

EXAMINING APPELLATE PROCESSES AND THEIR IMPACT ON VETERANS

HEARING BEFORE THE SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS OF THE COMMITTEE ON VETERANS' AFFAIRS U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

MAY 14, 2009

Serial No. 111-19

Printed for the use of the Committee on Veterans' Affairs



U.S. GOVERNMENT PRINTING OFFICE

49-917

WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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EXAMINING APPELLATE PROCESSES AND THEIR IMPACT ON VETERANS

THURSDAY, MAY 14, 2009

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room 334, Cannon House Office Building, Hon. John J. Hall [Chairman of the Subcommittee] presiding.

Present: Representatives Hall, Halvorson, and Lamborn.

OPENING STATEMENT OF CHAIRMAN HALL

Mr. HALL. Good morning, ladies and gentlemen. The Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs, oversight hearing on examining the appellate processes and their impact on veterans will now come to order.

Would you please rise for the Pledge of Allegiance? Flags are located on both ends of the room.

[Pledge was taken.]

Mr. HALL. Thank you. This morning we are here to conduct an oversight hearing entitled, "Examining Appellate Processes and Their Impact on Veterans."

I thank the witnesses for coming and I look forward to working with you on proposals that may require legislative changes. Making the administrative and judicial appeals processes better and more efficient for our veterans is our shared priority and I thank you for joining me in helping to find workable solutions.

The process a veteran goes through when filing an appeal is a never ending story that this Subcommittee has heard many times over. A new claim is more like a short story. Upon submission, it can be developed and rated in about 6 months. However, if a veteran disagrees with the U.S. Department of Veterans Affairs' (VA's) decision and files an appeal, then it becomes an epic tale that can go on for years or even decades.

First, the veteran can appeal the regional office (RO) decision to the Board of Veterans' Appeals known as the BVA. This process can take up to 2 years. From there, the veteran can appeal the BVA decision to the Court of Appeals for Veterans Claims (CAVC), where the average time from filing to disposition is 446 days.

From there an appeal can be made to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit Court usually takes up to a year to make a decision, which can then be appealed to the U.S. Supreme Court. This cycle can repeat itself a few times de-

pending on the options a veteran chooses and can take between 5 and 10 years before there is any type of finality.

I think, like me, many of you find this statistic astounding and evidence of an area that is in need of closer scrutiny by this Congress.

How can we improve the efficiency and effectiveness of the appellate story to the benefit of our veterans, their families and survivors, is the question at hand and the reason why I convened this hearing today. Right now, I think we can all agree that the multitude of appellate processes that involve constant redevelopment and remands is at odds with providing our veterans the timely and meaningful appellate justice they deserve.

First, I firmly believe that we must overcome the quality and accuracy challenges at VA's 57 regional offices, which perpetuate the unspoken belief held by many veterans and their advocates that given the variances in RO decisions, an appeal to the BVA is a necessity. Clearly, better standardized training and a hard look at the work credit reward system as outlined in my bill from the 110th Congress, the Veterans Disability Benefits Claims Modernization Act, H.R. 5892, which was incorporated into P.L. 110-389, should help on this front.

However, I am also concerned that the BVA still employs a system of rewards based on the quantity of work rather than its quality. Despite additional staff, centralization of appeals, and all of the training conducted since this Subcommittee heard from both the Appeals Management Center (AMC) and BVA in 2007, the backlog has increased by several thousand cases, days to process an appeal have only improved slightly, and remands have turned into more remands or re-remands. Thus, the appellate story is one that goes on and on with often no end in sight. Surely, this is not what anyone thinks of as justice for America's veterans.

With a backlog of over 43,000 cases in fiscal year 2008, the average length of time for an appeal with the BVA is an amazing 563 days. This inefficiency is only exceeded by the outcome of these long waits, a 39 percent denial rate. Also, although BVA claims a 95 percent accuracy rate, the Court of Appeals for Veterans Claims remands at least 70 percent of the cases appealed, indicating a much lower quality rate at the BVA in reality. It is clear from reading the BVA's annual report to Congress that these percentages are inconsistent and may not be based on the same quality measures that Congress considers indicative of good performance.

I think, too, that we can fairly conclude that in its current state, the AMC is a failed experiment whose poor performance and lack of accountability confounds veterans, their advocates and Members of Congress alike. It is time we take a long hard look at this layer of bureaucracy, which adds 2 years to the appellate process.

I am eager to hear from the witnesses on this area of concern. Additionally, I look to hearing from Judge Kasold—is that—

Judge KASOLD. Kasold.

Mr. HALL [continuing]. Kasold, thank you, from Judge Kasold on the Court of Appeals for Veterans Claims' annual report, the 70-percent remand rate, and on Judge Greene's short and long-term plans for the Court as a critical piece in producing better appellate outcomes.

Today's witnesses will speak to the concerns this Subcommittee has had with the BVA's and AMC's focus on production over quality, the poor development of claims, the lack of a technological infrastructure to manage information, and the lack of accountability through the entire adjudication and appeals process. I know, too, that we will hear about concerns we have with looking for ways that the Court of Appeals for Veterans Claims can serve as more of a final arbiter for veterans' appeals.

Moving forward, I hope that we can come up with a consensus on a plan that will foster a way forward for veterans and perhaps mitigate the current cumbersome and lengthy appellate process. If this happens, this is one story that could end a lot better.

I now would turn to Ranking Member Lamborn for his opening statement.

[The prepared statement of Chairman Hall appears on p. 30.]

OPENING STATEMENT OF HON. DOUG LAMBORN

Mr. LAMBORN. Thank you, Mr. Chairman.

It is good to once again have the opportunity to assess the appeals process for veterans' claims. As we all know, there are some longstanding issues regarding accuracy and timeliness of decisions throughout the system beginning at VA Regional Office level and ascending into the appeals process. We must ensure that ratings boards strive for thoroughness and accuracy, along with efficiency in their work, and this will have positive implications for the entire Benefits Adjudication System.

I am grateful for what we have been able to accomplish, not only on this Committee, but in a concerted effort with administration officials and our Senate colleagues to put steps in place to improving the system as a whole and the eventual elimination of the backlog of claims.

I welcome our witnesses, especially Judge Kasold and Chairman Terry, and thank you all for your participation and contributions to today's discussion. I look forward to your testimony and I yield back.

[The prepared statement of Congressman Lamborn appears on p. 31.]

Mr. HALL. Thank you, Congressman Lamborn. I would like to welcome all witnesses testifying today.

I remind you that your complete written statements have been made a part of the hearing record. Please limit your remarks so we may have sufficient time to follow up with questions.

Judge Kasold, we are expecting votes, we are told, at quarter-after to half-past, so hopefully we will get through your statement and maybe even into questions before that happens.

Welcome, sir. You are now recognized for 5 minutes.

Judge KASOLD. Thank you. Do I press this button?

Mr. HALL. Please.

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

Judge KASOLD. Thank you, Mr. Chairman, Ranking Member Lamborn, Mrs. Halvorson, for the invitation to this Committee.

I will make this short. My statement is in the record, and I will defer to it and open to questions. I would, however, be remiss if I

didn't note that the Court is in its 20th year of creation by statute and, this coming fall, the quorum being first established.

I also would just like to note that Judge Schoelen is with me in the audience, as well as our Clerk of the Court, Norm Herring, and our Board Counsel, Alice Kerns.

Mr. Chairman, I'll answer any questions you have.

[The prepared statement of Judge Kasold appears on p. 31.]

Mr. HALL. Shortest statement we've ever had. I neglected to—

Judge KASOLD. I will defer to my statement.

Mr. HALL. Well, your statement is in the record, and I neglected to introduce you fully. We just heard from our first witness, Judge Bruce E. Kasold from the U.S. Court of Appeals for Veterans Claims, and I will ask you a couple of questions, if I may.

The Disabled American Veterans (DAV) contends that the Court is not applying the benefit-of-the-doubt rule as Congress intended, because it upholds denials based on weaker evidence if it finds plausibility, despite the unfavorable evidence failing to equal the value of the favorable evidence. To rectify this situation, DAV suggests that Congress clarify the definition of material fact set in the law.

First, can you respond to the benefit of the doubt issue, and what do you think would be gained by amending that definition?

Judge KASOLD. To answer the second one first, it would depend on how it was amended, I suppose. You could give the Court de novo review. I am not sure I would recommend that because you have the agency that is responsible for the processing of these claims, the development of the facts. The Court is not a developer of facts, if you will. We remand to the Board to develop facts that might remand to the Regional Office to develop facts. And the Court sits as an appellate review of the decision rendered by the Secretary, that final decision being the one rendered by the Board.

As far as the benefit of the doubt, we do review the Board's application of the benefit of the doubt, and we believe we do it consistent with the statutory mandate. And that has been reviewed by the Federal Circuit, and the consistency—actually, their decision rendered and said that if the preponderance of the evidence weighs against the claim, that means it wasn't 50 percent; it was against the claim. And when the Board renders that finding, as long as that is not clearly erroneous, we uphold it.

Mr. HALL. In your testimony you note several steps that the Court took over the years to improve operating procedures. How were those plans developed and why do you think you have seen better outcomes?

Judge KASOLD. I am not sure the outcome, as far as a result, is better. I believe the Court from day one has rendered the proper decisions in an overwhelming majority of the cases. Timing, I think, is improving, and I think we will start seeing the benefits of that in the next annual report.

Our Chief Judge has implemented two major new initiatives, if you will. One is electronic filing, and the Secretary has been cooperative in that, in turning their records into electronic filing so that the claims file is sent electronically to the appellants. That can save time.

We have also implemented a proceeding of a narrower record being filed directly with the Court on the initial briefs when counsel are involved, where counsel are to focus on the issues that they see, present them to the Court and submit the documents supporting that, and that may save time.

The thing that has definitely saved time is our mediation process which was implemented about a year ago. And of the cases being filed with the Court, about 50 percent are being resolved at mediation, which is generally a remand back. The Secretary agrees that a remand is warranted and it is sent back to the Board.

That time processing generally happens within the first 60 days of the appeal being reviewed under mediation, et cetera. Some can go longer, but the medium is around the 60-day period I am told. And I think that will reflect favorably. We are hoping that will reflect favorably at the end.

Mr. HALL. That is encouraging. Do you think it will be beneficial, in your opinion, to eliminate the intermediate appellate review from the judicial process, the Federal Circuit review?

Judge KASOLD. As I said in my statement, I certainly think it is time to study it. The Court has been here for 20 years. It has 20 years of case law. It has been reviewed by the Federal Circuit for those 20 years.

We have two examples somewhat similar. The District Court of Appeals used to have an appeal to another appellate court, and that was changed and they have direct cert review by the Supreme Court. The Court of Appeals for the Armed Forces did not have a direct review by the Supreme Court for a long time and their actions were reviewed and a great number through habeas corpus. And then they were given direct cert review after a number of years.

I think the time has come. I noted at a hearing in the Senate about 60 days ago that I reviewed figures from the Federal Circuit where over 100 cases have been on their books for over 1,000 days. That reflects back on our timing. In other words, our timing, when you look at the 400 days, includes the time at the Federal Circuit, and any that might go to the Supreme Court, and that impacts the overall timing that we have.

If you actually look at the timing in our Court, we have two—three areas really now. One is the mediation process. As I indicated, that's being done in about a 60-day mean-time period.

You then have the briefing process, and we have gone from the administrative to the judicial arena, two parties opposing each other, equal before the Court. And so you have the normal process of development of the record to be reviewed by the parties, a 60-day briefing process for the Secretary, which is a standard in the appellate process, and 60 days for the response. I believe it is 14 days for a reply. And then the new modified record of proceedings there is an additional 14 days.

As you can see, you have, what is that, about 200 days just in the process, and that is without a request for extension. I think I also noted that we have a number of requests for extension in this particular process, and we are hoping that that is cut down by the electronic filing.

Mr. HALL. My time has expired, but I want to ask quickly—you mentioned electronic filing of claims. Where does that originate? At what point, to your knowledge, does the claim get turned from paper into electronic filing?

Judge KASOLD. I don't know the answer to that. For our purposes, as I understand it right now, the implementation is when an appeal is filed. And I don't know if that is a numbers issue because you have 800,000 claims, 40,000 at the Board, and then about 5,000 filed at the Court. But certainly the General Counsel representing the Secretary in our Court is working with the Court to do an electronic filing.

Mr. HALL. I am happy to hear about it. It just seems like it is happening at the end of the process, and some of us have been working really hard to try to get electronic claims and records from the beginning of the process.

Judge KASOLD. I am sure the Secretary will be able to answer that, sir.

Mr. HALL. Well, in between his other work, I will hopefully get a chance to ask him.

Mr. Lamborn, you are now recognized for 5 minutes.

Mr. LAMBORN. Thank you, Mr. Chairman.

Judge, why do appeals require approximately 4 months of processing by the Court's central legal staff after the final pleading is filed before the case is assigned to a judge, especially in light of the fact that each judge is authorized four law clerks?

Judge KASOLD. That is a good question. I asked it just before coming over here. I have not been the chief, so I have not studied the numbers, except before the Senate hearing and this one, and I had not identified that one before this hearing.

I spoke with the head of our central legal staff just before coming over, and it is, I was told, about 90 days, but it is comparable, and I said, if you had more people, could we do that faster, so I think it is a resources issue.

One of the things that has happened recently, and again I don't have the facts before me, but recently our central legal staff is also doing the mediation process. How that is impacting them and whether or not we need additional staffing, I do intend to talk to the Chief Judge about, but I do not have an answer to your question.

Mr. LAMBORN. Okay. Now, in general terms, I know you have touched on this in your written testimony and in your previous questions—if you can just recap, what actions is the Court taking to advance resolution of this, especially the long pending cases?

Judge KASOLD. My review of the cases is that generally speaking in about 25 percent of the cases, you have this 60-day rough time period where there's a remand agreed to by the Secretary. You then have the 200-day period without request for extension, so that actually is longer. But the 200-day period for the briefing, and then as you pointed out, an additional 90 days for the central legal staff memo.

Within chambers, because of the four clerks, we are getting cases out within 60 days generally. Some fall into the 90-day period. And as you know, we can do single-judge decisions.

We do have cases that go to panel, though. And like any appellate court, the panel decisions take longer to do. Same with an en banc decision. When a case is at panel or en banc, it generally includes a novel issue and that novel issue might result in another single-judge case waiting to be decided, stayed pending the result of that panel decision.

I think, the cases that are in that 90-day-or-above period in chambers are in that category.

So I think that the staffing that we have right now for the chambers is getting very positive results with regard to a judicial decision on a case that was complex enough to go to the judges, not resolved by the Secretary.

Mr. LAMBORN. Okay. Thank you for your answers and for your testimony as well.

Judge KASOLD. Thank you.

Mr. HALL. Thank you, Mr. Lamborn.

Ms. Halvorson, you are now recognized for 5 minutes.

Mrs. HALVORSON. Thank you, Mr. Chair.

And thank you, Judge Kasold, for being here.

First, let me state that one of the major calls that come into my office are about this appeals process. And, I believe that not only has everybody here acknowledged that it is probably the most confusing adversarial, legalistic and stressful process there is, I am wondering that if it wasn't so confusing and stressful, if we would have fewer appeals. Maybe this is going to be for one of the other panels coming up after you, but my problem, and I've talked to other people, is why do we even have so many appeals to begin with because if we are taking care of these things the first time, we wouldn't even have to appeal them. So, later on I am going to get to that point.

However, for now I just want to know, Judge Kasold, in your testimony that you sent us you said that, "Efforts should indeed be taken to reduce the number of errors made, particularly the repetitive errors."

Could you elaborate a little more? What kind of repetitive errors are you seeing and what, in your opinion, can be done about that?

Judge KASOLD. Well, anecdotally, because we don't take statistics as to the actual reason a case is remanded, but I have talked to the other judges and it is very similar in my chambers. The reasons or basis might be, is inadequate, is a significant number of reasons why we remand.

Congress has imposed on the Board a requirement to adequately explain their decisions so that the veteran understands it and so that it can be reviewed judicially. So when we get a case and we have an issue and it is not clear to us why they resulted in that, we remand it for further discussion.

One of the positives of that is this Court has also held that on any remand like that, further fact development can be undertaken. In other words, it is not just, "Board rewrite your decision," which can happen in the normal appellate process. It is, "Board, the appellant can ask for additional records, submit additional records, ask for a medical exam," and then you have to analyze all those issues. So it opens up the entire case once again.

Another one we see is whether or not a medical exam is needed and there are issues that are involved in that. And sometimes we find that the Board is wrong in its decision or has not discussed it and should have because it was reasonably raised.

Another one might be the adequacy of the medical examination. A number of them come through and they are conclusory, if you will. And when you look at the totality of the evidence, given the Board's discussion of it, you wonder why they relied so heavily on that conclusory opinion. I mean, if the doctor gave more analysis and you could follow it and understand it, then that would be plausible and acceptable.

So those are some of the common reasons why we remand. And just to answer your question going back, I don't know specifically, but usually it is a manpower issue and a training issue.

Mrs. HALVORSON. Which was the last time this came up and I had a lot of conflicting answers when I talked about that. However, I do want to get back to the fact that when we talked about these repetitive errors, it didn't sound to me like you had any one-size-fits-all, like where are the errors and how can we fix them. Is it the person filling out the forms? Is it the doctor and the training? Do we need a list when somebody comes to our office? Do we need to say, "And when you appeal your claim, you need to make sure this is happening?"

To just keep saying we have all these errors and we have all these problems is not good enough. Maybe I am a new Congressperson and I come to this with a different perspective, but I really need to know how we can fix this. If we keep having these same errors and they are repetitive, we have to get to the bottom of it and where do we straighten it out?

Judge KASOLD. Well, I think from the review that we do at the Court, which is of the Board decision, it would come back to, and again I am guessing, but the staffing and the training.

When you get done with the decision, it either flows, makes sense and you don't have any significant questions left, or you have them. When we review it, if we have them, we would remand it. Now, that could be done down below, I assume, reading it and whether there's a review done. I don't know the processes down below, so I don't want to misstate anything in that regard.

With regard to a medical exam, it would be the same thing. When you look at it, if it was your son or daughter, would you accept that?

