPENSATION RATINGS

Our analysis of ratings data shows that some disabilities are inherently more susceptible to variations in ratings decisions. This is attributed to a combination of factors, including a rating schedule that is based on a 60-year-old model and some diagnostic conditions that lend themselves to more subjective decision making.

As discussed in our report, the VA disability rating program is based on a 1945 model that does not reflect modern concepts of disability. Over the past 5 decades various commissions and studies have repeatedly reported concerns about whether the rating schedule and its governing concepts of average impairment adequately reflects medical and technological advancements, changes in workplace opportunities, and earning capacity for disabled veterans.

Although some updates to the rating schedule have occurred, proponents for improving the accuracy and consistency of ratings advocate that a major restructuring of the rating schedule is long overdue. This is evidenced by the fact that even updated sections of the rating schedule continue to result in inconsistent ratings for veterans with the same diagnosis, because rating criteria remains imprecise and confusing. For example, the rating schedule for a sciatic nerve condition causing paralysis of the foot has the following five possible ratings:

- 10% - Mild
- 20% - Moderate
- 40% - Moderately Severe
- 60% - Marked Muscular Atrophy
- 80% - Completely Disabling

Our concern is that the rating schedule does not define the first three levels, so when a rating specialist gets a medical examination pertaining to this condition, they must interpret it and try to align it with one of the rating levels. This results in inconsistent ratings for the same condition because what one rater will interpret as a mild condition, another may interpret as a moderately severe condition. Our survey of rating specialists and decision review officers resulted in 52 percent responding that they could support two or more different ratings for the same medical condition.

For disabilities that can be independently validated based on physical measurements, the assigned degrees of disability were consistent. Our review of data for 276,000 veteran claims with Musculoskeletal and Auditory disabilities, such as above-the-knee or below-the-knee amputations, tinnitus, and total deafness, found that veterans received consistent ratings nationwide.

However, the rating schedule criteria for other body systems, such as mental disorders, were more susceptible to interpretation and judgment. We selected the mental disorder system for further analysis because it had the highest overall nationwide rating average of 58 percent, and it included PTSD, which is the fastest growing disability condition.

From FYs 1999 to 2004, the number and percentage of PTSD cases increased significantly. While the total number of all veterans receiving disability compensation grew by only 12 percent, the number of PTSD cases grew by 80 percent – from 120,000 cases in 1999 to over 215,000 cases in 2004. During the same period, PTSD benefits payments increased 149 percent from $1.7 billion to $4.3 billion, while compensation for all other disability categories only increased by 42 percent. While veterans being compensated for PTSD represented only 9 percent of all compensation recipients, they received 21 percent of all payments. Also, the number of 100 percent ratings for PTSD increased from 34,568 in FY 1999 to 102,177 in FY 2004, for a 195.6 percent increase.

Data shows that differences in the number of 100 percent rated PTSD cases approved by state accounts for 34 percent of the variance. Basically, this means that $1,720 of the $5,043 variance is attributed to these ratings. The driver is not the amount of the awards but the variance in the number and percentage of veterans with 100 percent PTSD ratings in each state. States with higher average annual disability benefit payments have higher percentages of 100 percent PTSD ratings. For example, New Mexico has the highest payment average of $12,004, and 12.6 percent of its veterans are rated 100 percent for PTSD. Illinois has the lowest average payment of $6,961 and only 2.8 percent of its compensation recipients are rated 100 percent.

PTSD CASE REVIEW

To understand why this variance may be occurring, we reviewed 2,100 PTSD cases at seven VBA regional offices and found required procedures for documenting rating decisions were not consistently followed, and that raters approached stressor verification requirements differently from state to state. In 527 (25 percent) of the 2,100 cases reviewed, we found inconsistencies in the methods raters used to develop and verify veteran-reported evidence about the claimed service-related stressor event before granting compensation benefits. The error rate ranged from a low of 11 percent in Oregon to a high of 40.7 percent in Maine. The bottom line is that there was no documentation in the 527 case files to support the claim that the PTSD was caused by an event related to military service.

The 25 percent error rate is not an indicator of fraud. It reflects noncompliance with VBA rules and regulations concerning required documentation to justify and support rating decisions. These documentation requirements are essentially internal controls designed to ensure veterans

receive everything they are entitled to under the law, and to serve as a basis for declining claims when the required documentation does not exist.

To demonstrate the potential consequence of not obtaining or developing adequate evidence to support a PTSD claim, the 25 percent error rate equates to questionable compensation payments totaling $860.2 million in FY 2004. Over the lifetimes of these claims, the questionable payments would be an estimated $19.8 billion if all 25 percent were found to be unsupported. It is important to note that we recommended that VBA do a 100 percent review of all PTSD cases rated 100 percent in order to identify specific claims that were not supported with the required documentation and to rework those cases accordingly. VBA concurred with this recommendation and agreed to review approximately 72,000 100 percent rated PTSD cases approved between FY 1999 to 2004.

Our intent in reviewing the 72,000 cases is to have VA identify instances where the documentation requirements were not complied with, and to work with the veterans and their representatives to identify and obtain the required supporting evidence. In those cases where it is determined that the claimant is not entitled to receive disability compensation, we believe that appropriate due process action should be initiated to resolve the matter.

We also determined that veterans sought less mental health treatment after their ratings were increased to 100 percent. Of 92 PTSD cases reviewed, we found that 39 percent had a 50 percent or greater decline in mental health visits after obtaining a 100 percent status. The average decline in visits was 82 percent, with some veterans receiving no mental health treatment at VA facilities they were routinely visiting prior to receiving the 100 percent rating. While mental health visits declined, some of these veterans continued to receive all other medical care at the VA. This situation raises several important questions. Are veterans receiving the mental health care they need? How effective is VA's diagnosis and treatment for PTSD? Does the compensation program serve as an incentive to some veterans to exaggerate PTSD symptoms for the monetary benefits? We believe VBA should look at this issue in its review of all 100 percent PTSD ratings.

OTHER ISSUES

As part of our review, we issued a questionnaire to 1,992 VBA rating specialists and decision review officers to gain their perspective on training and other issues that affect the rating of disability claims; 1,349 responded, 45 percent of the respondents are veterans, and 59 percent have service-connected disabilities. Results included:

- Sixty-five percent reported insufficient staff to ensure timely and quality service.
- Fifty-two percent responded they could support two or more different ratings for the same medical condition.
- Forty-one percent estimated that 30 percent or more of the claims were not ready to rate when presented for rating.

- Twenty percent estimated that more than 10 percent were actually rated without all the needed information.

Another factor impacting the consistency of ratings is insufficient medical examination reports. Our review determined that medical disability examination reports do not consistently provide the specific information needed for rating purposes. Based on our questionnaire of 1,992 rating specialists and decision review officers, 32 percent of the respondents estimated that 20 percent or more of the medical examination reports provided for rating purposes were incomplete and should have been returned. To overcome this problem, the VA Compensation and Pension Examination Program is developing automated medical examination templates to provide a means for structured data entry of all information needed for rating decision purposes. However, at the time of our review, very few raters were familiar with the examination report templates.

We assessed the effectiveness of the STAR program in identifying and reducing processing errors in rating decisions. STAR managers said that for many disabilities the rating schedule is subjective and ratings assigned by different raters could vary and still be considered correct. They also said that they do not identify or analyze rating inconsistencies among raters or states. Nor did the STAR program detect the evidence development weaknesses identified in our review of the 2,100 PTSD cases.

We also reviewed prior internal and external studies conducted during the last 50 years that addressed the rating schedule as the basis for compensating veterans with service-connected disabilities. Although done at different times, these studies have repeatedly raised questions about whether or not the rating schedule reflected economic, medical, and social changes on the earning capacity of disabled veterans since 1945.

Fraudulent and improper claims are additional factors that will unnecessarily increase the amoun of disability compensation payments if left unchecked. From FY 1999 to 2004, the OIG successfully prosecuted 455 individuals who committed VA compensation and pension fraud. These cases resulted in $25.6 million in fraudulent payments.

CONCLUSION

Variances in average annual disability compensation payments by state have existed for decades. The factors that influence these payments are complex and intertwined. As stated in our report, compensation payments by state are affected by veteran demographics and inconsistent benefit rating decisions. Some disabilities are inherently prone to subjective rating decisions, especially for conditions such as PTSD. This subjectivity will cause inconsistencies in rating decisions which, in turn, contribute to variances in average annual compensation payments by state.

RECOMMENDATIONS

To address the issues raised in this report, we made the following recommendations. The Under Secretary for Benefits agreed with the findings of this report and our recommendations.

1. Conduct a scientifically sound study using statistical models, such as a multi-variant regression analysis, of the major influences on compensation payments to develop baseline data and metrics for monitoring and managing variances, and use this information to develop and implement procedures for detecting, correcting, and preventing unacceptable payment patterns.

2. Coordinate with the Veterans' Disability Benefits Commission to ensure all potential issues concerning the need to clarify and revise the Schedule for Rating Disabilities are reviewed, analyzed, and addressed.

3. Conduct reviews of rating practices for certain disabilities, such as PTSD, IU, and other 100-percent ratings, to ensure consistency and accuracy nationwide. At a minimum, these reviews should consist of data analysis, claims file reviews, and onsite evaluation of rating and management practices.

4. Expand the national quality assurance program by including evaluations of PTSD rating decisions for consistency by regional office, and to ensure sufficient evidence to support the rating is fully developed and documented, such as verifying the stressor event.

5. Coordinate with the Veterans Health Administration to improve the quality of medical examinations provided by VA and contract clinicians, and to ensure medical and rating staff are familiar with approved medical examination report templates and that the templates are consistently used.

6. In view of growing demand, the need for quality and timely claims decisions, and the ongoing training requirements, reevaluate human resources and ensure the VBA field organization is adequately staffed and equipped to meet mission requirements.

7. Consider establishing a lump-sum payment option in lieu of recurring monthly payments for veterans with disability ratings of 20 percent or less.

8. Undertake a more detailed analysis to identity differences in claims submission patterns to determine if certain veteran sub-populations, such as World War II, Korean Conflict, or veterans living in specific locales, have been underserved, and perform outreach based on the results of the analysis to ensure all veterans have equal access to VA benefits.

This concludes my statement. I would like to once again thank Chairman Miller and the other members of the Subcommittee for this opportunity, and welcome any questions you may have.

United States Government Accountability Office

GAO

Testimony Before the Subcommittee on Disability Assistance and Memorial Affairs, Committee on Veterans' Affairs, House of Representatives

For Release on Delivery
Expected at 10:30 a.m. EDT
Thursday, October 20, 2005

VA DISABILITY BENEFITS

Routine Monitoring of Disability Decisions Could Improve Consistency

Statement of Cynthia A. Bascetta, Director, Education, Workforce, and Income Security Issues

GAO-06-120T

October 2005

VA DISABILITY BENEFITS

Routine Monitoring of Disability Decisions Could Improve Consistency

GAO
Accountability · Integrity · Reliability
Highlights

Highlights of GAO-06-120T, a testimony before the Subcommittee on Disability Assistance and Memorial Affairs, House Committee on Veterans' Affairs

Why GAO Did This Study

The House Subcommittee on Disability Assistance and Memorial Affairs asked GAO to discuss its work on the consistency of disability compensation claims decisions of the Department of Veterans Affairs (VA). GAO has reported wide state-to-state variations in average compensation payments per disabled veteran, raising questions about decisional consistency. In 2003, GAO designated VA's disability programs, along with other federal disability programs, as high risk, in part because of concerns about decisional consistency. Illustrating this issue, GAO reported that inadequate information from VA medical centers on joint and spine impairments contributed to inconsistent regional office disability decisions.

What GAO Recommends

In 2004, GAO recommended that VA develop a plan to use data from a new administrative data system to identify indications of inconsistent decision making that need to be studied. VA concurred but has not yet developed such a plan. In October 2005, GAO recommended that VA develop a strategy for improving consistency of disability examination reports needed by regional offices to make proper decisions across the nation on claims involving joint and spine impairments. VA concurred.

www.gao.gov/cgi-bin/getrpt?GAO-06-120T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Cynthia A. Bascetta at (202) 512-7101.

What GAO Found

GAO's November 2004 report explained that adjudicators in the Department of Veterans Affairs often must use judgment in making disability compensation claims decisions. As a result, it is crucial for VA to have a system for routinely identifying the effect of judgment on decisional variations among its 57 regional offices to determine if the variations are reasonable and, if not, how to correct them. In 2002, GAO reported that state-to-state variations of as much as 63 percent in average compensation payments per disabled veteran indicated potential inconsistency. The nature of the criteria that adjudicators must apply in evaluating the degree of impairment due to mental disorders provides an example of the extent of judgment required.

VA's Medical Criteria for Evaluating the Degree of Impairment Due to Mental Disorders

Degree of impairment as characterized in VA's medical criteria	Disability severity rating (in percent)
Totally impaired	100
Deficient in most areas such as work, school, family relations, judgment, thinking, or mood	70
Reduced reliability and productivity	50
Occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks	30
Mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms can be controlled by continuous medication	10
Not severe enough to interfere with occupational or social functioning or to require continuous medication	0

Source: VA's Schedule for Rating Disabilities.

GAO's October 2005 report on decisions for joint and spine disabilities showed one important way to improve consistency. Specifically, regional offices often rely on VA's 157 medical centers to examine claimants and provide medical information needed to decide the claims. However, VA has found inconsistency among its medical centers in the adequacy of their joint and spine disability exam reports that regional offices need to decide these claims. As of May 2005, the percentage of exam reports containing the required information varied across the medical centers from a low of 57 percent to a high of 92 percent. This could adversely affect the consistency of disability claims decisions involving joint and spine impairments. Although VA has made substantial progress, more remains to be done to improve the level of consistency in the disability exam reports.

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to discuss our work on the consistency of decisions that the Department of Veterans Affairs (VA) makes on veterans' disability compensation claims. Ensuring that VA's disability decisions are consistent across the nation is vital to ensuring the integrity of VA's disability program. In 2002, we reported that wide variations existed across the nation in the average compensation payments per disabled veteran, and we recommended that VA study such indications of inconsistency in the decision making of its 57 regional offices.[1] As you know, in January 2003, GAO designated VA's disability program, along with other federal disability programs, as high risk, in part because of concerns about the consistency of decision making.[2]

In December 2004, the media published data showing that the average compensation payment per disabled veteran varied from a low of $6,710 in Ohio to a high of $10,851 in New Mexico. In response, the Secretary asked the Office of Inspector General in December 2004 to study the reasons for the wide variations in average payments, and in May 2005, the Inspector General reported its findings and made recommendations for improvement.[3] As the Inspector General found, much needs to be done to ensure that VA renders consistent decisions across the nation.

As you requested, my remarks today will draw upon two GAO reports. The first, issued in November 2004, addressed VA's need for a systematic approach to identifying consistency issues that need to be studied in detail.[4] The second report, issued on October 12, 2005, examined VA's efforts to achieve consistency among its medical centers in the quality of the medical information they provide to regional offices in order to make decisions on disability claims involving impairments of joints and the

[1]GAO, *Veterans' Benefits: Quality Assurance for Disability Claims and Appeals Processing Can Be Further Improved*, GAO-02-806 (Washington, D.C.: Aug. 16, 2002).

[2]GAO, *High-Risk Series: An Update*, GAO-03-119 (Washington, D.C.: January 2003).

[3]VA Office of Inspector General, *Review of State Variances in VA Disability Compensation Payments*, Report No. 05-00765-137 (Washington, D.C.: May 19, 2005).

[4]GAO, *Veterans Benefits: VA Needs Plan for Assessing Consistency of Decisions*, GAO-05-99 (Washington, D.C.: Nov. 19, 2004).

spine.[5] Improving the quality of the medical information for these impairments could improve VA's decisional consistency.

In summary, as we reported in November 2004, VA's adjudicators often must use judgment in making disability decisions. As a result, variation is an inherent factor in the decision-making process. This makes it crucial that VA have a system for routinely identifying variations among its 57 regional offices so that such variations can be studied to determine if they are within the bounds of reasonableness and, if not, how to correct the problem. Also, as we reported in October 2005, to achieve consistency, VA must deal with issues involving not only its regional offices but also its 157 medical centers which conduct most of the disability examinations that regional offices rely on to provide the medical information they need to make disability decisions. As we reported, VA has found inconsistency among its medical centers in the extent to which they provide regional offices with exam reports containing all the medical information needed to ensure that regional offices make decisions awarding the appropriate level of benefits to veterans with joint and spine impairments. Some medical centers consistently provide high-quality exam reports, while others do not, which means the benefits awarded to veterans with similar joint and spine impairments could differ, depending on which medical center examined them. Although VA has made substantial progress in correcting this problem, more remains to be done to ensure that all medical centers provide exam reports containing adequate information for regional offices to make proper decisions.

Background

Regardless of a veteran's employment status or level of earnings, VA's disability compensation program pays monthly cash benefits to eligible veterans who have service-connected disabilities resulting from injuries or diseases incurred or aggravated while on active military duty. A veteran starts the disability claims process by submitting a claim to one of the 57 regional offices administered by the Veterans Benefits Administration (VBA). In the average compensation claim, the veteran claims about five disabilities for which the regional office must develop the evidence required by law and federal regulations, such as military records and medical evidence. To obtain the required medical evidence, VBA's regional offices often arrange medical examinations for claimants. For example, in

[5]GAO, *Veterans' Disability Benefits: VA Could Enhance Its Progress in Complying with Court Decision on Disability Criteria*, GAO-06-46 (Washington, D.C.: Oct. 12, 2005).

fiscal year 2004, VBA's 57 regional offices asked the 157 medical centers administered by the Veterans Health Administration (VHA) to examine about 500,000 claimants and provide examination reports containing the medical information needed to decide the claim.

On the basis of the evidence developed by the regional office, an adjudicator determines whether each disability claimed by the veteran is connected to the veteran's military service. Then, by applying medical criteria contained in VA's Rating Schedule, the adjudicator evaluates the degree of disability caused by each service-connected disability in order to determine the veteran's overall degree of service-connected disability. The degree of disability is expressed as a percentage, in increments of 10 percentage points—for example, 10 percent, 20 percent, 30 percent, and so on, up to 100 percent disability. The higher the percentage of disability, the higher the benefit payment received by the veteran.

If a veteran disagrees with the regional office adjudicator's decision on whether a disability is service-connected or on the appropriate percentage of disability, the veteran may file a Notice of Disagreement. The regional office then provides a further written explanation of the decision, and if the veteran still disagrees, the veteran may appeal to VA's Board of Veterans' Appeals. Before appealing to the board, a veteran may ask for a review by a regional office Decision Review Officer, who is authorized to grant the contested benefits based on the same case record that the original adjudicator relied on to make the initial decision.

After appealing to the board, if a veteran disagrees with the board's decision, the veteran may appeal to the U.S. Court of Appeals for Veterans Claims, which has the authority to render decisions establishing criteria that are binding on future decisions made by VA's regional offices as well the board. For example, in *DeLuca v. Brown*, 8 Vet. App. 202 (1995), the court held that when federal regulations define joint and spine impairment severity in terms of limits on range of motion, VA claims adjudicators must consider whether range of motion is further limited by factors such as pain and fatigue during "flare-ups" or following repetitive use of the impaired joint or spine. Previous to this decision, VA had not explicitly considered whether such additional limitations existed because VA contended that its Rating Schedule incorporated such considerations.

VA Needs a System for Routinely Monitoring Variations Inherent in Deciding Disability Claims

Because adjudicators often must use judgment when deciding disability compensation claims, variations in decision making are an inherent possibility. While some claims are relatively straightforward, many require judgment, particularly when the adjudicator must evaluate (1) the credibility of different sources of evidence; (2) how much weight to assign different sources of evidence; or (3) disabilities, such as mental disorders, for which the disability standards are not entirely objective and require the use of professional judgment. Without measuring the effect of judgment on decisions, VA cannot provide reasonable assurance that consistency is acceptable. At the same time, it would be unreasonable to expect that no decision-making variations would occur.

Consider, for example, a disability claim that has two conflicting medical opinions, one provided by a medical specialist who reviewed the claim file but did not examine the veteran, and a second opinion provided by a medical generalist who reviewed the file and examined the veteran. One adjudicator could assign more weight to the specialist's opinion, while another could assign more weight to the opinion of the generalist who examined the veteran. Depending on which medical opinion is given more weight, one adjudicator could grant the claim and the other could deny it. Yet a third adjudicator might conclude that the competing evidence provided an approximate balance between the evidence for and the evidence against the veteran's claim, which would require that the adjudicator apply VA's "benefit-of-the-doubt" rule and decide in favor of the veteran.

An example involving mental disorders also demonstrates how adjudicators sometimes must make judgments about the degree of severity of a disability. The disability criteria in VA's Rating Schedule provide a formula for rating the severity of a veteran's occupational and social impairment due to a variety of mental disorders. This formula is a nonquantitative, behaviorally oriented framework for guiding adjudicators in choosing which of the degrees of severity shown in table 1 best describes the claimant's occupational and social impairment.

Table 1: VA's Medical Criteria for Evaluating the Degree of Occupational and Social Impairment Due to Mental Disorders

Degree of occupational and social impairment as characterized in VA's medical criteria	Disability rating (in percent)
Totally impaired	100
Deficient in most areas such as work, school, family relations, judgment, thinking, or mood	70
Reduced reliability and productivity	50
Occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks	30
Mild or transient symptoms that decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms can be controlled by continuous medication	10
Not severe enough to interfere with occupational or social functioning or to require continuous medication	0

Source: VA's Schedule for Rating Disabilities.

Note: The Veterans' Disability Benefits Commission is currently reviewing the appropriateness of VA's Rating Schedule, including the criteria for mental disorders.

Similarly, VA does not have objective criteria for rating the degree to which certain spinal impairments limit a claimant's motion. Instead, the adjudicator must assess the evidence and decide whether the limitation of motion is "slight, moderate, or severe." To assess the severity of incomplete paralysis, the adjudicator must decide whether the veteran's paralysis is "mild, moderate, or severe." The decision on which severity classification to assign to a claimant's condition could vary in the minds of different adjudicators, depending on how they weigh the evidence and how they interpret the meaning of the different severity classifications.

Despite the inherent variation, however, it is reasonable to expect the extent of variation to be confined within a range that knowledgeable professionals could agree is reasonable, recognizing that disability criteria are more objective for some disabilities than for others. For example, if two adjudicators were to review the same claim file for a veteran who has suffered the anatomical loss of both hands, VA's disability criteria state unequivocally that the veteran is to be given a 100 percent disability rating. Therefore, no variation would be expected. However, if two adjudicators were to review the same claim file for a veteran with a mental disability, knowledgeable professionals might agree that it would not be out of the bounds of reasonableness for these adjudicators to diverge by 30 percentage points but that wider divergences would be outside the bounds of reasonableness.

The fact that two adjudicators might make differing, but reasonable, judgments on the meaning of the same evidence is recognized in the design of the system that VBA uses to assess the accuracy of disability decisions made by regional office adjudicators. VBA instructs the staff who review the accuracy of decisions to refrain from charging the original adjudicator with an error merely because they would have made a different decision than the one made by the original adjudicator. VBA instructs the reviewers not to substitute their own judgment in place of the original adjudicator's judgment as long as the original adjudicator's decision is adequately supported and reasonable.

Because of the inherent possibility that different adjudicators could make differing decisions based on the same information pertaining to a specific impairment, we recommended in November 2004 that the Secretary of Veterans Affairs develop a plan containing a detailed description of how VA would (1) use data from a newly implemented administrative information system—known as Rating Board Automation 2000—to identify indications of decision-making inconsistencies among the regional offices for specific impairments and (2) conduct systematic studies of the impairments for which the data reveal possible inconsistencies among regional offices. VA concurred with our recommendation but has not yet developed such a plan. At this point, VA has now collected 1 full year of data using the new administrative data system, which should be sufficient to begin identifying variations and then assessing whether such variations are within the bounds of reasonableness.

Inconsistent Quality Of Disability Examination Reports Underscores Need to Monitor Consistency of Decisions

Because the existing medical records of disability claimants often do not provide VBA regional offices with sufficient evidence to decide claims properly, the regional offices often ask VHA medical centers to examine the claimants and provide exam reports containing the medical information needed to make a decision. Exams for joint and spine impairments are among the exams that regional offices most frequently request.[6]

To comply with the *DeLuca* decision's requirements for joint and spine disability exam reports, VHA instructs its medical center clinicians to make not only an initial measurement of the range of motion in the impaired joint or spine but also to measure range of motion after having the claimant flex the impaired joint or spine several times. This is done to determine the extent to which repeated motion may result in pain or fatigue that further degrades the functioning of the impaired joint or spine. In addition, the clinician also is instructed to determine if the claimant experiences flare-ups from time to time, and if so, how often such flare-ups occur and the extent to which they limit the functioning of the impaired joint or spine. However, in a baseline study conducted in 2002, VA found that 61 percent of the exam reports on joint and spine impairments did not provide sufficient information on the effects of repetitive movement or flare-ups to comply with the *DeLuca* criteria.

We reported earlier this month on the progress VA had made since 2002 in ensuring that its medical centers consistently prepare joint and spine exam reports containing the information required by *DeLuca*. We found that, as of May 2005, the percentage of joint and spine exam reports not meeting the *DeLuca* criteria had declined substantially from 61 percent to 22 percent. Much of this progress appeared attributable to a performance measure for exam report quality established by VHA in fiscal year 2004 after both VHA and VBA had taken a number of steps to build a foundation

[6]Because of workload issues at some VHA medical centers, 10 of VBA's 57 regional offices request most of their disability exams from a private contractor, QTC Medical Services. These 10 regional offices are San Diego, California; Los Angeles, California; Salt Lake City, Utah; Seattle, Washington; Atlanta, Georgia; Winston-Salem, North Carolina; Boston, Massachusetts; Roanoke, Virginia; Houston, Texas; and Muskogee, Oklahoma. To assess the quality of QTC exam reports, VBA uses a review system separate from the system for reviewing the quality of VHA medical center exam reports. According to VBA officials responsible for reviewing QTC exam report quality, VBA deemed about 95 percent of QTC's exam reports to be adequate during the quarter ending October 31, 2004. However, the method used to select the review sample does not provide statistically reliable results for any specific type of impairment, such as joint or spine impairments.

for improvement. This included creating the Compensation and Pension Examination Project Office, a national office established in 2001 to improve the disability exam process, and providing extensive training to VHA and VBA personnel.

While VA made substantial progress in ensuring that its medical centers' exam reports adequately address the *DeLuca* criteria, a 22 percent deficiency rate indicated that many joint and spine exam reports still did not comply with *DeLuca*. Moreover, in relation to the issue of consistency, the percentage of exam reports satisfying the *DeLuca* criteria varied widely across the 21 health care networks that manage VHA's 157 medical centers—from a low of 57 percent compliance to a high of 92 percent. It should be noted that the degree of variation is likely even greater than indicated by these percentages because, within any given health care network, an individual medical center's performance in meeting the *DeLuca* criteria may be lower or higher than the combined average performance for all the medical centers in that specific network. Therefore, in the network that had 57 percent of its joint and spine exams meeting *DeLuca* criteria, an individual medical center within that network may have had less than 57 percent meeting the *DeLuca* criteria. Conversely, in the network that had 92 percent of the exams meeting the *DeLuca* criteria, an individual medical center within that network may have had more than 92 percent satisfying *DeLuca*. Unless medical centers across the nation consistently provide the information required by *DeLuca*, veterans claiming joint and spine impairments may not receive consistent disability decisions.

Further, VA has found deficiencies in a substantial portion of the requests that VBA's regional offices send to VHA's medical centers, asking them to perform disability exams. For example, VA found in early 2005 that nearly one-third of the regional office requests for spine exams contained errors such as not identifying the pertinent medical condition or not requesting the appropriate exam. However, VBA had not yet established a performance measure for the quality of the exam requests that regional offices submit to medical centers.

