

**VETERANS' DISABILITY COMPENSATION:  
FORGING A PATH FORWARD**

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**HEARING**

BEFORE THE

**COMMITTEE ON VETERANS' AFFAIRS**

**UNITED STATES SENATE**

**ONE HUNDRED ELEVENTH CONGRESS**

**FIRST SESSION**

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**JULY 29, 2009**  
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## **VETERANS' DISABILITY COMPENSATION: FORGING A PATH FORWARD**

**WEDNESDAY, JULY 29, 2009**

U.S. SENATE,  
COMMITTEE ON VETERANS' AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 9:15 a.m., in room 418, Russell Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

Present: Senators Akaka, Murray, Brown, Tester, Begich, Burr, and Johanns.

### **OPENING STATEMENT OF HON. DANIEL K. AKAKA, CHAIRMAN, U.S. SENATOR FROM HAWAII**

Chairman AKAKA. This hearing of the Senate Committee on Veterans' Affairs will come to order. This morning we continue our work on VA's disability compensation process.

Today's hearing will focus on improvements that can be made in reviewing disability compensation claims. My goal is to ensure that claims are adjudicated accurately and in a timely fashion. Everyone involved realizes that there is no quick fix to solving all the problems with disability claims, but the Committee, teaming with the Administration and those who work with veterans, intends to do all it can to improve this situation.

To bring optimal change to a process that is as complicated and important as this, we must be deliberate, focused and open to input from all who are involved in this process. It is in that spirit that we have held previous hearings and it is the backdrop of this hearing as well.

To be fair, claims processing is a complicated matter. There have been many changes to the claims processing landscape in recent years. Many of those changes have come from policies intended to make improvements piece-by-piece. Unfortunately, these piece by piece reforms have failed to produce the results veterans deserve.

While many claims processing issues are internal to VA, this Committee recognizes that solutions go beyond the VA. This is especially true for transitioning servicemembers who look to VA and DOD to help them receive the care and benefits they have earned.

The Disability Evaluation System Pilot Program is one example of VA and DOD working collaboratively to ease the transition of disabled servicemembers from military to civilian life. Today, I hope to hear from VA and DOD about the status of this program and their plans for its future.

I reiterate that our goal is to provide veterans with accurate and timely resolution to their cases. No idea is too bold. We must act quickly, yet responsibly, to rectify this situation. I, again, welcome everyone to today's hearings.

May I call on Senator Tester for any opening remarks?

**STATEMENT OF HON. JON TESTER,  
U.S. SENATOR FROM MONTANA**

Senator TESTER. Well, thank you, Mr. Chairman. I think I am going to forego my opening remarks and will make the opening remarks during the questions. So, thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Tester.

Senator Johanns, your opening statement please.

**STATEMENT OF HON. MIKE JOHANNS,  
U.S. SENATOR FROM NEVADA**

Senator JOHANNS. Mr. Chairman, I will do likewise. That is a good idea.

Chairman AKAKA. Thank you very much.

I want to welcome our principal witness from VA, the Honorable Patrick Dunne. It is good to have you, the Under Secretary for Benefits, here. He is accompanied by Thomas J. Pamperin, Deputy Director for Policy at the Compensation and Pension Service. I also want to welcome DOD's witness, Noel Koch, Deputy Under Secretary, Office of Transition Policy and Care Coordination.

I thank all of you for being here this morning. Your full testimony will, of course, appear in the record.

Admiral Dunne, will you please begin with your testimony?

**STATEMENT OF PATRICK W. DUNNE, RADM U.S. NAVY (RET.),  
UNDER SECRETARY, BENEFITS, U.S. DEPARTMENT OF VET-  
ERANS AFFAIRS; ACCOMPANIED BY THOMAS J. PAMPERIN,  
DEPUTY DIRECTOR FOR POLICY, COMPENSATION AND PEN-  
SION SERVICES, VETERANS BENEFITS ADMINISTRATION**

Admiral DUNNE. Good morning, Mr. Chairman, Members of the Committee. Thank you for the opportunity to appear today to discuss the direction of VA's Disability Compensation Program. I fully share the concerns of this Committee, veteran service organizations, and the veteran community regarding the timeliness of disability benefits claims processing.

Our mission is to deliver to veterans first-rate care and service. Where we do not meet high standards, such as with timeliness and benefits adjudication, we will find the root causes and fix them. Our leadership team is deeply committed to changing the paradigm of today's lengthy and paper-bound disability claims processing.