Mrs. HALVORSON. Okay. So since my time is running out, I guess let me get to the point. All of you judges, do you do this objectively or subjectively? So if I were to ask you one question and the next judge another question, would I get the same answer, the same appeal, the same remand, or do you all see things differently?

Judge KASOLD. I think, generally, we see things the same and we do send around all the single-judge decisions for review by other judges, and a second judge can call it to panel.

Mrs. HALVORSON. So then the other people that give you the things, we will need to get them then and see if they see things the same. I guess what I am getting at is, we need to find which level the errors are coming from.

So, you know, as long as you are seeing these things objectively and not subjectively, I feel——

Judge KASOLD. I think, objectively, all the judges would agree that we are seeing those types of errors and they are the basis for most of the remands, yes.

Mrs. HALVORSON. Okay. Thank you.

Mr. HALL. Thank you, Ms. Halvorson.

I just had one more question for you, Judge, before we let you go. And that is, do you think the mediation process that is used by the Court could be also implemented at the BVA level as well?

Judge KASOLD. I do, but I caveat that the Secretary is statutorily required to assist the veteran to begin with, and they do have a hearing. I don't know their specific processes but, yes, I do believe that type of review would be helpful down below also, if it is not being done.

Mr. HALL. Thank you very much. I appreciate your coming before us and testifying and we will be in touch again as we move forward. So you are now free to go.

Judge KASOLD. Thank you very much.

Mr. HALL. I hope that means you have the day off, but probably not. You are excused and thank you for your testimony.

Judge KASOLD. No, I have a few cases. Thank you, Mr. Chairman, Members of the Subcommittee.

Mr. HALL. Our second panel, we will try to get started here. I am not sure how far we will get before they ring the bell. William Angulo Preston, Acting President of the American Federation of Government Employees (AFGE), Local 17; Kerry Baker, Assistant National Legislative Director of the Disabled American Veterans; Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program (NVLSP); and Richard Paul Cohen, Executive Director of the National Organization of Veterans' Advocates (NOVA).

Welcome, all of you, and as usual, your testimony is entered in the record, so you can abridge it or change it as you wish. Mr. Preston, welcome. You are recognized for 5 minutes.

STATEMENTS OF WILLIAM ANGULO PRESTON, ACTING PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 17, ON BEHALF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND ASSOCIATE COUNSEL, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS; KERRY BAKER, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; BARTON F. STICHMAN, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM; AND RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

STATEMENT OF WILLIAM ANGULO PRESTON

Mr. PRESTON. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on appellate processes and their impact on veterans, on behalf of the American Federation of Government Employees, AFL-CIO.

AFGE's testimony addresses the following: The need to expand BVAs' legal staff and administrative staff; recommendations for process improvement including specialization, establishing another decision team and using employees of the Board to transform BVA's adjudication into a paperless system.

First, BVA needs additional attorneys to handle its caseload. AFGE urges Congress to provide funding for the Board to hire at least 50 additional attorneys initially, with additional attorneys being hired thereafter, until the current caseload decreases.

Second, the Board currently faces a significant bottleneck in the administrative processing of claims caused by a shortage of staff to process claims. The ratio of support staff to attorneys has worsened over the years as the Board increased the number of attorneys without a comparable increase in support staff. We suggest a ratio of one administrative support staff member for every two attorneys and also recommend joint labor-management efforts to identify all the bottlenecks contributing to BVA's growing caseload.

Third, specialization by both BVA attorneys and the Veterans Law Judges would increase their familiarity with laws governing a specific set of benefits, and increase the quality of the decisions as well as their quantity. The quantity would increase due to greater familiarity with the pertinent case law and a consequent decrease in the need for research.

AFGE recommends the Subcommittee require the Board to identify approximately 20 areas of specialization and to assign no more than 3 such areas to each Veterans Law Judge. Each judge and his or her attorneys would retain those areas of specialization for 3 years. Other cases not involving an issue of specialization could be assigned to any judge.

Fourth, the Board should be reorganized to add an additional decision team to the four presently in place. It would handle all issues appealed from decisions by the other four teams by reconsidering them when the appellant requests reconsideration and issuing a decision that is ready for appellate review. This would increase both the quality of the decisions reviewed by the Court and the quality of decisions received by veterans. It should also speed up the issuance of decisions generally.

The four current decision teams should be required, by statute, to write appellant-friendly decisions, i.e., decisions meant solely for the veteran or other appellant and his or her representative, and not the Court. These decisions would be shorter without the legal explication only required to pass Court muster and would be more accessible to veterans and other appellants.

Fifth, AFGE strongly supports the Department's goal of conversion of the Board to a fully paperless system. AFGE recommends asking BVA employees to help transform the Boards' adjudication process into a paperless system that is designed to allow easy access to these files by employees conducting search queries.

The system should be user-friendly for VA employees, the veterans we serve, and veteran service organizations (VSOs). We believe that the experience and insights of BVA employees who work with claims files each day must be incorporated into any process of VA going paperless.

Rather than contract out the scanning and other related tasks to a private contractor, we urge Congress to create employment opportunities for veterans within the Department by establishing a new administrative unit within VA. In-house scanning would enable the conversion to take place at a reasonable cost. In addition, VA's in-house knowledge base would grow and other VA staff would have access to technicians who are directly responsive to VA and to the veterans.

This concludes the oral presentation of my statement. Thank you again for the opportunity to testify to our views.

[The prepared statement of Mr. Preston appears on p. 36.]

Mr. HALL. Thank you, Mr. Preston.

Mr. Baker, welcome, and you are now recognized for 5 minutes.

STATEMENT OF KERRY BAKER

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

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

Our recommendations are intended to simplify the process while preserving resources and reducing expenditures. Some of the recommendations contained herein may appear novel or controversial at first. They may even draw criticism. However, such responses would be misdirected. These recommendations are carefully aimed at making efficient a rather inefficient process without sacrificing a single earned benefit. They include removing administrative burdens in the appeals process by, one, incorporating the appeal election letter into the Notice of Appellate Rights the VA provides with the initial rating decisions; and, two, eliminating, to the extent feasible, the requirement to issue Supplemental Statements of the Cases or SSOCs.

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

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

Additionally, by no longer issuing SSOCs, in most cases the VA will reduce an extra 50,000 mailings at least. Some SSOCs are substantially complex and time consuming. These two actions alone could save VA well over 100,000 annual work hours. That amount of reduced work is equivalent to 625 VA employees working 4 full weeks.

The DAV also believes the time has come to reduce the 1-year appellate period currently allowed for filing a notice of disagreement (NOD) following the issuance of a rating decision from 1 year to 6 months.

However, we also recommend allowing that period to be extended for six additional months simply upon request and equitably tolled,

based on mental or physical impairment that prevents an otherwise timely NOD.

Both of these rights are not currently provided in law. We ask that you realize that this is only one part of the larger package aimed at reforming and streamlining the administration of claims and appeals.

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

Further, the AMC is succeeding in resolving less than 2.8 percent of VA's appellate workload. The AMC completed nearly 12,000 appeals in 2008, far less than the number received from the Board, out of which nearly 10,000 were returned to the Board, 89 were withdrawn and only 1,789 were granted; 2,500 appeals were returned to the AMC at least a second time because of errors in carrying out the Board's explicit instructions. That is a 25 percent error rate, an error rate that would never be allowed to continue in a Regional Office.

In closing, the VA will never be able to maximize its recent increases in staffing without making its processes more efficient. If such changes are made, the VA will see vast improvement in its entire claims process that are essential to achieving the broader goals of prompt and accurate decisions on claims. Likewise, only then will VA be able to incorporate training, quality assurance and accountability programs demanded by the veterans' community.

It has been a pleasure to appear before this honorable Committee today, but before I close, I would like to say that at a Senate hearing in February on the same topic, the DAV and my fellow associates here today, were asked to draft a new VA claims process from scratch. We have completed that proposal simply titled "The 21st Century Claims Process."

Chairman Hall, through your Committee's staffs, yourself, Chairman Filner and Ranking Member Buyer, have been provided copies of our proposal. It is a comprehensive plan that I ask you to review as fast as possible, and the DAV would honor a chance to discuss the proposal with you one on one. Thank you.

[The prepared statement of Mr. Baker appears on p. 38.]

Mr. HALL. Thank you, Mr. Baker.

Mr. Stichman, we are going to hear from you and that will leave Mr. Lamborn and me a minute to get across the street to vote. So you are now recognized for 5 minutes.

STATEMENT OF BARTON F. STICHMAN

Mr. STICHMAN. Thank you, Mr. Chairman and the rest of the Subcommittee.

The National Veterans Legal Services Program appreciates this opportunity to discuss with you the long-time failure of the VA appellate system to our Nation's veterans to decide cases fairly and within a reasonable period of time.

There are four major reasons we believe for these failures. One is currently there is a wait list that has expanded over the years.

Right now it is 563 days from the time the veteran files a substantive appeal form, a Form 9, at the Regional Office saying I am appealing to the Board. It takes 563 days on average for that case to be transferred to the Board for a decision.

Of course, the Board can't decide the case until the claims file arrives at the Board, 563 days. I don't know all the reasons for that delay, but I, and DAV, have pointed together to one reason, and that is veterans waiting around for 1 year 7 months, what they often do is submit additional evidence, but they think that evidence is going to the Board. Why? Because they have appealed to the Board.

But the VA policy is, when that happens, new evidence is submitted, and the file hasn't yet been transferred to the Board, then they send it to an adjudicator to review the new evidence, the entire VA claims file and prepare a Supplemental Statement of the case, an entirely new decision.

Then, if more evidence is presented, the Regional Office prepares another supplemental segment of the case, and both DAV and NVLSP call for a fix to that by changing the rules of the game so that veterans are told if you submit new evidence after you file this form, it is going to go to the Board for a decision. Unless you tell us that you want the Regional Office to re-decide the case, it should go to the Board.

There must be other reasons for this long delay, but it is unconscionable that 1 year and 7 months is wasted before the case even arrives at the Board.

Second problem, major problem, is the hamster wheel of justice that has existed for years between the Regional Offices, the Board of Veterans' Appeals and the next level of the court. Cases go back up and down for additional decisions because of errors being made at the various levels.

One of the reasons for the hamster wheel is the poor decision-making made by the Board of Veterans' Appeals. This is a copy of the annual reports issued by the Court. The statistics on this annual report, which is on the Court's Web site, document that of all the Board decisions that have been reviewed by the Court on the merits, they have found over 76 percent of those decisions need to be sent back for a new decision. Almost all of those are due to error by the Board.

That is a report card that is an F, and it has been an F for 14 straight years. Nothing changes at the Board. They make the same errors over and over again. You can read it in the Court's decisions. You can see it in the agreements of the VA and the opposing counsel, the veteran's lawyer, pointing out the errors, sending them back over and over again.

How can that change? Our suggestion is to change the way judges are selected using the administrative law judge concept that we use at other Federal agencies for selection of individuals on merit.

Right now, Board Members are selected within the system. They have a particular judicial philosophy that keeps getting batted

down by the Veterans Court and nothing changes. We need a breath of fresh air in the composition of the judges at the Board of Veterans' Appeals.

Another problem that creates the hamster wheel is one that DAV has pointed out in their testimony, as well as us, and that is the Court's undue deference to the Board in deciding whether to overturn the decision. The Court almost always sends the case back if they disagree with how the agency has evaluated the evidence, rather than simply reversing the decision and sending it back with an order to grant benefits.

Mr. HALL. Excuse me, sir. Your 5 minutes is up and we just have a minute to make this vote.

Mr. STICHMAN. Thank you.

[The prepared statement of Mr. Stichman appears on p. 45.]

Mr. HALL. Hopefully, in response to questions we'll be able to hear the rest of your story and, Mr. Cohen, of course, you will testify after we resume with this recess long enough to vote and come back. Thank you for your patience.

[Recess.]

Mr. HALL. Okay. Thank you for your patience. We will resume with the hearing on Examining the Appellate Processes and Their Impact on Veterans. Mr. Cohen, thank you for your patience. You are now recognized for 5 minutes.

STATEMENT OF RICHARD PAUL COHEN

Mr. COHEN. Thank you, Mr. Chairman. I would like to thank the Subcommittee for allowing the National Organization of Veterans' Advocates to present its views here. NOVA is a membership organization of more than 300 lawyers and accredited representatives who represent veterans.

There were some points that were raised in earlier testimony that I would like to deal with before I get to the points I mean to raise. The first one is that the court pre-briefing procedure has been referred to as mediation and that would be incorrect. It is not mediation. It is really a briefing conference, and the goal of it is not to resolve the appeal, but merely to see if there is a reason why it should be remanded. So, frequently, cases will go back on a very narrow remand which does not deal with the important issues that were raised on appeal.

The second point was, there was a question of whether the Federal Circuit should be maintained and is necessary. I will call your attention to part A-4 of NOVA's testimony at page 5. The Federal Circuit works to develop and enforce the law. There are three cases cited in NOVA's testimony which show how the Federal Circuit works to develop the law and also to enforce the law. And the most recent case was the Moore case in February 2009 where the Federal Circuit clarified the duty to assist, which the Veterans Court decided incorrectly.

I would like to present the novel idea that nothing is going to change in the VA claims adjudication system except that it will get worse. The delays, the backlog, the inaccuracy will not change until there is a change in VA culture and in the philosophy of the VA.

At present, the VA maintains the position that the primary concern is preventing liars, frauds and cheats from getting benefits. The concern of the VA, rather, should be to ensure that not one meritorious claim is denied and not one combat veteran is improperly turned away.

With the new viewpoint, the VA would focus on the presumption, the idea, that unless proven to the contrary, all claims are meritorious, sort of like in the criminal justice system. Our country is willing to give a presumption of innocence to anyone who is accused of a crime, which has the effect that they will not be convicted unless there is evidence of their guilt beyond a reasonable doubt, even though we understand that a few guilty people will benefit from that presumption. The fact that VA is not willing to provide such a presumption for our veterans is appalling. The VA can use presumptions to grant more benefits and to move claims through the system.

People will say there is no money for it. In fact, the VA should be part of the military budget. There are two costs of waging a war. One is the direct up-front costs of waging a war, and the other one is fixing what is broken. When veterans are injured or disabled, they need to get the medical care and benefits they are entitled to without regard to the money it costs. That can happen if there is only one budget, which is split between the Department of Defense and the VA.

It is vital to national security that our veterans should not feel that the government is turning their back on them.

NOVA's written testimony contains 11 suggestions to make the system better. I would like to talk about a few things, of our suggestions. The first applies to the Court. The Veterans Court should get class action status. That way a problem that affects a vast majority of veterans can be fixed all at once. In addition, the Court should deal with all issues, which are reasonably raised and not send the appeal back on a narrow basis to go back on the hamster wheel of VA adjudication.

Presumptions can be expanded. I mentioned before that the use of presumptions will help the VA move the backlog. One area would be in 1154(b). There is a proposal, H.R. 952, to expand that presumption, and that's a good idea. But it should also be expanded to include areas where we know Agent Orange was used, like Cambodia, Thailand and Laos.

The other big presumption is 5107(b) the benefit of the doubt. Instead of having the benefit of the doubt, which causes veterans to lose their case based on a preponderance of the evidence, it should require clear and convincing evidence for a veteran to lose his case. This is analogous to the standard used in worker's comp for many years, a liberality rule. Following this rule, if the claimant puts in evidence and there is evidence to the contrary, the claimant's evidence wins unless the evidence on the other side is so clear and convincing to the contrary. That is the only way, by use of new presumptions and a new mindset will the system be fixed. Thank you.

[The prepared statement of Mr. Cohen appears on p. 52.]

Mrs. HALVORSON [Presiding]. I appreciate all of you being here. We are a little pressed for time. It looks like I have to go back and make another vote. However, I have a couple of questions and I think enough time for each one of you to have one.

Now, I know that Mr. Preston, I saw in your testimony, the AFGC suggests that the BVA be divided into 20 areas of specialization. Can you elaborate a little bit on this proposal, and in the same vein do you think that this approach would hold true for the Regional Offices as a way of maybe improving the initial rating decision process?

Mr. PRESTON. Yes I can, Congresswoman. I am here to address issues pertaining specifically to BVA. In my experience as an attorney at BVA, I have been dealing, I have dealt with a lot of complex cases. It takes a fair amount of time for attorneys to get up to speed dealing with the complexity of the cases that they are dealing with.

And one idea that a number of activists and other people we represent put forward after much discussion was that we get back to a system such as existed in the past where there were distinct specializations. Now, I am not here to enumerate what exactly those 20 areas would be but, I mean, we know from just a quick survey of Code of Federal Regulations in our experience, we have got a lot of distinct complex issues—traumatic brain injury, reproductive system disorders, gunshot wounds, mental conditions, neurological, skin disorders, digestive system, cardiovascular, hearing and visual impairments and then a whole range of musculoskeletal system problems affecting everything from the shoulder and elbows down to the ankles, including the knees, hand, foot, et cetera, and then cervical spine and thorocolumbar spine problems.

And it is difficult enough for attorneys to gain the expertise to do justice to the claims, but it would be easier, and I think more effective, it would lead to greater productivity and concentrate skills and get people up to speed, focus on these areas of specialization, have them work at them for a period of time and then rotate them out of those areas so that they could acquire other specializations.

Mrs. HALVORSON. Thank you. Thank you.

Mr. Stichman, I have a question. The BVA holds quarterly forums with the VSOs and attorneys in order to have an exchange of ideas. How receptive is the BVA at the meetings when suggestions are made by the advocates to improve the system? Do you have any examples of any of your suggestions that have maybe been implemented by the BVA?

Mr. STICHMAN. Unfortunately, I haven't attended those sessions personally, so I would have to talk to other people to find out the answer to that question, and I can do that if you wish.

Mrs. HALVORSON. Sure, that would be great.

Mr. Cohen, in your testimony you noted that the decision review officer (DRO) at an RO can review and rate an appeal. Do you think that they are the most appropriate line of authority for providing this level of review or should the claim be automatically sent to the BVA?

Mr. COHEN. I think that should be a matter of choice of the veteran and the veteran's representative. There are certain situations

where, for strategy purposes, the veteran would like the case to just go up to the BVA and then go to the Court, understanding that it is probably not going to be granted because neither the regional office, nor the BVA is going to apply the correct law and they just want to get a determination.