To help ensure continued progress in satisfying the *DeLuca* criteria, we recommended that the Secretary of Veterans Affairs direct the Under Secretary for Health to develop a strategy for improving consistency among VHA's health care networks in meeting the *DeLuca* criteria. For example, if performance in satisfying the *DeLuca* criteria continues to vary widely among the networks during fiscal year 2006, VHA may want to consider establishing a new performance measure specifically for joint

and spine exams or requiring that medical centers use automated templates developed for joint and spine exams, provided an in-progress study of the costs and benefits of the automated exam templates supports their use. We also recommended that the Secretary direct the Under Secretary for Benefits to develop a performance measure for the quality of exam requests that regional offices send to medical centers.

Conclusions

As a national program, VA's disability compensation program must ensure that veterans receive fair and equitable decisions on their disability claims no matter where they live across the nation. Given the inherent risk of variation in disability decisions, it is incumbent on VA to ensure program integrity by having a credible system for identifying indications of inconsistency among its regional offices and then remedying any inconsistencies found to be unreasonable. Until assessments of consistency become a routine part of VA's oversight of decisions made by its regional offices, veterans may not consistently get the benefits they deserve for disabilities connected to their military service, and taxpayers may not trust the effectiveness and fairness of the disability compensation program.

Mr. Chairman, this concludes my remarks. I would be happy to answer any questions you or the members of the subcommittee may have.

Contact and Acknowledgments

For further information, please contact Cynthia A. Bascetta at (202) 512-7101. Also contributing to this statement were Irene Chu and Ira Spears.

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "Subscribe to Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are $2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm
E-mail: fraudnet@gao.gov
Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, D.C. 20548

Public Affairs

Paul Anderson, Managing Director, AndersonP1@gao.gov (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, D.C. 20548

PRINTED ON RECYCLED PAPER

STATEMENT

OF

JOHN M. GARCIA, CABINET SECRETARY

NEW MEXICO DEPARTMENT OF VETERANS' SERVICES

OVERSIGHT HEARING

ON

DISABILITY COMPENSATION CLAIMS DECISIONS

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE

AND MEMORIAL AFFAIRS

OCTOBER 20, 2005

Mr. Chairman and Distinguished Members of the Committee, on behalf of the Veterans of the great State of New Mexico and our Governor, Bill Richardson, I am honored to have this opportunity to testify this morning and to present my views regarding variances in disability compensation claim decisions made by the VA regional offices and the factors that are affecting the review process.

New Mexico, unlike any other State in the Union, has a 400-year rich military legacy. Many New Mexico natives such as myself can proudly trace our ancestry back eleven generations, to the early citizen soldiers that first arrived in the Southwest Region of our Country. Many citizens from the great State of New Mexico have served our Nation with dignity and honor from the Civil War to the fields of France during World War I to the battlefields of World War II and Korea, to the steamy jungles of Vietnam, to the desert sands of the Gulf War, and to the War in Iraq, New Mexicans have served with distinction. Our military legacy is made up of our infamous Navajo Code Talkers and our Bataan Death March Veterans whose place in American history has been firmly planted, and their story remains an incredible testimony to the courage and sacrifice of these men. Our New Mexico Vietnam Veterans were No. 1 in draftee percentage per capita, and our State was the third highest in casualty rate during the Vietnam War and we were the first into Iraq with our stealth fighters out of Holloman Air Force Base. New Mexico's Veterans have a rich legacy of honor and pride of service to their Country.

In the year 2003, Governor Bill Richardson elevated what was once the Veterans' Services Commission to what is now the New Mexico Department of Veterans' Services, a cabinet level Agency, in order to better serve our Veterans. In partnership with the Veterans Administration Regional Office, the Veterans Administration Hospital, the

Veteran Centers, and the Veteran Services Organizations, our Agency has created a New Mexico Veteran Administrative team providing an array of resources for outreach and benefits for our New Mexico Veterans. As a result, New Mexico is ranked among the top five (5) states assisting Veterans in receiving their disability, comp and pen benefits.

The Veterans Administration spent approximately $6.3million in New Mexico in 2003 to serve more than 185,000 Veterans who live in our State. Last year, approximately 59,000 Veterans received health care, and 31,000 Veterans and their survivors received disability compensation or pension payments from the Veterans' Administration in New Mexico per capita. More than 4,500 Veterans, reservists, and survivors used GI Bill payments for their education, and twenty four thousand owned homes with active VA home loan guarantees, and over 1,600 were interred in Ft. Bayard and Santa Fe National Cemeteries. Since 2003, we have seen a substantial increase in benefits and services to our New Mexico Veterans.

Per the Department of Veterans Affairs' Office of Inspector General (VAIG) recommendation, the Veterans' Benefits Administration will begin a review of an additional 72,000 claims that were awarded disability compensation for PTSD at the 100% scheduler rate or 100% based on individual unemployability.

Of the original sampling of 2,100 claims, there were three hundred cases from the State of New Mexico which were identified for further review, and letters were sent to each of them. The letters that were sent were threatening and strongly implied a loss of benefits at two levels: 1. The letter implied the Veteran would lose benefits if he did not comply, and 2. The letter implied that Veterans would lose benefits if they were not under current treatment.

This policy of "retroactive inspection" has been received by the ENTIRE Veteran community as an assault on every Veteran, not just those for review. It is clearly perceived by our Veteran community as an "attitude" and not a policy.

How serious is this problem? On October 8th, a Vietnam Veteran from New Mexico committed suicide. He was a 100% service connected PTSD/Unemployability combat Veteran in receipt of a Purple Heart. HE WAS NOT ONE OF THE NEW MEXICO VETERANS SELECTED FOR REVIEW, but it was clear to those who found him that the issue was on his mind because of information about the retroactive inspection was found at his side next to his Purple Heart Medal. He is clearly a casualty of this review.

Why? Because an attack on one Veteran is an attack on all of them. Let me make this clear. This review policy is perceived as an attitude, an attack, and a personal assault on the Honorable service of all Veterans.

Service-connected compensation should be considered a "Cost of War," as should our commitment to taking care of our disabled veterans' health care.

I recently returned from National Association of State Directors of Veterans Affairs Conference. During that Conference, the VA central office publicly stated that the letters sent to New Mexico Veterans were "horrible and a travesty" and a public apology was rendered. At this same Conference, we were told Veterans would have "to get in line" for their health care budget along with all the other Federal agencies. This means that we have no priority or guarantee of health care.

Are we truly seeing an "attitude"? As Secretary of the New Mexico Department of Veterans' Services, it certainly appears this way.

What can we do?

1. We can drop the retroactive inspections.
2. We can adequately fund future health care for our disabled veterans.
3. We can promise our young men and women, in writing, before we send them in harm's way that we can take care of them and their health needs for their lifetime.

On October 7, 2005, I attended a burial ceremony for eight (8) soldiers who died in Vietnam in 1968, and whose remains were recovered and interred at Arlington National Cemetery. One of the soldiers interred was from Albuquerque, New Mexico. Upon my return home, I also received a letter that was forwarded to our Governor requesting assistance for her Vietnam Veteran husband, and at this time I would like to read that letter to you. The letter is dated October 7, 2005:

> Dear Mr. Governor:
>
> I am a 3rd generation native of New Mexico. I am proud of being a part of a grand State. I am especially proud of the treatment our war veterans have received from State government. My father was a veteran of WWII, and spent some time in Korea in 1954-1955. I would like you to know that my husband and I appreciate everything this State stands for regarding our veterans.
>
> Recently, my husband received a letter from the Department of Veterans Affairs. This letter indicated that he was under for determination of his benefits. He was given 60 days to respond. He was, in effect, asked to prove all over again what he had spent the last 36 years trying to prove. At this time, he is receiving 100% benefits for PTSD.

As a result of this letter, I have spent the last three nights watching him walk the floor, scared his benefits are going to be cut off. He turned in all his paperwork as asked on Monday, October 3rd, and was told by the representative at the DVA Regional Office in Albuquerque, New Mexico that he would receive a call from that office by Monday afternoon. He is still waiting for that call! Many attempts to contact that office have been futile. The young lady who was to call him back "this afternoon" is either not in, away from her desk, or unavailable. I find this unacceptable.

This morning, I went to work, and when I called my husband to inform him that I was safe at work, he told me he was going to "fix everything." I left work, and when I returned home, he had called his brother to pick the two guns that he owns. I immediately contacted the VA hospital, and spoke to Dr. Mike Burger. He calmed my husband down, and promised that he would look into the VA Administration, and gather information. Then he would call us back.

I guess what I want you to know is that there are a large number of Veterans in New Mexico who have received this same letter. They and their families are going through much the same thing that my family is. This has affected me, our children, and our grandchildren.

Something needs to be done to stop this madness. Our Veterans are feeling that they are worthless, and are being called liars. How many veterans will succeed, where my husband did not this morning? This is very painful, and I can't stress enough how important these Veterans are to us. This is my life, my husband's life, and our family's life.

Please understand that there may be others who are feeling the same if not worse. If this continues, there are going to be more dead soldiers and they won't even have to leave the States.

Thank you for all you have done for the Veterans.

Mrs. Lane De Priest

Mr. Chairman and Distinguished Members of the Committee, I respect the important work that you and Members of this Committee are doing to improve the support to our Veterans who answered the call to serve our Country. The New Mexico Department of Veterans' Services is dedicated to providing outreach services and benefits to our Veterans. On behalf of the Veterans of the State of New Mexico and the over 26 million Veterans in this Country, I thank you for allowing me to express my concerns.

This concludes my statement, and I am happy to respond to any questions.

Mr. John M. Garcia, Cabinet Secretary
New Mexico Department of Veterans' Services
P. O. Box 2324
Santa Fe, NM 87504-2324
Phone: (505) 827-6312
Email: johnm.garcia@state.nm.us

Statement of
Steven H. Brown, MD
Director, Compensation and Pension Examination Program
Department of Veterans Affairs
On
VHA Compensation and Pension Exam Variability
Before the
House Veterans Affairs' Committee
Subcommittee on Disability Assistance and Memorial Affairs
U.S. House of Representatives
October 20, 2005

My name is Steven Brown, MD. I have been the Director of the Compensation and Pension Examination Program, or "CPEP," since its inception in 2001, when the Under Secretaries for Benefits and Health executed a Memorandum of Agreement, which established, staffed and funded a joint initiative to improve C&P exams. The goal of improving compensation and pension (C&P) exam quality fits "hand in glove" with the goal of reducing variations among the exams conducted by the Veterans Health Administration (VHA). CPEP's strategy is to reduce variation by continuously improving quality. Our goal is to ensure that VHA provides consistently high quality exams.

CPEP has adopted a pragmatic approach to quality improvement based on reliable and actionable baseline and ongoing performance data, accountability, and prioritization of effort. CPEP has targeted the ten most frequently requested C&P exam types, which account for approximately 67% of all VHA C&P exam requests. These exam types are: General Medical, Joints, Spine, Foot, Skin, Mental Disorders, Post Traumatic Stress Disorder, Audiology, and Eye.

Establishing the Baseline:

CPEP initially developed reliable and valid methodologies for measuring C&P exam quality based on the Veterans Benefits Administration (VBA) Compensation and Pension Service's examination worksheets and the rating regulations and used these methodologies to measure baseline C&P exam quality.

CPEP data were generated by a structured, standardized quality review process. Our reviewers answered specific questions about each exam. We refer to these specific questions as "quality indicators." An example quality indicator is: "Does the exam describe noise exposure during military [service]?"

Once an exam had been reviewed we gave it a score, exactly like a test in school. Exams that scored 90% or better were considered to be of "A" quality, just like in school. The more "A's" the better. CPEP used quality indicators and the idea of "A" quality work to determine the baseline quality of VHA C&P exams.

In the August 2003 Veterans Integrated Service Network (VISN)-level report, CPEP found that the baseline percentage of "A" quality exams for all VISNs was 53.5%, with a range from 46% to 67%. This information was shared with the examining sites and VISNs, as well as VHA and VBA leadership.

Improving Performance:

In response to these results, CPEP, with the strong support of Senior VHA and VBA leadership, implemented a number of quality improvement initiatives. These initiatives have, over time, contributed to a decrease in variation in VHA C&P examinations and an improvement in quality among exams. I would like to outline for you a number of the initiatives that VHA, CPEP and the examining sites undertook to improve performance.

CPEP began by taking steps to ensure that all sites were provided with the tools necessary for process improvement. All sites conducting C&P exams were required to participate in a "Collaborative Breakthrough Series" in which sites formed teams that were guided through a multi-month quality improvement exercise by subject matter experts and quality improvement coaches. The CPEP program was assisted in this effort by the VHA Quality Scholars program.

Each collaborative project included two 2-day learning sessions separated by a six-month work period. During the first learning session, the teams were taught how to improve the quality of their compensation and pension examinations and how to develop a specific action plan to implement improvements. In the six months between learning sessions, support was provided to participants through monthly conference calls, monthly coaching calls, and an electronic "chat room." At the final learning session, the teams shared with each other specific strategies and the results of their efforts via presentations and posters. Collaborative teams improved overall quality scores for each of the top ten exam types and improved overall timeliness.

To help sites strategically organize and prioritize their improvement initiatives, all VHA facilities performing C&P exams were required by Senior Management to submit a Facility Quality Improvement (QI) Plan using a CPEP template based on principles and techniques learned during the Collaborative Breakthrough Series. Plans included mandatory sections regarding implementation of quality monitoring via CPEP quality indicators, clinician orientation and ongoing education, clinician feedback, organizational reporting, and leadership and resource support. Facility QI plans required the approval and signature of the VISN Director, Facility Director, and Chief of Quality Management. CPEP reviewed each plan and provided constructive feedback when appropriate.

To further support the examination sites, CPEP developed and distributed videos and computer-based training to all VHA facilities on the General Medical, Musculoskeletal, Foot, Heart, Diabetes, Skin/Scar, Muscle, and Respiratory exams. CPEP conducted video conferences on topics such as "*DeLuca v. Brown*" (in which the Court of Appeals for Veterans Claims held that a rating for a musculoskeletal disability must take into consideration, in addition to limitation of motion specified in rating criteria, the degree of additional loss of range of motion due to pain on repetitive use or during flare-ups and that consideration of weakened movement, excess fatigability (or lack of endurance), and incoordination is not limited to cases involving muscle or nerve injury); exam

templates; and quality measurement techniques. CPEP conducted face-to-face training sessions for quality improvement teams, clinicians, administrators, and template "super users." We have made these educational tools available to every site that conducts C&P exams. Finally, CPEP coordinated a conference for VBA and VHA on "Improving the C&P Exam Process Together." The purpose of the conference was to promote effective collaboration between VBA and VHA for the purpose of improving compensation and pension examination processes.

CPEP is collaborating with the VHA Office of Information and the VBA Compensation and Pension Service and Office of Field Operations to computerize all 57 VBA C&P examination disability worksheets in order to eliminate errors of omission via structured data entry. As of April 2005, an initial version of each of the 57 automated templates has been installed at all exam facilities.

Finally, VHA leadership has set higher goals for the quality of exams by establishing a performance target in the Network Directors' performance plans. For FY 2004 and FY 2005, the performance measure targets were: 64% of exams being of "A" quality to be fully successful and 75% to be exceptional. In FY 2006, the proposed targets have been increased to 83% and 86%, respectively.

In support of leadership's decision to establish performance targets, CPEP developed routine, monthly reports on the quality of C&P examinations, utilizing the same structured quality review process that was developed for the baseline review. This information helped the VISNs and the examining sites by providing immediate feedback on performance. This information is used by the sites to identify specific areas needing improvement so that interventions could be appropriately focused.

Results

The efforts I've just outlined have led to dramatic improvements in the quality of C&P exams. Improvements of VHA C&P exam quality have increased over the last two years. Since CPEP began monthly monitoring in October 2003, the national average performance measure score has improved. The national average percentage of "A" quality exams for all VISNs was at 80% in June 2005, an increase of 34 %.

The positive results noted in this testimony come as the result of a concerted effort at all levels of VA, including clinicians in the field, CPEP staff, and VHA and VBA leadership. Much has been accomplished, and additional gains can be achieved. We look forward to the opportunity to face these challenges.

Mr. Chairman, this concludes my statement. I am now available to answer any questions that you or other members of the Committee may have.

STATEMENT OF
RONALD R. AUMENT
DEPUTY UNDER SECRETARY FOR BENEFITS
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
HOUSE COMMITTEE ON VETERANS' AFFAIRS

OCTOBER 20, 2005

Mr. Chairman and members of the Subcommittee: Thank you for the opportunity to review with you variances in disability compensation claims decisions made by VA regional offices, factors affecting our claims decisions, and recommendations for standardizing the adjudicative process. I am pleased to be accompanied by Ms. Renée Szybala, Director of VA's Compensation and Pension Service.

I will also today discuss the November 2004 report by the Government Accountability Office (GAO) and the May 2005 report of the Office of the Inspector General (IG). Finally, as requested, I will provide our views on the United States Court of Appeals for the Federal Circuit holding in *Allen v. Principi.*

Background

In October 2001, the VA Claims Processing Task Force, established by then Secretary of Veterans Affairs Anthony J. Principi, delivered its report containing 34 recommendations to improve compensation and pension claims processing.

The Task Force, which was chaired by Admiral Cooper, found that the most significant issue to be addressed – that would bring the most improvement to the decision-making process – was the need for greater accountability and consistency in our benefits delivery operations. Over the last 3½ years during the Admiral's tenure as Under Secretary for Benefits, the Veterans Benefits Administration (VBA) has worked hard to address this need.

Through the implementation of the Task Force recommendations, VBA has achieved major improvements in the delivery of benefits including the quality of our benefits decisions – and we have laid the basic groundwork that will continue to bring more consistency in our decisions as well.

First, we have made all regional offices consistent in organizational structure and work process. Work processes were reengineered and specialized teams established to reduce the number of tasks performed by decision-makers, establish consistent work processes, and incorporate a triage approach to incoming claims.

Second, specialized processing initiatives have been implemented to consolidate adjudication of certain types of claims to provide better and more consistent decisions. Three Pension Maintenance Centers were established to consolidate the complex and labor-intensive work involved in ensuring the continued eligibility and appropriateness of benefit amounts for pension recipients. We are exploring the centralization of all pension adjudications to these Centers.

A Tiger Team was established to adjudicate the claims of veterans age 70 and older, and VBA established an Appeals Management Center to consolidate expertise in processing remands from the Board of Veterans' Appeals. In a similar manner, a centralized Casualty Assistance Unit was established to process all in-service death claims. Most recently, VBA has consolidated the rating aspects of our Benefits Delivery at Discharge initiatives, which will bring greater consistency of decisions for newly-separated veterans.

To further our drive toward consistency, we have established an aggressive and comprehensive program of quality assurance and oversight to assess compliance with VBA claims processing policy and procedures and assure consistent application. Included in this effort are oversight reviews, regularly performed by Headquarters staff. The Area Directors perform oversight visits as well. Training is provided, when appropriate, to address gaps. Accuracy reviews, statistically valid for each regional

office, are provided by Headquarters. Centralized oversight, focused on quality and accuracy, will necessarily increase consistency as well.

We are working with the Veterans Health Administration through our joint VBA/VHA Compensation and Pension Examination Project (CPEP) Office to improve both the quality of examination requests from VBA regional offices and the examinations conducted by VA examiners. The examination is central to the ultimate evaluation decision. That effort is focused on two critical elements. First, our goal is to insure the examination request issued by the regional office is clear and comprehensive. Our second goal, through the development of templates, is to assure that the examination produced is complete, addresses all relevant elements such as the DeLuca criteria, and meets the needs of the rating specialist.

Training is central to every quality organization. VBA has deployed new training tools and centralized training programs that support greater consistency in decisions. New hires receive comprehensive training and a consistent foundation in claims processing principles through a national centralized training program called "Challenge." After the initial centralized training, employees follow a national standardized training curriculum (full lesson plans, handouts, student guides, instructor guides, and slides for classroom instruction) available to all regional offices. Additionally, standardized computer-based tools have been developed for training decision-makers (53 modules completed and an additional 38 in development). Additionally, a policy mandating job-specific training hours for each employee will be implemented. Finally, training letters and satellite broadcasts on the proper approach to rating complex issues have been provided to the field stations.

Consistent utilization of information technology (IT) applications, key to developing usable data to monitor our progress, and consistent work-management systems are now required. Organizational and individual accountability has been established at all levels through consistent measures of performance and implementation of national performance standards.

GAO Findings

VBA was very attuned to the consistency issue prior to receiving GAO's November 2004 review of consistency in decision-making by VA regional offices. This was not the first time that GAO looked at this issue. Previous GAO studies in 2000 and 2002 raised concerns about the element of potential variability due to the nature of VA claims adjudication, which requires the application of judgment by the decision-maker. Judgment is recognized as crucial when assessing the credibility of different sources of evidence, weighing the comparative value of evidence developed, and assessing disabilities where the evaluative criteria are not entirely objective. It was also recognized that VBA did not possess data sources sufficiently rich in their detail to enable us to do the kind of data comparisons needed to objectively identify potential areas of variance or inconsistency for further investigation.

In response to the GAO findings, we conducted a test in Nashville to learn what factors are critical in the design of consistency measurement tools. That initial test attempted to measure the consistency with which regional offices evaluated three discrete disabilities. The reasons for the selection of these disabilities are as follows. Hearing loss was selected because we anticipated that it would reflect the highest level of consistency across regional offices due to the highly objective nature of the evaluation criteria. Knee disabilities were chosen because they are among our most commonly claimed conditions. While the evaluation criteria for knee disabilities in the VA rating schedule are substantially objective, the application of *DeLuca v. Brown,* a Veterans Court decision that requires that a rating for limitation of motion take into consideration the degree of additional loss of range of motion due to pain, introduces more subjective judgments into the evaluation. Finally, we chose PTSD because of its high degree of complexity. The Nashville study found that the single most significant factor contributing to rating inconsistency was whether reviewers judged the case "ready to rate." Where there was agreement that the case was ready to rate, we found a very high degree of consistency between reviewers and original

decision makers. Where there was disagreement, consistency was low. Subsequent to these findings, we developed the "ready-to-rate" checklist and mandated its use.

We are also examining data and data sources, including that collected through the RBA 2000 rating-decision-support application, to develop a method for ongoing reviews that would identify possible inconsistencies among regional offices in the award and denial of specific conditions. We have conducted some preliminary data extracts, and we are now working to establish the process, schedule, and support requirements for these reviews.

IG Findings

Over the past year, news articles – particularly those of the Knight-Ridder News Service and the Chicago Sun Times – highlighted the existence of variations in the amount of annual compensation paid to veterans by state. As a result, Secretary Principi requested that the IG conduct a study of possible explanations for the variance. Earlier this year, the IG published its report.

The IG was unable to identify a single causative factor to explain the variance in the amount of compensation paid among differing states. Rather, the IG found a number of factors that directly contribute to variance in compensation payments. These factors include the makeup of the veteran population receiving benefits in each state. The IG reported that veterans with service prior to Vietnam tend to receive less compensation than those from Vietnam and later periods of service. This finding is consistent with anecdotal data from our employees that veterans from earlier periods of service file claims for increased evaluation less frequently than Vietnam Era and later veterans. The IG also found that veterans who are military retirees receive more annual compensation than veterans who did not retire from the military. Similarly, the IG found that veterans who elected to have representation from a national service organization in recent years received over $1,000 more in benefits than unrepresented veterans.

Finally, the IG identified PTSD – its prevalence and its evaluation, including the grant of Individual Unemployability (IU) ratings based on PTSD – as a major contributor to variability in compensation. It is important to understand that in the IG's review of cases, the IG found insufficient evidence to support the grant of service connection for PTSD in some cases; thus, VA's decision to award benefits was premature. Where VA had not fully developed the cases and verified the "stressors" as required, the IG was not able to validate entitlement to the service-connection award by VA. The IG did not find that these veterans were not eligible, but rather that additional evidentiary development is required to substantiate eligibility.

VBA has conducted its own review of the 2,100 cases reviewed by the IG. Our preliminary findings are that we generally agree with the IG that some of the decisions made were premature. We did, however, find that a large percentage of cases judged to have insufficient development were older cases in which VA statutes prohibit a change in the rating decision. If a condition has been determined to be service-connected for a period of 10 years or more, service connection is protected and may not be severed except for a finding of fraud on the part of the veteran. In other cases, we found that evidence verifying a stressor was of record, but the decision failed to adequately address the evidence. Additionally, in a number of the claims we reviewed, the benefit was granted by the Board of Veterans' Appeals, and VBA is not authorized to review Board decisions.

VBA has agreed, because of the strong recommendation of the IG, to conduct a review of PTSD claims in which the veteran was awarded a 100 percent disability rating or IU rating in the last five years. In that review, we expect that the majority of the claims will be found sufficient and will not require further development. We also expect to find, based upon our review of the 2,100 IG cases, that further consideration of entitlement in some cases is barred because the benefit granted is now protected by statute.

In some cases, it will be necessary to conduct "stressor verification" development. VA regulations require that, in order to grant service connection for PTSD, there must be "credible supporting evidence that the claimed in-service stressor occurred." Every decision involving the issue of service connection for PTSD claimed to have occurred as a result of combat must include a factual determination as to whether or not the veteran engaged in combat, including the reasons or bases for that finding. Combat status may be determined through the receipt of certain recognized military citations and other supportive evidence. If the evidence establishes that a veteran engaged in combat or was a prisoner of war (POW) and the stressor relates to that experience, the veteran's lay testimony alone may establish an in-service stressor for purposes of service connecting PTSD. In cases in which the stressful event is not linked to combat or POW status, VA will assist the veteran in establishing that the stressful event occurred while the veteran was on active duty and that the veteran was present at the event, including asking the Center for Unit Records Research or the Marine Corps Historical Center to research records that can verify occurrence of the stressor. This is a process that can take up to six months or more.

In addition, before VA can grant service connection for PTSD, VA regulations require a determination as to whether there is medical evidence diagnosing PTSD and linking the veteran's current symptoms to the in-service stressor.

In response to the IG's recommendation that VA conduct a scientifically-sound study of the major influences on compensation payments, VA's Office of Policy, Planning, and Preparedness has contracted with the Institute for Defense Analyses to perform a multi-variant analysis of the state-by-state and VA regional office distribution and variation in disability compensation claims, ratings, and monetary benefits to determine if there is a significant correlation to one or more variables. We anticipate receiving an interim briefing in January 2006 and a final report and database by October 2006, and believe that the information obtained will be useful in developing baseline data and metrics for monitoring and managing variances.

Finally, the Office of Policy, Planning, and Preparedness has also undertaken a more detailed analysis to identify differences in claims submission patterns to determine if certain veteran sub-populations, such as World War II veterans or those living in specific locales, have been underserved. We will use the results of this study to perform focused outreach efforts to ensure all veterans have equal access to VA benefits.

Consistency of Rating Decisions

VA acknowledges and is concerned that there are variances across the system with respect to average annual benefit payments, and we find it perplexing. We do not, however, agree that "average annual payments" should be the measure by which we judge consistency. Measurement of consistency is complex and cannot be discerned based upon a single measure of state-by-state comparisons of average disability payments.

Annual average payments are not a good way to evaluate consistency in disability compensation awards made in recent years, as these averages include all veterans on VA's disability compensation rolls, including many whose rating decisions were made in the 1940s and 1950s. Additionally, as the IG found, demographic factors play a role.

We will continue our efforts to better understand this complex and difficult issue, and to identify and reduce inappropriate variability in our decisions. Our objective is to ensure that all regional offices are generating consistently accurate decisions that provide the maximum benefits to which veterans are entitled.

Allen v. Principi

I would now like to turn to the *Allen* case, as requested by the Subcommittee. In 2001, the United States Court of Appeals for the Federal Circuit interpreted 38 U.S.C. § 1110 as allowing compensation for an alcohol or drug abuse-related disability arising secondarily from a service-connected disability. *Allen v. Principi*, 237 F.3d

1368, 1370 (Fed. Cir. 2001). VA is concerned that payment of additional compensation based on the abuse of alcohol or drugs is contrary to congressional intent when it mandated in PL 101-508 that benefits not be paid for alcohol or drug related disabilities, and that it is not in veterans' best interests because it removes an incentive for them to seek treatment for this debilitating compulsion.