The number of claims completed during this fiscal year is 10 percent greater than in the same period in 2008. We have improved average days to complete on rating claims from 178 days at the end of 2008 to 161 days at the end of June. We currently have approximately 406,000 disability claims pending, which includes all disability claims received, whether pending only a few hours or significantly longer.

This inventory is dynamic rather than static. Completed claims are continuously removed from the inventory while new claims are

added. We currently average over 80,000 new rating-related claims added to the inventory each month.

Our strategic goal for completing disability claims is 125 days. We consider all disability claims pending for more than 125 days to be our claims backlog. At the end of June, 144,652 rating claims, or 35 percent of the inventory, were pending for more than 125 days.

We believe our disability claims workload is increasing largely due to our many outreach efforts. We conducted thousands of transition briefings, including pre- and post-deployment briefings for Reserve and National Guard members and briefings for military personnel stationed overseas. All separating servicemembers are encouraged to attend Transition Assistance Program briefings. We project that we will brief over 300,000 new veterans this year. We have also hired nearly 4,200 new employees since January 2007. In addition, to leverage the knowledge and experience of retired claims processors, we hired more than 100 recent retirees as rehired annuitants to assist in completing rating decisions and train and mentor our new employees.

Last September, we partnered with Booz Allen Hamilton to conduct a review of the claim development process to divide recommendations on cycle time reduction. On July 20, we began a pilot at the Little Rock Regional Office to implement those recommendations.

Our core IT modernization strategy includes implementing a business model for claims processing that is less reliant on the acquisition and storage of paper documents. Our comprehensive plan will employ imaging and computable data as well as enhanced electronic workflow capabilities, enterprise content and correspondence management services, and integration with our modernized payment system. We are also exploring the utility of business-rules-engine software for both workflow management and improved decisionmaking.

We developed strategic partnerships with two recognized experts in the field of organizational transformation. First, MITRE Corporation is actively providing strategic program management support as well as support for the overall paperless initiative. Booz Allen was recently engaged to provide business transformation services as part of a pilot project for business process reengineering, organizational change management, workforce planning, and organizational learning strategies. The Providence Regional Office will serve as our business transformation lab—the focal point for convergence of process reengineering and technology.

We continue to work collaboratively with DOD to enhance the transition of servicemembers to successful civilian lives with programs such as Benefits Delivery at Discharge and Quick Start for servicemembers separating or demobilizing from the active force, and the joint Disability Evaluation System, or DES, Pilot. We believe the revised DES Pilot is a better process for servicemembers. It has been faster and more transparent than the traditional process and has reduced appellate activity. The pilot is now the standard process at 21 military treatment facilities, accounting for almost 30 percent of all servicemembers going through the DES process.

As of July 12th, over 3,000 servicemembers enrolled in the pilot and 560 completed the process. Those servicemembers qualified for veteran benefits are informed of entitlements from both departments when they are notified of the Physical Evaluation Board, or PEB's, decision.

Mr. Chairman, this concludes my testimony, and I will be happy to respond to any questions.

[The prepared statement of Admiral Dunne follows:]

PREPARED STATEMENT OF PATRICK W. DUNNE, UNDER SECRETARY FOR BENEFITS,  
VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

Chairman Akaka, Ranking Member Burr, and Members of the Committee: Thank you for providing me the opportunity to appear before you today to discuss the direction of the Veterans Benefits Administration's (VBA) disability compensation program. Accompanying me today is Mr. Tom Pamperin, VBA's Deputy Director of Compensation and Pension Service, Policy and Procedures. My testimony will focus on the challenges VBA faces processing claims and what we are doing to overcome those challenges. I will also discuss the status and future of the Disability Evaluation System (DES) Pilot.

#### ADDRESSING BACKLOG

I fully share the concerns of this Committee, Veterans Service Organizations, and the Veteran community regarding the timeliness of disability benefit claims processing. Our mission at VA is to deliver to Veterans—our clients—first rate care and services. Where we do not meet high standards, as is case with timeliness of benefit adjudication, we will find the root causes and address the issue. Our leadership team is deeply committed to changing the paradigm of today's lengthy and paper-bound disability claims processing.

VBA is completing more claims than ever before. The number of claims completed this fiscal year is 10 percent greater than the same period in fiscal year 2008. We currently have approximately 406,000 disability claims pending in our inventory, which includes all disability claims received, whether pending only a few hours or significantly longer. This entire inventory of pending disability claims is frequently—and incorrectly—referred to as the “claims backlog.” The inventory is dynamic rather than static. Completed claims are continuously removed from the inventory while new claims are added.