There are other situations where the veteran and the representative might think that the decision review officer review or informal session would cause the regional office to understand the nature of the evidence and grant the claim. So they should have that option.

Mrs. HALVORSON. Okay. Okay. One last question and then we will excuse the panel.

Mr. Baker, is it fair to the veterans that when they submit what they believe, and the DAV service officer believes, is evidence in support of the claim, that the VA then decides what is a material fact, assigns an adjudicative value to those facts and then judges those same facts. Is there a better way to counter the VA or counter VA from acting as a prosecutor and a judge?

Mr. BAKER. If I understand your question regarding material fact, I believe there is. This is, you mentioned the regional office, but I think this has more to do with the Court and the Board.

In my written testimony I tried to go in depth as to why the benefit of the doubt, when the Board takes two equal pieces of evidence and weighs it and makes an opinion or a judgment call as to which one is more probative, which one was not.

That is not a finding of material fact. It is an opinion. There are many types of facts, and if words are going to have meaning in the law, we have to apply their legal meaning, and a material fact is not an opinion.

I am not saying that material facts should not be viewed by the Court under the clearly erroneous standard. They should be, all right? The Board has asked that that remain in place. I agree with that, but an opinion should not be a material fact.

As long as it is, the statutory right to the benefit of the doubt can never truly be reviewed by the Court as a matter of law because you have a matter of fact on the clearly erroneous standard standing in a way, putting a big brick wall in the Court's way. And I think that is the benchmark of what makes VA great, is that it provides the benefit of the doubt.

But at the Court level, because of that standard of review, it is also one of the most meaningless laws.

Mrs. HALVORSON. Great, great. Well, thank you all for your testimony. You are all excused. And before we go to the third panel, I am going to quickly go vote and I will be back.

[Recess.]

Mrs. HALVORSON. Thank you for being patient. Joining us on our third panel of witnesses is the Honorable James Terry, chairman of the Board of Veterans' Appeals for the U.S. Department of Veterans Affairs, and Mr. Ronald S. Burke, Director of the Appeals Management Center for the U.S. Department of Veterans Affairs. Welcome.

Chairman Terry, you are now recognized for 5 minutes. Please proceed.

STATEMENT OF HON. JAMES P. TERRY, CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS; AND RONALD S. BURKE, JR., DIRECTOR, APPEALS MANAGEMENT CENTER, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

STATEMENT OF HON. JAMES P. TERRY

Mr. TERRY. Thank you, Madam Chairman, and good morning. It is a pleasure to be here. We really appreciate the opportunity to appear before the Subcommittee.

Before giving some thoughts that respond to your letter of April 29th, I would like to respond to Mr. Cohen for just a minute. I must say on behalf of the Secretary, I was somewhat concerned with his statement that the emphasis of the Department is on the denial of claims for liars, frauds and cheats, and I feel that needs to be responded to.

I would just ask the Chair to think about our system in toto. This year, 900,000-plus claims will be filed. Of that number, 550,000 or 61 percent will be granted, 350,000 will be denied, but 61 percent off the top will be granted. That's anything but looking for liars, frauds and cheats.

Second, of those 350,000 claimants who are denied, only 1 in 8 or 45,000 will think that, in a system where appealing to our Board is totally free, that there is any reason to do so, and that the explanation is not fair that he has received from one of the regional offices of the Veterans Benefits Administration (VBA).

So 1 in 8 or 12 percent of those who are denied come to our Board, only 1 in 8. I think that reflects a certain pro-veteran fairness that certainly was not taken into consideration by Mr. Cohen. That is also 5 percent, merely 5 percent, of the original claimants who filed this year.

Second, when you look at the 45,000 claimants who come to our Board, we attempt to try to hear their cases in 112 days when they reach our Board. Right now it is 112. It is down from 155 last year. That is our cycle time when it actually reaches the Board. We are very concerned about a timely resolution of these cases. We recognize there are many other delays in the system, but I think the Board does an extremely fine job of trying to move the cases expeditiously when they reach our Board.

Of those 45,000 claimants, there will be 22 percent granted or about 10,000 cases. There will be 17,000 cases denied or about 38 percent, and there will be 36 percent that are about 15,000, that are remanded. I think it is important to note that this grant rate, in addition to the 61 original percentage points, is certainly more than representative of what we see among appellants in the Federal system at large.

It is important to note, too, that of those 17,000 claimants who are denied, only 4,100 of them last year appealed to the Court of Appeals for Veterans Claims. Certainly, one must understand, that is less than 25 percent who saw fit to appeal, even knowing that the \$50 filing fee at the Court of Appeals for Veterans Claims is almost always waived by anyone requesting such.

I think it is important to note that our explanations to the veterans who are denied are done in a way that is veteran friendly

and is sensitive to their needs and certainly is sensitive to their condition.

I admit, I am somewhat appalled by a statement that we are intent upon denying to veterans who we consider to be liars, frauds and cheats. That is simply not true.

I would like to also say a little bit about the testimony earlier given with respect to the 70-percent remand rate. We remand approximately 35 percent and that is too much and we can certainly understand why—because the record is always open, the law changes, and certainly development is not always perfect below.

But to suggest that 70 percent of the cases are remanded from the Court of Appeals for Veterans Claims is belied by their own statistics. Twenty percent of those cases that are filed in the Court of the 4,100 or the 4,128 that were actually new cases filed last year, 20 percent of those that were decided were dismissed, and certainly that is a reflection of the fact there was no merit to those cases, upholding certainly the Board of Veterans' Appeals.

Twenty-five percent of those that were actually decided, of those that were actually decided on the merits, were affirmed. There were a number that were remanded, and far too many. They have 1,625 listed here and they certainly were included in a diversion program.

But the concern I have is that they are an adversarial body, not a non-adversarial body, and a mediation and diversion program sound an awful lot like a non-adversarial process to me.

And certainly we are anxious for the Court to decide more cases on behalf of the veterans because the mediation process doesn't result in final decisions on behalf of veterans. It results in cases coming back for further development, when in fact if a careful look at the case file were made, many of these decisions could be, in fact, finally decided.

Now, let me talk for a moment, if I might, about those issues that you asked us to address in our testimony, and I would just mention a couple of areas in which this Committee and the Committee in the Senate could greatly assist all our veterans in getting more expeditious results and certainly assist them in getting those results more quickly.

First of all—

Mrs. HALVORSON. Mr. Terry, I don't mean to interrupt you, but if you could bring it to a close within the next minute or so.

Mr. TERRY. Oh, absolutely, absolutely, ma'am.

First of all, we would hope you would look at our concern that we take advantage more often of video hearings as opposed to travel boards. That would allow us to get more veterans served in a more expeditious period of time. We would ask you to support our paperless claims and appeals processing as the Secretary certainly has indicated he has an intent to do.

We would ask you to certainly understand that the Expedited Claims Adjudication Initiative, which is now a pilot program, if implemented systemwide, would be a very, very effective way to move cases more quickly through the system, and that is certainly laid out in my written testimony, which I ask to be appended to the record.

Thank you very much, Madam Chair.

[The prepared statement of Mr. Terry appears on p. 55.]

Mrs. HALVORSON. Thank you, Mr. Terry.
Mr. Burke, you now have 5 minutes.

STATEMENT OF RONALD S. BURKE, JR.

Mr. BURKE. Thank you, and good afternoon. It is an honor to appear before you today to discuss the operations of VBA's Appeals Management Center.

My statement today will focus on the workload at the AMC, and my plan for continuing improvements at that facility.

The AMC's mission is to process remands from the Board of Veterans' Appeals, both timely and accurately. When the AMC is unable to grant an appeal in full, it is recertified to the Board of Veterans' Appeals for continuation of the appellate process.

I was detailed to the position of Director of the Appeals Management Center in December of 2008 and permanently appointed in February of 2009. Prior to this appointment, I served as the Veterans' Service Center Manager for one of VBA's largest compensation and pension divisions in the Winston-Salem Regional Office, and prior to that as Service Center Manager for the Baltimore Regional Office. Before joining VA, I was a veterans service officer for an accredited veterans service organization.

Since my appointment as Director, I have worked closely with AMC staff and VBA leadership to establish monthly performance goals and ensure increased accountability for AMC employees through monthly performance reviews.

Additionally, I have reallocated staffing resources to improve the efficiency of operations, to include the evidence-gathering, decision-making, and award-processing functions. These efforts have resulted in increased output of completed decisions, including the complete grant of benefits sought on appeal, partial grants of benefits sought on appeal, and appeals re-certified to the Board of Veterans' Appeals.

During the first quarter of fiscal year 2009, the AMC averaged 902 completed cases each month. Average monthly output increased to 1,404 completed appeals during the second quarter, which represents an increase of almost 60 percent. During the month of March 2009, AMC completed a record 1,695 remanded appeals.

The AMC currently manages an inventory of 21,428 cases using end-of-April 2009 numbers. This is a decrease of 750 pending remands since the end of December 2008. I have worked with AMC staff to develop a comprehensive workload management plan to improve the timeliness of decisions and better manage AMC's remand inventory. This plan outlines workflow and processes, to include specific actions performed by each team, in order to improve our remand processing.

Our current goal is to focus on processing the oldest pending remanded appeals in order to deliver decisions or re-certify appeals to BVA for those of our veterans who have been waiting the longest period of time for a decision. As a result of this emphasis, AMC's "average days to complete" has risen from 461 days at the end of fiscal year 2008 to 567 days at the end of April 2009. This change is indicative of our emphasis on processing the oldest pending remands. I anticipate that as the oldest workload is completed, the

“average days to complete” will show significant improvement toward the end of fiscal year 2009 and into fiscal year 2010. In fact, the average day’s processing at the Appeals Management Center has dropped more than 30 days since December of 2008.

Since arriving at the AMC, I have aggressively recruited and hired new claims processing employees. Ten full-time employees have been added to the staff since late December 2008, increasing the AMC’s staffing level from 114 full-time employees to 124 employees. Recently, as a result of the American Recovery and Reinvestment Act, I was authorized to hire an additional 15 employees, and we are actively recruiting and hoping to have those new personnel on staff before the end of the month.

To further improve timeliness and reduce the number of pending remands, the AMC does receive brokering assistance from the Huntington, Nashville, and Seattle Regional Offices. As the AMC productive capacity increases, my goal is to reduce the need for brokering assistance through fiscal year 2010.

We continue to work diligently with Chairman Terry and his staff at the Board of Veterans’ Appeals to increase and improve communications between the two facilities. Frequent telephone conversations and face-to-face meetings have been beneficial and will continue to play a pivotal role in improving the appellate workload. The AMC also benefits from a healthy and effective working relationship with many of the veterans service organizations.

In the past 4 months, the AMC has seen a reduction in the number of remands pending and an increase in the number of remands completed. Since assuming leadership of the AMC in February 2009, I have seen significant incremental improvements in processing. While we are not content with where we currently stand, we are encouraged with the direction in which we are heading.

In closing, VBA has made concentrated efforts to improve appellate processing and focus on the remanded workload by establishing a centralized processing center that establishes a core expertise in this area. The AMC is dedicated and will continue to be dedicated to timely and accurately collecting all evidence directed by the Board of Veterans’ Appeals. Over the next year, I do anticipate continued improvements.

This concludes my statement and I will be happy to respond to any questions that you may have. Thank you.

[The prepared statement of Mr. Burke appears on p. 57.]

Mrs. HALVORSON. Thank you, Mr. Burke, I do have a few questions for the two of you.

First of all, I keep hearing this 70 percent figure. Can either of you explain to me, then, why we hear 70 percent, but you are saying there is truly not a remand percent of 70 percent coming back?

Mr. TERRY. I think it is certainly true that there are more remands both from the Board back to the regional offices because there hasn’t been total development or from the Court back to the Board. I think one of the concerns we have had for some time is that the prejudicial error analysis, which has been required under Title V for a significant period of time, was not being applied in the way we thought that it should have been at the Court, and *Simmons* and *Sanders* [*Shinseki v. Sanders* 556 U.S. _____ (2009)]

in the Supreme Court this spring certainly made that very clear to the Court.

I think that this will certainly result in a number of decisions being decided on the merits where they had not been by the Court before.

I would also like to say that the diversion program, as I mentioned, is one in which case management is very effectively handled at the Court, and we believe that instead of mediating these cases and remanding them, if they could be more carefully reviewed, that a great number of them could be decided, and certainly I think I am joined by the Secretary in that view.

Mrs. HALVORSON. So, did I hear you say that you think that it is about 30 percent?

Mr. TERRY. I said that I am satisfied that there is at least 35 percent, and I certainly concur with that, but you have to remember how these cases are getting to the Court. They are being looked at by the Court in a substantive way, most often 2 to 3 years after we have decided them. The law has changed. There is new evidence before the Court that has been submitted. In those cases they have to send them back as a matter of law for review at the lower level.

So I mean, there are a number of reasons why cases come back, oftentimes not in any way the fault of the Board.

Mrs. HALVORSON. I guess I am a little confused. But, maybe I just need your help to reconcile the discrepancy between the Court's conclusion and your annual report, which suggests that you are about 95 percent accurate.

Mr. TERRY. We have a way of looking at our decisions before they go out the door. We have a system called "quality review" where a percentage of all of our cases are reviewed. And certainly if any errors are recognized that would have resulted in a remand from the Court, we would certainly make those corrections. That becomes the next issue in our training evolution before all our members, for both our judges and our attorneys.

But what I am suggesting is, that even the Committees of jurisdiction, both your Committee and that on the Senate side, found that the Court's recordkeeping did not give the Committees any indication of what the remand rates were and they asked, if you recall, in the Veterans Benefit Improvement Act of 2008 last fall, that they, this year, completely revamp their reporting so that it is clear what their percentages are. And I would simply say that it is not anywhere near 70 percent.

We don't know what the percentage is precisely, but I can tell you that it is not 70 percent.

Mrs. HALVORSON. Would it be beneficial for the Board to be able to consider evidence submitted after the veteran response to a Supplemental Statement of the Case, especially if this happens multiple times, instead of sending the case back to the RO?

Mr. TERRY. We have a procedure now that we have implemented as of February of 2005, which authorizes that. It is a waiver process which we offer to the counsel and veteran in each case if there is additional evidence because, as you know, we are a de novo fact finder.

Now, the veteran need not take advantage of that, but in many instances they do. We encourage it, and it certainly is a process

which we find to be very, very effective in moving the cases forward.

Mrs. HALVORSON. What do you mean by saying “the veteran take advantage of?” I feel like, if we can give a veteran any advantage, I think that is our job. So I don’t know what you mean—

Mr. TERRY. It certainly is, but there is an absolute right to have the agency of original jurisdiction consider all evidence on the veteran’s behalf. But this is being done by non-lawyers as well. You need to understand that.

In the case already at the Board of Veterans’ Appeals, if, in fact, the veteran then submits additional evidence to the Board, we have to, as a matter of right to the veteran, send it back to the agency of original jurisdiction for a full review on his behalf, unless he waives that and says, no, it is at the Board, I want the Board to consider this evidence, I don’t need it to go back.

All I am suggesting is, that is a process which, in many cases, in every case in my view, would benefit the veteran.

Mrs. HALVORSON. Great. Because you are right. I don’t understand any of that. All I understand is I am here for the benefit of the veteran.

Mr. TERRY. As I am as well.

Mrs. HALVORSON. If the CAVC’s remand rate is not indicative of the BVA’s performance, what are the BVA’s internal quality measures?

Mr. TERRY. Our internal quality numbers, as I pointed out to you, we grant, as I pointed out to you, 22 percent of our cases, which is, in fact, very positive when reflected against other appellate bodies within the Federal Government.

We deny, as I said, or uphold the agency in 38 percent of the cases. That is, we overturn the agency in 22 percent. We uphold them in 38 percent and additional development is needed in a number of cases. There are too many. We recognize that fact. We are working very hard with VBA and with Mr. Burke’s organization to ensure that that development is improved. We consider that to be of great importance.

But we have to remember, too, though, in an open system like we have, if we get additional medical evidence or if we get additional evidence of a late nature, we have to consider that and send it back unless that veteran is willing to waive consideration at the lower level.

Mrs. HALVORSON. One last question for you, Mr. Terry.

Mr. TERRY. Sure.

Mrs. HALVORSON. What do you think about the AFGE’s suggestion that you need 50 more attorneys and additional administrative support staff to handle your workload? Have you made any such request to your leadership to get some extra help?

Mr. TERRY. Well, let me just indicate to you, in 2005 we had 434 full-time equivalents. Now, we have 519, as result of our request to your Committee, and certainly the Senate Committee of jurisdiction. Those folks are on board now. They are being trained. As you know, we decided 43,757 cases last year and we received 39,000 in. When I came on board in 2005, we had a backlog of in excess of 24,000.

We are now down to 16,100. We are on our way down. We are exceeding our intake on a daily basis. I have to believe that the help and the assistance that this Committee and the Committee in the Senate have given us has been highly productive.

We believe that the number of judges, 60; the number of attorneys, 320, is a pretty effective number for us to deal with the caseload we have. We greatly appreciate the assistance of this Committee. It has been wonderful.

Mrs. HALVORSON. Okay. I have so many more questions. I don't even know where to begin, but I just have one other followup. Is the BVA subject to meeting annual performance targets? And are these included in the VA's Annual Performance and Accountability Report that you send to Congress?

Mr. TERRY. We have internal production goals for our attorneys and for our judges. We ask each of our judges to attempt to decide 752 decisions a year, and we ask each of our attorneys to draft 156 timely and quality decisions in the course of their work.

Mrs. HALVORSON. Correct me if I am wrong. That sounds to me like production. I was wondering about measurable.

Mr. TERRY. You mean in terms of quality and timeliness? We evaluate each of our cases in terms of quality and timeliness. Each of our attorneys receives a report of that case. It is signed by the judge and presented to them when they complete the case.

Each of our Chief Judges and our Deputy Vice Chairman review the cases of the 12 line judges on a continuing basis that work under their tutelage and certainly evaluate them. We have peer review on a yearly basis. We recertify each of our judges on behalf of the Secretary each year. In that peer review we look at the quality and timeliness of the judge's decisions and we also look at any trends that have arisen and use that for guidance from the senior leadership within each of the teams, decision teams.