The Federal Circuit's interpretation in *Allen* increases the amount of compensation VA pays for service-connected disabilities. Under the court's interpretation, any veteran with a service-connected disability who abuses alcohol or drugs is potentially eligible for an increased amount of compensation if he or she can offer evidence that the substance abuse is a result of a service-connected disability; that is, that the substance abuse is a way of coping with the pain or loss the disability causes. Under this interpretation, alcohol or drug abuse disabilities that are secondary to either physical or mental disorders are compensable.

VBA's initial assessment of the ruling in *Allen* was that the impact would be significant. Therefore, VBA conducted special reviews of a random sample of cases to objectively assess entitlement or potential entitlement to compensation based on the *Allen* decision.

The first review in June and July 2004 included all rating-related cases otherwise reviewed in our quality assurance review program. The results from this first review indicated that *Allen* claims received or potential *Allen* claims identified were associated with mental disorders. As a result, a second review took place from August 16, 2004, to January 14, 2005, limited to mental disorders listed in VA's rating schedule. A total of 359 cases were reviewed during this period for any potential eligibility under *Allen*. Thirteen claims for service connection for disability related to substance abuse as secondary to a service connected disability were identified. Potential *Allen* issues were identified in 29 cases. In 27 of these 29 cases, the condition at issue was alcohol dependence (or abuse) secondary to PTSD or claimed PTSD. Possible reasons for this somewhat limited *Allen* impact are that abuse

symptoms are intertwined with the underlying psychiatric disorder and not easily separated or *Allen*-type claims are frequently received after veterans are in active treatment. In this regard, in many cases the diagnoses include "history of abuse." Finally, veterans may not be aware of the potential for compensation under this court ruling.

The Secretary recently transmitted to Congress a draft bill, the "Veterans Programs Improvement Act of 2005." Section 3 of this draft bill amends sections 1110 and 1131 of title 38, U.S. Code, to clarify that disability compensation benefits may not be paid on account of disease or disability resulting from the abuse of alcohol or drugs, even when the abuse is secondary to a service-connected disability. It also clarifies that an alcohol or drug abuse disability may not be used as evidence of the increased severity of a service-connected disability. Based on our findings from the special reviews we conducted, we revised our cost estimate to indicate a more limited impact.

I want to assure the Subcommittee that we take our responsibility to accurately, fairly, and compassionately decide claims for disability from America's veterans very seriously. We believe that veterans should get the same result based on the same set of facts regardless of the State in which they reside or the regional official that decides the claim. Rating veterans disability claims is a complex and difficult task, frequently requiring resolution of multiple issues with sometimes conflicting medical evidence. It is a responsibility, however, that we believe can be done competently and compassionately. Our efforts are directed to that end.

Mr. Chairman, this concludes my testimony. I greatly appreciate being here today and look forward to answering your questions.

EXECUTIVE SUMMARY OF STATEMENT
OF
STATEMENT FOR THE RECORD OF
PETER S. GAYTAN, DIRECTOR,
VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
TO THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON A REPORT OF THE
DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL
ON CONSISTENCY AND VARIANCES IN DISABILITY COMPENSATION DECSION-MAKING

OCTOBER 20, 2005

The Department of Veterans Affairs (VA) has a statutory responsibility to ensure the welfare of the nation's veterans, their families, and survivors. There are currently almost 2.6 million veterans receiving disability compensation and VA reports that this number is increasing at a rate of 5,000 to 7,000 per month. In fiscal year 2005, VA anticipated that its 57 Veterans Benefits Administration (VBA) regional offices would receive approximately 800,000 new and reopened benefits claims; three and four percent increases are expected in fiscal year 2006 and 2007. This amounts to approximately 826,000 claims in fiscal year 2006 and 842,000 in fiscal year 2007. A majority of these claims involve multiple issues that are legally and medically complex and time consuming to adjudicate. Whether a case is complex or simple, VA regional offices are expected to consistently develop and adjudicate veterans' and survivors' claims in a fair, legally proper, and timely manner.

Any rational informed observer of the VA adjudication system would find that the VA suffers from a quality problem. Of course, if VA adjudications are reviewed solely for improper grants of benefits and improper high evaluations – they can be found. The May 2005 VA Office of the Inspector General (IG) report on variances in disability compensation payments, in part, confirms this. However, The American Legion quality reviews and the Board of Veterans' Appeals (BVA) remand/reversal rates also confirm that if improper denials and under-evaluations are sought – they will be found in even greater abundance.

In response to the IG recommendation No. 3, VBA announced that it plans to review all PTSD claims (100 percent schedular and IU where PTSD is the predominant condition) granted from fiscal year 1999 through fiscal year 2004. More than 70,000 cases will be part of this enormous review. The American Legion has serious concerns with this review and we strongly support Senate Amendment 1864 to the fiscal year 2006 Military Construction and Veterans Affairs Appropriation Bill which would provide much needed Congressional oversight and safeguards to ensure that our nation's psychologically traumatized veterans are not unfairly penalized for VA's mistakes. Moreover, discrepancies in the way regional offices process PTSD claims should be addressed in the adjudication of claims that are currently pending and those that are filed in the future. Instances of fraud aside, veterans whose claims have already been established should not have to suffer through the long and agonizing claims process again because of VA adjudicative deficiencies.

STATEMENT OF
PETER S. GAYTAN, DIRECTOR
VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
TO THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON A REPORT OF THE
DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL
ON CONSISTENCY AND VARIANCES IN DISABILITY COMPENSATION
DECISION-MAKING

OCTOBER 20, 2005

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to submit The American Legion's views on several important issues involving the Veterans Benefits Administration (VBA). We commend the Subcommittee for holding this hearing to discuss these important issues.

The Department of Veterans Affairs (VA) has a statutory responsibility to ensure the welfare of the nation's veterans, their families, and survivors. There are currently almost 2.6 million veterans receiving disability compensation and VA reports that this number is increasing at a rate of 5,000 to 7,000 per month. In fiscal year 2005, VA anticipated that its 57 Veterans Benefits Administration (VBA) regional offices would receive approximately 800,000 new and reopened benefits claims; three and four percent increases are expected in fiscal years 2006 and 2007. This amounts to approximately 826,000 claims in fiscal year 2006 and 842,000 in fiscal year 2007. A majority of these claims involve multiple issues that are legally and medically complex and time consuming to adjudicate. Whether a case is complex or simple, VA regional offices are expected to consistently develop and adjudicate veterans' and survivors' claims in a fair, legally proper, and timely manner.

Lack of Quality Decision Making in VBA

The adequacy of regional office staffing has as much to do with the actual number of personnel as it does with the level of training and competency of the adjudication staff. VBA has lost much of its institutional knowledge base over the past four years, due to the retirement of many of its 30-plus year employees. As a result, staffing at most regional offices is now made up largely of trainees, with less than five years of experience. Over this same period, as regional office workload demands escalated, these trainees have been put into production units as soon as they completed their initial training.

Concern over adequate staffing in VBA to handle its demanding workload was addressed by VA's Office of the Inspector General (IG) in a report released in May of this year (Report No. 05-00765-137, dated May 18, 2005). The IG specifically recommended, "in view of growing demand, the need for quality and timely decisions, and the ongoing training requirements, reevaluate human resources and ensure that the VBA field organization is adequately staffed and equipped to meet mission requirements." Additionally, the chairman of the newly established Veterans' Disability Benefits Commission questioned the Under Secretary for Benefits about the adequacy of current staffing levels during a Commission meeting this past July. The Under Secretary conceded that the number of personnel has (slightly) decreased over the last three years. The Chairman requested that he provide a fact paper on how many employees are needed to adequately deal with VA's growing claims backlog, which as of October 1, 2005, includes almost 350,000 rating cases pending in the VBA system. Of these cases, more than 72,000 (21 percent) have been pending for more than 180 days. The appeals rate has also increased from a historical rate of about 7 percent of all rating decisions being appealed to a current rate that fluctuates from 11 to 14 percent. This equates to more than 153,000 appeals currently pending at VA regional offices, with more than 129,000 requiring some type of further adjudicative action.

Over the past few years, The American Legion's Quality Review Team has visited almost 40 VA regional offices for the purpose of assessing the station's overall operation. This includes a review of recently adjudicated claims. Our site visits have found that, frequently, there have been too few supervisors or inexperienced supervisors to provide trainees necessary mentoring, training, and quality assurance. In addition, at many stations, ongoing training for the new hires as well as the more experienced staff would be postponed or suspended, so as to focus maximum effort on production. Despite the fact that VBA's policy of "production first" has resulted in many more veterans getting faster action on their claims, the downside has been that tens of thousands of cases have been prematurely and arbitrarily denied. Sixty-five percent of VA raters and Decision Review Officers (DRO) surveyed by the IG, in conjunction with its May 2005 report, admitted that they did not have enough time to provide timely and quality decisions. In fact, 57 percent indicated that they had difficulty meeting production standards if they took time to adequately develop claims and thoroughly review the evidence before making a decision. Inadequate staffing levels and pressure to make quick decisions, resulting in an overall decrease in quality of work, has also been a consistent complaint among Service Center employees interviewed by The American Legion staff during our regional office quality checks. As a consequence, the appeals burden at the regional offices, the Board of Veterans' Appeals (Board or BVA) and the Appeals Management Center (AMC) continues to grow. What must also be kept in mind is that there is a disabled veteran, most often with a family, behind each one of these appeals, who has been fighting the VA system for a year, two years, or more to get what he or she feels rightfully entitled to receive.

VA IG Report on Variances in Disability Compensation Payments

On December 3, 2004, a Chicago Sun-Times article revealed that Illinois veterans, on the average, received lower compensation payments than veterans in almost all other states. The article noted that federal authorities indicated that the Chicago Regional Office (RO) adjudicators and raters "have interpreted [VA rules regarding the payment of compensation benefits] more harshly than those [raters and adjudicators in other VA regional offices]

elsewhere. . ." This, noted the Chicago Sun-Times, unfairly punishes veterans solely on the basis of where they live.

As a result of the December article, members of the Illinois Congressional delegation and other concerned Representatives and Senators requested that the VA Secretary investigate this issue. The Secretary subsequently ordered the VA Office of the Inspector General to investigate why there are differences in the average monthly VA disability compensation payments made to veterans living in different states. The IG conducted an investigation and issued a report on May 18, 2005.

The IG noted that for fiscal year 2004, average annual payments by state ranged from $6,961 to $12,000, a difference of over $5,000. According to the IG the highest paying states were New Mexico (the highest), Maine, Arkansas, West Virginia, Oklahoma, and Oregon. The lowest paying states were Indiana, Michigan, Connecticut, Ohio, New Jersey, and Illinois (the lowest). The IG concluded that no single variable factor was responsible for the discrepancies in compensation payments.

The IG concluded that there were 16 possible factors that could cause compensation payment disparities. In its analysis, the IG determined that there were ten factors that the VA could not control and there were six factors over which the VA could exert some control.

According to the IG, the factors that the VA cannot control are power of attorney representation, enlisted versus officer, military retirees versus non-military retirees, participation of veterans receiving benefits, period of service, branch of service, dependents, special monthly compensation, age, and the average number of disabilities. The six factors that the IG indicated the VA has some control over are pending claims, brokered claims, appeal rates, transferred cases, grant rates, and rater experience.

The IG stated that some disabilities are inherently more susceptible to variations in rating determinations. The IG indicated that the Rating Schedule (38 C.F.R. Part 4), because it is a 60-year-old model, might also cause some inconsistencies. The IG identified post-traumatic stress disorder (PTSD) evaluations, total disability based on PTSD (including individual unemployability or IU), and all veterans rated with IU as rating decisions susceptible to variations.

The IG focused on mental disabilities for several reasons: mental disabilities have a high variable rate (compared to the other body systems evaluated by the Rating Schedule); mental disabilities have the highest average evaluation (58 percent); and PTSD, which is a mental disability, is one of the fastest growing service-connected disabilities.

The IG also noted that there were several instances of benefits fraud in the past few years. It was stressed that based on an income match, 8,486 veterans in receipt of IU benefits reported earned income to the Internal Revenue Service (IRS). The IG indicated that some or all of the 8,486 veterans in receipt of IU benefits and in receipt of earned income, may not be entitled to IU benefits.

The IG's eight specific recommendations are listed below:

1. Conduct a study to detect and correct unacceptable payment patterns.
2. Work with the Veterans' Disability Benefits Commission to clarify and revise the rating schedule.
3. Conduct a review of rating practices for certain disabilities such as PTSD and IU.
4. Expand national VA quality review to include review of PTSD evaluations for consistency, and to determine if the stressor was fully documented.
5. Coordinate with the Veterans Health Administration to improve the quality of medical examinations.
6. Ensure that VA regional offices are adequately staffed and equipped.
7. Consider establishing a lump-sum payment option in lieu of recurring monthly payments for veterans with disability evaluations of 20 percent or less.
8. Analyze differences in claim submission patterns to determine if certain veteran sub-populations, such as World War II veterans or veterans living in certain areas, have been underserved and perform outreach based on the results of the analysis.

For years The American Legion and other veterans service organizations (VSOs) have stated that the driving force behind most VA adjudications is the need for the VA to process as many claims as possible in the fastest possible time. This emphasis on quantity and speed of adjudication results in premature adjudications, improper denials of benefits, and of course, inconsistent decisions.

The IG report confirms much of what we have been saying about the VA claims adjudication process. Essentially, the IG acknowledges that because the VA often does not take the time to obtain all relevant evidence and information, there is a good chance that these claims are not properly adjudicated. The IG, to its credit, quoted raters and DROs who indicated that VA management is much more concerned with quantity than quality. Some VA adjudicators stated that awards and bonuses are centered around production.

The tone of the IG report is disconcerting. The IG implies that where the VA fails to develop claims properly, there are **only** improper **grants** of benefits. The IG failed to mention that in most claims where the VA does not obtain all relevant information, the claim is denied or under evaluated. The IG ignores the fact that many deserving veterans have their claims denied or under evaluated because the VA, in rush to claim work credit, failed to, or refused to, comply with the duties to assist and notify. The IG admits that the VA often makes errors but fails to consider or discuss whether these errors could result in the unlawful denial of benefits or the undervaluation of service-connected disabilities.

This negative tone exists throughout the IG report. For example, when discussing the differences between adjudications in New Mexico and Illinois, the IG noted that New Mexico had the highest average annual VA disability compensation payments at $11,206. The IG indicated that the high New Mexico payments "may be a cause for concern." However, the IG did not express any concern about the low paying regional offices.

The IG attacked the current rating schedule as "a 1945 model that does not reflect modern concepts of disability." The IG, however, did not define the term "modern concepts of disability" and did not explain why the current rating schedule would cause inconsistent payments.

According to the IG, whether a veteran was represented by a VSO was the single most important factor in determining the amount of compensation payments made to that veteran. The IG reported that on the average veterans who are represented by a VSO receive $6,225 more per year than those veterans without representatives. This is a telling statistic. The VA runs a disability benefits program that is required to be non-adversarial and ex parte. (38 C.F.R. § 3.103(a).) The huge disparity between non-represented veterans and represented veterans supports the conclusion that the VA claims adjudication system is more adversarial than the VA or IG would like to admit.

Posttraumatic Stress Disorder

The IG reviewed 2,100 PTSD cases at seven regional offices and found that regional offices approach stressor verification requirements differently from state to state. In particular, there were differences in how the regional offices verified veterans' allegations about traumatic events in service. The IG also found that, in general, once veterans with PTSD obtain a 100 percent evaluation their receipt of mental health treatment declined. The American Legion will specifically address the mistake of making generalizations based on this flawed conclusion in a separate written statement to the chairman of the full Committee.

The IG's discussion of confirmation of PTSD stressor events displays significant confusion over what evidence is required to confirm a stressor. Veterans do not have to prove they were in combat to establish the existence of a stressor if there is credible supporting evidence of the alleged traumatic event. Evidence from the service department indicating that a veteran served in the area in which the stressful event is alleged to have occurred and evidence supporting the description of the event should be considered in deciding whether the veteran experienced the alleged stressor. There is no need for the service records to corroborate every detail including the veteran'spersonal participation in the stressful event. As long as there is **"independent evidence of the occurrence of a stressful event, and the evidence implies the veteran's personal exposure"** then the requirement in 38 C.F.R. § 3.304(f) that there be "credible supporting evidence that the claimed in-service stressor occurred" is satisfied. *Suozzi v. Brown*, 10 Vet. App. 307, 311 (1997); *Pentecost v. Principi*, 16 Vet. App. 124, 128 (2002).

The IG report stated that about 25 percent of the 2,100 PTSD awards it reviewed were based on inadequately developed stressors. The IG stated that in some cases the VA improperly relied upon buddy statements, information taken from Internet web sites and other secondary information to confirm combat and/or a combat-related stressor. First, it is perfectly acceptable to rely upon buddy statements to confirm combat and/or a combat-related stressor. *Dizoglio v. Brown,* 9 Vet.App. 163, 166 (1996). Second, veterans do not have to prove they were in combat to establish that they suffered a traumatic event in service, even if it is alleged that the traumatic event occurred in combat. If there is credible supporting evidence that the event occurred and that the veteran experienced the event, the VA does not need to request any more information about the stressor or develop to confirm that the veteran engaged in combat.

The VA Manual M21-1, Part III, 5.14, instructs adjudicators to request details of the stressful incident such as dates, places and unit assignment at the time of the event. However, the Manual (apparently attempting to comply with U.S. Court of Appeals for Veterans Claims case law) goes on to state "Do not ask the veteran for specific details in any case in which there is credible supporting evidence that the claimed in-service stressor occurred." The IG report cites to the M21-1 concerning PTSD claims but does not refer to the above-quoted provision.

Additional areas of concern

Global Assessment of Functioning (GAF)

The IG indicated that, in general, some mental disabilities are inconsistently evaluated because medical experts have trouble measuring the degree of disability. In conducting psychiatric examinations, VA psychiatrists and other VA mental health medical examiners use the GAF scale to evaluate the veteran's overall psychological, social, and occupational functioning. The GAF is a numerical assessment that employs a scale of 1 to 100. A score of 100 denotes an individual who has superior overall functioning in a wide range of activities. At the lower end of the scale, a score of 1-10 denotes an individual who is so severely disabled that he or she is in persistent danger of hurting him or herself and others. In evaluating mental disabilities, the VA is obligated to consider the GAF score as it represents an expert medical opinion by a psychiatrist or other mental health professional regarding the veteran's social and occupational impairment.

It has been our experience that a significant number of service-connected mental conditions are under-evaluated because the rater failed to properly consider the GAF score. The IG report did not mention GAF scores. It is the opinion of The American Legion that if VA raters properly incorporated GAF scores the overall evaluations for mental conditions would be more consistent and they would reveal a higher level of severity. In fact, many cases have been appealed to the U.S Court of Appeals for Veterans Claims because a GAF score assigned by the VA examiner supported a higher evaluation. Most of these appeals result in a remand or even a reversal. *See Bowling v. Principi*, 15 Vet. App, 1 (2001).

Flawed IG Assumptions

The IG report appears to assume that the states with high levels of compensation payments are doing something wrong. The IG apparently did not consider that the states paying a high level of benefits are making correct legal decisions--doing a better job than the states with low levels of payments. The American Legion believes that it is quite possible that some, if not all, regional offices are incorrectly denying a considerable number of claims for compensation and under-evaluating some service-connected conditions. Moreover, based on the findings of our quality review visits, we believe there are more veterans being unfairly denied benefits and underpaid benefits than there are veterans who are being unfairly granted benefits and/or overpaid benefits.

Our Quality Review Team has found errors in all of the VA offices reviewed, including the regional office in Albuquerque, New Mexico. Provided below is a summary of the discrepancies we noted in our quality review visit to New Mexico.

Some of the New Mexico rating decisions reviewed by The American Legion exhibited lack of knowledge or carelessness. For example:

- In some instances, the RO incorrectly denied service connection for a congenital disease because the RO misinterpreted 38 C.F.R. § 4.9.
- In some instances, the Global Assessment of Functioning (GAF) score was ignored.
- The effective dates assigned for individual unemployability (IU) created problems. According to an RO official, the RO assigned an effective date from the receipt of the VAF 21-8940 – instead of the date of the informal claim for IU. The official stated this was a recurrent problem in this RO.
- Some VA examinations were inadequate.
- Some ratings concerning claims for increase should have, but did not, consider 38 C.F.R. § 3.400(o)(2).
- Some inferred issues were either missed or ignored.
- The rules concerning new and material evidence were not correctly applied.
- In some instances, special monthly pension (SMP) was not correctly considered or improperly rejected.
- In some cases, the RO issued confusing and misleading development and notice letters.
- In some instances, the RO failed to clarify the appellate process to veterans who clearly were confused.

Many of the types of errors identified in New Mexico were similar to the errors that our Team found in Chicago. If the New Mexico Regional Office, the highest paying office according to the IG, exhibited these underpayment and improper denial problems, it is possible that all VA regional offices under-compensate some claimants to various degrees. The IG never considered this possibility. In fact, all regional offices we have visited have exhibited patterns of improper denial and underpayment. Of course, some regional offices exhibited much better quality than others..

Also, the BVA remands or reverses approximately 60 percent of the appeals it reviews. It would probably be safe to say that none of those remands or reversals involve overpayments of benefits or the improper grant of service connection. The BVA reversal/remand rate reveals that regional offices commit many errors adverse to veterans.

In spite of the inescapable fact that there is a serious quality problem within the VA regional offices that unfairly deprives many deserving veterans of VA benefits, the IG did not mention or even allude to this situation. This omission is a disservice to veterans and casts serious doubt on most of the IG conclusions. VA's predictable response to the IG report is not balanced or responsible and puts the VA in an adversarial position against those who are in receipt of VA compensation benefits. It should be noted that in the past many VA reviews of benefits had a chilling effect. For example, when VA Central Office asked to review all grants of IU in the early 1980s, the grants of IU decreased dramatically. We are concerned that VA will overact in a similar fashion when it conducts case reviews based on the IG report.

Production Versus Quality

Any rational informed observer of the VA adjudication system would find that the VA suffers from a quality problem. Of course, if VA adjudications are reviewed solely for improper grants of benefits and improper high evaluations – they can be found. The IG report, in part, confirms this. However, The American Legion quality reviews and the BVA remand/reversal rates also confirm that if improper denials and under-evaluations are sought – they will be found in even greater abundance.

VSOs, as veterans' advocates, are not expected to act against the best interest of their clients or members. It is not the job of The American Legion to complain to the VA about over evaluations or improper grants of benefits. The IG, while not an advocate for veterans, is supposed to be impartial. The IG was asked to find out why Illinois veterans were being paid so much less than veterans in other states. The implication was that Illinois veterans were being treated unfairly. The IG, to its discredit, did not consider or discuss in any meaningful way the possibility that veterans in Illinois were being underpaid and improperly denied. No IG recommendation dealt with unfair denials and under-evaluations. Instead, the IG created a worst-case situation and tried to calculate the savings if the worst case proved to be true.

Lump Sum Payments

Lump sum payment of benefits is a bad idea. The IG report confirms that acceptance of a lump sum payment would prevent a veteran for filing a claim for increase. For example, a veteran might establish entitlement to service connection for hypertension evaluated as 10 percent disabling. Years later the hypertension could cause a heart condition that would render the veteran unemployable, and the heart disability might cause the veteran's death. The veteran would not be able to obtain an increase in evaluation if he or she accepted the lump sum payment. It is not clear whether the spouse would be entitled to service-connected death benefits in such a case. Additionally, in implementing this option, one would have to necessarily assume that the initial award, for which the lump sum is paid, is correct. As indicated by the high BVA remand and reversal rate, this is not a safe assumption.

Regional Office Consolidation

Regional office consolidation is an idea that rears its ugly head every few years. Some VA managers like the idea of consolidation because of the economic advantage to the VA. It is cheaper to have 10 or 16 offices rather than to pay for 57 regional offices. However, in our experience, many of the bigger VA offices have more quality problems than the smaller regional offices. The American Legion quality reviews reveal that the fact that raters and DROs are under the same roof does not mean they will all rate claims consistently. Also, consolidation, especially consolidation in low cost of living rural areas, would hamper access to the VA regional offices for many veterans, especially low income and minority veterans. Obviously, that is not a good thing.

The American Legion offers the following recommendations in response to the IG's report and recommendations:

1. The VA should implement an independent quality review program with teeth. The quality review managers and employees should be supervised by someone outside of VBA, such as the VA General Counsel or even the VA Secretary so that the people checking the quality of RO actions are not put into conflict with their supervisors and will not be subject to undue influence by VA managers.
2. The VA should make certain that the VA employees who perform their quality reviews are experts in veterans' law.
3. VA managers, DROs, and raters should be rewarded for excellent quality performance and held accountable for quality problems. Poor quality should result in a restriction on bonuses and promotions.
4. Both the VA and interested VSO groups (if they are willing) should initiate outreach efforts to veterans in states where there are fewer claims filed than the national average. The VA and the VSO organizations should conduct separate outreach programs..
5. The VA should not evaluate any mental condition without an acceptable Global Assessment of Functioning evaluation.

VBA PTSD Review

In response to the IG recommendation No. 3, VBA announced that it plans to review all PTSD claims (100 percent schedular and IU where PTSD is the predominant condition) granted from fiscal year 1999 through fiscal year 2004. More than 70,000 cases will be part of this enormous review. The American Legion has serious concerns with this review and we strongly support Senate Amendment 1864 to the fiscal year 2006 Military construction and Veterans Affairs Appropriation Bill which would provide much needed Congressional oversight and safeguards to ensure that our nation's psychologically traumatized veterans are not unfairly penalized for VA's mistakes.

First, the intent of such a review is highly questionable as it would only cover claims that were granted, not those that were erroneously or prematurely denied and/or under evaluated, a number that is undoubtedly higher than those that were improperly allowed. Contrary to the IG's conclusion that there is a major problem with veterans being awarded service connection for PTSD without proper verification of stressors, The American Legion's Quality Review Team has found, in every regional office we have visited, instances of improper or premature denial of PTSD claims. Failure to request supporting information from the United States Armed Services Center for Unit Record Research (CURR), or otherwise failing to fully develop a claim, prior to adjudication is a common error. We have also seen numerous instances of overdevelopment of stressors, such as requiring the veteran to submit additional evidence to verify the claimed stressor when sufficient evidence to verify the stressor has already been obtained. Under evaluation of mental conditions has also occurred in every regional office we have visited.

Second, discrepancies in the way regional offices process PTSD claims should be addressed in the adjudication of claims that are currently pending and those that are filed in the future. Instances of fraud aside, veterans whose claims have already been established should not have to suffer through the long and agonizing claims process again because of VA adjudicative deficiencies. Moreover, in light of its enormous claims and appeals backlog, as discussed

previously in this testimony, VA simply cannot afford to tap its already limited resources to conduct a review of more than 70,000 cases that would otherwise not have to be touched.

Lastly, announcing it will review thousands of previously granted PTSD cases, including those that were deemed to be "permanent and total" and would otherwise need no further action, without fully considering all potential ramifications, or even how such a large-scale review would be conducted, is extremely irresponsible. This past July, the Under Secretary for Benefits initially informed the executive directors of the major VSOs that VBA planned to begin its review of the 70,000 plus PTSD cases in September. VA has since informed us that the major review will not commence until it completed its review of the 2,100 cases looked at by the IG. Additional details, or even general information, regarding its review plans has not been released. Unfortunately, VA's knee jerk reaction to the IG's recommendation was quickly picked up by the media, resulting in undue stress among an untold number of veterans with serious psychiatric disabilities. Since the PTSD story first appeared in the media, The American Legion has received numerous inquiries from veterans concerned that VA will use the review to take away their benefits or make them relive the events that caused their illnesses by requiring them to "prove their case" all over again. In fact, many who have contacted us thought that they would automatically lose their benefits without notice. Although we requested, on several occasions, that VA issue an official public statement or press release to explain the purpose and intent of the review and clear up any confusion or misinformation resulting from media articles, VA has failed to do so, further exacerbating veterans' anxiety over the review.