VBA's pending inventory of claims is bundled into two categories: rating workload and non-rating workload. The rating workload is composed of original and reopened claims for disability compensation and/or pension. This workload is how VBA traditionally measures its claims inventory. We consider these claims the core of our claims processing activity because they represent Veterans awaiting an entitlement decision for service-connected disability compensation or non-service-connected pension benefits. At the end of June 2009, VBA's rating-related inventory was 406,056 claims. Of these, 270,863, or 66.7 percent, were reopened claims, which include claims for increased benefits, newly claimed disabilities for Veterans who have previously filed claims, or additional evidence submitted to reopen a previously denied claim.

Non-rating workload includes dependency adjustments on active compensation awards, income adjustments on pension awards, and eligibility determinations for ancillary benefits like automobile grants, clothing allowances, and special housing grants. At the end of June 2009, the non-rating inventory was 219,124 claims. This portion of VBA's workload varies during the year due to the cyclical nature of the income and eligibility verification processes associated with pension workload. During the second and third quarter of the fiscal year, inventory typically fluctuates by as much as 50,000 claims.

The steady and sizable increase in workload is a significant challenge in improving service delivery of compensation and pension benefits. During fiscal year 2008, VBA received 888,000 rating claims and 755,000 non-rating claims for a total of more than 1.6 million. In the third quarter ending June 30, we completed over a quarter of a million rating-related claims and nearly 210,000 non-rating claims. We currently average over 80,000 new rating-related claims added to the inventory each month, and we project we will receive nearly one million new disability claims this year. Rating-related claims received are up 14.5 percent compared to the same period in fiscal year 2008. Despite a 10.3 percent increase in claims completed, the



rating-related inventory has increased from 379,842 at the end of fiscal year 2008 to 406,056 at the end of June 2009.

Although the inventory of rating claims has increased by approximately 26,000 this year, we have made progress in improving the timeliness of our decisions. VBA has improved average days to complete on rating claims from 178.9 days at the end of fiscal year 2008 to 161.3 days at the end of June 2009. We have made similar progress in improving non-rating timeliness from 109.4 days at the end of fiscal year 2008 to 88.9 days at the end of June 2009. The combined fiscal year 2009 timeliness for all rating and non-rating claims completed through June 2009 is 129 days.

VBA's strategic goal for completing disability claims is 125 days. We therefore consider all disability claims pending for more than 125 days to be our "claims backlog." At the end of June 2009, 144,652 rating claims, or 35.6 percent of the inventory, were pending for more than 125 days.

We acknowledge that our disability claims workload is increasing, which we believe is largely due to VBA's many outreach efforts. Our disability claims receipts this year are up 13 percent over the same period last year. We have conducted thousands of transition briefings, including pre- and post-deployment briefings for Reserve and National Guard members and briefings for military personnel stationed overseas. All separating servicemembers are encouraged to attend Transition Assistance Program (TAP) briefings to learn about the benefits available to them and receive assistance in applying for their benefits. We project we will brief over 300,000 new Veterans this year.

Serving our seriously injured servicemembers returning from the current conflicts remains our top priority. The average time to complete these claims is 45 days. All of these efforts are a part of a dynamic shift to an organization that advocates and reaches out to Veterans to inform them of their benefits and to assist them in applying for them.

#### IMPROVEMENT INITIATIVES

VBA is aggressively hiring across the Nation, and we have hired nearly 4,200 new employees since January 2007. Because it takes at least 2 years for a new employee to become fully trained in all aspects of claims processing, we are only now beginning to see the full impact of those employees hired at the outset of our hiring initiative. We completed 10.3 percent more claims through June 2009 than we completed in the same period during 2008, and 19.6 percent more than the same period in 2007. Our newly hired workforce will continue to progress in delivering more decisions to Veterans.

In order to leverage the knowledge and experience of recently retired claims processors, VBA hired more than 100 recent retirees as rehired annuitants. Rehired annuitants assist in completing rating decisions and train and mentor new employees.

In September 2008, VBA partnered with Booz Allen Hamilton (BAH) to conduct a review of the rating-related claim development process to provide recommendations to improve the process with an emphasis on cycle time reduction. During its study, BAH interviewed VBA leadership, conducted site visits to regional offices, and met with front-line employees. At the conclusion of its review, BAH recommended VBA apply Lean Six Sigma production practices to claims processing to facilitate claims movement, thereby reducing processing time. On July 20, we began a pilot to implement BAH's recommendations.

#### INFORMATION TECHNOLOGY MODERNIZATION

VBA is taking additional initiatives to improve claims processing. We are modernizing our information technology by investing in the migration of compensation and pension claims processing to a paperless environment. We have successfully used imaging technology and computable data to support claims processing in our Insurance, Education, and Loan Guaranty programs for many years.

