

Veterans' Dilemma: Navigating the Appeals System for Veterans Claims

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STATEMENT OF

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BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY AND MEMORIAL AFFAIRS

WITH RESPECT TO

Veterans' Dilemma: Navigating the Appeals System for Veterans Claims

WASHINGTON, D.C.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

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

The Process

The Board of Veterans Appeals (BVA) has been in place since 1933 when the Veterans

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Administration (now the Department of Veterans Affairs) was created. While Congress has amended various processes within the BVA, the overall schema for appeals within VA has remained largely unchanged.¹

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

- Notice of decision

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

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

- Two step appeals process

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

NOD - Once a NOD is received, VA places it under electronic control. VA personnel are required to review the decision and correct any errors noted. If the decision is not changed the claimant is provided a Statement of the Case (SOC) which restates the decision, may (but rarely does) provide additional reasons for the decision, as well as a statement of the applicable laws and regulations used in evaluating the evidence and

deciding the case. The purpose of the SOC is to provide claimants with sufficient information to understand the decision and the laws and regulations used in making that decision so that they have the information needed to decide whether to continue their appeal.

Evidence and Decision Review Officer Review

The claimant can submit additional evidence throughout the appeals process.

A claimant can ask for a review by the Decisions Review Officer (DRO) with submission of a NOD or shortly thereafter. A Decision Review Officer is a highly skilled individual who has the authority to hold a formal hearing with the claimant or an informal hearing with the claimant's representative, conduct additional development and accept and review new evidence. The DRO makes a "de novo" review of the evidence of record and can grant part or all of the benefits sought on appeal by exercising "difference of opinion" authority or based on the evaluation of new evidence. Difference of opinion authority allows the DRO to change an unfavorable decision based on the same evidence already of record. The DRO position was created to resolve some appeals short of a decision by the BVA.⁴

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

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

- Board of Veterans Appeals

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

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

- In person hearing at the BVA in Washington

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

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

Data

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

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

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

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

VACOLS data is summarized below:

Date	Claims pending in regional offices and the AMC
September 1, 2012 (beginning FY 2013)	255,861

August 31, 2013 (end FY 2013)	255,258
August 31, 2014 (end FY 2014)	280,029
January 3, 2015	288,290
• NOD's pending in VACOLS	194,112
• NOD's Ave days pending	407

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

Discussion and analysis

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

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

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

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

It is clear that despite substantial increases in VBA staffing over the past 5 years, it is evident that this increased workforce has been focused on increasing decisions in disability claims. VBA has neglected large segments of other work in order to give the illusion that it is making progress on reducing its "workload" (self defined as disability compensation and

pension claims) and its "backlog" (again, only disability compensation and pension claims). The data clearly shows that other pending work, principally but not solely, dependency claims and appeals, have skyrocketed in the last three years.⁹

Recommendation 1: Properly staff the appeals teams within regional offices

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

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

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

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

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

Revitalize the Decision Review Officer

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

VBA executives state as recently as last fall that data shows that DRO's infrequently exercise

difference of opinion authority; that grants almost always stem from the receipt of new evidence. As a consequence, they argue, this expanded authority is not necessary and any rating specialist can make these decisions. As a result, they argue, the position of DRO should be eliminated and the personnel used in other capacities.

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

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

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

Recommendation 4: Evaluate the work quality of DROs

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

New and Material Evidence

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

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

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

Fully Developed Appeals; Fast Track Appeals

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

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

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

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

Docket - Under the law currently in place, BVA must consider cases in docket order. The docket order is established upon receipt of a Substantive Appeal (Form 9). While it may take VBA another two years to physically transfer the appeal to the BVA, when it arrives, if

its docket date is ahead of other cases already at the BVA, those other cases must wait until the older docketed appeal is decided. This ensures that oldest appeals are always worked first. Except for a few special circumstance appeals, every appeal is worked in docket order.

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

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

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

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

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

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

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

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

Committee staff.

Conclusion

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

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

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

Footnotes:

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

²Notice requirements under 38 USC 5104 are discussed below.

³The quality of notice letters is discussed below.

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

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

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

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

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

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

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

¹¹38 USC 5104 “(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant’s representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision (b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include:

- (1) a statement of the reasons for the decision, and
- (2) a summary of the evidence considered by the Secretary.

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

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

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

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