Mr Chairman, thank you again for allowing The American Legion to submit for the record on these important issues. We look forward to working with you and the members of the Committee to help ensure America's veterans receive fair and equitable adjudication of their disability claims. This concludes our statement.

STATEMENT OF RICK SURRATT
DEPUTY NATIONAL LEGISLATIVE DIRECTOR
DISABLED AMERICAN VETERANS
FOR OCTOBER 20, 2005, HEARING IN THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

In accordance with the invitation of the Subcommittee, the Disabled American Veterans (DAV) submits its views on three specified items: (1) the Government Accountability Office's (GAO's) November 2004 report, *VA Needs Plan for Assessing Consistency of Decisions*; (2) the Department of Veterans Affairs (VA) Office of Inspector General (OIG) May 2005 report, *Review of State Variances in VA Disability Compensation Payments*; and (3) the United States Court of Appeals for the Federal Circuit's decision in *Allen v. Principi*.

EXECUTIVE SUMMARY

After having designated VA's disability compensation program "high risk" because of its concerns about the consistency of decisions, GAO later found that VA data are insufficient for determining possible decision-making inconsistencies. Apart from these contradictory GAO findings, indications of inconsistency do exist. In response to a survey, DAV National Service Officers (NSOs) reported variations in the consistency of VA claims decisions. In addition to GAO's recommended steps to improve data and conduct studies on consistency, VA must focus on the causes of inconsistency.

To address concerns about substantial variations in average annual compensation payments among the states, OIG reviewed compensation awards from the six states with the highest average annual payments ("high cluster") and the six states with the lowest average annual payments ("low cluster") finding that veteran demographics and inconsistent rating decisions may account in part for the variations. OIG also found that claims processing practices, the quality of disability examinations, staffing levels, production pressures, and adjudicator experience and training may influence payment levels. On average, veterans in the high cluster states had more service-connected disabilities and higher disability ratings than veterans in the low cluster. In general, training was a higher priority, adjudicators were more experienced and had less difficulty applying the disability rating schedule, disability examinations were judged better, and error rates were lower in the high cluster states. Adjudicators in the high cluster states took longer to adjudicate claims, although the pressing backlogs were smaller there and they shipped fewer cases to other offices for adjudication. High cluster states had higher percentages of (1) represented veterans, who were shown to be higher compensated than unrepresented veterans; (2) Vietnam veterans, who were shown to be higher compensated than veterans of other periods; and (3) veterans of the enlisted ranks, who were shown to be higher compensated than veterans of the officer ranks. In the high cluster, a higher percentage of veterans exercised their right to appeal than in the low cluster. These findings suggest that the trend of lower payments in some states may be due in part to lower proficiency in adjudication. Adequate resources are essential to proficient claims adjudication.

A fundamental principle of law is that a disability due to military service is compensated. A secondary disability that results from a service-connected disability is due to service. The effects of alcohol abuse are considered in evaluating the severity of service-connected posttraumatic stress disorder (PTSD), for example, when the alcohol abuse resulted from and is a component of the PTSD, though alcohol abuse itself, as a primary condition, is not compensable. The ongoing effort to change the law to

prohibit consideration of the effects of alcohol abuse in rating PTSD for compensation purposes appears to be more a product of a political agenda and negative attitudes about compensating mental illness with associated alcohol abuse than about the equity of doing so. Rather than rely on views of agency witnesses who speak to further an agenda, Congress should rely, in its consideration of this issue, on the views of medical professionals who have insight and understanding about the cause-and-effect relationship between the distressing symptoms of PTSD and alcohol abuse. No justification exists for changing the law to prohibit compensation for alcohol abuse incurred under these circumstances.

STATEMENT

VA Needs Plan for Assessing Consistency of Decisions

From its 2003 review of VA's disability compensation program, GAO found that VA is struggling to provide accurate, timely, and consistent disability rating decisions. GAO designated the program "high risk."[1] Subsequently, the Chairman of the then Subcommittee on Benefits of the House Committee on Veterans' Affairs asked GAO to conduct a review to determine (1) the actions VA has taken to assess the consistency of regional office decisions on disability compensation claims and (2) the extent to which VA program data can be used to measure the consistency of decision making among regional offices.[2] In its report from this review, GAO noted: "In January 2003, in part because of concerns about consistency, we designated VA's disability program . . . as high risk."[3] GAO found that VA does not systematically assess decision-making consistency among its field offices. For its own assessment, GAO found that current VA data were insufficient for GAO to compare decision making among VA regional offices and therefore did not provide "a reliable basis for identifying indications of possible decision-making inconsistencies" in the disability compensation program.[4]

Like other of its unsubstantiated, broad-brush criticisms and allegations about defects in VA programs, GAO here specifically alleged systemic inconsistency in VA decision making, and this finding served as the premise for further review, upon which GAO then found that VA data are insufficient for identifying "possible," or "potential," decision-making inconsistencies.[5] The obvious question is how GAO was initially able to find VA had problems with inconsistency when its later review concluded that VA data are insufficient to reveal inconsistencies.

That said, we do not disagree with GAO's finding that VA has made little effort to assess and ensure consistency. We do not disagree with GAO's finding that the data are insufficient for this purpose. GAO did have a factual basis for these findings, unlike its mere convenient assumption that the program is plagued with inconsistency. Apart from GAO's unfounded declaration, there are indications of inconsistency in VA's decisions on compensation claims, however. The experience and observations of those who work within the system on a regular basis have shown a lack of uniformity in the understanding and application of the law, as well as variations in management emphasis on accuracy and technical proficiency.

Over the past 3 years, the DAV's corps of approximately 260 NSOs reviewed an average of 202,000 rating decisions per year. To aid GAO in this review, the DAV surveyed its National Service

---

[1] U.S. Gen. Accounting Office, *GAO-03-119, High-Risk Series: An Update* 38 (Jan. 2003).
[2] U.S. Gov't Accountability Office, *GAO-05-99, Veterans Benefits: VA Needs Plan for Assessing Consistency of Decisions* 1 (Nov. 2004).
[3] *Id.*
[4] *Id.* at 2, 16-22.
[5] *Id.* at 2, 18, 19.

Offices with 25 questions on VA rating consistency in late November 2003. The first four survey questions addressed overall consistency among VA regional offices, overall consistency among adjudicators in the same regional offices, overall consistency between rating veterans service representatives (RVSRs) and decision review officers (DROs), and overall consistency between regional office decisions and Board of Veterans' Appeals (BVA) decisions. The remaining 21 questions addressed consistency among regional offices in deciding specific issues and in ratings on specific types of disabilities by body system. National Service Office supervisors were asked to rank consistency on a scale from 1 to 5, with 1 representing "not consistent," 2 representing "substantial variations in consistency," 3 representing "fairly consistent," 4 representing "substantially consistent," and 5 representing "consistent." Twenty-one of the 51 responses indicated substantial variations in consistency among VA regional offices. Twenty-two indicated that decisions among VA regional offices were fairly consistent. Only 3 rated interoffice decision making as consistent. Twenty-five responses indicated that decision making was fairly consistent among adjudicators within the same regional office. Thirty-three responses indicated substantial variations in consistency between RVSRs and DROs. Twenty-three respondents indicated there is substantial variation in consistency between regional office decisions and BVA decisions. Thirty-five respondents indicated that there were substantial variations in consistency in ratings for mental disabilities, which was the highest level of inconsistency noted on the survey. Sixteen responses ranked decisions on presumptive service connection as substantially consistent, the highest number for that ranking. Twenty-three more ranked decisions on presumptive service connection as fairly consistent. Thirty-eight respondents ranked ratings for eye disabilities as fairly consistent, constituting the highest number for this ranking. The rankings for consistency of ratings involving other bodily systems were predominantly in the midrange.

In its report, GAO noted: "Although VA acknowledges that veterans are concerned about consistency, VA has not taken action to assess consistency."[6] A lack of consistency is evidence of arbitrariness or seriously flawed decision making. It may demonstrate inadequate training or a lack of proficiency, which may result from inadequate resources. Certainly, it demonstrates management deficiencies and a lack of oversight and accountability within VA. Thus, VA's continued failure to correct the problem represents an unacceptable management tolerance of erroneous decision making, which is a disservice to veterans and taxpayers. GAO recommended that VA (1) modify its data gathering to allow it to identify inconsistencies and (2) conduct systematic studies of consistency. Those steps are not the ultimate solution, however. While those steps are essential to a better understanding of any problem of inconsistency and the targeting of remedies, we believe VA must focus more immediately and fundamentally on the more readily apparent causes of inconsistency. Its budget must request adequate resources. It must invest in more thorough training. It must institute more comprehensive quality assurance measures. It must incorporate real accountability on the part of adjudicators and management alike.

Review of State Variances in VA Disability Compensation Payments

To address legislators' concerns about Veterans Benefits Administration (VBA) data showing that average compensation payments made to Illinois veterans were the lowest of all states, the VA Secretary requested that OIG conduct a review to determine the reasons for variations in the average monthly disability compensation payments. OIG limited its review to the six states with the highest and the six states with the lowest average compensation payments, which it designated the "high cluster" and the "low cluster."

As of fiscal year (FY) 2004, the national average annual compensation payment for a disabled veteran was $8,378. The average annual payment for veterans in the high cluster states was $11,073,

[6] *Id.* at 17.

compared with $7,127 for veterans in the low cluster states. The average annual payment in the highest state was $12,004, and the average annual payment in the lowest state was $6,961.[7]

According to OIG, demographic factors, over which VA has virtually no control, account for some of the variation. The demographic factors OIG studied were: military retired status, enlisted or officers status, average age, number of disabilities, representation by an accredited organization, branch of service, period of service, existence of dependents, and entitlement to special monthly compensation.[8]

OIG found that, on average, military retirees, veterans of the enlisted ranks, veterans with higher numbers of disabilities, veterans represented by accredited organizations, and Vietnam veterans receive higher compensation payments and that, generally, the high cluster states had more of these veterans than the low cluster states. OIG could not evaluate the effect of entitlement to additional compensation for dependents and entitlement to special monthly compensation because of data limitations. OIG concluded that there was no correlation between the compensation rates and veterans' ages or branch of service.[9]

The variations between represented and unrepresented veterans were particularly marked. The national averages showed that veterans represented by accredited service organizations had substantially higher levels of compensation than veterans without representation. The national average annual payment for veterans with representation was $10, 631, compared with a national average of $4,406 for unrepresented veterans. All the states in the high cluster had higher percentages of represented veterans. Nationwide, 63.8 percent of the veterans receiving compensation were represented. In the high cluster states, 69.5 percent of the veterans were represented. In the low cluster states, 54.7 percent of the veterans were represented. In the high cluster states, veterans with representation had an average annual payment of $13,488. Represented veterans in the low cluster states had an average annual payment of $9,891, above the national average of $8,378 for all veterans. Though well below the national average for represented veterans and below the national average for all veterans, unrepresented veterans in the high cluster states had an average annual payment of $5,637, compared with only $3,862 for unrepresented veterans in the low cluster states. Thus, represented veterans in the high cluster states received an average annual payment that was $7,644 higher than the average annual payment of unrepresented veterans in low cluster states.[10] As we will discuss below, this appears to call into question some of the conclusions reached or suggested by OIG.

OIG investigated seven claims processing factors as potential contributors to the variation. OIG observed that VA has some control over these factors. The claims processing factors considered were: number of pending claims, brokering of claims, rating timeliness, rater experience, appeal rates, transferred claims, and grant rates.[11]

On the whole, the six low cluster states had higher numbers of pending claims in 1999 and 2004 than the six high cluster states. Five states in the low cluster showed higher numbers of pending claims in 2004 than in 1999. One state in the low cluster had 34.1 percent fewer claims pending in 2004 than in 1999. If this one anomaly is disregarded, the average increase in pending claims for the five remaining low cluster states was 50.82 percent. The average increase in pending claims for the high cluster states was 42.7 percent. One state in the high cluster contributed disproportionately to this average increase: the pending caseload for Oregon increased by 64.3 percent. Nationwide, pending claims rose by 33.9 percent

---

[7] Department of Veterans Affairs Office of Inspector General, *Rep. No. 05-00765-137, Review of State Variances in VA Disability Compensation Payments* ii-iii, 12 (May 2005).
[8] *Id.* at 20.
[9] *Id.* at 20-27.
[10] *Id.* at 23-24.
[11] *Id.* at 28.

from 1999 to 2004. All of the low cluster states except the one with a decreased inventory of pending claims exceeded the national average. Three of the high cluster states exceeded and one equaled the national average for increase in pending claims, leaving two states below the national average for increased pending claims. OIG concluded that there is no apparent correlation between pending caseload variations and average annual payment variations.[12]

To reduce large claims backlogs within regional offices, VA transfers pending claims to regional offices with smaller caseloads on hand for adjudication, a practice it refers to as "brokering." On the whole, the six states in the high cluster brokered fewer in number and a lower percentage of their decided cases in 2004. Only two of the high cluster states brokered a higher percentage of their cases than the national average of 13.3 percent for brokered cases. Of the low cluster states, the three lowest payment states brokered percentages of their cases well above the national average. However, because the brokered cases could not be individually identified, OIG could not determine whether there was any significant variations or trend toward lower compensation awards in brokered cases.[13]

Using 120 days as a timeliness baseline, VA data showed that the high cluster states had a higher percentage of claims that took more than 120 days to complete than the low cluster states. For the years 2002, 2003, and 2004, the high cluster states had a 3-year average of 69.51 percent for cases that took more than 120 days to complete, as compared with 65.20 percent for the low cluster states. In each of the three years, both the high cluster and low cluster states had overall averages that exceeded the national average of cases taking more than 120 days to complete. OIG concluded that the variations in the time taken to process claims had no correlation to average annual payments.[14]

Compared with low cluster states, RVSRs in high cluster states were overall shown to be somewhat more experienced. For two of the three years 2002–2004, the six-state average for RVSR experience in the low cluster states was slightly above the national average, however. OIG concluded that, though RVSR experience does not explain the variation in average annual payments, it does have some influence on this average.[15]

To calculate appeal rates for the individual states in the high and low clusters, OIG took the number of appeals filed during the 3-year period ending with 2004 for each state in relation to the number of veterans receiving compensation in that state (rather than as a percentage of the number of decisions rendered). In the high cluster, the six-state average for number of appeals per 1,000 veterans was 47.7, compared with 32.7 in the low cluster, or 5 percent for the high cluster vs. 3 percent for the low cluster. Four of the six high cluster states had appeal rates substantially higher than the national average of 34 appeals per 1,000 veterans: Arkansas–80 appeals, West Virginia–69 appeals, Oregon–39 appeals, and Oklahoma–38 appeals. With 33 appeals, New Mexico was one below the national rate. With 27, Maine was 7 below the national rate. In the low cluster, only one state exceeded the national rate. OIG concluded: "The data does not suggest that a higher rate of appeals results in higher average annual payments."[16]

OIG thought that the transfer of a case between regional offices subsequent to adjudication because the veteran relocated might have an effect on the level of payment and thus a study of transferred cases might reveal an impact upon variations. Because VBA does not track transferred cases, OIG was

---

[12] *Id.* at 28-29.
[13] *Id.* at 29-30.
[14] *Id.* at 30-31.
[15] *Id.* at 31-32.
[16] *Id.* at 32-33.

unable to review the effect of this factor.[17] Similarly, because VBA no longer tracks grants and denials, OIG was unable to determine if there were differences among the states in the rates of grants and denials that could be responsible for variations.[18]

According to OIG's findings, veterans in high cluster states tended to have higher combined ratings, higher ratings for individual disabilities, and higher percentages of veterans with total disability ratings.[19] For the high cluster states, the average combined degree of service-connected disability was 44.2 percent, compared with 33.4 percent for the low cluster states.[20] The high cluster states had higher percentages of veterans rated above 60 percent than the low cluster states. Conversely, the high cluster states had lower percentages of veterans rated less than 40 percent than the low cluster states.[21] Compared to the low cluster states, the high cluster states averaged fewer 10-percent ratings and more 100-percent ratings than the low cluster states. In the high cluster, the six-state average was 23.5 percent for veterans rated 10 percent and 11.6 percent for veterans rated 100 percent. In the low cluster, the six-state average was 35.7 percent for veterans rated 10 percent and 7.1 percent for veterans rated 100 percent disabled.[22]

From these statistics, OIG segued into a recommendation of lump-sum payments for less severe disabilities. Noting that 46.9 percent of all disabled veterans are rated from 0 to 20 percent, OIG recommended that VBA propose a one-time lump-sum option payment for these veterans to inactivate 1.17 million claims, or reduce active case files by 46.9 percent. OIG observed that this would "result in reducing recurring compensation payments of $1.96 billion a year and free up staff to improve the quality and timeliness of future workload.[23]

The percentages of veterans receiving compensation for disabilities rated total on account of individual unemployability or under the rating schedule were higher than the national average in the high cluster and higher than in the low cluster. In the high cluster, 14.3 percent of the veterans were rated totally disabled due to unemployability, compared with 7.9 percent nationally and 5.4 percent in the low cluster. In the high cluster, 11.6 percent of the veterans were rated 100 percent according to the rating schedule compared with 8.4 percent nationally and 7.1 percent in the low cluster. All the high cluster states were above the national average for veterans rated totally disabled on a schedular basis and due to unemployability; all the low cluster states were below the national average for veterans rated totally disabled on a schedular basis and due to unemployability.[24] Although OIG apparently did not calculate how much this variation contributed to the higher average annual payments in the high cluster and the lower average annual payments in the low cluster, it did note that totally disabled veterans received an average annual compensation of $30,940, while all other veterans received an average annual compensation of $4,239, and that the 16.3 percent of veterans paid at the 100 percent rate nationally received 57.6 percent of the total compensation paid in 2004.[25]

Looking at ratings by body system, OIG found generally that veterans in the high cluster states had higher ratings, that ratings based on subjective criteria showed more variability, and that rating criteria requiring the exercise of greater judgment are more difficult for RVSRs to apply.[26] Compared

---

[17] *Id.* at 33.
[18] *Id.*
[19] *Id.* at 35.
[20] *Id.* at 35-36.
[21] *Id.* at 37-38.
[22] *Id.* at 38-39.
[23] *Id.* at 39.
[24] *Id.* at 39-40.
[25] *Id.* at 40-41.
[26] *Id.* at 41-43.

with the national average of 4.1 percent and the low cluster average of 2.8 percent, 8.9 percent of veterans in the high cluster were receiving compensation at the 100-percent rate for disabilities that included PTSD or PTSD with unemployability. Veterans with 10-percent ratings, total schedular ratings, and total ratings for unemployability account for most of the variations found.[27]

Departing from its comparison of high and low cluster states for factors causing variations, OIG reviewed PTSD decisions for proper adjudication from seven VA regional offices. In OIG's view, service connection was established for PTSD in 25 percent of the cases it reviewed without proper verification that the veterans experienced responsible stressors in service. OIG attributed the problems it identified to differences in interpretation of policy guides and the necessity to base decisions on judgment under ambiguous criteria.[28] In OIG's view, quality reviews under the Systematic Technical Accuracy Review (STAR) program are not completely effective for discovering claims development deficiencies in PTSD cases. A comparison of STAR data for all claims decisions of the high and low cluster states showed overall 2004 error rates of 12.7 percent in the high cluster and 15.2 percent in the low cluster.[29]

In response to an OIG survey, RVSRs and DROs indicated that adjudicator training had not been a high priority in VBA, although they were said to have expressed generally positive opinions about the quality of the training they did receive. Nearly half admitted that many claims were decided without adequate record development, and some evaluated disability examinations as poor. They saw an incongruity between their objectives of making legally correct and factually substantiated decisions and management objectives of maximizing decision output to meet production standards and reduce backlogs. Nearly half reported that it is generally or very difficult to meet production standards without sacrificing quality. Fifty-seven percent reported difficulty meeting production standards if they make sure they have sufficient evidence for rating each case and thoroughly review the evidence. Most attributed VA's inability to make timely and high quality decisions to insufficient staff. The OIG report quoted many respondents' narrative comments about management emphasis on quantity, with rewards and incentives for high production and with no rewards or incentives for quality work. Respondents from both high and low cluster states shared these concerns about production standards and staffing. This is consistent with results of a DAV survey in May of this year regarding claims processing in which about two-thirds of our NSO supervisors pointed specifically to the push for production and overworked VA employees as a serious problem responsible for poor decision making. Respondents from the states with higher average annual compensation payments indicated that training had received higher priority than respondents from the states with low average annual payments. Likewise, respondents from the high cluster had a more favorable opinion about the quality of disability examinations in their regional offices than respondents from states with the lowest average compensation payments. Respondents from states with the highest average compensation payments reported less difficulty applying the disability rating schedule than respondents from the lowest payment states. Fifteen percent of respondents from high payment states and 49 percent of respondents from low payment states reported management had, subsequent to the publicity about variations, encouraged them to change their attitudes when rating disability claims.[30]

OIG's ultimate conclusion, apparently, is that, because the variation of the high cluster from the national average for compensation payments (deviation from the mean) is supposedly greater than the deviation of the low cluster from the national average, "this suggests that the high cluster may be more problematic than the low ranked states."[31] The results of this study do not necessarily suggest, and certainly do not conclusively show, there are more errors in favor of veterans than against them. With the

---

[27] *Id.* at 43-45.
[28] *Id.* at 46-51.
[29] *Id.* at 55-56.
[30] *Id.* at 58-65.
[31] *Id.* at iii.

widespread and longstanding quality problems, the national average may very well not represent the most appropriate level of compensation. If the national average itself is too low because of poor rating practices, the high cluster may be closer to what is in reality appropriate. Indeed, some of the findings and survey responses about compromises in quality for higher production suggest that is the situation. Thus, because the mean may not be a reliable benchmark or indicator of what is proper, the derivative deviation from the mean, as far as it goes here, is only a raw mathematical measure that by itself supports no clear-cut conclusions and serves as no reliable basis for action.

The general trend was that veterans in the low cluster states received average annual compensation payments below the national average. However, represented veterans and Vietnam veterans were two notable exceptions. Their average annual compensation payments were higher than the national average for all veterans. It would be interesting to compare percentages of veterans with accredited representatives by period of service to determine if that contributed to higher annual compensation payments to Vietnam veterans. Higher percentages of veterans in low cluster states who lacked representation in their claims pulled the average annual payment down significantly. It is telling that the six-state average annual payment of $9,891 for represented veterans in the low cluster is 18 percent above the national average of $8,378 for all veterans. Though significant, the gap between the six-state average annual payment for represented veterans in the high cluster and the six-state average annual payment for represented veterans in the low cluster is smaller than it is between the six-state average for all veterans in the high cluster and the six-state average for all veterans in the low cluster. The six-state average annual payment of $13,488 for represented veterans in the high cluster is 36 percent higher than the six-state average of $9,891 for represented veterans in the low cluster. The six-state average annual payment of $11,073 for all veterans in the high cluster is 55 percent higher than the six-state average annual payment of $7,127 for all veterans in the low cluster. The gap between the six-state average annual payment of represented veterans in the high cluster and represented veterans in the low cluster is also substantially smaller than the disparity between the six-state average for unrepresented veterans in the high cluster and the six-state average for unrepresented veterans in the low cluster. The six-state average annual payment of $5,637 for unrepresented veterans in the high cluster is 46 percent higher than the six-state average of $3,862 for unrepresented veterans in the low cluster. The gaps between represented veterans and unrepresented veterans in the high cluster and between represented and unrepresented veterans in the low cluster are also marked. The six-state average annual payment of $13,488 for represented veterans in the high cluster is 139 percent higher than the six-state average annual payment of $5,637 for unrepresented veterans in the high cluster; the six-state average annual payment of $9,891 for represented veterans in the low cluster is 156 percent higher than the six-state average annual payment of $3,862 for unrepresented veterans in the low cluster. Said differently, the six-state average annual payment for represented veterans in the low cluster is more than two and one-half times as much as the six-state average for unrepresented veterans in the low cluster.

After publication of the variations, it was predominantly management in the low payment states that encouraged a change in attitude to improve the fairness of claims decisions. After the regional office director in Chicago became "committed to awarding all benefits consistent with law and regulation" and acted on that commitment by doubling training, emphasizing quality, and pairing trainees with mentors who embodied a philosophy of granting every benefit possible, Illinois moved from 47th in 2000 to 5th in 2005.[32] These facts support the conclusion that improperly low payments may be a more pervasive problem than purportedly unjustified higher payments.

The other facts also strongly suggest more problems with lower payment states. In the high cluster, training was a higher priority than in the low cluster. Decision makers were somewhat more experienced in the high cluster than in the low cluster. According to the survey, adjudicators in the high

[32] *Id.* at 15.

cluster had less difficulty applying the rating schedule than adjudicators in the low cluster. Disability examinations were judged better in the high cluster than in the low cluster. The high cluster had an overall lower error rate under STAR in 2004. Adjudicators in the high cluster take longer to decide claims than adjudicators in the low cluster; however, there is less of a backlog pressing adjudicators in the high cluster than the low cluster, despite higher numbers of claims filed, more veterans on the compensation rolls, and fewer brokered cases. As noted, represented veterans are higher compensated, and higher percentages of veterans are represented in the high cluster. More of these veterans in the high cluster exercise their right to appeal, but, on average, they have higher numbers of service-connected disabilities and higher ratings than veterans in the low cluster. Vietnam veterans have higher rated disabilities than veterans of other periods, and there is a higher percentage of Vietnam veterans in the high cluster than in the low cluster. Possibly due to exposure to more trauma, enlisted veterans are rated higher than veterans from the officer ranks. The high cluster had higher percentages of enlisted veterans than the low cluster. Though OIG dismissed some of these factors as insignificant, such as appeal rates, they generally fit into an overall pattern of factors favorable to higher average payments, along with demographic factors that show valid reasons for the higher average payments in the high cluster. Moreover, we believe some of OIG's analysis is questionable. For example, OIG considered appeal rates in the states as a percentage of the veteran population of the states rather than as a percentage of claims decisions for the period. OIG viewed data sets pertaining to one factor in isolation from data sets pertaining to other factors. For example, OIG did not consider appeal rates in light of demographic variations between states that may have influenced appeal rates. OIG did not consider appeal rates in relation to the number of pending claims, brokered cases, adjudicator experience, etc., that may have shown correlations. Though OIG reviewed grants of service connection for PTSD in an attempt to attribute variations to purportedly questionable grants, OIG reviewed no denied claims to ascertain whether questionable denials could have been responsible for comparatively lower payments in some states. Without reviewing for patterns of erroneously low ratings or improper denials, OIG seems to conveniently assume that the high payment states are deciding cases incorrectly. We question whether OIG can draw any valid conclusions about variability without studying both positive and negative deviations from the mean.

While admitting that the review of rating practices were generally inconclusive for the purpose of attributing the variations to them,[33] OIG recommends lump-sum payments as a solution to variations, the causes of which are not satisfactorily understood. Observing that 46.9 percent of service-connected veterans are rated 0, 10, and 20 percent, OIG recommends payment of lump sums "for all veterans with disabilities rated 20 percent or less," which would "result in reducing 46.9 percent or 1.117 million active case files" and result in "reducing recurring compensation payments of $1.96 billion a year and free up staff to improve the quality and timeliness of future workload."[34] As of the end of 2004, approximately 15,300 veterans were rated 0 percent. Apparently OIG would pay lump sums to veterans rated 0 percent who may never otherwise have compensable disability. It is unclear whether multiple lump sums would be paid for multiple noncompensable disabilities. However, OIG does admit here, perhaps unwittingly, that the real problem is poor quality and timeliness due to inadequate staff, where it elsewhere acknowledged only that payment levels "may be" affected by timeliness pressures, staffing levels, and adjudicator experience and training.[35]

Though the better trained and more experienced adjudicators from the high cluster states have no general difficulty in applying the rating schedule, OIG parrots others—primarily GAO—that have criticized it and recommends that it undergo "major restructuring."[36]

---

[33] *E.g., id.* at 34.
[34] *Id.* at 39.
[35] *Id.* at x.
[36] *Id.* at vi, 4-6.