Our core information technology modernization strategy includes implementing a business model for compensation and pension claims processing that is less reliant on the acquisition and storage of paper documents. Our comprehensive plan, the Paperless Delivery of Veterans Benefits Initiative, will employ a variety of enhanced technologies to support end-to-end claims processing.

In addition to imaging and computable data, we will incorporate enhanced electronic workflow capabilities, enterprise content and correspondence management services, and integration with our modernized payment system. We are also exploring the utility of business-rules-engine software for both workflow management and improved decisionmaking by claims processing personnel.

## BUSINESS TRANSFORMATION EFFORTS

While the use of advanced technologies is critical to our service-delivery strategy, we must also address our business processes. To that end, VBA developed strategic partnerships with two recognized experts in the field of organizational transformation. MITRE Corporation, a manager of federally Funded Research and Development Centers, has been supporting VBA on the VETSNET project since 2006. MITRE is now actively providing strategic program management support, as well as support for the overall Paperless Initiative, addressing multiple areas of focus.

Additionally, BAH was recently engaged by VBA to provide business transformation services. BAH assists VBA in business process re-engineering, organizational change management, workforce planning, and organizational learning strategies to ensure that VBA positions itself to take best advantage of the technology solutions being developed.

Our comprehensive transformation strategy also includes designating the VA Regional Office in Providence, Rhode Island, to serve as our Business Transformation Lab. The Business Transformation Lab will serve as the focal point for convergence of process re-engineering and technology. This designation assures that VBA will optimize service delivery and then develop and deploy best practices throughout the organization.

We recognize that technology is not the sole solution for our claims-processing concerns; however, it is the hallmark of a forward-looking organization. Our paperless strategy combines a business-focused transformation and re-engineering effort with enhanced technologies, to provide an overarching vision for improving service delivery to our Nation's Veterans.

## DISABILITY EVALUATION SYSTEM (DES) PILOT

The Departments of Veterans Affairs and Defense continue to work collaboratively to enhance the transition of servicemembers to successful civilian lives. We work together through the Benefit Delivery at Discharge (BDD) and Quick Start programs for servicemembers separating or demobilizing from the active force, the joint DES pilot, and the development of the combat-related catastrophically disabled Expedited DES process.

Since March 2007, the two Departments have engaged in unprecedented joint efforts to resolve concerns about the process through which servicemembers are released from active duty due to disability. Following detailed collaborative analysis, the two Departments deployed a revised DES process in November 2007 at the three Military Treatment Facilities (MTFs) in the National Capital Region. VA believes the revised pilot is a better process for servicemembers and our respective Departments.

VA is involved at the earliest stages of the process by interviewing servicemembers and taking claims for both the potentially unfitting and other potentially qualifying disabilities. Examinations are conducted in accordance with established VA protocols for all potentially unfitting and claimed conditions. If the Military Department's Physical Evaluation Board (PEB) determines the member to be unfit, VA prepares a single rating that is binding on both Departments.

The revised pilot process has been faster and more transparent than the traditional process and has reduced appellate activity. Based on findings to date, the two Departments are expanding the pilot. The pilot is now the standard process at 21 MTFs, accounting for almost 30 percent of all servicemembers going through the DES process.

As of July 12, 2009, over 3,000 servicemembers enrolled in the pilot, and 560 servicemembers completed the process. The servicemembers who completed the process includes 179 retained by the Services, 230 retired, and 57 separated with severance pay. Separated and retired servicemembers are informed of entitlements from both Departments when they are notified of the PEB's decision.

## CONCLUSION

VA's goal is to transform to a 21st century organization that is Veteran-centric, results-driven, and forward-looking. We have initiated a plan to address this issue in a more aggressive fashion, which includes development of a paperless benefits delivery system that will integrate the latest technologies with redesigned business processes. We are examining automated decision-support programs to enhance decisionmaking and evidence gathering, as well as streamline the claims workflow. We look forward to working with Congress, the Department of Defense, and the Department of Homeland Security in the continuing transformation of the DES to meet the needs of 21st century Veterans and their families.

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

Chairman AKAKA. Thank you very much.

Mr. Koch, will you please proceed with your statement?

Mr. KOCH. Good morning, Mr. Chairman. I submitted written testimony for the record.

Chairman AKAKA. Thank you. It will be included.

Mr. KOCH. Thank you.