Mrs. HALVORSON. Okay.

Mr. TERRY. I might add—

Mrs. HALVORSON. Okay. I guess I don't see that much as measurable. But who actually monitors the performance and the strategic objectives and the performances since you were talking about performance? Who monitors that within the VA?

Mr. TERRY. Who monitors our performance? I report to the Secretary on a weekly basis and certainly he is acutely aware. I report to him the number of decisions decided. I report to him any issues that arise within the Board. And certainly, if there is anything he needs to know, I am at his doorstep within 5 minutes.

Mrs. HALVORSON. Great. Okay—

Mr. TERRY. I might add we are the only board, we are the only board within the Federal Government which has performance standards. We are the only board. We are the only one which has peer review, and we are the only one that has a recertification process. And I think it is important to note that, plus we are the only group of judges whose appointment is approved by the President.

Mrs. HALVORSON. Thank you.

Mr. Burke, since the AMC testified before the Subcommittee in 2007, the inventory and the days pending has gone up in spite of the additional hires, training that has been conducted and the

work that is been brokered back to the ROs. Can you explain how and why this is occurring? And please feel free to elaborate in any way you might need to.

Mr. BURKE. Thank you. The testimony that I provided today indicates that since December, we are starting to see a decline in both the averages pending and the inventory itself. Whereas, before, the inventory was showing a steady increase.

By utilizing the staff members that we have and getting more of our full-time employees into more productive roles as they progress through their training element and as they gain more experience with the consolidated appeals review, we are starting to see a pay-off, if you will, with the incoming compared to the number of cases that we are actually sending out of the AMC.

So, in fact, the timeliness measures are being reduced, as is the inventory at the AMC.

Mrs. HALVORSON. Thanks. As the DAV aptly points out in its testimony, the AMC error rate is higher than its grant rate. Is this error typical in other RO performances, and what do you think this difference indicates?

Mr. BURKE. I can't speak for other Regional Offices, only my current experience at the AMC and my experience in two regional offices as the Service Center Manager.

However, looking at the national average of the Nation's remand rate, the AMC's own remand rates or error rate, if you will, is fairly commensurate within about a percentage to a percentage and a half from the RO's percentages.

Mrs. HALVORSON. And so, you think that there is no difference, then?

Mr. BURKE. Not a measurable difference, but I will tell you one of the things that the AMC is doing at this point to reduce that error rate. The AMC has recently hired a station training coordinator. We are using the collected data of the remand reasons that is captured through our VACOL system to use for training. We also fall under the Systematic Technical Accuracy Review (STAR) Review and our own internal quality review process.

So we are aware of the fact that improvement needs to be made in the error rate, and we are taking some steps at this point to remedy that.

Mrs. HALVORSON. I just want to add to that. How long have you been subject to STAR Review?

Mr. BURKE. The STAR Review for the AMC has not been a long-standing review. In fact, we are getting ready to go for our second sample that I believe gets pulled next month. So the AMC's purview under the STAR process has been relatively short lived.

Mrs. HALVORSON. When?

Mr. BURKE. I believe that started, the first sample was in October or November, if I'm correct, right before I got there.

Mrs. HALVORSON. November, October of this—

Mr. BURKE. Of 2008, ma'am.

Mrs. HALVORSON. Okay. On average, how many ready-to-rate claims do you have each month, and how long does it take for the AMC to process a ready-to-rate claim?

Mr. BURKE. Ballpark, as I don't have specific numbers in front of me, we normally have about 2,000 to 3,000 ready-to-rate cases

at any given time. Depending on the complexity of the development, the time to get a case ready for decision, it depends on the complexity of the case. The AMC has cases that require interaction with foreign entities for exam purposes, and those are normally a little longer to make ready-to-rate than others, but I would have to get you some specific numbers as our cycle time from the time the claim is received to the time that it is ready for decision.

Mrs. HALVORSON. Yeah, could you do that, please?

Mr. BURKE. Yes, ma'am.

[The VA provided the information in response to Question #5 of the Post-Hearing Questions and Responses for the Record, which appears on p. 60.]

Mrs. HALVORSON. How does your ready-to-rate claim ratio compare to the rate at the Regional Offices?

Mr. BURKE. That would be something I would have to get a comparison from our Central Office. I am not really aware of what the Regional Office ready-to-rate percentage is, but I would have to get some information for you on that as well.

[The VA provided the information in response to Question #5 of the Post-Hearing Questions and Responses for the Record, which appears on p. 60.]

Mrs. HALVORSON. It is my understanding that the AMC was created to alleviate the workload burden on the regional offices and develop a specialization in appeals. However, if the AMC is brokering claims and claims are being remanded, then can you please identify what the actual success of instituting the AMC has been?

Mr. BURKE. Yes, ma'am. And I think the success that the AMC has provided is being shown currently. Specifically, the second quarter of fiscal year 2009, where we have started to see a reduction of more than 30 days in our average days pending in that short period of time, as well as our inventory.

We are, in fact, starting to reduce the amount of brokering need as the AMC's productive capacity increases. With the authority to hire under the Reinvestment Act, we also believe that will increase our ability to develop cases, to make more cases ripe for decision and also make decisions or recertify back to the Board.

So I think that the AMC's success is being shown at current times and maybe with the increased staffing that we are going to benefit from, that we will continue to see that progress.

Mrs. HALVORSON. So you don't think it would be better just to hold the original jurisdictions more accountable?

Mr. BURKE. Each Regional Office has a set of performance expectations, and the remand rate and remand measures are a part of every regional office director's performance expectations. So the regional offices are, in essence, being held accountable for their work in the appellate process.

The establishment of the Appeals Management Center allows for a centralized location, thus giving the AMC the opportunity to hone their expertise in processing appeals.

Taking the appeals from the AMC now and putting that burden back on the field, which is already a strained system, in my opinion would not be beneficial.

Mrs. HALVORSON. So the AMC doesn't rely on the field at all?

Mr. BURKE. The AMC does rely on the field. Obviously the more completed cases, the more ready for decision that a case is. It reduces the chance that a case would be remanded from the Board to the AMC. However, the AMC is, with the exception of the brokering assistance, a relatively self-contained unit. The appeals are developed at the AMC. All of the development that is directed by the remand is done at the AMC. Decisions are rendered at the AMC and the recertification process is also done at the AMC.

Mrs. HALVORSON. Oh, okay. That is what I was trying to get at. Can you explain the re-remand?

Mr. BURKE. The re-remand is a situation where after the AMC receives a remand from the Board of Veterans' Appeals, we initiate the development action that was directed in such Remand Order. When the case is recertified back to the Board of Veterans' Appeals, should the Board realize that the development that was required in the order was not fully undertaken, it will be re-remanded back to the AMC.

And what we are utilizing the re-remanded data for at this point is to provide stationwide training on trends and the analysis of what the Board says, you know, the following remanded directives were not undertaken.

Mrs. HALVORSON. Okay. So when you triage cases at the AMC, can you identify those cases that only require the Supplemental Statement in order to work those cases separately and quicker?

Mr. BURKE. Not necessarily. As the claims come through our triage department, the first priority is to get those claims under control so that they are on the AMC's inventory. And we try to get them as quickly as possible to our development staffs.

The one thing that is triage right up front as the cases come in from the Board are those orders that result in full grants. And those are expedited and promulgated because that does not require additional development.

Those type of cases coming through the triage department are readily screened through and expedited, but not to the point where we can determine what you are referring to, ma'am.

Mrs. HALVORSON. What would you think are the implications and the consequences when a claim is re-remanded from the BVA, and how much time would have to be added to that process for each re-remand?

Mr. BURKE. Having only been at the AMC for a brief period of time, my review of the re-remand issues is relatively in the infantile stages. I will tell you that many of the reasons for the re-remands deal a lot with medical examinations and the adequacy of medical examinations. And I will tell you that I just participated in a VA training session, a nationwide training session dealing with the adequacy of examinations. So that is certainly an area that we see as a large reason for cases being re-remanded.

In addition to that, one of the things that we have instituted at the AMC is a more vigorous approach to adequate development up front, trying to get a faster control of the case as it comes through the AMC and trying to make sure that every specific step that is directed by the remand is undertaken at the earliest stage possible, and I think that is also assisting us as we benefit from a fairly significant reduction in ADP over the last quarter.

Mrs. HALVORSON. Mr. Terry, do you have anything you would like to add to that, about the implications and consequences when a claim is re-remanded from the BVA?

Mr. TERRY. There is no doubt that that increases the time for resolution, ultimate resolution a great deal.

I might say that I know that the entire leadership of the VA is extremely pleased with the new leadership at the AMC and the impact they are making, and we certainly have great hope that that entire process will be improved greatly over the next months.

Mrs. HALVORSON. Mr. Terry, could you explain the "directed development?"

Mr. TERRY. Directed development, you mean by the Board back to the regional office in a remand?

Mrs. HALVORSON. Yes.

Mr. TERRY. Each of our remands carefully and concisely explains exactly what must occur for the case to be developed as required for resolution of that case on behalf of the veteran. So each remand has a section where it lays out precisely what is expected before that case is returned.

Mrs. HALVORSON. Mr. Burke, what is the budget for the AMC?

Mr. BURKE. The budget for the AMC, a little over \$10 million in employee-related, and a little over \$830,000 for non-payroll. That doesn't include travel or—

Mrs. HALVORSON. So your operating costs, especially the FedEx and courier services? What would that be about?

Mr. BURKE. We are spending on average for FedEx anywhere from \$15,000 to \$25,000 a month in FedEx services.

Mrs. HALVORSON. Wow. Why was the AMC not subject to the same level STAR Review as the regional offices?

Mr. BURKE. That I can't answer. I do understand that there is a need and a vested interest in making the AMC a continued part of the STAR process, but I don't have any historical information on that, ma'am.

Mrs. HALVORSON. Can you provide that information for the record?

Mr. BURKE. Yes, ma'am. I will have to get some information for you. Yes, ma'am.

[The VA provided the information in response to Question #4 of the Post-Hearing Questions and Responses for the Record, which appears on p. 60.]

Mrs. HALVORSON. Thank you. Is the AMC being included in the VA's plans to carry out the work credit and management systems that our studies mandated in P.L. 110-389?

Mr. BURKE. Specifically, ma'am?

Mrs. HALVORSON. The AMC being included in the VA's plans to carry out the work credit and management systems outlined under the Veterans' Benefits Improvement Act?

Mr. BURKE. I am not aware of any specific process.

Mrs. HALVORSON. Okay. So if you will just get it to us for the record, that would be great.

Mr. BURKE. Okay. Yes, ma'am. Thank you.

[The VA provided the information in response to Question #6 of the Post-Hearing Questions and Responses for the Record, which appears on p. 61.]

Mrs. HALVORSON. Well, since I am the only one asking questions, I guess——

You have no questions, Minority Counsel? No. Okay.

Well, we thank everyone here for being here today and for their statements and I know we surely appreciate everybody's valued insights and opinions, so at this point, the hearing stands adjourned.

[Whereupon, at 12:55 p.m. the Subcommittee was adjourned.]

A P P E N D I X

Prepared Statement of Hon. John J. Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs

Good Morning Ladies and Gentlemen:

Would you please rise for the Pledge of Allegiance?

This morning we are here to conduct an oversight hearing entitled, "Examining Appellate Processes and their Impact on Veterans." I thank the witnesses for coming and I look forward to working with you on some of the proposals that may require legislative changes. Making the administrative and judicial appeals processes better and more efficient for our veterans is our shared priority and I thank you for joining me in helping to find workable solutions.

The process a veteran goes through when filing an appeal is a never ending story that this Subcommittee has heard many times before. A new claim is more like a short story. Upon submission, it can be developed and rated in about 6 months. However, if a veteran disagrees with the VA decision and files an appeal, then it becomes an epic tale that can go on for years or even decades.

First, the veteran can appeal the Regional Office decision to the Board of Veterans' Appeals, known as the BVA. This process can take up to 2 years. From there, the veteran can appeal the BVA decision to the Court of Appeals for Veterans Claims, where the average time from filing to disposition is 446 days. From there, an appeal can be made to the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit Court usually takes up to a year to make a decision, which then can be appealed to the U.S. Supreme Court. This cycle can repeat itself a few times depending upon the options a veteran chooses and can take between 5-10 years before there is any type of finality. I think, like me, many of you find this statistic astounding and evidence of an area that is in need of closer scrutiny by this Congress.

How can we improve the efficiency and effectiveness of the appellate story to the benefit of our veterans, their families and survivors is the question at hand and the reason why I convened this hearing today. Right now, I think we all can agree that the multitude of appellate processes that involve constant re-development and re-remands is at odds with providing our veterans the timely and meaningful appellate justice they deserve.

First, I firmly believe that we must overcome the quality and accuracy challenges at VA's 57 Regional Offices, which perpetuate the unspoken belief held by many veterans and their advocates that given the variances in RO decisions, an appeal to the BVA is a necessity. Clearly, better standardized training and a hard look at the work credit reward system as outlined in my bill from the 110th Congress, the Veterans Disability Benefits Claims Modernization Act, H.R. 5892, which was incorporated into P.L. 110-389, should help on this front.

However, I am also concerned that the BVA still employs a system of rewards based on the quantity of work rather than its quality. Despite the additional staff, centralization of appeals, and all of the training conducted since this Subcommittee heard from both the AMC and BVA in 2007, the backlog has increased by several thousand cases, days to process an appeal have only improved slightly, and remands have turned into re-remands. Thus, the appellate story is one that goes on and on with often no end in sight. Surely, this is not what anyone thinks of as justice for America's veterans?

With a backlog of over 43,000 cases in FY08, the average length of time for an appeal with the BVA is an amazing 563 days. This inefficiency is only exceeded by the outcome of these long waits—a 22 percent denial rate. Also, although BVA claims a 95 percent accuracy rate, the Court of Appeals for Veterans Claims remands at least 70 percent of cases appealed, indicating a much lower quality rate in reality. It is clear from reading the BVA's annual report to Congress that these percentages are inconsistent and may not be based on the same quality measures that Congress considers indicative of good performance.

I think too that we can fairly conclude that in its current state, the AMC is a failed experiment whose poor performance and lack of accountability confounds veterans, their advocates and Members of Congress alike. It is time we take a long hard look at this layer of bureaucracy, which adds nearly 2 years to the appellate process.

I am eager to hear from the witnesses on this area of concern. Additionally, I look forward to hearing from Judge Kasold on the Court of Appeals for Veterans Claims' annual report, the 70 percent remand rate, and on Judge Greene's short and long-term plans for the Court as a critical piece in producing better appellate outcomes.

Today's witnesses will speak to the concerns this Subcommittee has had with the BVA's and AMC's focus on production over quality, the poor development of claims, the lack of a technological infrastructure to manage information, and the lack of accountability throughout the entire adjudication and appeals process. I know too that we will hear about concerns we have with looking for ways that the Court of Appeals for Veterans Claims can serve as more of a final arbiter for veterans' appeals.

Moving forward, I hope that we can come up with a consensus on a plan that will foster a way forward for veterans and perhaps mitigate the current cumbersome and lengthy appellate process. If this happens, then this is one story that could end a lot better.

I now recognize Ranking Member Lamborn for his opening statement.

**Prepared Statement of Hon. Doug Lamborn, Ranking Republican Member,
Subcommittee on Disability Assistance and Memorial Affairs**

Thank you Mr. Chairman for recognizing me. I thank you for holding this hearing on the Court of Appeals for Veterans Claims and its role in the efficient processing of disability compensation claims.

I welcome our witnesses, especially Judge Kasold, and Chairman Terry, and thank you all for your contributions to the veterans' affairs system.

As everyone is aware the VA's compensation and pension backlog has reached an epic and disgraceful level. While I understand that there are numerous challenges facing the Board, the appeals management center, and the Court of Appeals for Veterans Claims all three play a significant role in veterans waiting many months if not years for an accurate rating.

I agree with our other witnesses that we can't just look at the Board in a vacuum. Poor quality work at the regional office level results in much larger problems later in the appeals process. We are seeing among veterans a growing propensity to appeal.

We must ensure that rating boards strive to achieve thoroughness and accuracy along with efficiency in their work. Doing so is a key step toward eventual elimination of the backlog.

I do want to commend Chairman Terry and the judges at the Court for the excellent work they are both doing. They are deciding a record number of appeals this fiscal year. While your output has increased the number of claims waiting to be reviewed is still too high.

Our veterans deserve the best benefits delivery system we can provide. I was pleased to work with Chairman Hall in the last Congress on legislation that would improve how we serve veterans applying for benefits that they earned through a paperless and electronic system. It is my hope that the new electronic system that is being built at the RO level will compliment the system at the Board and Court.

In the testimony we have read numerous suggestions regarding the Board's and the Court's operations, and I now look forward to our discussion on this essential facet of the benefits system.

Mr. Chairman, I yield back.

**Prepared Statement of Hon. Bruce E. Kasold,
Judge, U.S. Court of Appeals for Veterans Claims**

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Good Morning. I am Judge Bruce E. Kasold, and I am here pursuant to your kind invitation of April 29th to Chief Judge William P. Greene, Jr., to address, from the Court's perspective, the efficiency and effectiveness of the appellate processes of both the Department of Veterans Affairs (VA) and the Court, and how they "impact appeals outcomes for veterans."

I. AN ADMINISTRATIVE AND JUDICIAL APPELLATE PROCESS

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

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

When an appeal is taken to the Court, the claimant enters the judicial arena. In the Federal judicial system, the parties are viewed equally, and the claimant, now the appellant, generally has the burden of demonstrating that the Board decision is either clearly erroneous, or that there is some procedural error that has been prejudicial to the claimant. If dissatisfied with a decision from the Court, an appellant has the right to appeal to the U.S. Court of Appeals for the Federal Circuit, although that court's jurisdiction generally is limited to questions of law. Upon dissatisfaction with the results from the Federal Circuit, appellants may seek certiorari at the Supreme Court, although over our 20-year existence, the Supreme Court has taken less than a handful of cases involving VA benefits claims.