OIG has, we believe, attempted to address the political concerns over the Illinois ranking by attempting to shift most of the blame away from inadequate resources and consequent management emphasis on production quotas at the expense of accuracy to the rating schedule and veterans, the victims, for the variations. Illinois did not require a restructured rating schedule or lump-sum payments to come from the bottom to the 5th-ranked state in 2005. It needed only an attitude adjustment, better training, and an emphasis on lawful decision making. If we had that kind of proficiency, focus, and mindset in every regional office, there would not be such a wide gap between the benefit levels of represented and unrepresented veterans. The will to change must be backed by adequate resources, however.

Allen v. Principi

OIG singled out PTSD for separate review because this disability is inherently the most susceptible to variations[37] and the most vulnerable to criticism. Regrettably, PTSD has a stigma for some and some still prejudicially view veterans with mental illness skeptically as weaklings or malingerers, apparently. While the more enlightened professionals understand PTSD and its very real and debilitating nature, there seems to be less sensitivity and understanding at the political levels of government. An aversion to compensation for PTSD shows in the critical views sometimes expressed. This appears to be the mindset responsible for the ongoing campaign to negate the judicial decision upholding the law that the effects of alcohol abuse caused by and a component of PTSD must be considered in evaluating the level of disability for compensation purposes.[38] Congress should therefore not look to VA witnesses who have an agenda on this issue for a proper understanding, but to the wealth of insightful information from professionals who treat PTSD patients and understand its nature.

A fundamental principle of veterans law is that veterans are compensated for disabilities caused by service in the Armed Forces. Disability caused by the willful use of alcohol to enjoy its intoxicating effects is not caused by service and is not in the line of duty. However, disability from alcohol use caused by service-connected PTSD, for example, is due to a service-connected disability and is therefore caused by service. The Court upheld this principle of law in *Allen.* In previous testimony before this Subcommittee's predecessor subcommittee, we discussed the legal and equitable significance of the distinction. We cited medical authorities on the causal relationship between the distressing symptoms of PTSD and the use of alcohol for an emotional numbing effect to escape or cope with the intrusive psychological pain.[39] Because of the page limitation imposed here, we incorporate our previous testimony herein by reference. In short, no justification exists for disturbing the court's decision on this question.

CONCLUSION

While variations in the average compensation payment levels from state to state are apparently attributable in part to demographic factors, available information also suggests that there are responsible inconsistencies in VA decision making related to inadequate resources and the level of management emphasis on adjudicator proficiency and decisional accuracy. Compensation for alcohol abuse as a component of a service-connected disability is correct under the law, in accordance with the fundamental principles of compensation, and appropriate as a matter of equity.

---

[37] *Id.* at 9.
[38] *Allen v. Principi,* 237 F.3d 1368 (Fed. Cir. 2001).
[39] *Hearing on H.R. 241, H.R. 533, H.R. 761, H.R. 850, H.R. 966, and H.R. 1048 Before the Subcomm. on Benefits of the H. Comm. on Veterans' Affairs*, 108th Cong. (2003) (statement of Rick Surratt, Deputy National Legislative Director, Disabled American Veterans).

STATEMENT FOR THE RECORD OF

PARALYZED VETERANS OF AMERICA

BEFORE THE HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND

MEMORIAL AFFAIRS

CONCERNING

GAO AND VA INSPECTOR GENERAL'S REPORT ON

VARIANCES IN DISABILITY COMPENSATION CLAIMS,

THE VA REVIEW OF PTSD CLAIMS, AND

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT CASE OF

ALLEN v. PRINCIPI

OCTOBER 20, 2005

EXECUTIVE SUMMARY

Concerns with Perceived Variances in Disability Compensation Claims

- Nature of the VA adjudication system and the types of claims it considers allows for subjectivity of individuals reviewing the claims.
- VA's adjudications of claims for service-connection for disabilities are fact-based.
  - This means that two reasonable VA adjudicators assessing the same facts in two different cases could reasonably come to different conclusions.
- Evaluating the nature and extent of the disability resulting from a veteran's service-connected PTSD cannot be measured objectively.

VBD Review of PTSD Claims

- We are concerned that VBA does not have the lawful authority to conduct this review.
- Under the law, when an award of service-connection becomes final, the award of service-connection may only be severed based on finding of clear and unmistakable error.
- Evidence of a stressor being sought in review of claims is legally irrelevant under the plain and unambiguous language of 38 C.F.R. § 3.105 and the Court decisions interpreting the meaning of clear and unmistakable error.

Review of Individual Unemployability

- The clear and unambiguous language of 38 C.F.R. § 3.343(c) creates a rule that gives the veteran a legitimate expectation of the continued receipt of individual unemployability benefits until VA establishes "by clear and convincing evidence" that he has regained his "actual employability."

Final Thoughts About VA IG's Report

- PVA believes that the VA IG's report conveys the tone that the problems identified by the IG stem in large part from the individual behavior of those veterans receiving compensation and less from the problems inherent in the VA compensation and pension program.
  - However, the report advocates a "restructuring of the rating schedule."
- PVA has serious concerns with any assertion that the schedule for rating disabilities is meant only to reflect the average economic impairment that a veteran faces.
  - It also takes into consideration the impact of a lifetime of living with a disability and the every day challenges associated with that disability.
- VA recommends that a standardized licensure and certification requirement be adopted by federal and state agencies, and VETS must facilitate this process.

Allen v. Principi

- PVA is deeply troubled by continued attempts to overturn the Federal Circuit Court of Appeals' decision in the *Allen v. Principi* case.
- The narrowness of the Federal Circuit Court of Appeals' holding in *Allen v. Principi* 237 F.3d 1368 (U.S.C.A. Fed. Cir. 2001), would enable compensation only when there is "clear medical evidence establishing that the alcohol or drug-abuse disability is indeed caused by a veteran's primary service-connected disability, and where the alcohol or drug-abuse disability is not due to willful wrongdoing."

Paralyzed Veterans of America (PVA) is pleased to present our views on the Government Accountability Office (GAO) report *VA Needs Plan for Assessing Consistency of Decisions* and the Department of Veterans' Affairs (VA) Inspector General's report *Review of State Variances in VA Disability Compensation Payments*. We also appreciate the opportunity to comment on the VA's current review of PTSD claims and the United States Court of Appeals for the Federal Circuit case *Allen v. Principi*.

CONCERNS WITH PERCEIVED VARIANCES IN DISABILITY COMPENSATION CLAIMS

PVA believes that the variances in disability claims outlined in the GAO report from November 2004 or the VA Inspector General's report in May 2005 are the natural result of the VA's claims adjudication system. The very nature of the VA adjudication system and the types of claims it considers allows for subjectivity of individuals reviewing the claims. As long as individuals are responsible for making these decisions, variances will occur. This is an inevitable occurrence.

We believe that a number of reasons explain why variances occur. VA's adjudications of claims for service-connection for disabilities are extremely fact-based. This means that two reasonable VA adjudicators assessing the same facts in two different cases could reasonably come to different conclusions on the question whether the veteran should be awarded service-connection for a given disability. One adjudicator could decide to deny service-connection and the other could decide to award service-connection. The fact that they arrive at different conclusions should not be taken to mean that one decision is correct and the other is erroneous.

The assignment of disability ratings for these disabilities is also extremely fact-based. The assessment of evidence and the assignment of disability ratings are, by their very nature, subjective in nature.

It may be impossible for any VA adjudicator to judge a veteran's Post Traumatic Stress Disorder (PTSD) disability objectively. Indeed, evaluating the nature and extent of the disability resulting from a veteran's service-connected PTSD cannot be measured objectively. Because these sorts of decisions are not objective in nature and involve making almost entirely subjective judgments about what the evidence shows or does not show, variances in the assignment of disability ratings for PTSD are to be expected.

Most VA decisions on claims for service-connection for PTSD and the assignment of disability ratings for PTSD are made based on the adjudicators' reviews of the evidence contained in a veteran's claims folder. Therefore, the VA adjudicators' decisions in these sorts of claims are based on their subjective sense of the expertise, reliability, and credibility of the medical reports, medical opinions, and lay statements and lay evidence in deciding these claims.

At its core, the VA disability compensation program is not an objective one. Rather, VA's governing statutes and implementing regulations for adjudicating claims for service-connection for PTSD and awarding disability ratings for PTSD, contain guidelines or "principles" rather than clear-cut legal rules. The nature of the governing statutes and regulations also contribute to the existence of variances in VA adjudications.

Consider 38 C.F.R. § 3.303(a) (2004). The regulation, which is titled "Principles relating to service connection" provides in pertinent part:

> Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. . . . Determinations as to service-connection will be based on review

> of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation, consistent with the facts in each individual case. § 3.303(a).

As can be seen, this regulation contains guidelines or "principles" for the VA adjudicator to follow as he or she decides a claim for service-connection. Since the regulation establishes guiding principles and not hard-edged legal rules, the regulation bestows a great deal of discretion on the VA adjudicator. This means that there are few restrictions placed on the adjudicator with respect to the evidence he or she can consider, the weight each piece of evidence should receive, or the findings the adjudicator can make.

Section 3.303(a) also helps explain why variances in VA rating decisions addressing claims for PTSD exist. The variances exist, in part, because the VA's regulations give the VA adjudicator discretion on how to weigh evidence, to find facts, and ultimately to decide whether to grant or deny a claim for service-connection.

PVA believes that at best the VA can only hope to narrow the gap between claims for similar disabilities in different geographic locations. This may occur as the VA updates its adjudication regulations. Currently, the VA is completing a rewrite of 38 C.F.R. Part 3, regulations which govern the actual adjudications process for claims. PVA's General Counsel Office has had every opportunity to review initial rewrites of the regulations. Once the final regulations are completed, the VA will then begin to implement new, comprehensive training that all of its claims adjudications staff will have to complete. PVA's benefits service officers will also be given the opportunity to participate in the new training. This should help bring the VA benefits staff into a more universal framework for adjudicating claims, thereby closing the gap between decisions.

VBD REVIEW OF PTSD CLAIMS

PVA is aware that VA Central Office directed VA Regional Offices to conduct evidence development in cases where VA has awarded service-connection for PTSD. However, we are concerned that VBA does not have the lawful authority to conduct this review.

We have seen the letters that the VA Central Office sent to Regional Offices directing development in cases where we hold power of attorney. However, while the letters inform the Regional Offices to conduct evidence development in each case, none of the letters cited any law or regulation that authorizes the actions that the Regional Offices are required to take. This is understandable. That Central Office purported to find fault in the Regional Office's grants of service-connection for post traumatic stress disorder is legally irrelevant under the law that governs the agency's actions once service-connection has been established for a disability.

Once the Regional Office awards a veteran service-connection for post traumatic stress disorder, or any other disability for that matter, VA's decision becomes final. *See generally* 38 U.S.C.A. § 5108, 5109A, 7111 (West 2002); 38 C.F.R. § 3.104(a) (2004) ("A decision of a duly constituted rating agency . . . shall be final and binding on all field offices of the [VA] as to conclusions based on the evidence on file at the time VA issues written notification"); 38 C.F.R. § 3.105(d) (2004) ("service-connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government).").

Under the law, when an award of service-connection becomes final, the award of service-connection may only be severed based on finding of clear and unmistakable error. However, the letters that have been

issued to the Regional Offices in cases where PVA holds power of attorney do not assert that the original grant of service-connection was based on clear and unmistakable error. Rather, Central Office merely states the unsupported conclusion that Central Office's "review of the records . . . found that we did not have sufficient credible supporting evidence when we granted service-connection for PTSD." This statement does not meet any of the applicable and controlling legal tests for reconsidering an award of service-connection. Indeed, it seems little more than an impermissible reweighing of the evidence.

In August 2005, in a case where PVA holds the veteran's power of attorney, VA Central Office sent a letter to the Regional office. The letter stated:

> Review of the above-captioned claims folder found that additional development is required. Please notify the veteran and his/her representative as appropriate, of the actions you are taking. A sample opening for the letter to the veteran is enclosed. . . .
>
> Our review of the records in this case found that we did not have sufficient credible supporting evidence when we granted service-connection for PTSD. Action must now be taken to remedy this deficiency.
>
> Review of the evidence has shown that confirmation of a stressor necessary to support the grant of service-connection for PTSD has not been established. Evidence in file does not establish that the event described by the veteran occurred. The veteran did not receive any combat decorations for his military service, and there is no objective evidence of record which either supports or verifies an In-service event. The military personnel records do not verify or support combat. Action must now be taken to determine if a stressor for the veteran can be verified.

The August 2005, letter assumes without citation of legal support that Central Office can direct the Regional Office to undertake development in this veteran's case. However, PVA is unaware of any statute or regulation that authorizes these actions.

In 1997, Congress enacted two statutory provisions to prescribe VA's authority to consider and correct clear and unmistakable error (CUE). 38 U.S.C.A. § 5109A, § 7111 (West 2002). These two statutes address when and how the agency can make a determination of agency error for, or against, a veteran or other VA claimant or beneficiary. A prior, final decision of the agency can be reversed or revised where the evidence establishes the existence of CUE. 38 U.S.C.A. § 5109A; 38 C.F.R. § 3.105(a) (2004) For a CUE to exist either the correct facts in the record must not have been present before the adjudicator or the statutory or regulatory provisions extant at that time must have been incorrectly applied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). More significantly, "the error must be 'undebatable' and of the sort 'which, had it not been made, would have manifestly changed the outcome at the time it was made.'" *Id.* at 245 (quoting *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc)); *see also Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999) (expressly adopting "manifestly changed the outcome" language in *Russell, supra*). "In order for there to be a valid claim of [CUE] . . . [t]he [VA], in short, must assert more than a disagreement as to how the facts were weighed or evaluated." *Russell*, 3 Vet.App. at 313. This is because, "even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable." *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993).

PVA respectfully submits to this Subcommittee that the instructions given to the Regional Office in Central Office's August 2005, letter, are incompatible with these requirements. We note that none of the "errors" that are mentioned in the letter are sufficient, in and of themselves, to warrant reversal or revision of the "final" agency decision that awarded the veteran service-connection for his PTSD. Therefore, the agency did not have lawful authority to initiate development in this veteran's case.

As described above, in order to demonstrate that an agency decision contains clear and unmistakable error, it is insufficient for VA to find that the agency made mistakes of law or fact, that facts were overlooked, that clerical errors were made, or that the agency failed to follow or properly apply VA instructions, regulations, or statutes. Rather, before any "final" agency decision can be revised, reversed or amended by the agency, clear and unmistakable error must be shown to exist. And a finding of CUE requires the party claiming the existence of VA error—and this includes the agency—to demonstrate that the agency action would have been "manifestly different" if the agency had not committed the error. This means that VA must demonstrate that the rating decision that originally granted service-connection to the veteran contains error and that VA would have denied the veteran service-connection for his Post Traumatic Stress Disorder if the error had not been made. PVA respectfully submits that the errors asserted by Central Office in the August 2005, letter, do not rise to the level of clear and unmistakable error.

The August 2005, letter, directs the Regional Office to conduct development of evidence regarding the stressors that the veteran experienced during his or her military service. However, this stressor evidence is legally irrelevant under the plain and unambiguous language of § 3.105 and the Court decisions interpreting the meaning of clear and unmistakable error. It is legally irrelevant because the regulation and the Court decisions interpreting the regulation direct that when an award of service-connection has become final it can only be reviewed under a clear and unmistakable error analysis, which is limited to the evidence that was before the adjudicator at the time the challenged decision was made. Any evidence that VA may develop now concerning stressors that the veteran experienced during service could not be considered by the agency in reviewing the correctness of the rating decision that awarded the veteran service-connection for PTSD. Consequently, VA may not undertake development regarding the veteran's in-service stressors.

REVIEW OF INDIVIDUAL UNEMPLOYABILITY

PVA is also concerned about the VA IG's focus in its report on the impact of grants of individual unemployability as a result of PTSD. As an example, we currently hold the power of attorney for a veteran in a case where VA Central Office has questioned the Regional Office's original award of individual unemployability based on the veteran's service-connected PTSD. In awarding the veteran individual unemployability benefits, the Regional Office determined that:

> Findings at the VA examination show that you are unable to work due to your post traumatic stress disorder. Therefore, entitlement to individual unemployability is granted because the claimant is unable to secure or follow a substantially gainful occupation as a result of service-connected disability.

In August 2005, VA Central Office sent a letter to the Regional Office. The letter directs the regional office to conduct additional evidence development on this veteran's case. The letter states:

> Our review of the records found that the grant of IU was in error (38 CFR § 3.105(a)) because the evidence in the file dos not support entitlement to a total evaluation based on unemployability.
>
> Development (VA Form 21-4192) with employers for the twelve months prior to the date the veteran last worked must be of record. There is no information from the veteran regarding his employment. He should be contacted and asked to verify his last employers and the date he last worked. On receipt contact with the last employer should be made to verify last date of employment and reason for the termination.

> These deficiencies must be fully developed to determine if they can be cured. If the new evidence and information obtained supports entitlement to IU, prepare and promulgate a confirmed and continued rating decision. . . .
>
> As with any decision, you must also write to the veteran, and his or her representative, to advise him or her of this outcome.
>
> If the new evidence and information does not support entitlement to IU, the next step is to request direction from the C&P Service.

PVA believes that the governing regulations do not authorize the actions that Central Office directs the Regional Office to take in this case. First, we note that 38 C.F.R. § 3.105(a)—the regulation cited by Central Office—requires a showing of "clear and unmistakable error" and not just a mere error before an award may lawfully be terminated. Central Office incorrectly cites the regulation for a legal rule that does not actually exist in the regulation.

Second, it seems that VA has adopted a regulation that governs when an award of individual unemployability benefits may be lawfully terminated. Section 3.343(c) of 38 C.F.R. provides, in relevant part, as follows:

> In reducing a rating of 100 percent service-connected disability based on individual unemployability, the provisions § 3.105(e) are for application but caution must be exercised in such a determination that actual employability is established by clear and convincing evidence. 38 C.F.R. § 3.343(c) (2004).

Contrary to the instructions contained in Central Office's August 2005, letter, VA may only lawfully seek to terminate the veteran's award of individual unemployability benefits by complying with the law as set forth in 38 C.F.R. § 3.343(c). VA must establish, as is required by its regulation, that his "actual employability is established by clear and convincing evidence." *See United States v. Nixon*, 418 U.S. 683, 694-96 (1974) (when an agency establishes in its regulations a procedure for dealing with a particular class of cases, it must follow those procedures in order for its action to be valid). If the veteran's "actual employability" is not shown by "clear and convincing evidence" VA is without lawful authority to terminate his individual unemployability award.

Section 3.343(c) gives this veteran a legitimate claim of entitlement to the continued receipt of his individual unemployability benefits until VA establishes by the necessary "clear and convincing evidence" that he has regained his "actual employability." The clear and unambiguous language of this regulation creates a rule that gives the veteran a legitimate expectation of the continued receipt of individual unemployability benefits until VA establishes "by clear and convincing evidence" that he has regained his "actual employability." As stated by the Supreme Court: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *see also Arizona Grocery co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932) (Supreme Court establishes the rule that an agency is bound by its own rules); *Way of Life Television Network v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (D.C. Circuit refers to a "well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action."); *Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1986) (holding that an agency's failure to follow its own regulations constitutes "arbitrary and capricious conduct" which the courts "must overturn."); *Reuters Ltd. v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986) ("A precept that lies at the foundation of the modern administrative state is that agencies must abide by their own rules and regulations").

Under these authorities, VA must comply with its governing regulation. It may only terminate the award of individual unemployability benefits based on a showing of "clear and convincing evidence" that the veteran regained his "actual employability."

FINAL THOUGHTS ABOUT VA IG'S REPORT

Initially, we believe that the report conveys the tone that the problems identified by the IG stem in large part from the individual behavior of those veterans receiving compensation and less from the problems inherent in the VA compensation and pension program. However, the report advocates a "restructuring of the rating schedule." During the past several years a restructuring of the rating schedule has been ongoing and has yet to be completed. As PVA understands it the completion of the ongoing restructuring of the rating schedule is on hold pending the completion of the rewrite of the VA's regulations, which is also nearing completion.

However, any changes made to the rating schedule must be given serious consideration as to the long term impact on veterans and their lives. PVA has serious concerns with any assertion that the schedule for rating disabilities is meant only to reflect the average economic impairment that a veteran faces. Disability compensation is intended to do more than offset the economic loss created by a veteran's inability to obtain gainful employment. It also takes into consideration the impact of a lifetime of living with a disability and the every day challenges associated with that disability. This approach reflects the fact that even if a veteran holds a job, when he or she goes home at the end of the day, that person is still disabled.

In addressing the question of lump sum payments for either 10 or 20 percent disability evaluations, we do not agree that this avenue could be easily traversed. The VA would clearly have to identify the disability as one which has absolutely no potential for worsening, and not prohibit claims of secondary service connection for disabilities that may arise from the disability for which a lump sum payment was made.

The report surmises that once a veteran receives a 100 percent evaluation for PTSD the veteran somehow gets well and implies that veterans stop requesting treatment recognizing that they are in receipt of the maximum ratings schedule benefit. There are several factors that must be considered when drawing this conclusion. First, it may well be that a veteran has private insurance and prefers to utilize that insurance for treatment of PTSD rather than suffer the long waits very often encountered when scheduling an appointment at VA medical facilities. Second, once a veteran receives a 100 percent evaluation for PTSD, the VA in the rating decision that awards that benefit regularly chooses not to schedule the veteran for a future examination. Thus, the decline in PTSD patient visits. In those instances that a PTSD patient had been awarded less than a 100 percent evaluation the VA as a rule does schedule future examinations, thus the higher number of patient visits.

ALLEN v. PRINCIPI

The Federal Circuit held in *Allen* that § 1110 of Title 38, as amended by § 8052(a)(2) of the Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, 104 Stat. 1388, did not prohibit the award of "compensation for an alcohol or drug abuse disability secondary to a service-connected disability or use of an alcohol or drug abuse disability as evidence of the increased severity of a service-connected disability." *Allen*, 237 F.3d at 1381.

PVA is deeply troubled by continued attempts to overturn the Federal Circuit Court of Appeals' decision in the *Allen v. Principi* case. We believe that the Court's decision is consistent with the plain language of 38 U.S.C.A. § 1110 (West 1991 & 2002), VA's implementing regulation, 38 C.F.R. § 3.310 (2000), and

the remedial nature of VA's service-connected disability compensation program. The narrowness of the Federal Circuit Court of Appeals' holding in *Allen v. Principi* 237 F.3d 1368 (Fed. Cir. 2001), a narrowness repeatedly referenced by the Court, would enable compensation only when there is "clear medical evidence establishing that the alcohol or drug-abuse disability is indeed caused by a veteran's primary service-connected disability, and where the alcohol or drug-abuse disability is not due to willful wrongdoing." PVA will continue to oppose any legislation that would overturn this ruling and that would erase the important distinction between willful and involuntary acts.

PVA would like to thank you again for the opportunity to comment on these important issues. It is important that any changes discussed by the VA regarding veterans' claims will not have a negative impact on veterans. The best interest of the veteran must be first and foremost. We would be happy to answer any questions that you might have.

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

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

Fiscal Year 2005

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program — $228,000 (estimated).

Paralyzed Veterans of America Outdoor Recreation Heritage Fund – Department of Defense -- $1,000,000.

Fiscal Year 2004

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program — $228,000 (estimated).

Fiscal Year 2003

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program — $228,803.

STATEMENT OF

QUENTIN KINDERMAN, DEPUTY DIRECTOR
NATIONAL LEGISLATIVE SERVICE
VETERANS OF FOREIGN WARS OF THE UNITED STATES

FOR THE RECORD

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

VARIANCES IN DISABILITY COMPENSATION CLAIMS, AND DECISIONS MADE BY REGIONAL OFFICES, FACTORS AFFECTING CLAIMS DECISIONS, AND RECOMMENDATIONS FOR STANDARDIZING THE ADJUDICATION PROCESS

WASHINGTON, D.C. OCTOBER 20, 2005

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the Veterans of Foreign Wars of the United States on the GAO report from November 2004 on Consistency of VA Decisions, the VA Inspector General report on State Variances, released May 19, 2005, the VA review of 72,000 PTSD claims, and the United States Court of Appeals decision on *Allen v. Principi.*

In summary, these are our views
The GAO proposes to monitor the "consistency" of VBA claims decisions based on data to be made available on a future VBA claims processing network called "Vetsnet" by way of a subsystem "RBA 2000" since the current system does not provide adequate data for this purpose. The VFW has reservations about the GAO plan, and concerns regarding the impact of this plan on VBA management strategies. We believe that it would not be possible to monitor adequately decision-making quality from statistical data thus produced. We also believe that VBA may use this data to influence decision makers and inappropriately affect the outcome of claims.

The VAIG in the report on state variances of average compensation payments, was unable, in VFW's opinion, to fully develop demographic reasons for these state-by-state differences in payment, and resorted to testing theories that they previously developed against the data. They found a major anomaly contributing to the variance in PTSD cases, which were rated as totally disabled. However, they failed to determine if this also affected claims that were rated as less than 100%. Some of the recommendations made by the VAIG appear not to fit with the mission of the investigation. In the

opinion of the VFW, a major source of concern, poor quality resulting from production pressures, and lack of resources, was given insufficient emphasis.

Regarding the 72,000 case review of recently awarded PTSD claims based on Individual Unemployability; VFW is of the opinion that the review is ill advised. It singles out the most troubled and vulnerable veterans and the only goal is to reduce benefits. It is not justified by VAIG's findings. It is likely to have a very negative effect on the attitude of veterans and active duty military, especially those serving in war zones.

The decision of the Federal Appeals Court in *Allen v. Principi* was correct. The VFW opposes any change to current law that would reimpose the restrictions applied by General Counsel Opinion. Furthermore, it is doubtful that that VA could administer this restriction in a fair and balanced way. The net effect would be to harm the dependents and family of affected veterans.

The GAO Report

The GAO report states that VBA lacks the data systems that would be sufficiently comprehensive to assess if given disabilities are consistently rated in different regional offices. They expect that this assessment will be possible under a new system that VBA has planned. We are sympathetic with GAO's concerns that there is no mechanism to assure that similar claims would receive similar outcomes, if evaluated by different decision makers. While the GAO is focused on decision making in different regional offices, the same concern is appropriate, in our opinion, even about decisions made within a regional office by different employees. VBA decisions are generally made by a single individual. The GAO suggests a methodology using statistical data to monitor "consistency" by assuming, for a large population, there will be a consistent distribution of outcomes, probably in this case, by diagnosis and severity, if consistent decisions are being made. We infer that, should this data be skewed, then there would be cause for concern that external factors or suspect quality was affecting the decision process. Except in the most simplistic of cases, or the most grossly out-of-line decision making, it is difficult to imagine that there would be meaningful data, looking at just outcomes without the medical and other information in the file, to glean any useful conclusions about the decision process.

The analyses of data resulting from claims decisions, assuming that such data becomes available, in a system as resource starved as VBA, is inherently dangerous. One only needs to look at the tradition in VBA of managing the backlog in VBA claims processing to see the potential downside. VBA, despite initial success, has never gained control of their workload, never managed to learn how to deal with the periodic and inevitable legislative and policy changes and complexity within the Compensation and Pension programs, or been able to successfully address their 15% self reported error rate. In fact, most of their management direction and effort involves massaging the oldest workload through the bottlenecks, working the dynamics of the system without effective consideration of decision quality, and sometimes applying pressure to decide cases before adequate information is available. Those who respond to these pressures are rewarded.

Given VBA's tendency to manage by the numbers, we can imagine the possibility of pressure placed downward on local managers to "manage" the average grant rate or percentage of severity for each disability category. This would force decision makers to make their evaluations differently from what their judgment would otherwise dictate, to chase some theoretical consistency target. It's hard to

imagine an outcome that is more likely to be harmful to the veteran population. For this reason, we have reservations about pursuing "consistency" as a goal.

If this analysis is used as an analytic tool, not as an end in itself, but to direct attention to areas that are likely to be producing poor or unfair decisions, it may have some merit. However, that is not the outcome that we would expect, given VBA's history.

The VA Inspector General Report

The VA Inspector General (VAIG), faced with a difficult task and a short deadline, and the same lack of data as GAO from VBA's Benefits Delivery Network (BDN) system, fell upon the strategy of developing hypotheses, then testing them against the available data. This was, perhaps, the only approach at their disposal within the mandated time frame. Working backwards from the conclusions, is, however, a dangerous way to proceed.

There is a principle in science that seems to us to be applicable here. That is, one tends to find what one looks for, perhaps to the exclusion of other, but more valid conclusions. Put another way, what you catch depends on which hunt you pursue. It seems to us that the VAIG set out to prove that there was a problem with PTSD, based on a different study, and used this one to drive home the point. Some factors that would have significant influence on average payment rates were not addressed by VAIG because the data was not available. Of particular interest is the migration of veterans to the Sun Belt region. Higher income, especially income that is not geographically dependent, for example, VA compensation, produces mobility and the tendency to move to a state that has both a more desirable climate and cost of living. Given the non-linear payment rates of VA compensation, this effect would be amplified in the state-to-state variance.

The delivery of the results of the VAIG study was unfortunate, both for VA, and for the veteran population. While we understand that the mission of the IG does not always converge with the best interests of serving veterans, the strategy of a high profile press conference, and sensational but still unsubstantiated language alleging widespread fraud by veterans, was clearly intended for the observer to conclude that veterans are faking their PTSD conditions. Marrying this statement to allegations that evidence of stressors was absent, or unverified, and that some veterans were not in treatment, created a picture of wholesale abuse by veterans on the suddenly burgeoning PTSD roles. This was strangely coincidental to the creation of the Veterans Disability Benefits Commission, where it was given prime attention.

Recently, some members of the Veterans Affairs' Committees have repeated the statements of the VAIG that veterans who were serviced connected for PTSD and receiving compensation under the provision of individual unemployability, are dropping out of treatment. The inference, which apparently had its origin on statements by VA officials, including, but not limited to the VAIG, is clear. Veterans, who receive compensation for PTSD, are suspect. A senior VA official not long ago in the hearing room down the hall summed it up. "Perverse incentives are at work." he said.

To the membership of the Veterans of Foreign Wars, the nation's largest organization of combat veterans, these statements are disquieting. Frankly, we believe that they have little merit, but these statements appear to have a receptive audience in some circles. While we remember vividly these statements made by VA officials and other elected officials, it appears that they are not exactly what

the VAIG said in their written report, which, for the sake of clarity, we include here, emphasis provided:

When PTSD ratings were increased to 100 percent, veterans sought less treatment for the condition. In ***a judgment sample of 92 PTSD cases****, we found that 39 percent of the veterans had a 50 percent or greater decline in mental health visits over the 2 years after the rating decision. The average decline in visits was 82 percent, and some veterans received no mental health treatment at all. While their mental health visits declined, non-mental health visits did not.*

Although 39 percent had a 50 percent or greater decline in mental health visits, they had a slightly higher rate of non-mental health care visits for the 2 years after they received their 100 percent rating. ***VA needs to review care provided at Vet Centers and through other sources*** *to determine if there is a significant population of veterans who no longer pursue or receive mental health care after their 100 percent rating.*

As nearly as we can decipher this language, VAIG set out to prove that veterans, once granted 100% disability for PTSD, then abandon treatment. It appears that they found a few veterans, that for reasons still unknown, choose not to, or were not able, to continue therapy at the VA medical centers. We note, however, that the VAIG never checked other sources of mental health care, including the vet centers, or the private sector; instead they suggest, with a bit of negative bias, that VBA might wish to do so. The VAIG concludes that a national problem exists based on a "judgment sample" of 92 cases, perhaps with the judgment preceding the sampling, and saw fit to imply these conclusions in public statements despite a plethora of evidence that service connection, as the program policy and the law requires, is quite compatible with treatment. That is, when treatment is offered, as it not always is, consistent with the law.

Veterans who are adjudicated as totally disabled are a very high calling in the compensation program, and they are also the most significant priority of the health care system. As Chairman Buyer said in his press release regarding the disturbing findings of the VAIG in another of their reports, this one on abnormalities in medical appointment scheduling:

> **CHAIRMAN BUYER SAYS WAIT TIMES FOR VETERANS TO RECEIVE HEALTHCARE ARE UNACCEPTABLE**
>
> **Washington, D.C.—** Chairman of the House Committee on Veterans Affairs Steve Buyer today expressed concern over findings in a recent report on outpatient scheduling procedures, issued by the Department of Veterans Affairs inspector general. The findings reinforced evidence of rising waiting times for health care appointments that was discussed at a Committee hearing on VA health care funding shortfalls Thursday.
>
> The July 8 report, "Audit of the Veterans Health Administration's Outpatient Scheduling Procedures," used survey data gathered by VA's IG in eight VA medical facilities for the week of June 21-27, 2004. Initiated by then-Secretary of Veterans Affairs Anthony Principi, it found that VA health care schedulers often failed to correctly schedule appointments. It also found that facility directors did not have accurate data on patient waiting lists.

"To provide the best care possible to veterans, VA must more efficiently handle the basics," Buyer said. "I want VA to resolve these problems with appointment scheduling, eliminate these waiting lists, and improve access."

Chairman Buyer, responding to evidence of growing waiting lists at many VA facilities, last week directed VA to fully report its patient waiting times to Congress. As of July 15, the number of new enrollees and established patients waiting more than 30 days for appointments in Cleveland was 1,638; in San Diego, 621; in Indianapolis, 287; and in Tampa, 2,650. Buyer informed the VA of these numbers at the hearing, and intends to return to the matter.

VA policy requires that any veteran with a service-connected disability rating of 50 percent or more and veterans who need care for any service-connected disability will be scheduled for care within 30 days of the desired appointment time. If they cannot be, VA must provide for their care at another VA facility or through a non-VA provider at VA expense.

However, misreporting has caused VA medical facilities to understate waiting times. Veterans were consequently kept on waiting lists past 30 days without referral for treatment at another VA facility or at a non-VA facility. VA health care facility directors were unaware of thousands of such cases and thus could not ensure correct procedure.

This commitment appears to have been ignored when it comes to treatment for service connected PTSD. Moreover, as the PTSD compensation roles have increased, creating a greater demand for this treatment, VHA has seen fit to reduce resources available to treat veterans for this condition. Even more disturbing, VHA policy makers appear to be seeking ways to lighten this burden of priority treatment by actually discouraging OEF and OIF veterans from exercising their rights to claim service connection for PTSD, while receiving treatment at VHA facilities. The attached white paper from VHA's task force on chronic mental illness outlines options to accomplish this.

Mr. Chairman, we believe that this suggests that the problem is not with the veterans seeking compensation or treatment from the VA for PTSD, which is their right. We don't believe that the problem is with the clinicians who are mostly dedicated and compassionate healers. Instead, we believe that the problem is institutional, a sense of barrier between the two major institutions in the VA; VBA and VHA, who have become barricaded within their own cultures and cannot appreciate that they share areas of mission and responsibility with their sister organization.

In fact, it appears that other, but more rational explanations exist for why this relatively small proportion of veterans, 39% of a "judgment" sample, declined by half in their visits to a VAMC. Given that these veterans are mentally disabled, and as a result possibly somewhat unpredictable, that VBA has added substantially to the roles in recent years, and that VHA has cut back on the availability of mental health treatment, it would not be surprising if some of these vets have abandoned VA mental health care. Frankly, it would not surprise us if VA failed to provide mental health care to these 100% rated service connected veterans. We have been told that VHA monitors only the delivery of health care, not the demand for it; consequently, it is not possible to determine if the delivery of mental health care is optimal for the service connected veteran population.

There is, however, ample science to show that the delivery of health care to PTSD service connected veterans is less than optimal, but not because of the veterans. Several relevant studies are referenced in this statement, just below.

There is, of course, the VAMC Minneapolis study that finds a positive correlation between service connection and treatment for PTSD at http://ps.psychiatryonline.org/cgi/content/full/55/5/589; another study by the same author that finds evidence of clinician hostility toward service connected PTSD veterans at http://ps.psychiatryonline.org/cgi/content/full/53/2/210; a letter commenting on bias in VA studies against "compensation seekers" at http://www.dva.wa.gov/PDF%20files/RAQ8-1.pdf; and a study which concludes that if service connected veterans are treated with respect, they tend to want to get treatment and get better at http://ps.psychiatryonline.org/cgi/content/full/51/3/369.

The VAIG also makes recommendations to revise the Disability Rating Schedule, and make lump sum payments for less severe, 10% and 20% rated disabilities. These proposals have a familiar ring to them, but little to do with variance of average payment between states. They are both flawed ideas that distract attention from the real problems afflicting VA. In our opinion, the VAIG, eager to offer both viable theories to explain the state variances, as well as possible solutions, offered up a grab bag of past and present pet ideas borrowing heavily from both other IG reports and perennial ideas usually offered when times appear ripe for change. We find it disturbing how these ideas, some of which have been rehashed over the years, fit nicely with similar agenda items offered to the Veterans Disability Benefits Commission for consideration. It is as if the weight of repetition could add credibility to what are, in the end, simply impractical, bad ideas which would compound, rather than resolve, VA's problems.

For all the fussing about program policy, regulations, and veterans' behavior, the VAIG State Variance report is most interesting for what VAIG found, but did not emphasize. The VAIG barely addresses the obvious; that the VBA has made a lot of bad decisions on a lot of cases. VBA's self reported error rate is 15%. VFW's opinion is that it is at least that high. The VBA STAR quality review is adequate to determine that a problem of significant magnitude exists, but is apparently inadequate to identify the specific nature of any pattern of error, or even, as GAO or VAIG characterize it, any consistency or variance problem. There can be no doubt that the VAIG, by isolating a large component of "state variance" to PTSD ratings has identified an issue that is a problem, the scope of which needs to be determined. The problem, in the highest average payment state, based on our review of cases for which VFW holds a power of attorney, is that the VBA in a rush to closure on these cases, failed to gather the evidence necessary to support the decision. The VAIG only looked at 100% rated PTSD cases. We do not know from this review--and this is important--if there is a similar or perhaps larger number of veterans who were denied, or received erroneous lesser ratings, with similarly flawed decisions. We also do not know if a similar pattern of poor adjudication exists in other regional offices, also caused by relentless pressure to fight the backlog with inadequate resources that has driven the average payment down, instead of up. The widespread error rate, averaging 15%, suggests that this might well be the case.

VBA badly needs a more robust and comprehensive quality assurance system. The system must be sufficiently comprehensive to detect problems such as inadequate development of PTSD/IU cases, which the current STAR system certainly failed to do, but it must also be capable of detecting these sorts of problems across all types of cases. VBA also needs an effective mechanism to translate the discovery of these problems into effective remedial action at the local level. VBA's tradition of

ignoring this problem is monumental. Their manual on quality issues has not been updated in about a decade. A newsletter to advise the regional offices of even general trends in errors is published infrequently. The message is clear that accountability is focused on the volume of caseload, not on the quality of decision making.

The 72,000 Case PTSD Review

You asked us to discuss the apparently now underway 72,000 case review of relatively recently granted 100% disabled veterans, service connected for PTSD. This review is a very bad idea, for many reasons. With regard to the veterans who would be reviewed, the VA is choosing to further alienate a category of veterans who have, for years, suffered without recognition of their problems, or their service, from the society that many of them fought to defend. The review singles out the most vulnerable and disabled. It seeks to reduce or deny their benefits, with no similar effort to correct erroneous VA decisions that denied other veterans what was due them. The resources to do this review will further deplete services to new veterans returning from the war against terrorism. It will turn the system even more adversarial as the veteran service organizations, including the VFW, do everything possible to defend our veterans.

The impact that this review will have on the hearts and minds of the heroes in the field today in Afghanistan, in Iraq, and elsewhere fighting the war on terrorism, is terrible to contemplate.
This review is possibly the worst idea in veterans' affairs to approach fruition in decades. We urge you to support the Senate amendment to the VA appropriations bill now in conference. Please kill this review before it does irreparable harm to veterans, and to the institutions that serve them.

Allen v. Principi

Finally, you asked our views on the Appeals Court decision, *Allen v. Principi*. The VA proposed legislation that was considered in the past in this Committee that would have reversed this court decision. That legislation was not enacted. We believe that was the proper decision and we see no merit in revisiting that effort. Reversing *Allen v. Principi* would reinstate a bar to compensation that is payable for the effects of alcohol or drugs considered secondary to another service connected condition, most commonly a service connected mental condition. The ban overturned by the Appeals Court in *Allen v. Principi* did not have its origins in the Omnibus Budget Reconciliation Act of 1990, or the implementing regulations. It was created as a result of an opinion of the VA General Counsel. This unilateral policymaking by an appointed official within the VA is not without precedent, but should be of concern to all affected by veterans' law. These decisions are generally restrictive in nature, and are accomplished by unelected officials, without the opportunity for public consideration. In this case, reversal of *Allen v. Principi* would impose on VA an almost impossible burden to separate the disabling effects of a service-connected disorder from the medically associated effects of alcohol and drugs. Given the uneven track record that the VA has established with PTSD cases, the results would be inconsistent, and unfair. The net effect most likely would be the reduction of income and benefits available to the veteran's family. A far better solution would be for the Committee to direct the VA to provide treatment to these disabled veterans, rather than to punish them for what is essentially a component of the disability suffered in service to their country.

Thank you for this opportunity to present the views of the Veterans of Foreign Wars.

Eligibility for Returning OEF/OIF Veterans

1. Returning OEF/OIF veterans currently receive two years of full eligibility for a full range of health benefits within VHA.
2. Current data reveals that 23.8% (85,857) of returning veterans are taking advantage of this eligibility and are receiving services through VHA.
3. Of those receiving services, 27.8% (23,889) are receiving treatment for mental health disorders that include but are not limited to PTSD, substance abuse and depression.
4. For most returning veterans, the onset of mental health issues as well as the recognition of the need for treatment is not immediate, often resulting in a delay in seeking needed services.
5. Once in treatment, the two year window for eligibility becomes a barrier for further care and treatment (for those who would otherwise not be eligible) unless the veteran enters into the compensation and pension system and seeks a service-connected disability.
6. Mental health professionals are aware that continued needed services may only be available if the veteran seeks service-connected status.
7. For those who first recognize that they struggle with issues related to their military combat services after the two year window (and do not meet the eligibility requirements), entering the compensation and pension system is the only option available to them to receive care through VHA.
8. The current eligibility system encourages access to the compensation and pension system for those veterans who would otherwise not be eligible for services, but clearly are in need of mental health services for treatment of service-related conditions.
9. For the 12 month period ending June 2005, 212,469 initial compensation claims were processed requiring the efforts of 1209 FTEE. On average, this equates to 176 claims per processor. This does not take into account the time and cost of clinicians completing the C&P evaluations in the field, the time and cost related to the appeals process, nor does it include the many years of payment for treatable conditions (such as PTSD) that, if diagnosed and aggressively treated early, could be resolved.
10. Consideration should be given to changing the incentive for seeking a service connected disorder in order to access VHA health care services.
11. Other options for consideration include:
    A. increasing the eligibility of returning OEF/OIF veterans to five years,
    B. focusing the eligibility on the presumptive service-related condition such as PTSD (as determined clinically by a psychiatrist or psychologist) so that treatment may be given without consideration of service connection,
    C. for those in priority group 7 or 8, presumptive service-related conditions would require no co-pay and,
    D. build in a temporary 0% service-connected eligibility for those disorders for which research clearly shows are likely to occur in a significant (i.e. greater than 5%) number of veterans who were exposed to life threatening combat situations.

STATEMENT BY

WITOLD SKWIERCZYNSKI

PRESIDENT

REPRESENTING THE

NATIONAL COUNCIL OF SSA FIELD OPERATIONS LOCALS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE THE

HOUSE WAYS AND MEANS
SUBCOMMITTEES ON
SOCIAL SECURITY AND HUMAN RESOURCES

ON

PROPOSED REGULATION TO IMPROVE THE DISABILITY DETERMINATION PROCESS

Hearing held on

SEPTEMBER 27, 2005

FOR THE RECORD

Chairman McCrery, Ranking Member Levin, and members of the Social Security and Human Resource Subcommittees, I present this statement regarding the proposed regulatory changes to improve Social Security's disability programs.

As a representative of the AFGE Social Security General Committee and President of the National Council of SSA Field Operations Locals, I speak on behalf of 50,000 Social Security Administration (SSA) employees in over 1500 facilities. These employees work in Field Offices, Offices of Hearings & Appeals, Program Service Centers, Teleservice Centers, Regional Offices of Quality Assurance, SSA Headquarters, Wilkes Barre Data Operations and other facilities throughout the country where retirement and disability benefit applications and appeal requests are received, processed, reviewed and decided by SSA employees.

In previous testimony and statements before the Social Security Subcommittee, AFGE has addressed many concerns regarding the administration of the Social Security Disability programs. It is regrettable that opinions and concerns of the employees of the Social Security Administration were not solicited by your committees. The employees of SSA have valuable input to provide regarding their knowledge of the disability process. Ignoring such input is a mistake.

Commissioner Jo Anne Barnhart has abandoned a working relationship with SSA employees and their Union. She continues to distance herself from those who process disability claims and work with the public on a daily basis. Due to the Commissioner's reluctance to entertain employee input in the decision making process, SSA's public service and employee morale have plummeted in SSA. Despite the Union's differences with the Commissioner, AFGE remains committed to working with Congress and, if allowed, with Commissioner Barnhart to address and resolve problems in the Social Security disability benefits program.

Development of the Proposal

SSA Commissioner Barnhart, and Martin Gerry, Deputy Commissioner for Disability, led a small group of SSA officials in developing the disability proposal during the last two years. Although Commissioner Barnhart claims to have met with all interested parties inside and outside of SSA, this does not mean that the methodology for developing these regulations was an open process featuring meaningful two-way communication. In fact, senior SSA officials in the Regions were kept uniformed about the proposal. Few officials at Headquarters were involved in the deliberative process. There were no drafts shared with these Agency leaders for comment, which is the traditional methodology used by SSA regarding change. Instead, AFGE learned that the central design team was a small one and its members were sworn to secrecy.

AFGE's experience is indicative of SSA's closed decision making process. There was just one brief meeting with the Union at the beginning of the process. There was no effort to respond to, or to address, the Union's stated concerns at that meeting. AFGE later made repeated requests for briefings and opportunities to engage in dialogue, on behalf of the 50,000 employees we represent, but had only one subsequent opportunity to meet with Deputy Commissioner Gerry.

The Agency has also notified SSA employees that they may not comment on the regulatory proposal using Agency computers, equipment, or supplies, even on their own time. Furthermore, they must not comment as employees, but only as private citizens, even from home. This is an unprecedented effort by the Agency, to prevent employees from commenting and criticizing the proposal. Thus, SSA declines to obtain input from bargaining unit employees who are knowledgeable about the disability process and threatens those who might want to express their views with discipline. The arrogance displayed by SSA leadership is shocking.

Rationale for Changing the Administrative Review Process

Congress has expressed valid concerns about the length of time that it takes to process disability claims. In addition, Congress is also understandably concerned about the inconsistency of decisions made to award or deny claims. AFGE shares those concerns and has vigorously lobbied Congress to increase staffing and introduce sensible changes. The Agency has never recovered from the loss of nearly 20,000 positions during the 1980s. We have testified about the adverse impact these cuts in staff have caused on clients and SSA employees. There is no substitute for having a sufficient number of trained SSA employees available to provide personal service to disability claimants. In fact, when asked, the public expresses a strong preference for personal help from career civil servants, as compared to other less personalized service delivery options, such as the Internet.

The Barnhart Administration has done a poor job implementing initiatives designed to streamline the disability process. The Electronic Disability Claims System (EDCS) is the automation of the disability claims process which is the basis of the Commissioner's regulatory concept. Both Union and management studies indicate that EDCS takes more time at the initial interview than the previous paper based disability process. Claimant self help in completing the disability forms is eliminated in the automated process. Thus, SSA employees must input all of the disability claims related information. Even though EDCS takes more time, SSA did not allocate any additional resources to assist in the initial disability claims interviewing process. Such failure to provide staff support has resulted in significant backlogs of other workloads in SSA field offices. Such short sighted planning is not encouraging when one wonders how SSA intends to implement other aspects of the Commissioner's plan.

During the Commissioner's tenure, SSA has initiated questionable policies in disability claims taking which constitute a waste and abuse of limited resources. Despite severe staffing constraints, SSA has adopted a policy of taking unnecessary Title XVI (SSI) disability applications from every applicant for TII disability benefits. Employees are pressured to coerce claimants to file for SSI disability benefits despite the fact that many applicants are clearly ineligible. Limited resources are wasted on unnecessary work. Why does SSA engage in such behavior? The result of such needless claims taking is shorter overall processing time of all disability claims. This provides Congress with a false picture of the Agency production and processing times. It also results in the government creating an unnecessary data base and invades the privacy of disability applicants. *Can an Agency that engages in such manipulative practices be trusted in implementing a radical plan to strip disability applicants of appeals rights in order to expedite the processing time of disability work?*

Under Commissioner Barnhart, SSA has also increased the use of third parties in claims taking. Such processes have been expanded due to staffing constraints. Private companies charge applicants for services which are provided at no cost by the government. In addition, such companies negotiate arrangements with medical institutions, States, etc., to take disability applications for individuals who are receiving State benefits. Employees of such companies have not received the extensive training of SSA employees nor do they receive ongoing training like SSA workers. SSA employees inform the Union that the work product of these third parties is often poor and causes extra work by SSA employees to correct errors. SSA refuses to perform any quality review analysis of third party disability work.

Staffing constraints have also led SSA to encourage disability claimants to file applications on the Internet. Such claims take 20% more time than non internet claims to process. Also, SSA employees indicate that it is rare for an Internet disability application to be completed properly.

SSA has mismanaged the disability claims process due to poor planning and the failure to seek input from the SSA employees who do disability work. *Why should Congress trust them in this new scheme which is designed to reduce processing time by eliminating claimant appellate rights?*

Previous SSA Commissioners did involve AFGE in proposals to improve the disability process. AFGE participated in the design and piloting of the Disability Claims Manager (DCM) and the Adjudication Officer (AO) initiatives. The Disability Claims Manager, the Adjudication Officer, and the Project Network Case Manager resulted in reduced processing time, high quality work production, and significant claimant and employee satisfaction. Unfortunately, these initiatives appear to have been discontinued for political reasons. Instead, the Commissioner has proposed significant changes in the methodology of processing disability claims and appeals without seeking meaningful input from the employees who process the work. She is also proposing implementing these changes without any testing or piloting. This is foolish and dangerous.

Proposal – In General

The Union objects to the basic premise of the Commissioner's proposal that cutting processing time of disability appeals should be accomplished by eliminating two current appeals. Certainly one can save time by eliminating two appeals. *However, does this constitute good service?* We think that the answer is obvious.

In addition, SSA's proposal to introduce the new reviewing officer position will lead to a more litigious process and appears designed to decrease the disability claims approval rate. Such a cynical approach to disability reform should be rejected by Congress. SSA claimant satisfaction surveys indicate that the public endorses a caseworker approach which allows claimants to deal with the individual who makes the decision on their case. SSA's plan is the opposite of this approach and a repudiation of the public's desire.

Quick Disability Determination Units

Currently SSA has a quick decision making process: Presumptive Disabilities. The Commissioner proposes to expand presumptive disabilities and ensure that such claims are sent to a special unit that can process these cases quickly.

The Union endorses the idea of expanding presumptive disability cases so that quick decisions can be made on obvious cases. However, the Union sees no need to require a handoff of these cases from an SSA intake worker to a DDS employee to make the decision. The Union feels that such presumptive disability decision making can be accomplished in the field office by the Claims Representative. The DCM pilot showed that front line interviewers can make initial disability decisions expeditiously and accurately. *Why send these cases somewhere else for a time consuming handoff?*

Establishment of a Reviewing Official to Review the State Agency Initial Determinations

The Union previously supported the Adjudicative Officer (AO) position which has some elements similar to the Reviewing Official. The AO reviewed hearing requests and had the ability to issue favorable decisions. The Reviewing Official has the same power. However, when the AOs could not issue a favorable decision, they set up prehearing meetings with the claimant and their representative to gather evidence and set up the case for a smoother hearing. This claimant assistance approach would be more in the tradition of SSA which is to assist the claimant in creating an environment to maximizing their rights. The AO was not required to be an attorney.

Unfortunately, the Commissioners vision of the reviewing official is one where this employee has no direct contact with the appellant. Instead if the case could be approved, the Reviewing Official prepares a legal document which must be refuted by the Administrative Law Judge (ALJ) if the Judge feels a reversal is the appropriate decision. The Commissioner is demanding a legalistic approach which discourages ALJ's from reversing initial claims decisions. In addition, the Reviewing Official performs none of the case preparation activity of the AO which is designed to streamline the hearing process.

The Union feels that the AO is the better approach and asks Congress to consider it.

Further, although not addressed in the Agency's proposal, the Union submits that the Reviewing Officials will need staff support, including possibly a Junior Paralegal position to assist in obtaining additional evidence, drafting decisions for review and other similar duties to ensure that the Reviewing Official has the ability to meet the workload demands of the position and provide world class service to the public he/she serves.

The Union submits that there is the possibility that all attorney decision writers in OHA may apply for this job and if selected, it will create a massive void of decision writers within the OHA hearing offices. The Agency would then be required to hire and train new decision writers who presumably would be paralegals because most of the attorneys would have been hired as Reviewing Officials. The decision writing position of paralegal is essentially a two year developmental position for an employee to be fully productive and such action would

obviously create a massive backlog of cases at the hearing level, as well as establishing a significant delay in processing disability cases far and beyond what the Agency has experienced in the past.

Finally, as the Agency should be aware, a recent IRS ruling regarding the Contract Hearing Reporter will adversely affect the current hearing process because of additional duties being required by support staff in the hearing offices that the Contract Hearing Reporters have done for several years. In the absence of a significant increase in support staff hiring in OHA hearing offices, it appears there will be a significant reduction in the number of dispositions for ALJs and an increase in backlogs before the change in process, as contemplated by the proposed Regulations, is implemented. As such, it is the Union's opinion that hearing offices would not be capable of the proposed changeovers in the hearing process unless immediate staffing and training needs are met. As the Agency should be aware, this recent occurrence was not a budgeted item to increase FTEs for OHA.

Elimination of the Appeals Council

If SSA eliminates the reconsideration appeal, one would expect a significant increase of requests for hearings, which would become the initial appellate step. In addition, elimination of the Appeal Council will likely result in significant increase in claimants seeking judicial review of denials.

The demographics of an aging population and the stagnant economy have already created huge disability claims and appeals backlogs. The Seattle Hearing Office, one of 141 in the country, has about 12,000 cases pending. There is barely room for the employees, because files are stacked on floors, in and on file cabinets, and in bins. There will soon be 700,000 Hearings pending nationally, and already unacceptable processing times continue to grow longer. Ironically, the Appeals Council is the only part of the process showing real processing time improvements, and this plan would eliminate it.