A. The Judicial Appeal Process

I would be remiss if I did not note for the record that the Court passed a milestone this past November 18, 2008, which marked the 20th year since its creation with President Ronald Reagan's signing into law the Veterans' Judicial Review Act 1988 (VJRA). The Court actually convened with three judges on October 16, 1989, and we look forward to celebrating this coming Fall the 20th year of judicial access and review for veterans and their families.

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

As always, the Court is looking for ways to ensure timely judicial review. The primary time-consuming process that warrants review is the time to prepare the record before the agency and the briefing process. Both are essential to a judicial process that is not only fair and just to both parties, but perceived to be fair and just by the parties. On this issue, I note that there are a significant number of requests for additional time to prepare the record before the agency or a brief. On average, the Court receives approximately 800 motions for extensions of time, per month, from the Secretary, and about 200–300 from veterans and their counsel. Clearly both parties have time-management problems, but the Secretary, by far, has the greater number of requests for an extension of time. This is an area where a process change would benefit veterans by reducing the time they wait for decisions. I am not familiar with the Secretary's internal operations, but I understand there is recognition that additional staffing might be warranted, and I suspect this might be the most significant factor in helping to reduce the number of requests for additional time in which to prepare the record or required briefs.

Additionally, viewing the judicial appeal process overall, and particularly in the context of 20 years of the development of Veterans law, it appears time to seriously

consider the added value of the unique, additional right of the parties to seek review by another Federal appellate court. The majority of cases appealed to the Federal Circuit generally are dismissed for lack of jurisdiction—that is, they generally present no legal issue for review—or they are affirmed because the legal issue raised on appeal is well-settled. Appeals presenting novel or difficult issues can be time consuming and remain pending for years, and these appeals in particular can generate significant delays in the processing of claims below and appeals at the U.S. Court of Appeals for Veterans Claims. Moreover, a party dissatisfied with the Federal Circuit's decision might seek certiorari at the Supreme Court, with a resultant, further delay in the processing of other cases and appeals involving the same issue. As I previously noted, the Supreme Court has taken less than a handful of cases involving VA benefits claims, although it most recently reinstated two decisions of this Court that had been overturned by the Federal Circuit.

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

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

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

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

Eliminating the intermediate appellate review currently extant with veterans judicial appeals not only would reduce the time involved in the judicial appeal process for a particular case, it would reduce the overall processing time for many cases as issues that have a systemwide impact generally would be brought to final resolution in a more timely manner. I know some will object to losing that unique, additional bite at the apple, but it has been my observation that the few significant cases that the Federal Circuit viewed differently than our Court, generally have come down fairly equally, with the Secretary or the appellant being satisfied in one case only to be dissatisfied in another. Given Justice Jackson's observation, and the fact that we now have a seasoned body of case law, it appears timely to bring the judicial appeals process provided for review of claims for veterans benefits inline with the overall Federal judicial appeals process.

B. The Administrative Appeal Process

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

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

Professor Pierce went on to state that in situations where the reviewing court specializes in the subject matter that it reviews, such as here, the reviewing court must work hard to resist the temptation to fall into a partnership-type mentality with the agency, and must remember that "agencies are autonomous entities that are entitled to respect and deference from the courts." (Pierce quoting *Vermont Yankee Nu-*

clear Power Corp. v. NRD, 439 U.S. 961 (1978). In sum, the Court sits in a judicial role and lacks the day-to-day administrative claims processing experience that might enlighten one on ways to improve on the timeliness of processing claims below.

Nevertheless, we have some general observations, although I note that the Chairman of the Board generally has recognized these problem areas already, as stated in his annual report to Congress and as presented in February 2009 in testimony to the U.S. Senate Committee on Veterans' Affairs. Any observations of problem areas must take into consideration the gravamen of the situation. It is my understanding that in the past couple of years, the Secretary has processed and rendered an initial decision in hundreds of thousands of claims annually, with about 40,000 being appealed to the Board. About 15 percent of these decisions are appealed to our Court, but it is my understanding that a good number of the Board decisions involve a remand for continued adjudication by the regional office. This general fact presents two areas for discussion.

1. Appeal of Board Decisions

Of those Board decisions appealed to the Court, about 70 percent are remanded for further adjudication. This figure represents cases where the sole disposition by the Court was a remand, as well as those appeals where the Court remanded the Board's decision in part. The most common error is the failure to sufficiently explain the basis for a decision. The Board is statutorily required to explain its decision, and our case law requires an explanation that discusses the material and relevant evidence and explains the basis for the decision so that it allows the appellant to understand the precise reason for the decision as well as permits judicial review.

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

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

Approximately one-quarter of the cases appealed to the Court are affirmed. This often ends the matter, although a dissatisfied party has a right to seek reconsideration or appeal to the Federal Circuit. Less than 5 percent of the decisions of the U.S. Court of Appeals for Veterans Claims result in an outright reversal of the Board's decision. No doubt appellants would like to see that higher, but I note that the high remand rate can often result in an award based on the proper development of the facts (improperly done initially), or renewed development of the facts (generated by the claimant in conjunction with a remand based on a faulty explanation of a Board decision or other procedural error)—facts that were missing when the matter was decided by the Court, and which precluded an outright reversal and award of benefits.

2. Remand of Claims by the Board

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

Nevertheless, we are cognizant of the high number of remands generated by the Board. This appears consistent with their mandate, which includes de novo review of the claim—that is a complete review of the matter without any deference to the initial decisionmaker, as well as application of the benefit of the doubt and the duty to assist. As I understand it, only a small percentage of the hundreds of thousands of claims adjudicated by the Secretary are appealed to the Board. Nevertheless, a high number of remands suggests a high degree of error in those claims appealed to the Board, and this would appear to be an area that might be improved. As noted above, however, here we cross into the administration and management of the claims process, where we defer to the Secretary, the Board Chairman, and the oversight provided by Congress and the President.

II. RELATIONSHIP BETWEEN THE COURT AND THE BOARD

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

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

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

Unlike the Board, the Court generally does not conduct de novo review, except when questions of law are presented. Thus, the facts are developed below and weighed below with application of the benefit of the doubt. On appeal to the Court, the facts found by the Board are reviewed for clear error. Consequently, consistent with general Federal appellate review, a degree of deference is given to agency fact-finding. In contrast, but also consistent with general Federal appellate review, questions of law are reviewed without deference. Also consistent with general Federal appellate review, the appellant generally has the burden of demonstrating error and prejudice resulting from that error.

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

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

Judicial review by a specialized Court, as is the U.S. Court of Appeals for Veterans Claims—limited to review of final Board decisions and ancillary matters—might be viewed as twofold. It provides judicial review for the individual claimant; that is review that is wholly independent of the executive or legislative branch. Within our Nation and set of values, this independent judicial review is a sacred right, and one for which our veterans fought many years to achieve. But there is

a second aspect to judicial review by a specialized court. Judicial decisions that have precedential value (our panel and full-court decisions) are binding on the agency, and can help establish uniformity in the adjudication of matters within the agency. Compliance is enforced not only by the Secretary and the Board, but by the uniform application of law and subsequent decisions of the Court.

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

It strongly appears that at least for the present and near future, the number of claims filed below will remain high, which likely will keep appeals to the Board and the Court high. I have confidence that the Court is poised and ready to handle the appeals that we will receive. I defer to the Secretary and the Board with regard to their operations.

III. CONCLUSION

We recognize that it is the political branches of government that must take the steps necessary to create the laws and the framework surrounding veterans benefits which the Executive branch is then charged to administer with the Legislative branch conducting appropriate oversight; and it is our responsibility to provide judicial review of Board decisions when timely appealed. On behalf of the judges of the Court, we appreciate the opportunity to engage in dialog aimed at strengthening and improving the veterans benefits adjudication system as a whole, and we thank the Committee for its efforts in this regard.

**Prepared Statement of William Angulo Preston, Acting President,
American Federation of Government Employees, Local 17, on behalf of
American Federation of Government Employees, AFL-CIO, and,
Associate Counsel, Board of Veterans' Appeals,
U.S. Department of Veterans Affairs**

Dear Chairman and Members of the Subcommittee:

Thank you for the opportunity to present our views on appellate processes and their impact on veterans on behalf of the American Federation of Government Employees, AFL-CIO (AFGE), the exclusive representative of the employees in the Board of Veterans' Appeals (Board).

AFGE's testimony addresses the following: the need to expand the Board's legal staff and administrative staff; recommendations for process improvement including specialization, establishing another decision team and using employees of the Board to transform the Board's adjudication into a paperless system; and, changing eligibility rules for the Vice Chair position.

I. EXPANSION OF THE BOARD'S LEGAL STAFF

The Board needs additional attorneys to handle its caseload. We use the term "caseload" rather than "backlog" because it more accurately describes the flow of claims from VA Regional Offices (ROs) and the U.S. Court of Appeals for Veterans Claims (Court) by operation of statutes and regulations. The Board's jurisdiction in claims by veterans is established by receipt of a substantive appeal signed by either the veteran or by the representative of the veteran. All cases for which a substantive appeal has been entered become the Board's caseload.

AFGE urges Congress to provide funding for the Board to hire at least fifty additional attorneys initially, in addition to maintaining current staffing levels. That expansion should continue with additional attorneys being hired thereafter until the current caseload decreases. The expanded legal staff should remain in place until the caseload significantly declines, as measured by a percentage of the total caseload or another measure that accurately reflects a decrease in the number of cases for which a substantive appeal has been filed.

II. EXPANSION OF THE BOARD'S ADMINISTRATIVE STAFF

The Board currently faces a significant bottleneck in the administrative processing of claims caused by a shortage of staff to process claims. An initial inadequate ratio of support staff to attorneys has worsened over the years as the Board has increased the number of attorneys without a comparable increase in support staff. Administrative staff members are as critical to sending completed decisions to

the veterans as the attorneys and Veterans Law Judges (VLJs) who write and sign decisions. We suggest an approximate ratio of one administrative support staff member for every two attorneys.

Therefore, AFGE recommends joint labor-management efforts to identify all the specific “bottlenecks” currently contributing to the Board’s growing caseload will also be very productive and will assist in the determination of the optimal administrative staffing levels and structure.

III. SPECIALIZATION

Specialization by both the Board attorneys and the VLJs would increase their familiarity with laws governing a specific set of benefits, which in turn would increase the quality of the decisions as well as their quantity. (The quantity would increase due to greater familiarity with the pertinent case law and a consequent decrease in the need for research.)

Therefore, AFGE recommends that the Subcommittee require the Board to identify approximately twenty areas of specialization and to assign no more than three such areas to each VLJ. Each VLJ would retain those areas of specialization for 3 years. Other cases not involving an issue of specialization could be assigned to any VLJ.

Attorneys would also benefit from this specialization, in light of our recommendations. Attorneys who completed their probationary period and are performing successfully for the VLJ would continue working in that VLJ’s area of specialization for 3 years. If the attorney passes his or her probationary period and thereafter performs unsuccessfully, he or she will be reassigned to a different supervisor for a year, with that supervisor allowed to administer a performance-based action after 90 days.

IV. ESTABLISH A FIFTH DECISION TEAM

The Board should be reorganized to add an additional decision team to the four presently in place. The additional decision team would be larger than the others and would handle all issues appealed from decisions by the other four teams, by reconsidering them (a current part of the law) and issuing a decision that is ready for appellate review. This would increase both the quality of the decisions reviewed by the Court and the quality of decisions received by veterans. It should also speed up the issuance of decisions generally.

In addition, the four current decision teams should be required by statute to write “appellant-friendly” decisions, i.e., decisions meant solely for the veteran or other appellant and his or her representative, and not the Court. Thus, these decisions would be shorter and would not contain the legal explication only required to pass Court muster. Decisions would be more accessible to veterans and other appellants since there would be no requirement to use language designed to be defended before the Court.

V. USE OF BOARD EMPLOYEES TO TRANSFORM THE BOARD’S ADJUDICATION INTO A PAPERLESS SYSTEM

AFGE strongly supports the Department’s goal of conversion of the Board to a fully paperless system, moving with all due dispatch to have all claims files be paperless. AFGE’s recommends tapping the knowledge that exists among Board employees to effectively transform the Board’s adjudication process into a paperless system. More specifically, we urge that the new system be designed to allow easy access to these files by employees conducting search queries.

The system that results should be user-friendly for VA employees, the veterans we serve, and veterans service organizations. To that end, we believe that the experience and insights of BVA employees who work with claims files each day must be incorporated into any process of VA going paperless. Board employees and their representatives should work jointly with management during the transition process to ensure that the new system is implemented effectively, that the needs of veterans remain paramount, and that employees receive training and other support to accurately and efficiently adjudicate claims without interruption during and after this transition period.

Rather than contract out the scanning and other related tasks to a private contractor, we urge Congress to create additional employment opportunities for veterans within the Department by establishing a new administrative unit. This new unit would be located within the Board, however it does not necessarily need to be stationed at VA headquarters. In-house scanning would enable the conversion to take place at a reasonable pace and reasonable cost. In addition, the Board’s in-house knowledge base would grow and other Board staff would have access to technicians who are directly responsive to the Board and to the veterans, in contrast

to for-profit private contractors who at best are only remotely involved in or familiar with day-to-day Board operations.

VI. REVISED ELIGIBILITY RULES FOR VICE CHAIR POSITION

We urge Congress to modify the current statutory provision related to the selection process for Vice Chair of the Board to require that that person be employed at the Board for at least twelve months prior to appointment as Vice Chair. Veterans and the Board's attorneys are both adversely impacted when the Vice Chair lacks sufficient familiarity with Board operations.

VII. OTHER COMMENTS

- A. *RO Training*: We support quality, comprehensive training of Regional Office (RO) staff conducted by the Board employees as it will improve the quality and timeliness of decisions made at the RO level. However, AFGE members from the field report that this training program is sporadic and not available at most ROs. We urge Congress to provide the oversight and funding to ensure that this valuable training is provided consistently across all ROs.
- B. *VCAA*: The letter notifying claimants of their rights under the Veterans' Claims Assistance Act should be much shorter and use nontechnical language.
- C. *Revise VA Form 9*: Instead of requiring the veteran to submit a VA Form 9 to indicate whether he or she wants to continue or withdraw the appeal, a form should be attached to the front of the Statement of the Case (SOC) that the veteran can fill out to state his or her preference in this regard. Also, the deadline for receipt of the form by the RO should be made much more visible than it is currently.

Prepared Statement of Kerry Baker, Assistant National Legislative Director, Disabled American Veterans

Mr. Chairman and Members of the Subcommittee:

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

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

As VBA renders more disability decisions, a natural outcome of that process is more appellate work from veterans and survivors who disagree with various parts of the decisions made in their case. In recent years, the appeal rate on disability determinations has climbed from a historical rate of approximately 7 percent to a current rate that ranges from 11 to 14 percent. The 824,844 disability decisions in 2007 generated approximately 100,000 appeals. The VA estimates that the 942,700 projected completed disability decisions in 2009 will likely generate as much as 132,000 appeals. At the end of 2007, there were over 180,000 appeals pending in regional offices and the Appeals Management Center (AMC).

This increase in appellate workload seriously affects VA's ability to devote resources to initial and reopened claims processing. Appeals are one of the most challenging types of cases to process because of their complexity and the growing body of evidence that must be reviewed in order to process them. Likewise, the number of actions taken in response to VA's appellate workload has increased. In 2001, the VA processed more than 47,600 statements of the case (SOCs) and supplemental statements of the case (SSOCs). In 2007, they processed over 130,000 SOCs and SSOCs.

THE APPEAL PROCESS AND THE BOARD OF VETERANS' APPEALS

I. Remove Procedural Roadblocks to Efficiency in the Appeals Process

To begin the appeal process, an appellant files a written notice of disagreement (NOD) with the VA regional office (RO) that issued the disputed decision. For most cases, the appeal must be filed within 1 year from the date of the decision. After filing an initial NOD, the VA sends the appellant an appeal election form asking him/her to choose between a traditional appellate-review by a rating veterans' serv-

ice representative (RVSR) or a review by a decision review officer (DRO). DROs provide a *de novo* (new decision and no deference to previous decision), review of an appellant's entire file, and they can hold a personal hearing with the appellant. DROs are authorized to grant contested benefits based on the same evidence utilized by the initial rating board. The VA provides the appellant 60 days to respond to the appeal election form. *See* 38 C.F.R. § 3.2600 (2007).

Once the VA receives the appeal election form, the RVSR or DRO (as appropriate) issues an SOC explaining the reasons for continuing to deny the appellant's claim. A VA Form 9, or substantive appeal form, which is used to substantiate an appeal to the Board of Veterans' Appeals ("Board" or "BVA") is attached to the SOC. The VA Form 9 must be filed within 60 days of the mailing of the SOC, or within 1 year from the date VA mailed its decision, whichever is later.

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

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

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

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

The Board amended its regulations in 2004 so that it could solicit waivers directly from appellants in those cases where an appellant or representative submits evidence without a waiver. 38 C.F.R. § 20.1304(c); *see* 69 Fed. Reg. 53,807 (Sep. 3, 2004). This has helped to avoid some unnecessary remands. The Board's remand rate decreased from 56.8 percent in fiscal year (FY) 2004, to 35.4 percent in FY 2007 due *in part* to these procedures. Nonetheless, the Board still remanded 1,162 cases solely for the VA to issue an SSOC. The frustrating reality of this situation is that issuing an SSOC may only consume one work hour from an experienced employee, but the case will nonetheless languish at the AMC for the next 2 years while the VA completes that 1-hour's worth of work.

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

In FY 2007, the Board physically received 39,817 cases. Despite this number of cases making it to the Board, the VBA actually issued 51,600 SSOCs, a difference

of 11,783.¹ As of May 2008, the VBA has already issued 38,634 SSOCs. Likewise, the Board has remanded an additional 1,162 cases solely for the issuance of an SSOC. This number does not include cases wherein the appellant responded to the Board's initiation of a request for waiver of RO jurisdiction, thereby eliminating the requirement for a remand for VBA to issue an SSOC.

The average number of days it took to resolve appeals, by either the Veterans Benefits Administration (VBA) or the Board, was 657 days in FY 2006.² This number, however, is very deceptive, as it represents many appeals resolved at the RO level very early into the process. The actual numbers show a picture much worse. According to the FY 2007 *Report of the Chairman*, Board of Veterans' Appeals, a breakdown of processing time between steps in the appellate process is as follows:

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

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

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

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

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

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

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

The VA currently receives over 100,000 NODs annually (approximately 119,000 in 2008). This minor change would eliminate 60 days of undue delay in every one of those appeals and eliminate VA's requirement to separately mail, in letter format, all 119,000 appeal election forms. This recommendation would have a tremendous effect on VA's appeals workload without the need to expend any governmental resources.

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

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

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

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

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

II. The Time Has Come to Reduce the Appellate Period From One Year to Six Months

The DAV believes the time has come to reduce the 1-year appellate period currently allowed for filing a timely NOD following the issuance of a rating decision from 1 year to 6 months. This subject has been the discussion topic in countless hallway and sidebar conversations for a considerable period of time. It is time these discussions be made public.

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

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

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

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

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

The status quo of no judicial review of veterans claims persisted until an influx of post-Vietnam claims in the 1970s and 80’s directed the spotlight on an adjudication process in obvious need of reform. The House Committee on Veterans’ Affairs consistently resisted efforts to alter the VA’s unique status and noted that the Veterans Administration stood in “splendid isolation” as the single Federal administrative agency whose major functions were explicitly insulated from judicial review. (The Supreme Court was sure to remind all of the coldness of that term in a landmark decision.)³ By now, history had proven that without proper oversight, those wishing to cut veterans’ benefits, whether couched in government reform or expressly decided by an Agency Board, while ignoring the suffering caused by their service-connected disabilities would do so without hesitation.

The Veterans’ Judicial Review Act finally created a veterans’ court under Article I of the Constitution on November 18, 1988. This Act of Congress, along with a multitude of other favorable pieces of legislation throughout the years, has solidified the VA into its current non-adversarial, veteran-friendly, pro-claimant system. Veterans and their dependents also have more avenues than ever before to choose from when

³See *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (holding that statutory interpretation, or “interpretative doubt” be resolved in a veteran’s favor and further stating: “But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation . . . , the government’s position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency’s ‘splendid isolation’ (citation omitted). As the Court of Appeals for the Federal Circuit aptly stated: ‘Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations’ unscrutinized and unscrutinizable existence’ could not alone, therefore, enhance any claim to deference.”

seeking representation in the claims and appeal process. Veterans' organizations are also stronger than ever and stand ready to fight against any power that might try to reduce benefits.

It is for all of these reasons and many more, however, that reducing the appellate period from 1 year to 6 months would not reduce veterans' rights. Such a time would also be consistent with other appellate periods. For example, an appellant currently has 60 days in which to file an appeal to the Court of Appeals for the Federal Circuit from the Court of Appeals for Veterans Claims, and 120 days to file an appeal to the Court of Appeals for Veterans Claims from the Board. It necessarily follows then that a fair period to file an NOD, which is the first step in initiating an appeal to the Board, would be an additional 60 days, totaling 180 days, which is still an extremely long period by any appellate standards. Additionally, when originally enacted in 1930, the U.S. Postal System was barely effective compared to today's reliable system. Such an unreliable postal system in place nearly 80 years ago, when disabled veterans were truly "on their own" further supported the need for a 1-year appellate period. This is no longer the case.

Since originally suggesting this recommendation, many have asked whether VA receives most appeals during the first or second half of the appellate period. The answer supports our proposition: Out of approximately 119,000 NODs in 2008, 92,000 were received in less than 6 months. In fact, the average time it took appellants to file NODs following a rating decision was only 41 days.

Congress should decrease the period in which a VA claimant may submit a timely notice of disagreement to the VA following the issuance of a VA rating decision from 1 year to 6 months. We realize that some may impulsively draw several inferences onto this idea. Those inferences will likely be misplaced—our ambitious goal is to take every opportunity in which to bring efficiency to VA's entire claims process so that it can better serve our Nation's disabled veterans. We must be open to change for such a goal to succeed.

This is also an opportunity to bolster certain statutory rights for which the law is currently silent. When amending the appellate period from 1 year to 180 days, Congress must include an appellate period extension clause and equitable tolling clause to the appropriate section of law concerning NODs.

Specifically, we recommend changing the law so that an appellate may, upon request, extend his/her appellate period by 6 months, beyond the initial 6 months. We also suggest an amendment to provide for equitable tolling of the appellate period in cases of mental or physical disability so significant as to have prevented a VA claimant from responding within the specified time.

III. The Appeals Management Center Promotes an Atmosphere Low in Accountability, Has a Poor Record of Success, and Should be Dissolved

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

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

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

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

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

Another 2,461 cases were remanded because the claimant had requested a travel board hearing or video-conference hearing. Again, there is a disturbing factor here. A checklist is utilized prior to sending an appeal to the Board that contains a section that specifically asked whether the claimant has asked for such a hearing.

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

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

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

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

The AMC received nearly 20,000 remands from the Board in FY 2008. By the end of FY 2008, the AMC had slightly over 21,000 remands on station. By the end of January 2009, they had approximately 22,600 remands on station. The AMC completed nearly 11,700 appeals, out of which 9,811 were returned to the Board, 89 were withdrawn, and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions, over a 25-percent error rate. This means the AMC's error rate was higher than its grant rate. Such a poor record of performance would never be allowed to exist at an RO. Returning these cases to their respective jurisdictions will help ensure accountability, and most likely reduce the number of cases that proceed to the Board of Veterans' Appeals.

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

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

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

Congress and the Administration must not conduct the foregoing actions without including the appeals process—it is inextricably intertwined with the entire claims processing system. Section 226 of Pub. L. 110-389 may provide the perfect opportunity to dismantle the dysfunctional AMC, return appeals to local offices, and in-

clude the appellate process when enhancing VA's accountability as required by the Veterans' Benefits Improvement Act of 2008.

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

THE COURT OF APPEALS FOR VETERANS CLAIMS

IV. Congress Should Enforce the Benefit-of-the-Doubt Rule

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

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

Congress tried to correct this situation when it amended the law with the enactment of the Veterans Benefits Improvement Act of 2002⁴ (VBA of 2002) to expressly require the Court to consider whether a finding of fact is consistent with the benefit-of-the-doubt rule. The Court has not upheld the intended effect of section 401⁵ of the VBA of 2002. This is in part due to the Court's jurisprudence of reviewing the Board's application of section 5107(b) as a finding of fact. As long as that is the case, it is reviewed by the Court under the clearly erroneous standard, which invokes the plausible-basis standard by direction of higher courts' jurisprudence.

In the VBA of 2002, Congress added new language to section 7261(b)(1) that mandates the Court to review the record of proceedings before the Secretary and the BVA and "take due account of the Secretary's application of section 5107(b) of this title. . . ."⁶ Therefore, as the foregoing discussion illustrates, Congress intended the VBA of 2002 to fundamentally alter the Court's review of BVA fact-finding. This is evident by both the plain meaning of the amended language of these subsections as well as the unequivocal legislative history of the amendments.⁷

Yet, the nearly impenetrable "plausible basis" standard continues to prevail as if Congress never amended section 7261. Why? The DAV believes this is because the Court cannot reasonably find a way around the clearly erroneous review applicable to factual findings. The Court reviews an application of law under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C.A. § 7261(a) (West 2002 & Supp. 2006). In particular, the Court has held that it reviews "question[s] of statutory and regulatory interpretation . . . *de novo*." *Meakin v. West*, 11 Vet.App. 183, 187 (1998). Application of section 5107(b) is therefore an application of statutory right, meaning the Secretary should receive no deference in such cases.

In order to understand this impenetrable wall in front of the Court's review of the Board's application of the benefit of the doubt, Congress should look no further than 38 U.S.C.A. § 7261(a)(4), which states: "[I]n the Case of a finding of *material fact* adverse to the claimant made in reaching a decision . . . , [the Court shall] hold unlawful and set aside or reverse such finding if it is clearly erroneous." 38 U.S.C.A.

⁴Pub. L. No. 107-330, 401, 116 Stat. 2820, 2832.

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

⁶See 38 U.S.C. § 7261(b)(1).

⁷See 148 CONG. REC. S11334 (remarks of Sen. Rockefeller) (emphasis added).

§ 7261 (West 2002 and Supp. 2007) (emphasis added). Congress can clarify this entire matter simply by further defining “material fact.”

Application of the benefit of the doubt usually comes down to the Board weighing the probative value of two pieces of evidence, one in favor of an appellant, and one against. The Board then assigns probative weight to each piece of evidence. If it ultimately determines the weight of the unfavorable evidence is more probative than the weight of the favorable evidence, it decides the evidence is not in equipoise and the benefit of the doubt does not apply, and the appellant loses. Board decisions sometimes use entire pages of discussion to cite case after case of how its assignment of probative value and weight are “factual findings” reversible only if “clearly erroneous” while further emphasizing that if plausible, their findings cannot be “clearly erroneous.” So how can the Court ever review *de novo* an appellant’s statutory right under 5107(b) if it cannot penetrate the Board’s factual finding under a clearly erroneous standard? The answer lies in the meaning of the phrase “material fact.”

Simply put, not every finding, factual or otherwise, rises to the evidence (as opposed to mere opinion) based finding of “material fact.” The entire practice of VA litigation, whether at the Board or the Court, has, for two decades, been locked in group think believing that any judgment call by the Board, regardless of how flimsy, in assigning probative weight to two opposite pieces of evidence renders such judgment call a “material fact.” It does not—it cannot.

A material fact is defined as “[a] fact that is significant or essential to the issue or matter at hand.” Black’s Law Dictionary 629 (8th ed. 2004). A material fact is a “potentially outcome determinative” fact. *Pike v. Caldera*, 188 F.R.D. 519, 527 (S.D.Ind.1999). A “fact” is further defined as “[s]omething that actually exists; an aspect of reality.” Black’s Law Dictionary 628 (8th ed. 2004). Likewise, “material” is defined as “[h]aving some logical connection with the consequential facts <material evidence>”. *Id.* at 998.

Therefore, notwithstanding that the Board is a duly recognized fact-finder, *see id.*, at 629, only findings of “material fact” are restricted to the highly deferential clearly erroneous standard of review. The Board’s judgment call, per se, its opinion, can never rise to the level of “material fact.” Therefore, Congress should amend section 7261 to make clear that mere judgment calls by the Board when reviewing evidence for and against a claim in the assignment of probative value, when subject to a benefit-of-the-doubt review under section 5107(b), is reviewed as a matter of law, or *de novo*. Alternatively, such findings could be viewed under the arbitrary and capricious standard, which affords some deference to the Agency and applies to an application of law to a set of facts. Regardless, such opinion-based judgment calls cannot rise to the level of a “material fact” if words in the law are to be given the legal meaning.

Mr. Chairman, the benefit of the doubt under section 5107(b) is the most important standard that sets the VA benefits apart from others. Yet, in the highest levels of appellate litigation, it is sometimes the most meaningless. It is time that meaning is restored.

CONCLUSION

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

Mr. Chairman, last week the DAV released its official recommendation for a 21st century claims processing system. Most of the recommendations incorporated herein are also in that proposal. The 21st Century Claims Process goes much further than the recommendations in today’s testimony. We have provided your staff as well as the staffs of Chairman Filner, Ranking Member Buyer, Chairman Akaka, and Ranking Member Burr with a copy of the new proposal.

**Prepared Statement of Barton F. Stichman,
Joint Executive Director, National Veterans Legal Services Program**

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Veterans Legal Services Program (NVLSP) on the current process by which appeals of VA benefit claims are adjudicated and its impact on veterans. This testimony focuses

on the two major tribunals that decide appeals of VA benefit claims—the Board of Veterans’ Appeals (BVA) and the U.S. Court of Appeals for Veterans Claims (CAVC).

NVLSP is a nonprofit veterans service organization founded in 1980. Since its founding, NVLSP has represented thousands of claimants before the Board of Veterans’ Appeals and the Court of Appeals for Veterans Claims. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans’ Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

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

A. The Longstanding Delay in Forwarding Appeals to the BVA

One of the reasons for the unreasonably long delays that occur in VA decision-making is the long time it takes for VA to forward an appeal to the BVA for a decision. This interval occurs after (a) the veteran files his or her claim; (b) the regional office (RO) issues a decision denying the claim; (c) the veteran files a notice of disagreement with the RO decision; (d) the RO issues a statement of the case (SOC); and (e) the veteran files a VA Form 9 (entitled “Appeal to the Board of Veterans’ Appeals”) on which the veteran states whether he or she wants the Board to decide the appeal based on the record or after a BVA hearing.

The Board reported in its FY2006 Report (at 16) that it took an average of 489 days (1 year and 4 months) after the filing of the Form 9 appeal for the RO to “certify” the appeal (that is, to forward the VA claims file to the BVA for a decision). In its FY2008 Report (at 19), the Board reported that the average time from filing a Form 9 appeal to certifying the appeal had increased to 563 days (1 year and nearly 7 months).

This Subcommittee should investigate why there is a 563-day time lag. But NVLSP is already aware of one of the major reasons for this large time lag: the VA policy that governs what takes place if the claimant submits additional evidence after the filing of the Form 9, but before the appeal is certified to the Board. While veterans wait for months on end for their case to be sent to the BVA, they often decide to submit additional evidence in support of their claim. Since they have already appealed to the BVA, they often assume that this evidence will first be reviewed by the BVA. Yet, VA policy is that whenever the veteran submits new evidence during this period, the case is sent to an RO adjudicator who reviews both the new evidence and the claims file and prepares a new decision in the form of a Supplement Statement of the Case (SSOC). Then, if the veteran submits additional evidence after the SSOC, the case is again sent to an RO adjudicator to review the new evidence and the claims file and prepare yet another SSOC. In some cases, the VA has taken the time to prepare four or more SSOCs before the case is forwarded to the BVA for a decision.

This VA policy should be changed. Much time and tens of thousands of VA work hours per year would be saved if VA regulations and the Form 9 were amended to explain that any evidence submitted with or after submission of the form will be forwarded directly to the Board and will not be considered by the RO unless the claimant or the claimant’s representative specifically elects to have the additional evidence considered by the RO.

B. The Hamster Wheel

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

There are at least three aspects of the BVA’s and CAVC’s decisionmaking process that contribute to the Hamster Wheel phenomenon: (1) the high error rate that ex-

ists in BVA decisionmaking, which delays the decisionmaking process by requiring disabled veterans to appeal to the CAVC to correct these errors, which, in turn, leads to further VA proceedings on remand; (2) the policy adopted by the CAVC in 2001 in *Best v. Principi*, 15 Vet.App. 18, 19–20 (2001) and *Mahl v. Principi*, 15 Vet.App. 37 (2001); and (3) the CAVC's reluctance to reverse erroneous findings of fact made by the Board of Veterans' Appeals.

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

The most prominent fact in assessing the performance of the Board of Veterans' Appeals is the track record that Board decisions have experienced when an independent authority has examined the soundness of these decisions. Congress created an independent authority that regularly performs this function—the U.S. Court of Appeals for Veterans Claims. Each year, the Court issues a report card on BVA decisionmaking. This annual report card comes in the form of between 1,000 and 3,600 separate final judgments issued by the Court. Each separate final judgment incorporates an individualized judicial assessment of the quality of a particular one of the 34,000 to 44,000 decisions that the Board issues on an annual basis.

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

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

To formulate an effective plan to reform the Board and significantly improve its performance requires an understanding of the underlying reasons that the Board has consistently failed in its primary mission (i.e., to issue decisions on claims for benefits that comply with the law). Over the last 20 years, NVLSP has reviewed over 10,000 individual Board decisions and thousands of Court assessments of these decisions. Based on this review, NVLSP has reached three major conclusions:

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

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

The Board has consistently been called to task by the Court for faulty explanations that violate 38 U.S.C. § 7104(d). These violations fall into several common patterns. One pattern is that the Board often does not assess or explain why it did not credit positive medical evidence submitted by the claimant from a private physician, while at the same time expressly relying on a negative opinion provided by a VA-employed physician. The problem here is not that the Board decided to credit the opinion of the VA physician and discredit that of the private physician. The problem is that the Board never explained its analysis (if indeed, it had one) of the private physician's opinion in the first place.

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

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

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

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

2. Board Management Does Not Take Remedial Action When Veterans Law Judges Continue to Make These Types of Errors

One method of eliminating repetitive types of Board errors would be if Board management took remedial action when Veterans Law Judges repeatedly violate deeply embedded legal principles. This has not been done.

The problem is not that Board management fails to assess the performance of the Board's Veterans Law Judges. Board management does conduct such assessments. The problem lies in Board management's definition of poor performance. As the Chairman of the Board stated in his FY2006–FY2008 Reports, Board management annually assesses the accuracy rate of Board decisionmaking—a rate which "quantifies those substantive deficiencies that would be expected to result in a reversal or a remand by the CAVC." Over the last three fiscal years, the Chairman reports that the Board's accuracy rate was 93 percent, 93.8 percent, and 94.8 percent, respectively.

There obviously is a major disconnect between the annual report card prepared by the Court of Appeals for Veterans Claims and the annual report card prepared by Board management.¹ How can it be that year in and year out the Court consistently concludes that well over 50 percent of the Board decisions contain one or more specific legal errors that prejudiced the rights of the VA claimant to a proper decision, while at the same time Board management concludes that only 6–7 percent of the Board's decisions are inaccurate? It appears that by using a skewed definition of what constitutes poor performance, Board management actually promotes, rather than discourages, these errors of law.

NVLSP's Recommendations

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

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

¹ Because the only BVA decisions that the Court assesses are those appealed to the Court by a VA claimant, the decisions the Court reviews are self-selected by VA claimants. They do not represent a true random sample of BVA decisionmaking. Thus, it does not necessarily follow that the Board's overall error rate is 77.7 percent. On the other hand, the Court's report cards undoubtedly indicate that the Board's overall error rate is quite high. In NVLSP's experience, many of the BVA decisions that are not appealed to the Court contain the same types of errors as those contained in the decisions that are appealed to the Court. Some veterans do not appeal these flawed decisions because after years of pursuing their claim, they simply give up.