The Union totally opposes the elimination of the claimant's right to request a review of a hearing decision by the Appeals Council and notes that such review is at no cost to the claimant and provides for fair and equitable adjudicative relief. While the Union notes that the Appeals Council has been subject to considerable criticism over the past several years, a review of this process since 2003 clearly establishes real improvement in the processing of claims with consistent corrective relief to approximately 30% of the claimants who request review of the ALJ's decision. Such improvement has been based on various changes at the hearing level, but most significantly because each employee who works at the Appeals Council has an "I can do" attitude. The Union notes that at present, the Appeals Council has a manageable claims workload with less staff and that the new digital recording of hearings and the implementation of the electronic claim file will streamline the appeals process so that the timeline suggested for the Decision Review Board could be met by retaining the Appeals Council review process. With such improvements proposed at lower levels of adjudication, the Appeals Council should be allowed to continue in accordance with the regulatory process and the Union notes there should be a significant decrease in the filing of civil actions because both the claimant and the legal profession will accept a decision by the Appeals Council as the final adjudication of a claim. To eliminate the Appeals Council and essentially replace it with a Disability Review Board would create a self-serving, non-effective function

and the Union submits that as a result thereof, there will be a substantial increase in civil action filings for many years to come. This will result in substantial staffing increases of highly paid professionals to address the massive number of court remands. As anyone can see, rather than having a claimant friendly process, the proposal of the elimination of the Appeals Council and establishment of a Disability Review Board clearly reflects a very legalistic, adversarial process which can be viewed as substantially decreasing service to the American public. The proposed process would substitute a random review for an appeal. Chance would dictate or which cases would be reversed or remanded. Substituting chance for a viable appellate option will result in many claimants being denied rightful entitlement since their appeal rights were eliminated.

Closing the Record

The Union opposes the Agency's time limits for closing the record on the basis that while the timeline may possibly result in a slight improvement in the processing time for the Agency to meet unrealistic goals, the overall effect will clearly deny many claimants a full and fair opportunity to establish his/her disability within the Agency's claim adjudicative process. Such time limitations will not reflect world class service, restore public confidence or reduce cost, but will be viewed by the people of America that SSA is more interested in numbers than being responsive to the needs of each disabled individual. The Union believes that the proposed changes by this Administration will erode public service. Claimants will not have any opportunity to meet and/or discuss their claim for disability with the decision maker. SSA makes no proposal to assist the claimant with the development of his/her claim, such as identifying the supporting documentation necessary to approve the claim. Yet, SSA penalizes the claimant for the Agency's inability to determine a disability, whether or not the claimant is actually disabled.

Closing the record creates an artificial deadline for a claimant to meet the disability requirements of the law. *If evidence emerges at a later date, what rationale exists for SSA to just ignore it?* The premature closing of the record in the Commissioner's proposal provides no benefit to the claimant. It simply is speedy case processing for statistical purposes. Often times, the passage of time is a factor that indicates a deterioration of a condition or that a condition is of sufficient duration to meet disability requirements. *Why cut off the process and establish time limits which require claimants to file again and lose retroactivity?*

Proposed Demonstration Projects

Last year, the Union made Congress aware of the Agency's plans to implement temporary allowance demonstration projects that would provide immediate cash and medical benefits for a specified period (12-24 months) to disability applicants who are likely to benefit from aggressive medical care. SSA denied such plans.

In the proposed regulations, SSA now identifies time-limited benefits as a specific demonstration project. The Union believes SSA intends to implement this program nationally. Terminating disability benefits after a specific time without any evidence of medical improvement or successful work attempts will have a devastating effect on the disability population. Since disability benefit recipients must have a condition which will last

for at least a year to be eligible for benefits, their disabling condition by definition is severe. Terminating their benefits and forcing them to re-file in order to reestablish eligibility would constitute severe economic and psychological hardship.

This time limited benefit plan will result in the unfortunate termination of benefits for many beneficiaries who become too discouraged to pursue continuing entitlement yet remain disabled. Such a result would be tragic and unjust. Unfortunately this and other aspects of the Commissioner's plan seem motivated by a desire to remove disabled individuals from the benefit roles.

If SSA seriously moves forward with implementation, Congress should allow all stake holders to provide input. ***AFGE urges Congress to pay close attention to the details of this project and should monitor it closely.*** SSA should not be allowed to implement any limitation without the approval of Congress. The Union opposes any such legislation.

AFGE's Recommendations to Improve SSA's Disability Programs

AFGE believes that immediate attention needs to be given to three specific issues regarding the SSA disability benefit program:

- Inclusion of SSA employees and the Union in the process to address problems and craft solutions;
- Providing proper staffing and resource allocations;
- Ensuring consistent disability decisions in a more expeditious manner; and
- Maintaining quality in person service and assistance at the field office level.

The Commissioner continues to refuse to engage in dialogue with SSA employees regarding her disability initiatives. Workgroups designed to address problem areas or workloads do not include either the union or bargaining unit employees who actually do disability claims and appellate the work. Employees in field offices and OHA offices fully understand the disability claims process, the problems with the system and potential solutions to such problems. The Commissioner's "open door policy" does not exist for the Union. These actions have caused SSA employees to doubt Commissioner Barnhart's sincerity and will ultimately cause employees to mistrust any changes implemented without their participation and input. AFGE understands that long-lasting progress will only be achieved with the assistance of those who not only understand the problems, but who also have the institutional experience and knowledge to repair Social Security's disability programs. Certainly much more can be accomplished, in a constructive manner, with open, two-way communications. The Union remains committed to such a process.

SSA must develop and implement a new quality management system that will routinely produce information the Agency needs to properly guide disability policy. Equity and consistency in disability decision-making continues to be a problem. In June 2002, AFGE brought this issue to Congress's attention. Since then, ***the only consistent change*** in disability decision-making ***has been to deny more claims.*** The claimant's chances of being approved for disability benefits depend on where they live and the amount of their resources.

For example, SSA records continue to suggest that those who have the resources to obtain medical attention early and often have a better chance of being approved for benefits than those who are unable to obtain early medical intervention due to limited income or resources. (See Chart Below) Nationwide, those applying for Social Security disability have a much greater chance of being approved than those who may only apply for the Supplement Security Income (SSI) program. SSA records continue to expose the inconsistencies of the State DDS decisions. Presumably early closing of the record could have significant adverse impact on lower income, disabled claimants.

As an illustration, following is a compilation of different regions and the variance in allowance and denial rates:

	Title II		Title XVI		Concurrent		Title II Recons		Title XVI Recons		Concurrent Recons	
	Allow	Deny	Allow	Deny	Allow	Deny	Allow	Deny	Allow	Deny	Allow	Deny
National Average	44.3	55.7	36.9	63.1	25.8	74.2	16.4	83.6	13.9	86.1	11.7	88.3
Atlanta Region	35.6	64.4	30.7	69.3	21.7	78.3	13.3	86.7	11	89	9.6	90.4
Boston Region	55.6	44.4	45.4	54.6	33.2	66.8	29.1	70.9	25.4	74.6	24	76
Chicago Region	41.9	58.1	31.6	68.4	22.4	77.6	13	87	10.4	89.6	9	91
Dallas Region	46	54	40.7	59.3	30.1	69.9	19.9	80.1	18.2	81.8	14.4	85.6
Denver Region	36.9	63.1	36.7	63.3	20	80	9.7	90.3	7.8	92.2	8.7	91.3
Kansas City Region	43.8	56.2	31.1	68.9	17.8	82.2	16.4	83.6	11.6	88.4	9.2	90.8
New York Region	50.9	49.1	41.2	58.8	32.2	67.8	16.1	83.9	10.3	89.7	10.8	89.2
Philadelphia Region	51.9	48.1	42.1	57.9	29.7	70.3	19.2	80.8	15	85	13.5	86.5
San Francisco Region	51.8	48.2	44.3	55.7	34	66	20.8	79.2	18	82	16.5	83.5
Seattle Region	42.6	57.4	40.1	59.9	23.9	76.1	16.4	83.6	11.6	88.4	10.3	89.6

Divergent allowance rates raise significant questions regarding the accuracy and fairness of the decision making process. The public is entitled to quality, consistent decisions whether they live in California or New Jersey. The significant differences between SSA and SSI disability approval rates leads one to conclude that income is a factor in the decision making process.

So long as inconsistent medical decisions continue to be made by the State DDSs, the backlogs at the hearing levels may never be completely resolved. In some areas, the rate of hearing reversals is as high as 60%. The problems that plague the State DDS system, which result in inconsistent decisions, have been addressed in GAO's report, GAO-04-552T.

GAO found that the state DDS's have:

- Twice the turnover rate of federal employees performing similar work, resulting in increased costs to SSA for hiring and training, as well as increased claims-processing times;
- Difficulties in recruiting and hiring examiners due to state imposed compensation limits, which have contributed to increases in claims-processing times, backlogs and turnovers;
- Critical training needs that are not being met, which impact their examiner's ability to make disability decisions.

In spite of SSA's efforts to provide the State DDS's with additional resources and shifting oversight to SSA's Office of Operations rather than the Office of Disability, the problems identified by GAO have not been resolved by SSA.

AFGE strongly recommends federalizing the DDS system. This is the only significant solution to address the recruiting and hiring problems, sinking retention rates and serious training needs. AFGE urges Congress to hold hearings on this matter in the near future. Federalizing the DDS system would require legislative changes.

As I emphasized in previous testimony before the Social Security Subcommittee, SSA needs to revisit SSA initiatives, such as the Disability Claims Manager (DCM) and the Adjudicative Officer (AO), that were determined to be successful in reducing processing times and improving public service. SSA spent millions for pilots that improve processing time, yet the successful initiatives were abandoned because of political considerations. The only real criteria for these initiatives should be the level of service that is provided to the claimant. Using customer service as a measure, the DCM exceeded State DDS performance in virtually every category.

AFGE urges Congress to consider legislative amendments to the Social Security Act necessary to allow SSA workers to make disability decisions. The crisis in disability processing requires immediate and long-term changes. When trained to make medical decisions, SSA employees can provide immediate relief to backlogged DDS's, and provide faster and better service to the public by serving as a much needed single point of contact. In fact, the claimants found that the DCM, a single point of contact/decision maker, was more beneficial in their understanding and acceptance of the final decision, even when that decision was a denial.

Summary

There will always be short term budget priorities. However, both workers and employers contribute to the self-financed Social Security system and are entitled to receive high quality service. It is entirely appropriate that spending for the administration of SSA programs be set at a level that meets the needs of Social Security's contributors and beneficiaries, rather than an arbitrary level within the current political process.

AFGE strongly encourages each of your Committees to reconsider introducing legislation that will provide SSA with the appropriate funding level to process claims and post-entitlement workloads timely and accurately. Former Chairman E. Clay Shaw and Rep. Ben Cardin introduced The Social Security Preparedness Act of 2000 (formerly H.R.5447), a bipartisan bill to prepare Social Security for the retiring baby boomers. AFGE believes that by taking these costs OFF-BUDGET with the rest of the Social Security program, Social Security funds will be protected for the future. We believe this can be accomplished with strict congressional oversight to ensure that the administrative resources are being spent efficiently.

AFGE is committed to serve, as we always have in the past, as not only the employees' advocate, but also as a watchdog for clients, taxpayers, and their elected representatives.

Congress of the United States
Washington, DC 20515

October 13, 2005

Honorable Jim Nicholson
Secretary
Department of Veterans Affairs
Washington, DC 20420

Dear Mr. Secretary:

We are writing to express our serious concern with the Department of Veterans Affairs' (VA) decision to initiate review of 72,000 claims of veterans who are currently compensated at the 100% payment rate for Post-traumatic Stress Disorder (PTSD). It is our understanding that the Veterans Benefits Administration has instructed its Regional Offices to review and, if necessary, develop approximately 35% of the 2,100 claims considered by the Inspector General (IG) in preparation of the May 19, 2005, IG report "Review of State Variances in VA Disability Compensation Payments."

It is possible that if the current review of 2,100 claims identifies any benefits which are truly improperly being paid, it will provide data to refine the parameters of any larger study so that only veterans with a particular profile will have their claims reviewed. We are particularly concerned that the veterans targeted for this review are those who have serious disabilities involving such symptoms as "persistent danger of hurting self or others," "suicidal ideation" and "impaired impulse control (such as unprovoked irritability with periods of violence)." We have already heard reports of veterans experiencing increased symptoms and requiring hospitalization as the result of the current smaller scale review.

It is our understanding that there has been no coordination with VA medical providers and Vet Centers who treat the veterans having claims reviewed in order to minimize the risk of suicidal or violent behavior. These veterans and their loved ones are at serious risk of harm due to reactivation of the symptoms associated with severe PTSD. The additional burden of having to revisit their original stressors may well result in increased symptoms. Before VA places these veterans

at risk, all steps should be taken to mitigate that risk. Veterans' lives and health should not be jeopardized in an effort to complete a paper trail for VA files.

We strongly urge you to delay any further review of claims until the current study has been completed and a report issued which would document the feasibility, staffing requirements, cost and appropriate parameters of any further reviews. In addition, we are requesting that VA coordinate with VA medical and Vet Centers to mitigate the risk of adverse health consequences in veterans whose claims are currently being reviewed and any whose claims may be reviewed in the future.

We would appreciate your providing a response to this letter by October 19, 2005. If you have any questions about this request, please contact Mary Ellen Mc Carthy, Democratic Staff Director, Subcommittee on Disability Assistance and Memorial Affairs, House Committee on Veterans Affairs at 202-225-9756 or Dahlia Melendrez, Minority Counsel, Senate Committee on Veterans Affairs at 202-224-2074.

Sincerely,

Lane Evans
LANE EVANS
Ranking Member
House Committee on Veterans Affairs

Daniel K. Akaka
DANIEL K. AKAKA
Ranking Member
Senate Committee on Veterans Affairs

Department of Veterans Affairs

Memorandum

Date: May 25, 2005 VAOPGCADV 5-2005

From: General Counsel (022)

Subj: Review of Awards of Total Disability Rating for PTSD

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

What statutes and regulations apply to a Veterans Benefits Administration (VBA) review of cases in which the Department of Veterans Affairs (VA) rated a veteran's service-connected post-traumatic stress disorder (PTSD) 100-percent disabling under the Schedule for Rating Disabilities or totally disabling based upon individual unemployability (TDIU)?

DISCUSSION:

1. We understand that VBA intends to conduct a review of certain cases in which VA rated a veteran's PTSD 100-percent disabling under the Schedule for Rating Disabilities or on the basis of TDIU. This opinion is intended to advise VBA on the statutes and regulations applicable to both revising existing decisions and rendering new decisions based on current facts. Several statutes and regulations limit VA's power to change a decision on a claim. Under these statutes and regulations, claim decisions become final and can be changed only in specified circumstances depending on whether the period allowed for appealing the decision has elapsed, whether the decision was appealed, and how far it was appealed. Also, prior to revising a claim decision, VBA must follow certain procedures to ensure that the claimant receives applicable procedural protections.

Where Period Allowed for Appeal Has Not Elapsed

2. There will be some decisions subject to the contemplated review for which the appeal period will not yet have run. The following rules apply to such decisions. Section 3.104(a) of title 38, Code of Federal Regulations, provides for the finality of decisions by agencies of original jurisdiction. Section 3.104(a) states:

> A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of [VA] as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. [§] 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in [38 C.F.R. §§ 3.105 and 3.2600].

Under section 3.104(a), once VA has adjudicated a claim, the decision may not be revised based on the evidence on file at the time of VA's written notification of

2.

Under Secretary for Benefits (20)

the decision, except by an appellate authority, such as the Board of Veterans' Appeals (Board), or as specifically permitted by sections 3.105 and 3.2600. Section 3.104(a)'s references to "the evidence on file at the time" and "the same factual basis" recognize that an otherwise binding decision may be revised based on evidence not on file at the time that decision was issued.

3. Section 3.105 specifies certain exceptions to the general rule that an agency of original jurisdiction (AOJ) decision is final. A decision that involves clear and unmistakable error (CUE) must be reversed or amended. 38 C.F.R. § 3.105(a). Also, Central Office authorities may revise or amend a decision that is final under section 3.104(a) on the same factual basis if an adjudicative agency is of the opinion that such revision or amendment is warranted based on difference of opinion rather than CUE. 38 C.F.R. § 3.105(b). Section 3.105(b)'s text provides only that a proposed revision or amendment based on difference of opinion will be recommended to Central Office, but can be fairly read to authorize Central Office personnel to revise or amend the decision. VAOPGCADV 21-1999, para. 7.

4. Section 3.2600 also permits certain decisions to be revised, by a Veterans Service Center Manager or a Decision Review Officer, based on the evidence that was on file when VA issued written notification of the decision. However, because the decisions subject to revision under section 3.2600 are decisions for which a claimant has filed a timely notice of disagreement (NOD), 38 C.F.R. § 3.2600(a), revision under section 3.2600 would not generally be relevant to the review contemplated by VBA, even if an authorized VA official files an administrative appeal.

5. If VA receives new and material evidence prior to the expiration of the appeal period or prior to the appellate decision if a timely appeal has been filed, VA will consider the evidence as having been filed in connection with the claim that was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b). New and material evidence is defined as follows:

> New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

38 C.F.R. § 3.156(a). Therefore, review of a decision for which the appeal period has not yet expired is subject to the possibility that timely received new and material evidence may substantiate the decision being reviewed.

3.

Under Secretary for Benefits (20)

6. Finally, certain VBA officials may file an administrative appeal to the Board of a decision denying or allowing the benefit claimed in whole or in part. 38 U.S.C. § 7106; 38 C.F.R. §§ 19.50, 19.51(a) and (b). The Under Secretary for Benefits or a VBA service director has one year from the date of mailing notice of such a decision to the claimant to file an administrative appeal. 38 C.F.R. § 19.51(a)(2). A regional office director or comparable official has only six months from that date to file an administrative appeal, and an official below the level of regional office director, such as a veterans service center manager (formerly called "adjudication officer"), has only 60 days from that date. 38 C.F.R. § 19.50(b)(2).

Where Period for Appeal Has Elapsed

7. A claim, the decision on which became final because no NOD was filed within the appeal period, may not thereafter be reopened or allowed, except as otherwise provided by regulations. 38 U.S.C. § 7105(c); 38 C.F.R. § 20.302(a). As noted above, section 3.105(b) authorizes Central Office authorities to revise, based on difference of opinion, an otherwise final AOJ decision. In addition, as explained below, VA may issue a new decision on a claim that has been finally decided by an AOJ, based on additional evidence received after the AOJ decision became final. Furthermore, even an AOJ decision that has become final by the claimant's failure to timely appeal the decision must be reversed or revised if evidence establishes CUE. 38 U.S.C. § 5109A(a); 38 C.F.R. § 3.105(a).

8. Unlike the Chairman of the Board, who may order reconsideration of a Board decision, VBA lacks express authority to vacate a final decision and order the claim readjudicated. Nevertheless, VBA may reverse or revise a final decision on the basis of CUE. In fact, VA must reverse or revise a decision if evidence establishes CUE. 38 U.S.C. § 5109A(a). VA may, on its own motion, initiate review of a decision to determine whether it involves CUE. 38 U.S.C. § 5109A(c). CUE may be found only where the correct facts, as they were known at the time, were not before the adjudicator, or the statutory or regulatory provisions existing at the time of the decision were incorrectly applied. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994); *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc). Further, the error must have been one that manifestly changed the outcome of the claim. *Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc); *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999). In order to revise a decision based on CUE, a finding would generally have to be made that the adjudicator had overlooked or ignored pertinent evidence or had misapplied or ignored binding legal requirements, and that such action manifestly changed the outcome of the claim.

Where Decision Was Appealed and Decided by the Board

9. Other finality considerations apply to a claim that has been appealed to and decided by the Board. A Board decision is final unless the Chairman orders re-

consideration of the decision. 38 U.S.C. § 7103(a); 38 C.F.R. § 20.1100(a). Once the Board has decided a claim, that decision is no longer subject to revision based on difference of opinion. VAOPGCPREC 11-90. Furthermore, unlike an unappealed decision, an AOJ decision in a claim that is subsequently appealed to and decided by the Board is subsumed by the Board decision and is no longer subject to revision based on CUE. 38 C.F.R. § 20.1104; *Duran v. Brown*, 7 Vet. App. 216, 224 (1994). Even if not itself appealed to the Board, an AOJ decision can be subsumed by a Board decision on an appeal of a subsequent AOJ decision on the same claim (called "delayed subsuming") and consequently become immune from revision on grounds of CUE. *Dittrich v. West*, 163 F.3d 1349, 1353 (Fed. Cir. 1998); *Donovan v. West*, 158 F.3d 1377, 1382, 1383 (Fed. Cir. 1998).

10. Whether an AOJ decision is subsumed on direct appeal or by appeal of a subsequent AOJ decision, the subsuming Board decision itself is subject to revision based on CUE. 38 U.S.C. § 7111(a); 38 C.F.R. § 20.1400(b). Such revision must, however, be made by the Board. 38 U.S.C. § 7111(c) and (e). If the Board decision is appealed to the United States Court of Appeals for Veterans Claims (CAVC) and the court decides the appeal, the Board decision is no longer subject to revision based on CUE. 38 C.F.R. § 20.1400(b)(1). Thus, absent new and material evidence, VBA may not change a claim decision that has been appealed to and decided by the Board or the court.

11. Furthermore, if a particular disability rating has been ordered by a court of competent jurisdiction, VA may not reconsider the issue on the same evidence because, under the law of the case doctrine, findings made at one point during litigation become the law of the case for subsequent stages of that same litigation, *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993), and under a complementary theory, the mandate rule, a lower court or administrative agency must generally conform with an articulated appellate remand.[1] *United States v. Moore*, 83 F.3d 1231, 1234 (10th Cir. 1996); *Scott v. Mason Coal Co.*, 289 F.3d 263, 267-

[1] An exception to the law of the case doctrine and the mandate rule exists if a court is convinced that the prior holding is clearly erroneous and would work a manifest injustice. *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 787 (9th Cir. 2000); *Hudson v. Principi*, 260 F.3d 1357 1364 (Fed. Cir. 2001). However, because an AOJ decision that is appealed to the Board is subsumed by the subsequent Board decision, 38 C.F.R. § 20.1104, and because a Board decision that is appealed to and decided by the CAVC is no longer subject to revision based on CUE, 38 C.F.R. § 20.1400(b)(1), VBA may not change a claim decision that has been appealed to and decided by the Board or the court, based a finding that the prior decision was clearly erroneous.

68 (4th Cir. 2002). The law of the case doctrine applies to factual determinations as well as to questions of law. *Filmtec Corp. v. Hydranautics*, 67 F.3d 931, 938 (Fed. Cir. 1995); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991).

Decisions Based on Current Facts

12. We next address VA's authority to issue new decisions based upon the current facts regarding a veteran's condition. Section 303 of title 38, United States Code, makes "[t]he Secretary [of Veterans Affairs] . . . responsible for the proper execution and administration of all laws administered by the Department." We believe that this statute authorizes VA to render a decision regarding the current existence and/or extent of a veteran's disability. *Cf. Countee v. United States*, 112 F.2d 447, 449 (7th Cir. 1940) (Veterans Administration may, based on new facts, make new determination as to veteran's disability after court found total permanent disability); *Kontovich v. United States*, 99 F.2d 661, 665 (6th Cir. 1938) (relying on different statute to authorize former Administrator of Veterans Administration to determine veteran's extent of disability after court found total permanent disability). As explained below, for purposes of this type of review involving no error in a previous decision, VA may obtain evidence and, based on this new evidence, prepare a rating proposing reduction of a 100-percent schedular or TDIU rating for service-connected PTSD or severance of service connection for PTSD. 38 C.F.R. § 3.105(d) and (e). For purposes of obtaining such evidence, the heads of regional offices and centers that have insurance or regional office activities have the authority to issue subpoenas to compel the attendance of witnesses within a radius of 100 miles from the place of a hearing and to require the production of books, papers, documents, and other evidence. 38 U.S.C. § 5711(a); 38 C.F.R. § 2.2(a) and (b).

13. For purposes of determining the current extent of a veteran's disability, section 3.327(a) of title 38, Code of Federal Regulations, provides for reexamination "whenever VA determines there is a need to verify either the continued existence or the current severity of a disability." Generally, VA requires a reexamination if: (1) it is likely that a disability has improved; (2) evidence indicates there has been a material change in a disability; or (3) evidence indicates the current rating may be incorrect. *Id.*; *see* 38 C.F.R. § 4.30 (when evidence is inadequate to assign schedular evaluation upon termination of total rating based on need for convalescence, physical examination to be scheduled and considered prior to termination of total rating). An individual for whom a reexamination has been authorized and scheduled must report for the reexamination. 38 C.F.R. § 3.327(a).

14. Some regulations limit VA's ability to reduce total ratings. A total schedular rating may not be reduced, in the absence of clear error, without an examination showing material improvement in a veteran's physical or mental condition. 38 C.F.R. § 3.343(a). Furthermore, even with material improvement shown, VA

must consider whether the veteran's condition improved under the ordinary conditions of life or whether the symptoms have been brought under control by prolonged rest or by following a work-precluding regimen. *Id.* Reduction of a TDIU rating under 38 C.F.R. § 3.105(e) requires that clear and convincing evidence establish actual employability. 38 C.F.R. § 3.343(c)(1). If a veteran is undergoing vocational rehabilitation, education, or training, the rating may not be reduced "unless there is received evidence of marked improvement or recovery in physical or mental conditions or of employment progress, income earned, and prospects of economic rehabilitation, which demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her, or unless the physical or mental demands of the course are obviously incompatible with total disability." *Id.* If a veteran with a TDIU rating begins to engage in a substantially gainful occupation, the veteran's rating may not be reduced solely on the basis of having secured and followed such occupation unless the veteran maintains the occupation for a period of 12 consecutive months. 38 C.F.R. § 3.343(c)(2). Section 3.344(a) of title 38, Code of Federal Regulations, imposes additional requirements that must be met for VA to reduce certain service-connected disability ratings. Section 3.344(a) is applicable to ratings that have been in effect at the same level for approximately five years or more, rather than disabilities that have not become stabilized or are likely to improve. 38 C.F.R. § 3.344(c); *Brown v. Brown*, 5 Vet. App. 413, 417 (1993).

15. Under 38 C.F.R. § 3.105(d), service connection that has been in effect for less than 10 years may "be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being on the Government)." *See also* 38 U.S.C. § 1159; 38 C.F.R. § 3.957. Section 3.105(d) contemplates the use of evidence acquired subsequent to the original VA decision to make a determination as to whether service connection should be severed. 38 C.F.R. § 3.105(d); *Venturella v. Gober*, 10 Vet. App. 340, 343 (1997) (Steinberg, J., concurring) (personal data report obtained after grant of dependency and indemnity compensation showed that veteran's death did not occur during active duty for training or inactive duty training). For example, the regulation states that "[a] change in diagnosis may be accepted as a basis for severance" if a medical authority certifies that, in light of all the accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. We understand that one issue that may arise during VBA's review of PTSD claims is whether the existence of the claimed in-service stressor was verified prior to the award of service connection. *See* 38 C.F.R. § 3.304(f). Because "[s]ervice connection for [PTSD] requires . . . credible supporting evidence that the claimed in-service stressor occurred," we believe that service connection may be severed under section 3.105(d) if service connection has been in effect for less than 10 years and evidence establishes that the grant of service connection was clearly and unmistakably erroneous because there is no credible supporting evidence of occurrence of the claimed stressor.

7.

Under Secretary for Benefits (20)

Effective Dates

16. The effective date of a decision issued pursuant to the contemplated review depends upon the nature of the decision that the Department issues. The effective date of a decision reducing, discontinuing, or otherwise adversely affecting benefits based on CUE may not be retroactive. In general, a reduction or discontinuance of compensation by reason of an erroneous award based solely on administrative error or error in judgment is effective the date of last payment. 38 U.S.C. § 5112(b)(10); 38 C.F.R. § 3.500(b)(2); *but see* 38 U.S.C. § 5112(b)(9); 38 C.F.R. § 3.500(b)(1) (retroactive effective date for reduction or discontinuance if based on an act of commission or omission by the beneficiary). However, a reduction or discontinuance of compensation based on a change in service-connected or employability status is effective the last day of the month following 60 days from the date of notice to the claimant of the proposed reduction or discontinuance. 38 U.S.C. § 5112(b)(6); 38 C.F.R. §§ 3.105(e) and (i)(2)(i), 3.500(r).

Protection and Fraud

17. A rating of total disability that has been made for compensation purposes and that has been continuously in force for 20 or more years may not be reduced except upon a showing that the rating was based on fraud. 38 U.S.C. § 110; *see* 38 C.F.R. § 3.951(b). Service connection for any disability that has been in force for ten or more years may not be severed except upon a showing that the original grant of service connection was based on fraud or military records clearly show that the person concerned did not have the requisite service or character of discharge. 38 U.S.C. § 1159; 38 C.F.R. § 3.957. VA regulations do not define fraud for purposes of either section 110 or 1159. *See* VAOPGC 4-85 (5-23-84) (definition of "fraud" in 38 C.F.R. § 3.901 is for purposes of forfeiture for fraud, not protection statute). Generally, fraud is a knowing misrepresentation of the truth or concealment of a material fact with the intent to induce another to act to his or her detriment. *See* Black's Law Dictionary 670 (7th ed. 1999).

18. Unlike revisions based on CUE, a determination as to whether a decision involved fraud would not be limited to the evidence that was of record at the time the decision was made. VBA could obtain additional evidence and use that evidence to determine whether the grant of benefits was based on fraud. However, unlike increases or grants of benefits based on new and material evidence, the effective date of a reduction or discontinuance of benefits on grounds of fraud would be retroactive. A reduction or discontinuance of compensation by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, is effective the date of the award or, in the case of a running award, the day preceding the act. 38 U.S.C. § 5112(b)(9); 38 C.F.R. § 3.500(b)(1).

8.

Under Secretary for Benefits (20)

Procedural Protections Prior to Revision of Claim Decision

19. General Rights. Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of 38 C.F.R. part 3. 38 C.F.R. § 3.103(c)(1). Hearings in connection with proposed adverse actions and appeals must be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. *Id.* A claimant may produce witnesses at a hearing and "introduce into the record . . . any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent." 38 C.F.R. § 3.103(c)(2). In addition, VA must include in the record any evidence offered by a claimant in support of a claim. 38 C.F.R. § 3.103(d). However, when VA proposes to reverse or revise a benefits decision on the ground of CUE, the final determination must be based on the evidence that was of record when the reviewed decision was made; additional evidence may not be considered. *Cook v. Principi*, 318 F.3d at 1343; 38 C.F.R. § 20.1405(b) and (c)(1).

20. Subject to regulations governing who may represent claimants before VA, claimants are entitled to representation of their choice at every stage in the prosecution of a claim. 38 C.F.R. § 3.103(e). VA must notify the claimant or beneficiary and his or her representative in writing of decisions affecting the payment of benefits. 38 U.S.C. § 5104(a); 38 C.F.R. § 3.103(f). Such notification must advise the claimant of the reason for the decision, the date the decision will be effective, the right to a hearing, the right to initiate an appeal, and the periods in which an appeal must be initiated or perfected. 38 C.F.R. § 3.103(f). Furthermore, any notice that VA has denied a benefit sought must summarize the evidence considered. 38 U.S.C. § 5104(b); 38 C.F.R. § 3.103(f).

21. Rights Prior to Termination or Reduction of Award. With certain exceptions not relevant to the review being contemplated, VA must provide 60 days advance notice and an opportunity to submit evidence before terminating, reducing, or otherwise adversely affecting a compensation award. 38 C.F.R. § 3.103(b)(2). If a reduction in evaluation of a service-connected disability or employability status is warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, VA must prepare a rating proposing the reduction or discontinuance "setting forth all material facts and reasons." 38 C.F.R. § 3.105(e). The beneficiary must be notified of the contemplated action, provided "detailed reasons" for the reduction or discontinuance, and given 60 days to present additional evidence to show that payments should be continued at the current level. *Id.* Advance written notice of a proposed reduction in the disability rating assigned to a service-connected disability must also inform the beneficiary of the right to a predetermination hearing provided that VA receives a request for such hearing within 30 days from the date of the

9.

Under Secretary for Benefits (20)

notice. 38 C.F.R. § 3.105(i)(1). If VA receives a timely hearing request, VA must notify the beneficiary in writing of the time and place of the hearing at least ten days in advance of the scheduled hearing date, and the hearing must be conducted by VA personnel who did not participate in the proposed adverse action and who will bear decision-making responsibility. *Id.* If a hearing is not requested within 30 days and additional evidence is not received within 60 days, final rating action can be taken. Whether or not a predetermination hearing was held, VA must issue written notice of the final action to the beneficiary and his or her representative, setting forth the reasons for the decision and the evidence on which it was based. 38 C.F.R. § 3.105(i)(2).

HELD:

The Veterans Benefits Administration (VBA) may review decisions awarding a 100-percent schedular rating or total disability rating based upon individual unemployability for service-connected post-traumatic stress disorder to determine whether the decisions were rendered in accordance with applicable Department of Veterans Affairs statutes and regulations and the VBA Adjudication Procedures Manual M21-1. VBA may revise these decisions only in accordance with the statutes and regulations governing finality and revision of decisions, which provide for reopening or revision of final decisions only under specified circumstances, such as where new and material evidence or clear and unmistakable error is present. VBA may also issue new decisions regarding a veteran's current entitlement to service connection if service connection has been in effect for less than ten years and new decisions regarding the current extent of a veteran's service-connected disability if a rating at a particular level of disability has been in effect for less than 20 years. In so doing, VBA must ensure compliance with established adjudication procedures, including giving 60 days' advance notice of a proposed reduction or discontinuance of compensation, permitting the claimant to present arguments against the proposed adverse action, notifying the claimant of the decision and the reasons for it, and notifying the claimant of the right to appeal the decision, as provided in 38 U.S.C. § 5104(a) and 38 C.F.R. §§ 3.103(b)-(f) and 3.105(d), (e), and (i).

Tim S. McClain

Tim S. McClain

STATE OF NEW MEXICO
DEPARTMENT OF VETERANS' SERVICES

P.O. BOX 2324
SANTA FE, NEW MEXICO 87504-2324

BILL RICHARDSON
GOVERNOR

JOHN M. GARCIA
SECRETARY

November 21, 2005

Mr. Jeff Miller, Chairman
Subcommittee on Disability Assistance and Memorial Affairs
House Committee on Veterans' Affairs
337 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Miller:

I would like to thank you for the privilege of testifying before this esteemed Subcommittee on October 20, 2005.

This letter is in response to your follow-up request regarding our efforts to "calm down" our Veteran constituency's anxieties caused by the Retroactive PTSD Re-evaluations.

The State of New Mexico has 16 Field Offices located strategically throughout New Mexico for the purpose of assisting Veterans and their families in obtaining all benefits they have justly earned. These offices are manned by V A Accredited Service Officers.

Unemployability claims was announced when our offices began to receive an overwhelming number of calls from anxious, fearful and angry veterans and their families. These calls were not limited When the Administration plan to retroactively reevaluate 72,000 PTSD and Individual to the 100% service connected veterans with PTSD or Individual Unemployability. Many of the calls to our local offices were from 20% to 50% service connected disabled veterans. Because of the nature and volume of calls and visits to our Field Offices we felt it was necessary to develop a strategy to inform and "calm down" our constituents.

All of our Veterans' Service officers were mailed and e-mailed all pertinent literature pertaining to the IG Report and the resulting retroactive evaluations for PTSD and Individual Unemployability. Our Veteran Service Officers attended veteran Town Hall meetings in an attempt to bring sense to the situation, and to ensure the veterans that their benefits were not going to be changed.

The Department of Veterans' Services also formed a Veterans' Service Organization Leadership Council to discuss issues that affect our veterans. This is a very proactive Council with good lines of communication to its members. We have an established toll free number at our Santa Fe headquarters to discuss these and any other timely issues.

We have worked throughout this experience with our Congressional officials and appreciate their support.

The local VA Regional Office has been very helpful and instrumental in getting the proper information to us for distribution to the Veterans' community. The three Vet Centers worked with their clientele and we put on joint presentations at the Santa Fe Vet Center to calm our constituents' fears. This Santa Fe Vet Center's clientele was particularly understanding and cooperative due to our joint efforts.

Again, thank you for the opportunity to express our concerns.

Respectfully,

JOHN M. GARCIA
Cabinet Secretary

RESPONSES FROM THE DEPARTMENT OF VETERANS AFFAIRS

Questions for the Record
Chairman, Jeff Miller
House Committee on Veterans' Affairs,
Subcommittee on Disability Assistance and Memorial Affairs

October 20, 2005

Oversight Variances in Disability Compensation Claims

Question 1: In his testimony, Mr. John M. Garcia, Secretary of the New Mexico Department of Veterans' Services, stated that if a veteran has been awarded a Combat Infantry Badge, a Bronze Star, or Silver Star "it is almost automatic that he will be given or granted 100 percent [service-connected rating for PTSD]". Is Secretary Garcia's statement correct?

Response: In order to establish service connection for post traumatic stress disorder (PTSD), there must be: (1) credible evidence that the claimed in-service stressor occurred; (2) medical evidence diagnosing PTSD; and (3) medical evidence establishing a link between a veteran's current symptoms and an in-service stressor. The Department of Veterans Affairs (VA) accepts a veteran's receipt of certain individual decorations as sufficient to establish a stressor related to combat. Evidence of a stressor is relevant to establishing service connection for PTSD however, it is not a factor in determining the extent of disability caused by PTSD.

The awards that VA considers as evidence of a veteran's exposure to combat-related stressors are the Congressional Medal of Honor, Air Force Cross, Air Medal with "V" Device (denoting valorous action), Army Commendation Medal with "V" Device, Bronze Star Medal with "V" Device, Combat Action Badge, Combat Action Ribbon, Combat Aircrew Insignia, Combat Infantry Badge, Combat Medical Badge, Distinguished Flying Cross, Distinguished Service Cross, Joint Service Commendation Medal with "V" Device, Navy Commendation Medal with "V" Device, Navy Cross, Purple Heart, and the Silver Star.

The criteria for rating service-connected PTSD are set out in the VA rating schedule. The criteria for an award of total disability based upon individual unemployability (TDIU) are also found in VA regulations.

Question 2: A September 1995 article in the New England Journal of Medicine concluded that continued drug use may be influenced by monthly disability payments. Further, as identified in the IG's report, "Review of State Variances in VA Disability Compensation Payments," there seems to be a built-in disincentive for a veteran to receive, or continue to receive, treatment once he or she has reached the maximum compensation amount. How do we ensure that veterans

Response: Making decisions about service connection and extent of disability are difficult and complex tasks affected by a number of variables. These include the number of disabilities claimed, the nature of the disabilities claimed, and the fact that at least some level of judgment must be applied to decisions on service connection and degree of disability for each claimed disability based upon the specific facts of the case. VA believes some degree of variance is inevitable under these circumstances. VA's goal is to reduce the variance to the lowest level possible through the initiatives explained in the VA's testimony.

Question 4: The VAIG found evidence suggesting that there is little difference in the quality of exams conducted by VHA or QTC Medical Group, a supplier of contract compensation exams. Does VBA agree that the quality of VHA and QTC exams are comparable? How do they compare for timeliness?

Response: The Veterans Benefit Administration (VBA) agrees that there is little difference between the quality and timeliness of the Veterans Health Administration (VHA) and the contractor, QTC, examinations. Both are subject to regular quality reviews based on various measures. The measures are different but are considered equally effective. VHA exam quality is one of the performance measures applied to field director performance. The contractor (QTC) is subjected to a quarterly random assessment of its exams. The contractor (QTC) must maintain a 92 percent quality rating in order to meet the contractual performance indicator.

QTC standard for timeliness is 38 days and the VHA standard is 35 days. QTC's standard takes into consideration the large number of Benefits Delivery at Discharge examinations that require additional testing and specialty examinations after the initial medical evaluation. Both QTC and VHA consistently meet their standards. QTC timeliness for August 2005 to October 2005 was 33 days. VHA timelines for that same period was 29.5 days.

get the help they need to lead productive lives? Should compensation for PTSD and other mental disorders be tied to treatment?

Response: VA's mission is to provide for veterans' physical and mental health and welfare. VA attempts to ensure that veterans get the care they need by making them aware of the various types of services VA is authorized to provide them. VA provides free medical treatment to veterans for their service-connected disabilities and, in many circumstances, for other conditions as well. A veteran with a service-connected disability rated at 20 percent or more disabling or a veteran with a service-connected disability rated at 10 percent who is determined to be in need of rehabilitation because of a "serious employment handicap" is eligible for rehabilitation under chapter 31 of title 38, United States Code. Compensation award letters contain information about these and other benefits to which a veteran may be entitled. Also, when a veteran is awarded a TDIU rating, VA is required by statute to provide the veteran with information regarding the availability of, the veteran's eligibility for, and procedures for pursuing a vocational rehabilitation program under chapter 31 and offer the veteran the opportunity for a vocational evaluation.

As for tying VA compensation for mental disabilities to receipt of treatment, we note that, from 1917 until 1957, VA statutes required any person receiving disability compensation to "submit to any reasonable medical or surgical treatment furnished by [VA] whenever requested . . . ; and the consequences of unreasonable refusal to submit to any such treatment shall not be deemed to result from the injury compensated for." However, for the past 49 years, the use of VA services by veterans with service-connected disabilities has been voluntary.

Based upon a judgment sample of 92 PTSD cases, the VA Inspector General (IG) Report at page 52 stated that veterans whose ratings for disability due to PTSD were increased to 100 percent "sought less treatment for the condition." VA researchers report, however, that veterans rated 70 or 100 percent disabled as a result of PTSD used more mental health services in the period after award notification than those who received lower ratings. Nina A. Sayer Ph.D., et al., "Disability Compensation for PTSD and Use of VA Mental Health Care," 55 Psychiatric Services 589 (2004). It is readily apparent that the evidence on this issue is far from definitive. The question of whether VA should link compensation to mandatory medical treatment is a truly a complex public policy issue that could only be answered after consideration of a diversity of views and cannot be decided based on the IG's statement, which is based upon a limited review of a small number of cases involving a single mental disability

Question 3: You indicate in your testimony that VBA has been aware of inconsistencies in claims decisions for at least five years now. With all the initiatives you cite throughout your testimony to address inconsistency, why do GAO and the IG continue to see these problems throughout the regional offices?

RESPONSES FROM THE DEPARTMENT OF VETERANS AFFAIRS

Questions for the Record
Ranking Democratic Member, Lane Evans
House Committee on Veterans' Affairs

October 20, 2005

Oversight Variance in Disability Compensation Claims

Question 1: Some VA employees believe that only the quantity of claims processed is rewarded, without regard to quality. What procedures has VBA developed to recognize employees who consistently produce high quality low error decisions?

Response: The Performance Awards Program was created to reward individual and station success in meeting or exceeding set performance standards. The performance program was implemented in fiscal year 2002 and uses a three-tiered approach to allocating award funding with the objective of rewarding outstanding individuals, groups of employees, and entire divisions based on their performance against productivity and accuracy goals.

Level I award funding is allocated proportionately to all offices to be used at the discretion of the director in rewarding employees for high performance and for special contributions to the office's performance or mission during the course of the year. Performance standards for all veterans service representatives (VSR) and rating veterans service representatives include an accuracy element that must be met in order for the decision maker to be considered successful, which is a threshold criterion for consideration for a performance award.

Level II funding is allocated to individual divisions (Veterans Service Center, Vocational Rehabilitation and Employment, etc.) that attain superior performance in a range of measures, which vary by division. Regardless of performance in other areas, a division must significantly exceed the established accuracy targets to qualify for Level II awards. For example, for fiscal 2005, veteran's service centers were required to exceed accuracy targets by 2 percent in rating and authorization quality, and by 5 percent in fiduciary program quality.

Finally, Level III funding recognizes contributions by stations that exceed normal expectations, for example by performing additional work for other offices or developing a new process that improves service delivery.

Question 2: A Best Practice Manual for PTSD Compensation and Pension Exams has been developed. Please explain why there is not a requirement for VA examiners to follow the Manual. What would it cost to provide all veterans with an initial claim for PTSD with an examination which generally comports with the Manual criteria?

Response: Practical concerns regarding the manual's feasibility limited its acceptance by the VHA medical community. For that reason, VHA has established a group that is conducting an analysis of the evidence regarding the validity, reliability, and feasibility of various diagnostic methods. The Task Force will make a recommendation to the Under Secretary by the end of January 2006 on the best diagnostic method for conducting compensation and pension examinations and the rationale for that recommendation. The Task Force will also make other recommendations to ensure that opportunities for recovery are optimized. When that information is available, VHA would be in a position to estimate costs.

Question 3: Some Veterans Service Representatives (VSR) believe that they do not have the in-depth training and understanding of body systems and medical terminology to properly request appropriate medical examinations, especially on complicated medical conditions. What training has been provided to VSRs concerning medical requests and what documentation does VBA have that this training has been provided to all VSRs at all regional offices?

Response: During initial centralized training programs, all new VSRs receive basic instruction on how to select the proper examination worksheets based on claimed conditions. To further assist them in understanding medical terminology and body systems, C&P Service deployed a medical electronic performance support system (EPSS) job aid that contains medical terminology and body system information, including definitions for complex medical terms and conditions. Medical EPSS can remain open on a VSR's desktop during the day for easy reference. VBA also produced a satellite broadcast demonstrating the use of Medical EPSS which aired 16 times during November and December 2005. Regional offices tape these broadcasts for use in local training.

In addition, VBA is assembling an advanced development curriculum that will expand the basic course on selecting the correct examination worksheets. This training will cover more complicated issues, such as when it is appropriate to order medical opinions and how to review examination reports for sufficiency. This curriculum will be available to the field in the second quarter of fiscal 2006.

Questions for the Record
Honorable Shelley Berkley
House Committee on Veterans' Affairs

Question 1: What statutory authority permits VA to request additional documentation from a veteran concerning stressor evidence when the claim has been finally decided and there is no evidence of fraud or clear and unmistakable error in the file as of the date the decision under review was rendered?

Response: Section 303 of title 38, United States Code, makes "the Secretary of Veterans Affairs...responsible for the proper execution and administration of all laws administered by the Department." We believe that this statute authorizes VA to render a decision regarding the current existence and/or extent of a veteran's disability in cases in which a rating for compensation purposes has been continuously in force for less than 20 years or in which service connection for the disability has been in force for less than ten years.

Further, under the general authority of 38 U.S.C. § 501, the Secretary of Veterans Affairs has the authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department of Veterans Affairs (VA), including – regulations with respect to the nature and extent of proof and evidence...the forms of application by claimants under such laws, and the methods of making investigations and medical examinations." Pursuant to this statutory authority, VA has promulgated 38 C.F.R. § 3.327(a), providing for reexamination of a veteran "whenever VA determines there is a need to verify either the continued existence or the current severity of a disability."

Also, VA has promulgated 38 C.F.R. § 3.105(d), which states that service connection that has been in effect for less than 10 years may be severed if "evidence established that it is clearly and unmistakably erroneous (the burden of proof being upon the Government." With regard to a claim for post-traumatic stress disorder (PTSD), 38 C.F.R. § 3.304(f) provides that "service connection for (PTSD) requires..."credible supporting evidence that the claimed in-service stressor occurred." Therefore, if there were currently no credible supporting evidence of occurrence of the claimed stressor in a veteran's file, a grant of service connection for PTSD would be clearly and unmistakably erroneous. Nonetheless, VA may conduct further development in an attempt to sustain the award.

Question 2: Given the high risk of suicide and other violent behavior in veterans with severe PTSD, what actions has VA taken to mitigate the risk of harm before contacting veterans with finally decided claims for additional information?

Response: VA recognizes the mental health risk to veterans whose claims are being reviewed. To ensure that the veterans in the group of 2,100 cases reviewed by the Office of Inspector General are not unnecessarily burdened, VBA has instructed our field stations to work closely with each veteran and his or her representative and to keep them informed of actions being taken. VBA has also directed that field stations, whenever possible, attempt to resolve any issues in a particular case through internal development actions without involving the veteran. Only in the exceptional circumstance where the issue cannot be resolved internally will VBA ask the veteran for information. VBA has also consulted mental health professionals in the Veterans Health Administration in developing our processes.

DEPARTMENT OF VETERANS AFFAIRS
INSPECTOR GENERAL
WASHINGTON DC 20420

NOV 29 2005

The Honorable Lane Evans
Ranking Democratic Member
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Evans:

This is in response to your November 8, 2005, letter concerning post-hearing questions resulting from the October 20, 2005, hearing before the Subcommittee on Disability Assistance and Memorial Affairs. Please find enclosed my answers to the questions. If I can be of any further assistance, please let me know.

Sincerely,

Jon A. Wooditch

Jon A. Wooditch
Deputy Inspector General

Enclosure

Questions for Jon A. Wooditch from Ranking Member Berkley

1. *During your testimony, you indicated that it might not be necessary for the Veterans Benefits Administration to review 72,000 old claims for PTSD. With the number of rating claims pending before the regional offices at over 364,000 and rising, what impact would you expect a review of 72,000 finally decided claims to have on veterans with claims currently pending?*

OIG Response.

Without knowing the methodology, timeframe, or resources to be devoted to conducting this review by the Veterans Benefits Administration (VBA), we are not in a position to assess what impact it might have had on pending claims. Our expectation was that the VBA would take this matter into consideration when developing its review process so as to minimize any disruption to ongoing claims work. This issue, however, has been overtaken by events. While VBA's review of the 2,100 cases sampled confirmed administrative errors, no fraud was indicated. This was followed by the Secretary's decision not to review the 72,000 claims but to focus on improving development practices and the consistency of rating decisions for future claims.

2. *What would you expect to be learned from a review of 72,000 claims which could not be learned from a review of 2,100 claims?*

OIG Response.

The purpose of our report was to identify factors that contributed to the wide variance in average annual disability compensation payments by state. Among the numerous demographic and benefit rating factors identified, data shows that a significant contributing factor was the wide variance in the number and percentage of 100 percent PTSD awards by state. A review of 2,100 PTSD claims determined that 25 percent lacked the documentation required to justify the claim, and that there was a correlation between this error rate and those states with the highest average annual payments. The purpose of reviewing the 72,000 cases was to identify the true extent and location of the problem and to use that information to help address congressional concerns over variances and inconsistent ratings, to help ensure compliance with applicable rules and regulations that govern the rating process, to ensure all payments were proper, and to ensure fair and equitable treatment of all veterans nationwide.

3. *Do you believe that a review of all 72,000 claims is needed?*

OIG Response.

We concluded that a review of the claims was needed to address the variance in average annual disability compensation by state, which was the focus of our review. VBA's initial review of 2,100 approved claims focused on whether claims decisions were adequately documented and if potential fraud occurred. While VBA confirmed administrative errors on the part of VBA, no fraud was indicated. This was a main concern as to the financial integrity of the program. The Secretary announced that while the administrative issues needed to be addressed, a retrospective review of the remaining portion of the 72,000 claims

would not be completed. Rather, the information would be used to improve development practices and the consistency of rating decisions for future claims.

4. *What purpose would be served by beginning a review of 72,000 claims before an analysis based upon the review of the 2,100 claims currently underway is completed?*

   OIG Response. No purpose would have been served by beginning a review of the 72,000 claims before an analysis of the 2,100 claims was completed. It was our understanding that VBA would use the information determined from its review of the 2,100 cases to set the parameters for future reviews.

5. *Given the serious risk of suicide in veterans with PTSD, what precautions does the Inspector General believe should be taken before contacting seriously disabled veterans with respect to finally decided claims?*

   OIG Response. We believe that precaution should be exercised when reviewing any decided claim, and recognizing the seriousness of PTSD, VBA needed to develop a well thought-out and coordinated strategy that would protect the medical and psychological requirements of veterans. For example, a cursory review of these cases before any notifications were sent out to veterans would most likely have resulted in the determination that the vast majority of the cases were proper and files could have been put back on the shelf with out ever having to contact most veterans.

6. *In determining that veterans received less mental health care after being paid at the 100% rate for PTSD, how was mental health treatment by Vet Centers, private providers and non-mental health specific VA providers taken into consideration?*

   OIG Response. The VA computerized medical records used for this review do not contain reports from Vet Centers or private providers. In addition there may be private psychiatry notes that are not maintained in the computerized medical record. This limitation was recognized in the report with the statement that, "VA needs to review care provided at Vet Centers and through other sources to determine if there is a significant population of veterans who no longer pursue or receive mental health care after their 100 percent rating."

7. *The IG's finding on treatment is contradicted by the only peer reviewed published research concerning disability ratings and subsequent treatment. Please describe the methodology employed in reaching the conclusion that less care was received after a rating and to what extent the reduction in stress related to the claims process was considered.*

   OIG Response. OIG healthcare inspector reviews found an indicator that there may be a population of veterans who do not seek mental health care upon obtaining a 100 percent disability rating for PTSD. The report acknowledged that additional follow-up work would be needed to determine whether these patients may have sought care elsewhere or stopped receiving care. The report did not address the causes for such a decline in visits. The impact of stress related to claims processing issues was not examined.

8. *In estimating the savings from the proposed PTSD review, did the estimate include "savings" from veterans whose benefits could not legally be terminated, such as those whose service-connection and/or rating is protected by statute?*

OIG Response. The funds at risk discussed in our report were not characterized as savings, but rather as a quantitative assessment of financial risk of VBA granting claims without full and proper development. This estimate appropriately raised questions about the financial integrity of the VA Compensation Program. Our sample included PTSD claims that may in fact now be protected by statute and thus not subject to reduction or termination except for evidence that the rating was based on fraud or that a clear and unmistakable error occurred in claims processing. The fact that a significant number of claims for compensation benefits for PTSD were granted without adequately developed evidence of service-connected stressors, and that ratings become protected after a period of time, further demonstrate the importance of ensuring consistent and accurate claims development.

Questions for Jon A. Wooditch from Congressman Evans

1. *Please explain why a review of the 2,100 claims currently underway would not be adequate to develop criteria for identification of claims involving employed veterans who are receiving IU or other parameters for determining claims which may meet the criteria for fraud or clear and unmistakable error (CUE)?*

   OIG Response. We believe that a review of the 2,100 claims currently underway would be adequate to develop criteria for ensuring that claims development and rating decision practices are consistently performed nationwide. Applying the lessons-learned from this review, and developing criteria that better defines development and rating procedures for raters to follow, will establish parameters of consistency that will help address the variance in average annual disability compensation payments by state.

2. *Please describe what criteria the Inspector General uses to determine if a claimed stressor is supported by "credible supporting evidence"?*

   OIG Response. We used VBA criteria and all related opinions and decisions that are used by raters to evaluate claimed stressors and document credible supporting evidence. We also had assigned to this project, former VBA rating specialists, recently hired by the Office of Inspector General, who were subject experts in rating claims. In addition, we discussed each case with regional office management and their rating specialists during site visits to obtain concurrence and input into the case development and rating process. Furthermore, VBA independently reviewed the 2,100 cases in our sample and confirmed the reported error rate.

3. *Pleased describe what criteria the Inspector General uses to determine if a veteran "engaged in combat with the enemy"?*

   OIG Response. In determining whether a veteran "engaged in combat with the enemy," we relied on criteria described in the Office of General Counsel Precedent Opinion 12-99 and guidance provided by VBA to its rating specialists. The opinion and guidance held that the ordinary meaning of the phrase "engaged in combat with the enemy" requires that a veteran participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality. It also held that as a general matter, evidence of participation in an "operation" or "campaign" often would not, in itself, establish that a veteran engaged in combat because those terms ordinarily may encompass both combat and non-combat activities. Our review of the 2,100 cases demonstrated a lack of consistency in applying the criteria.

O