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

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

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

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

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

This recommendation may not be necessary if Congress adopts the first recommendation. But if Congress does not embrace the ALJ system for the BVA, it should at least require Board management to make publicly available the details of the system it employs for evaluating and rewarding the performance of VLJs and the results of the evaluation as applied to individual VLJs. When the evaluation system employed by Board management results in the conclusion that 93–94 percent of all Board decisions are accurate, it is plain that the evaluation system suffers from serious defects. Oversight of this system requires that it be made publicly available and reported to Congress.

Contributor #2 to the Hamster Wheel: *Best and Mahl*

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

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

- after prosecuting a VA claim for benefits for 3½ years, the veteran receives a decision from the Board of Veterans' Appeals denying his claim;
- the veteran appeals the Board's decision within 120 days to the CAVC, and files a legal brief contending that the Board made a number of different legal errors in denying the claim. In response, the VA files a legal brief arguing that each of the VA actions about which the veteran complains are perfectly legal;
- then, 4½ years after the claim was filed, the Central Legal Staff of the Court completes a screening memorandum and sends the appeal to a single judge of the CAVC. Five years after the claim was filed, the single judge issues a decision resolving only one of the many different alleged errors briefed by the parties. The single judge issues a written decision that states that: (a) the Board erred in one of the respects discussed in the veteran's legal briefs; (b) the

Board's decision is vacated and remanded for the Board to correct the one error and issue a new decision; (c) there is no need for the Court to resolve the other alleged legal errors that have been fully briefed by the parties because the veteran can continue to raise these alleged errors before the VA on remand;

- on remand, the Board ensures that the one legal error identified by the CAVC is corrected, perhaps after a further remand to the regional office. But not surprisingly, the Board does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was before the CAVC. Six years after the claim was filed, the Board denies the claim again;
- 120 days after the new Board denial, the veteran appeals the Board's new decision to the CAVC, raising the same unresolved legal errors he previously briefed to the CAVC;
- the Hamster Wheel keeps churning . . .

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

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

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

If such a Board decision is appealed to the CAVC, Congress has authorized the Court to decide if the Board's weighing of the evidence was "clearly erroneous." But the Court interprets the phrase "clearly erroneous" very narrowly. The Court will reverse the Board's finding on the ground that it is "clearly erroneous" and order the VA to grant benefits in only the most extreme of circumstances. As the CAVC stated in one of its precedential decisions: "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a 5-week-old, unrefrigerated dead fish. . . . To be clearly erroneous, then, the [decision being appealed] must be dead wrong. . . ." *Booton v. Brown*, 8 Vet.App. 368, 372 (1995) (quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

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

C. Injustice and Inefficiency Due to the Lack of Class Action Authority

Another reason for the longstanding delays and inefficiency in the VA adjudication system derives from the fact that Federal courts do not currently have clear authority to certify a veteran's lawsuit as a class action. When Congress enacted the Veterans' Judicial Review Act (VJRA) in 1988, it inadvertently erected a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. *See, e.g., Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989); *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or veterans organization to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction, Congress failed to address clearly the authority of the CAVC and the Federal Circuit to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (*see Lefkowitz v. Derwinski*, 1 Vet.App. 439 (1991)), and the Federal Circuit has indicated the same. *See Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

As we illustrate below, the benefit of class actions in litigation against the government is that they conserve the resources of the government and the courts and help ensure that the government treats all similarly situated individuals in the same way.

Class actions are typically used to resolve efficiently a legal issue that affects a large number of similarly situated individuals. There are literally hundreds of individual VA rules and policies that affect the entitlement to VA benefits for a large number of VA claimants. From time to time, a VA claimant will file an appeal at the CAVC or the Federal Circuit that challenges the legality of one of these rules or policies. For example, a few of the Vietnam veterans who served off the coast of Vietnam appealed their claims all the way to the CAVC to challenge the VA rule limiting the statutory presumption of Agent Orange exposure to only those who set foot on the land mass of Vietnam. Another veteran filed suit at the CAVC to challenge the 2007 VA policy requiring the Compensation & Pension Service to conduct a clandestine review (i.e., without notice to the claimant) of all RO decisions granting a large amount of benefits (but not RO decisions denying a large amount of benefits) and requiring the ROs to amend their decisions if a Compensation & Pension Service official (before whom the claimant had no right to appear) disagreed with the RO decision granting benefits.

Without the benefit of a class action, each veteran adversely affected by the challenged rule or policy must individually take steps like filing a timely notice of disagreement, VA Form 9, and notice of appeal to the CAVC in order to keep their claim alive until a Federal court issues a final decision on the legality of the VA rule or policy. Each of these actions requires the VA or the CAVC to expend substantial resources to process and readjudicate the claims. This piecemeal adjudication of claims unnecessarily consumes the resources of the government, the courts, the veterans, and their representatives.

With a class action, however, the court that has jurisdiction over the challenge to a VA rule or policy could certify the case as a class action and order a moratorium on all VA and judicial adjudication of the claims of similarly situated veterans. Then, after the court's decision becomes final, the court would have authority to end the moratorium and ensure that all similarly situated veterans are granted the relief, if any, obtained by the veteran who filed the lawsuit. The end result is that thousands of VA and judicial work hours are saved.

In addition, without the benefit of a class action, many similarly situated VA claimants will never receive the benefits obtained by the veteran who appealed to the CAVC or the Federal Circuit, if the veteran is ultimately successful in convincing the court that the VA rule or policy is illegal. That is because by the time the court issues a final decision, many similarly situated VA claimants will have already given up. They will not have filed a timely notice of disagreement, VA Form 9, or notice of appeal to the CAVC. In other words, the VA denial of their claim would have become final before the court issued its final decision. And unless the courts are provided class action authority, no law requires the VA to reopen the finally decided cases of similarly situated veterans for the purpose of granting them the benefits that the successful litigant ultimately obtained as a result of the court's final decision.

Congress should enact legislative to provide the CAVC and Federal Circuit with class action authority in order to conserve the limited resources of the VA and the courts, and to ensure that similarly situated veterans receive the VA benefits to which they are entitled.

That completes my testimony. I would be pleased to answer any questions the Members of the Subcommittee may have.



**Prepared Statement of Richard Paul Cohen,
Executive Director, National Organization of Veterans' Advocates, Inc.**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc. ("NOVA") concerning the topic entitled "Examining Appellate Processes and their Impact on Veterans." NOVA also testified, on February 11, 2009, before the Senate Committee on Veterans' Affairs, on the problems in the VA claim adjudication process.

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

Because of space constraints, the concerns and suggestions in this written testimony represent some but not all of NOVA's observations and suggestions. This testimony has been approved by NOVA's Board of Directors, and represents the shared experiences of NOVA's members, as well as my own experience in representing veterans for the past 16 years.

A. Overview of the Department of Veterans Affairs ("VA") Appeals Process

1. The Entire Process is Affected by Regional Office ("RO") Functioning

The foundation of the VA's benefits system is a "strongly and uniquely pro-claimant" and "non-adversarial" approach to deciding claims.¹ Accordingly, the VA, the veteran, and the veteran's representative are all meant to share the same goal: making sure veterans and their dependents receive the VA benefits to which they are entitled. Cognizant of this shared goal, it is important to remember that these adjudicatory bodies—the 57 VA Regional Offices ("RO"), the Board of Veterans' Appeals ("BVA"), and the U.S. Court of Appeals for Veterans Claims ("CAVC")—do not exist in a vacuum. CAVC functioning is dependent upon the quality of BVA's decisionmaking. Similarly, the BVA's decisionmaking efficiency and quality are directly related to the RO's claim development and quality of adjudication.

All veterans' claims are initially adjudicated at the RO level. From the moment the veteran files a notice of disagreement ("NOD") in response to an adverse rating decision, unacceptable delays ensue. As noted in BVA's 2008 Annual Report, it takes the VA an average of 218 days to issue a Statement of the Case ("SOC") in response to a veteran's NOD.² If the veteran disagrees with the SOC, the veteran can continue the appeal to the BVA, and wait untrained in and unaware of CAVC jurisprudence, and the low quality of their decisions reflects this ignorance. In addition, some of the Decision Review Officers ("DROs"), who serve as the first line of appeal adjudicators at the ROs, ignore their duty [as set forth in the VA Adjudication Procedures Manual, M21-MR, Part 1, Chapter 5, section C, pp. 5-C-3, 5-C-15] to hold informal conferences, which are intended to operate as an important time-saving opportunity to narrow issues and resolve appeals.

Despite the unreasonable time VA currently takes to adjudicate claims at the RO level, the vast majority of appeals arrive at the BVA inadequately developed and/or improperly decided. In 2008, 37 percent were remanded by BVA to the RO for re-adjudication. The quality of BVA decisionmaking is still poor, and the numbers BVA provides concerning the quality of its decisions are misleading at best. A much more accurate assessment of the quality of BVA's work can be ascertained by analyzing the statistics maintained by the CAVC. These numbers show only 20 percent of BVA's denials are affirmed, and 60 percent are remanded or reversed due to BVA errors.³

¹*Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

²Department of Veterans Affairs FY 2008 Performance and Accountability Report, p.119 located at <http://www.va.gov/budget/report/2008/index.htm> and Report of the Chairman, Board of Veterans' Appeals, Fiscal Year 2008, p.19, average elapsed time from NOD receipt until issuance of SOC.

³See CAVC Annual Report, FY 2008, subtracting CAVC's extraordinary relief decisions from total merits decisions and dividing that sum into the decisions affirmed results in a 20 percent affirmance rate as contrasted with an over 60 percent remand or reverse rate for BVA errors. The remainder are affirmed in part, and/or reversed/vacated/remanded in part. Also see, BVA report for the period 10/01/2007 to 8/26/2008 showing 604 CAVC affirmances out of 3106 appeals.

2. Although RO Problems are Compounded at BVA Level, BVA Serves a Useful Purpose

Delays and poor decisionmaking aside, BVA's role is useful and important to the functioning of the Veterans Benefits Administration ("VBA") in two key respects. First, by statute, 38 U.S.C. § 7104(a), BVA provides a unique opportunity for a *de novo* review of an appealed claim "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." Additionally, because BVA is the highest appellate body within the VA, it acts as a buffer between the 57 ROs and the CAVC. Thus, without the BVA's intermediary role in reviewing and re-adjudicating errors prior to court appeals, the CAVC could feasibly face a 1,000-percent increase in its caseload from a little over 4,000 newly filed appeals each year to over 40,000.⁴

3. Some of CAVC's Delays Are Caused by Its Failure to Decide All Issues Raised

The CAVC is one of the busiest Federal appellate courts with an incredibly challenging caseload, as evidenced by the more than 6,000 cases inventoried in 2007.⁵ In 2008, because of the continuous filing of over 4,000 new appeals, it took, on average, 446 days from the initial filing to the ultimate disposition of the appeal.⁶

NOVA's members can attest to the frustration of veterans whose dispositive statutory arguments have been ignored by a court decision focused solely upon the BVA failure to explain its decision adequately or focused upon the RO's failure to provide proper notification prior to issuing a rating decision. Not only does such a narrowly-constructed remand add more delays to both the CAVC's and the VA's caseloads, but it also ensures a second, third, and even fourth "hamster-wheel" of never-ending remands leaves all parties—the CAVC,⁷ the veteran's attorney, and most importantly, the veteran—wholly disgusted, dismayed, and disenchanted with the very process meant to assist disabled veterans.

4. The United States Court of Appeals for the Federal Circuit Provides a Valuable Review Function and Helps Develop VA Law

Contrary to some criticisms of the Federal Circuit's role, that appellate court has taken the lead in developing and enforcing veterans' law when the CAVC has declined to do so. An important example of development and enforcement includes the area of claim reopening where the Federal Circuit reversed a CAVC decision which adopted a standard imposing an excessive burden on veterans. *Hodge*, 155 F.3d at 1483. An additional example concerns requests for total disability based on unemployability. The Federal Circuit held that the VA must consider total disability based on unemployability where a veteran submits a claim for benefits at the highest rating possible and where there is evidence of unemployability, even if the veteran had not specifically requested a finding of unemployability in his original claim. *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). The Federal Circuit also provides an essential function by reviewing CAVC decisions in a similar manner in which the CAVC reviews BVA decisions. A recent Federal Circuit decision which clarified the VA's duty to assist shows the importance of the Federal Circuit's role. *Moore v. Shinseki*, ___ F.3d. ___ (Fed. Cir. 2009), decided February 10, 2009.

B. Specific Recommendations to Improve the Timeliness and Quality of Appeals

1. Starting with the veteran's first contact with the VA, the system must be easy to use. Today, a veteran must complete a 16-page form (VA form 21-526) to apply for benefits. This could be condensed to a one-page document akin to the report-of-injury forms many States use in the workers' compensation system. The new claim form should also provide space for a treating doctor to certify that the present disability is likely related to active military service (another procedure similar to that utilized in the workers' compensation system).

⁴CAVC Annual Report, FY 2008, at www.vetapp.uscourts.gov/documents/Annual_Report_-_2008.pdf; Report of the Chairman, Board of Veterans' Appeals, FY 2008, p.18; cases received at BVA at www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf.

⁵Chief Judge William P. Greene Testimony to Senate Committee on Veterans' Affairs, pp.1-2 (11/7/07).

⁶See footnote 5.

⁷*Blackwell v. Shinseki*, No. 07-2948, decided April 20, 2009, unpublished slip opinion, p.4 "the Court notes that it is extremely troubled by the length of time (10 years) and number of remands (four) involved in this case."

2. Additionally, the system must be redesigned to allow ill and impaired veterans to file claims, participate in hearings, and review claim files without the need to travel long distances to participate in the adjudication of their claims. The present system consists of only 57 Regional Offices nationwide. A user-friendly system would disperse most of the functions of the present Regional Offices to locations in or in close proximity to each VA Hospital and Vet Center, while centralized offices in each State would house the rating boards.
3. It is unlikely that the VA will be able to realize improvements in RO and BVA decisionmaking speed and accuracy without creating a system based on a true partnership between the VA, the claimant, and the claimant's representative. Congress should encourage this partnership by amending 38 U.S.C. § 5103 to require the VA to provide meaningful, claim-specific, pre-adjudicatory notice of evidence needed to grant a veteran's claim. In addition, Congress should add teeth to this requirement by legislating that VA's failure to provide such notice or assistance is presumed to prejudice the veteran, unless the VA demonstrates by clear and convincing evidence that there was no prejudice to the veteran.
4. By the increased use of carefully-crafted presumptions, significant time could be saved in adjudicating claims and granting benefits. Congress should pass legislation to clarify and expand 38 U.S.C. § 1154(b) and to modify 38 U.S.C. § 116(a)(1)(A). Section 1154(b) should be amended to extend the combat veteran's presumption to all veterans who served on active duty in a theater of combat operations, as proposed by H.R. 952. Additionally, the presumption of service incurrence should be broadened to include a presumption of a medical nexus, thus eliminating this time-consuming requirement for combat veterans. Then, the rating board would be able to focus on the severity of the veteran's symptoms instead of getting bogged down in the questions of whether the combat veteran can provide details of an in-service combat-related stressor, and whether that stressor is related to the veteran's Posttraumatic Stress Disorder ("PTSD"). The presumption of exposure to Agent Orange in Section 116 should be expanded, as proposed by H.R. 2254, to include those who served in the territorial waters of Vietnam or were involved in flying in supplies, including herbicides.
5. In addition, Congress should amend the benefit-of-the-doubt rule in 38 U.S.C. § 5107(b) to provide the veteran with a rule of liberality which would allow evidence favorable to the veteran to prevail unless there is clear and convincing evidence to the contrary. This would eliminate many adverse decisions based on VA's perception that a mere preponderance of the evidence is against the claim. Such a liberality rule would tend to ensure that meritorious claims are approved in much the same way that the rebuttable presumption of innocence in criminal cases tends to ensure that no innocent person is convicted of a crime.
6. For the VA benefits system to function well, the criteria for evaluating disabilities should be updated. With few exceptions, VA adjudicators currently apply the same Diagnostic Code criteria which have been in place since 1945. This archaic rating system is difficult for rating specialists to apply. Further, it is so outdated, it often does not comport with today's veteran's disabling medical condition or its effects on the veteran's ability to work or live. An overhaul of the entire Schedule for Rating Disabilities in 38 C.F.R. Part 4 is long overdue. Being mindful of the increasing number of veterans whose lives are a living hell because of residuals of PTSD or TBI, Congress should build on the foundation laid in Section 213 of The Veterans' Benefits Improvement Act of 2008 and should enact legislation to rewrite the Schedule for Rating Disabilities to compensate veterans for loss of quality of life, in addition to loss of earning capacity.
7. Veterans must be granted the same rights of representation granted to all citizens. Veterans are still the only class of citizens in this country who do not have the option to hire a lawyer for assistance from the very beginning of the claim adjudication process, the filing of a claim. Moreover, those who represent veterans should not be looked upon as having interests opposed to the VA's central mission of providing proper benefits to veterans and their families. It therefore follows that the RO's decision unit should partner with the claimant's representative and use informal conferences to speed claim development and to narrow the issues to be decided.
8. Congress should amend 38 U.S.C. § 7105 to provide that the veteran must file only one request for appeal. Presently, veterans are first required to file a notice of disagreement followed by an appeal to BVA. It saves time to transfer the appeal directly to BVA, without further pleadings, unless the veteran re-

quests a conference, hearing, or review by a Decision Review Officer at the RO.

9. To ensure efficient, convenient, timely, and proper appellate review at the administrative level, BVA should be made independent from the VBA. It should function as a separate Board of Appeals with independent Federal Administrative Law Judges who are housed in dedicated hearing offices throughout each State, thus making it easier for veterans to have timely in-person hearings. These Veterans Law Judges should be reconfigured into a corps of truly independent and well trained Federal Administrative Law Judges.
10. NOVA's experience confirms the findings in the 2005 report of the Office of Inspector General that the present work credit system is providing a disincentive to properly decide claims. Section 226 of The Veterans' Benefits Improvement Act of 2008 is a testament to Congress' realization that the system should be replaced. At present, the VA's work credit system incentivizes VA adjudicators at the RO to issue unnecessary letters and/or deny claims, and Board members to deny or remand claims. This is so because these actions (denials, remands, and VA form letters) take less time and require no supervisory approval, thus allowing the VA employee to receive work credit faster, and more total work credits. In contrast, to grant a veteran's claim requires more work and more time, and supervisory approval. Revising the VA's work credit system to remove these disincentives is integral to the overall improvement of the VBA's appeals process. In addition, it is essential that VA employees be repeatedly and adequately trained and supervised.
11. Appeals from the Board should go to the CAVC and then to the Federal Circuit. Two changes to the operation of the CAVC would help veterans significantly. First, Congress should amend 38 U.S.C. § 7252 to grant the CAVC class action jurisdiction to remedy situations which affect a broad class of veterans. Second, Section 7252 should be amended to require the CAVC to resolve all issues which have been reasonably raised on appeal. Constitutional claims would be exempted if the appeals could be resolved without reaching the constitutional claim.

**Prepared Statement of Hon. James P. Terry, Chairman,
Board of Veterans' Appeals, U.S. Department of Veterans Affairs**

Good morning, Chairman Hall, Ranking Member Lamborn, and Members of the Subcommittee. It is a pleasure to be here today on behalf of the Board of Veterans' Appeals (Board) to provide information to you and the Members of the Committee on the important issues outlined in your April 29th letter of invitation. Those major subject areas include the issues surrounding the Department of Veterans Affairs (VA) appellate processes as well as that of the Court of Appeals for Veterans' Claims (CAVC or Court), the efficiency and effectiveness of these processes, as well as how they impact appeals outcomes for Veterans.

Turning to the first area, in our continuing attempt to improve the appellate process, we have worked to develop and implement several targeted approaches. These include increased staffing, improved training, enhanced performance goals, and effective communication. Key to meeting our staffing needs has been the critical assistance provided by Congress and the Administration through additional funding for staff hiring over the past 3 years, which has greatly enhanced the Board's productivity. This authorization has not only enabled the growth of our attorney staff, but has led to a commensurate increase in the professionalism of our administrative staff. In order to help new staff achieve their full potential, the Board has a comprehensive training program. Each new attorney is mentored by one of the Board's many experienced attorneys, and substantive legal, medical, and decision-writing training is thus provided for all attorneys in critical areas related to appeals adjudication. Along with training, the Board's performance goals further enhance our efficiency in decisionmaking. Each of our Veterans Law Judges and attorneys are expected to meet specific minimum standards of production and quality each year, and many usually far exceed these goals.

The Board continues to experience improved productivity from our attorneys and judges, and, in this Fiscal Year, we expect to issue more than the 43,757 decisions we issued last year, which was more than 3,000 beyond the number of cases received and made a significant dent in the case backlog. We take advantage of every communication opportunity to reach out to those who share our responsibility to deliver speedy and accurate appellate decisions to our Veterans' community. We have worked with your staff to clarify through legislation, such as that passed last Octo-

ber, the best approach to notifying Veterans of the information and evidence that is expected of them to help substantiate their claims. We are working with the Regional Offices (ROs) through our Travel Board trips and videoconferencing to assist in the training of rating specialists and Decision Review Officers. We have regular meetings with other VA staff for purposes of sharing ideas on how to mitigate delays in the processing of claims and appeals.

The Board has fully supported VA's goal of increasing the use of paperless claims and appeals processing, and in Fiscal Year 2008 completed its first paperless appeal. As VA expands the paperless processing of Benefit Delivery at Discharge (BDD) claims, the Board is actively preparing to provide timely service to these claims if they mature into appeals. We are planning to train additional judges and attorneys to handle paperless appeals. In addition, the Board supports the administration's development of a Joint Virtual Lifetime Electronic Record, which will also speed claims processing with more timely and complete access to Veterans' medical records.

In addressing the effectiveness and the efficiency of the Board's appeals process, we must remember that the system of adjudicating claims and appeals is designed to give the benefit of the doubt to all Veterans. This means that times allocated for submission of documents and moving to the next step in the claims and appeals process are elongated for the benefit of the Veteran. As a consequence of recent changes in the law that provide for increased opportunities for attorney representation at the Regional Office level, the time may be right for shortening certain statutory and regulatory response periods for purposes of expediting the processing of claims and appeals without taking away rights or protections from Veterans. This is at the heart of the Expedited Claims Adjudication Initiative (ECA), which I will address in a moment.

Another change the Subcommittee may want to consider is allowing the Board to determine whether a video-conference hearing vice an in-person Travel Board hearing could expedite resolution of Veterans' appeals in appropriate circumstances. The success rate for Veterans who choose video-conference hearings is exactly the same as those who choose an in-person hearing before the Board. Changing the law to allow the Board to determine which hearing method would be most expeditious, subject to an exception for good cause shown, would greatly enhance the use of the Board's resources and expedite the processing of appeals without affecting veterans' rights. More importantly, this change would benefit veterans who live in areas of the country where the volume of hearing requests does not warrant Board travel to a Regional Office to conduct hearings more than once or twice a year by enabling them to receive much more timely hearings. For the Board, not only could travel expenses be reduced, but Veterans Law Judges would also be able to continue deciding other appeals when not conducting hearings, unlike when they are away from the office on "Travel Boards."

In responding to your query concerning our views on the appeals process at the CAVC, the volume of cases before each body is instructive. For example, the Board received more than 39,000 cases in 2008 and decided 43,757, making a significant dent in its backlog. The Court received 4,128 new cases in 2008, and decided 4,446, again making a significant impact on its backlog. Like the Department, the Court has been aided by the Committee's support for additional resources. Further, we believe that the Court can serve veterans by eliminating avoidable remands by taking due account of the rule of prejudicial error contained in 38 U.S.C. § 7261(b). This should be greatly assisted by the Supreme Court's decision in the *Simmons and Sanders* cases on that subject decided in April 2009.

As to material factual findings made by the Board, appropriate consideration should be given to the deferential clearly erroneous standard of review contained in 38 U.S.C. § 7261(a)(4), (c). While the Board is obligated, pursuant to 38 U.S.C. § 7104(d), to provide reasons or bases in support of all material findings of fact and conclusions of law in its decisions, the Court is not permitted to substitute its judgment for that of the Board as long as there is a "plausible" basis in the record for such factual determinations, even if the Court might not have reached the same factual determinations. This deferential standard of review ensures that the responsibility for making the highly technical factual determinations required in adjudicating complex disability compensation cases is not switched from the statutorily appointed fact-finder to a non-expert judicial body. When this standard of review is not properly applied, cases may be unnecessarily remanded for further amplification of the reasons and bases in support of the same decision previously reached.

Finally, I would like to update you on the Expedited Claims Adjudication Initiative (ECA). This initiative, published as a final rule in the Federal Register in November 2008, is a 2 year pilot program that began on February 2, 2009. The program offers accelerated claims and appeals processing for eligible claimants at four

select VA Regional Offices: Nashville, Seattle, Lincoln, and Philadelphia. The goal of the initiative is to determine whether VA can expedite the claims and appeals process by obtaining waivers from claimants and their representatives of the generally unused portions of certain statutory and regulatory response periods, and by pre-screening cases at the Board to determine the adequacy of the record for appellate review.

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

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

**Prepared Statement of Ronald S. Burke, Jr., Director,
Appeals Management Center, Veterans Benefits Administration,
U.S. Department of Veterans Affairs**

Chairman Hall and Members of the Subcommittee:

It is an honor to appear before you today to discuss the operations of the Veterans Benefits Administration (VBA) Appeals Management Center (AMC).

My statement today will focus on the status of the workload at the AMC and my plan for continued improvements in appellate remand processing at this facility.

The AMC's mission is to process remands from the Board of Veterans' Appeals (BVA) timely and accurately. The AMC has complete authority to develop remands, make decisions based on evidence gathered, and authorize the payment of benefits. When the AMC is unable to grant an appeal in full, it is re-certified to BVA for continuation of the appellate process.

I was detailed to the position of Director of the AMC in December 2008 and permanently appointed in February 2009. Prior to this appointment, I served as the Veterans Service Center Manager at the Winston-Salem Regional Office (RO), one of VBA's largest compensation and pension divisions, and the Baltimore RO. Before joining VA, I was a Veterans Service Officer for an accredited Veterans Service Organization.

Since my appointment as Director, I have worked closely with AMC staff and VBA leadership to establish monthly performance goals and ensure increased accountability for AMC employees through monthly performance reviews. Additionally, I have reallocated staffing resources to improve the efficiency of AMC's evidence-gathering, decisionmaking, and award-processing functions. These efforts have resulted in increased output of completed decisions, including complete grants of benefits sought on appeal, partial grants of benefits sought on appeal, and appeals re-certified to BVA.

During the first quarter of FY 2009, the AMC averaged 902 completed appeals each month. Average monthly output increased to 1,404 completed appeals during the second quarter, which represents an increase of 55.7 percent. During the month of March 2009, AMC completed a record 1,695 remanded appeals.

The AMC currently manages an inventory of 21,428 (end of April 2009) appellate claims remanded from BVA. This is a decrease of 750 pending remands since the end of December 2008. I worked with AMC staff to develop a workload management plan to improve the timeliness of decisions and better manage AMC's remand inventory. This plan outlines workflow and processes, to include specific actions performed by each team, in order to improve remand processing.

Our goal is to focus on the oldest pending remanded appeals to deliver decisions or re-certify appeals to BVA for those veterans who have been waiting the longest period of time for a decision. As a result of this emphasis, AMC's "average days to complete" has risen from 461 days at the end of FY 2008 to 567 days at the end of April 2009. This change is indicative of our emphasis on processing the oldest pending remands. I anticipate that as the oldest workload is completed, the "average days to complete" will show significant improvement toward the end of FY 2009 and into FY 2010.

Since arriving at the AMC, I have aggressively recruited and hired new claims processing employees. Ten full-time employees have been added since late December 2008, increasing the AMC's staffing level from 114 to 124 employees. Recently, I

was authorized to hire an additional 15 employees under the American Recovery and Reinvestment Act (ARRA). We are actively recruiting to fill these positions and expect these employees to be on board by the end of May 2009. We plan to utilize some of these new employees to expand telephone contact with veterans and claimants to expedite many of our development actions.

To further improve timeliness and reduce the number of pending remands, the AMC receives brokering assistance from the Huntington, Nashville, and Seattle ROs. This includes assistance in both evidence-gathering and rating. These ROs are providing short-term assistance. As the AMC's productive capacity continues to improve, I hope to reduce the level of brokering assistance needed during FY 2010.

We continue to work diligently with Chairman Terry and his staff at the Board of Veterans' Appeals to increase and improve communications between the two facilities. Frequent telephone conversations and face-to-face meetings have been beneficial and will continue to be a pivotal element in improving the appellate workload. The AMC also benefits from healthy and effective working relationships with many of the Veterans Service Organizations (VSOs). The VSOs work directly with our decisionmakers and help reduce administrative waiting time, thus reducing unnecessary delays in claims processing.

In the past 4 months, the AMC has seen a reduction in the number of remands pending and an increase in the number of remands completed monthly. Since assuming leadership of the AMC in February 2009, I have witnessed incremental improvements in processing. However, there remains much room for future improvements.

In closing, VBA has made a concentrated effort to improve appellate processing and focus on the remand workload by establishing a centralized processing center that establishes a core expertise in this area. The AMC is dedicated to timely and accurately collecting all evidence directed by BVA. Over the next year, I anticipate continued improvements.

Mr. Chairman, this concludes my statement. I will be happy to respond to any questions that you or other Members of the Subcommittee might have.

MATERIAL SUBMITTED FOR THE RECORD

Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Washington, DC.
June 19, 2009

Ronald S. Burke
Director, Appeals Management Center
Veterans Benefit Administration
U.S. Department of Veterans Affairs
810 Vermont Ave., NW
Washington, DC 20420

Dear Mr. Burke:

Thank you for testifying at the House Committee on Veterans' Affairs' Subcommittee on Disability Assistance and Memorial Affairs hearing on "Examining Appellate Processes and their Impact on Veterans," held on May 14, 2009. I would greatly appreciate if you would provide answers to the enclosed followup hearing questions by Monday, July 20, 2009.

In an effort to reduce printing costs, the Committee on Veterans' Affairs, in cooperation with the Joint Committee on Printing, is implementing some formatting changes for material for all Full Committee and Subcommittee hearings. Therefore, it would be appreciated if you could provide your answers consecutively on letter size paper, single-spaced. In addition, please restate the question in its entirety before the answer.

Due to the delay in receiving mail, please provide your response to Ms. Megan Williams by fax at (202) 225-2034. If you have any questions, please call (202) 225-3608.

Sincerely,

John J. Hall
Chairman

Questions for the Record
The Honorable John J. Hall, Chairman
Subcommittee on Disability and Memorial Affairs
House Committee on Veterans' Affairs
May 14, 2009

Examining Appellate Processes and Their Affect on Veterans

Question 1: What are the error rates for the AMC in comparison to the Regional Office national average?

Response: The systematic technical accuracy review (STAR) staff did an initial quality review of work completed by the Appeals Management Center (AMC). The review showed error trends comparable to those identified in the national quality review of related work completed by regional offices; 37 percent of AMC errors involved compliance with the Department of Veterans Affairs' (VA) duty to assist requirements and assuring complete development of a claim or appeal. This accounts for 35 percent of all errors nationally. The AMC error rate for establishing the correct effective date was 18 percent, while the national average is 10 percent. The AMC error rate for identifying and addressing all claimed issues was 4 percent, while the national average is 10 percent.

The STAR staff has not reviewed a statistically valid sample of completed claims for the AMC at this time (which is needed to establish an error rate) however, monthly reviews of AMC cases began in July 2009, which will allow a valid assessment of AMC quality and comparison to the national average in the future.

Question 2: What is the AMC grant rate?

Response: Claims submitted to the AMC for processing are resolved in several ways: a full or partial grant of benefits, withdrawal of the appeal by the claimant or representative, or completion of required development for return to the Board of Veterans' Appeals (BVA). During fiscal year (FY) 2009, the AMC fully or partially granted 35 percent of claims reviewed. The remaining 65 percent were either withdrawn by the claimant or returned to BVA for a decision.

Question 3: What is the AMC cycle time from the time a claim is received until the time it is rated and the veteran is sent notification? How does that compare to the national average for the ROs?

Response: The AMC cycle time to process remanded appeals is 504 days on average. AMC processing time is not comparable to the national average for regional office processing of the original claims decisions, as the AMC handles remanded appeals that involve additional processes and reviews. The combination of the following factors impacts AMC cycle time:

- Development of remanded claims is required to be completed in sequential order. Requested evidence must be received or all applicable time limits must have expired before proceeding with the next step.
- The appellate is provided 60 days to respond to requests for evidence and an additional 30 days are provided for followup requests.
- Requests for records not in the custody of a Federal department or agency are provided 60 days for a response. Followup requests are provided 30 additional days.
- Requests for records in the custody of a Federal department or agency are repeated until the evidence is received or it is determined that additional requests would be futile.
- Appellants are provided 60 days to respond to the supplemental statement of the case (SSOC). Evidence received after the issuance of the SSOC may require the issuance of an additional SSOC. An additional 60 days is provided for the appellant's response. Many appeals require the issuance of multiple SSOCs.
- Veterans service organizations (VSO) are provided an opportunity to review the SSOC and offer additional arguments in support of the claimant's appeal. The VSO must review the entire claim folder as well as prepare a VA Form 646, *Statement of Accredited Representative in Appealed Case*. Arguments presented by the VSO may require additional development as well as issuance of another SSOC.
- The majority of all remands require the appellant to undergo a medical examination in connection with their appeal.
- Procedural changes issued as a result of recent Court decisions must be considered on all pending remands involving similar issues.
- Many of the appeals involve older, archived records, which are difficult to obtain.

Question 4: Why did it take until October 2008 to include AMC into the STAR process? Why was STAR not required at the inception of the AMC?

Response: The Veterans Benefit Administration (VBA) decided to exclude certain types of cases from STAR review, such as brokered cases and cases from the AMC, due to limited resources and unusual workflows that created difficulties in the sampling methodology. The sampling methodology to conduct AMC STAR reviews was complicated by the fact that the AMC does not decide many of the claims that are remanded; they are sent to BVA for decision.

VBA developed the sampling criteria for the AMC in March 2008 and began reviewing a sample of 120 AMC cases. The STAR staff completed the review in October 2008 and made recommendations for establishing a statistically valid process for future reviews, which began in July 2009.

Question 5: What is the AMC ready-to-rate average for this year and last year? How long does it take the AMC to process a ready-to-rate claim? How does the AMC's ready-to-rate claim ratio compare to the rate at the Regional Offices?

Response: The Appeals Management Center handles appellate claims remanded by the Board of Veterans' Appeals. AMC obtains additional evidence requested by BVA, and the appeal is placed in ready-to-rate status for decision. Decisions resulting in a grant of benefits are processed by AMC, while unfavorable decisions are returned to BVA for further consideration. During FY 2008, AMC completed development on 74,324 remands or an average of 6,194 ready-to-rate claims per month. In FY 2009, this number increased 6.6 percent to 79,238, a monthly average of 6,603 appeals.

In June 2009, the AMC processed ready-to-rate claims in an average 19.1 days. The national average for regional offices was 14.6 days. Fiscal year to date through June, the AMC processed ready-to-rate claims in an average of 26.4 days, while the national average was 15.9 days. In fiscal year 2008, the AMC processed ready-to-rate claims in an average of 39.2 days, and the national average was 14.7 days.

The AMC is aggressively recruiting and training new claims processing employees to improve service delivery. Ten full-time employees have been added since late December 2008, increasing the AMC's staffing level from 114 to 124 employees. Recently, the AMC was authorized to hire an additional 15 employees under the American Recovery and Reinvestment Act. To further improve timeliness and reduce the number of pending remands, the AMC receives brokering assistance from the Huntington, Nashville, and Seattle regional offices. This includes assistance in both evidence-gathering and rating.

Question 6: Will the AMC participate in the VBA work credit and work management system studies required by P.L. 110-389?

Response: The Veterans Benefits Improvement Act of 2008 requires VA to conduct a study on the effectiveness of the current employee work credit and work management systems. VA contracted with the Center for Naval Analyses (CNA) to perform a review of the work credit and work management system, including the automated standardized performance elements nationwide (ASPEN) system. CNA will include data and findings from the AMC in its final assessment. The final report from CNA, due to VA on September 30, 2009, will provide details on how the AMC is being evaluated as well as results.