**STATEMENT OF NOEL KOCH, DEPUTY UNDER SECRETARY, OFFICE OF TRANSITION POLICY AND CARE COORDINATION, U.S. DEPARTMENT OF DEFENSE**

Mr. KOCH. Mr. Chairman, distinguished Members of the Committee, this is my first appearance before you in my present capacity, and I am privileged to have the opportunity to be with you this morning. I am honored to share with you our profound responsibility for the future well-being of our wounded, ill, and injured servicemembers, veterans and their families.

My position as Deputy Under Secretary for Transition Policy and Care Coordination was established in December 2008, and I am the first person to hold this position formally. As you know, it represents not only a priority of the Secretary of Defense, but of the President and the First Lady as well, so I am mindful of the potential cost of failing in this work that has been assigned to me.

I am responsible for Lines of Action 1, 3, and 8; Disability Evaluation System Reform; case management and benefits—the latter including management and monitoring the DOD side of the Benefits Executive Council, which I co-chair with my colleague, Admiral Dunne.

Immediately at issue before us today is the progress of the Disability Evaluation System Pilot, also called the DES Pilot. As you know, this was a spearhead of the effort to expedite—simply, smoothly and equitably the transition of our wounded, ill, and injured warriors to the next phase of their lives—from healing and rehabilitation back to active duty or to veterans status. This undertaking was prompted in the first instance by the events at Walter Reed Army Medical Center, but it had deeper antecedents in the experience of duplicative examination procedures, lost records, delayed medical care, and protracted efforts to provide to your servicemembers the attention they earned, deserved, and, in many cases, desperately needed to assist in recovering from the sacrifices they made on the battlefield.

The DES Pilot is precedent to a more extensive effort to make permeable the barriers between DOD and the Department of Veterans Affairs through the DES evolution. I can report to you that the DES Pilot has exceeded its expectations as a learning process and as an expedient to serve those who have been engaged in it.

As of the 12th of this month, some 2,500 servicemembers were enrolled in the pilot at 21 medical treatment facilities; 466 servicemembers completed the DES Pilot—returning to duty, separating from service, or retiring. The average time to completion of the DES Pilot has been 275 days—exceeding the goal set for the pilot and exceeding the legacy to DES by an estimated 46 percent.

The legacy DES, Mr. Chairman, would be one that you would have familiarity with from your experience in the Army. It goes back to the earliest days. The Republic was refined somewhat in 1949 and has not improved since then.

The people who have gone through this were active duty personnel. Reserve and National Guard members moved through the system to the receipt of their VA benefits letter 13 percent faster than the goal set for them in the terms of reference governing the DES Pilot, which was 305 days. Tracking of servicemembers satisfaction reflects the success indicated by these numbers. Among the practical efforts taken to assist the wounded, ill, and injured, has been the Recovery Coordination Program begun in November 2008. This covers servicemembers less severely wounded but who are not likely to return to active duty in less than 180 days.

We are wrestling with a number of complex issues, ranging from the fit to the unfit equation, compensation for family caregivers, and TBI and PTSD screening. One among many of the issues we face in addressing these and other issues is the velocity with which medical science is accelerating the area of care for our wounded, ill and injured personnel.

Injuries that once would have disqualified a servicemember from returning to active duty no longer do so. So, in the policy arena we find ourselves trying to keep up with miracles. The tendency in some areas is to sit tight and see where the miracles take us, between medical science and the incredible will of our servicemembers. Many of them want to go back to war. So this is what we are dealing with. It is very different than any conflict we have ever seen in the past.

As you know, the DES Pilot is a test bed that will help us determine what future changes we can and may need to make in this endeavor through the modality of the DES evolution. The pilot program is operated within the context of existing policy and law. We may discover the need for changes in policy and may request that you consider changes in the law.

I do not want to speculate on that today. We are required to report on the DES Pilot at the end of August, and at that point, we expect to have a sense of the future of the pilot itself as well as the course of the DES evolution.

That concludes my oral statement, Mr. Chairman, and I look forward to any questions you may have.

[The prepared statement of Mr. Koch follows:]

PREPARED STATEMENT OF NOEL KOCH, DEPUTY UNDER SECRETARY, OFFICE OF  
TRANSITION POLICY AND CARE COORDINATION, U.S. DEPARTMENT OF DEFENSE

#### OPENING

Mr. Chairman, Committee Members, I am pleased to be here today to discuss with you the Department's continued support of our wounded, ill and injured servicemembers, veterans, and their families, and in particular, the continued work of the Office of Transition Policy and Care Coordination (TPCC) with regard to the Disability Evaluation System (DES) Pilot.

#### TPCC BACKGROUND

On 14 November 2008, the Under Secretary of Defense for Personnel and Readiness established the Office of Transition Policy and Care Coordination (TPCC). As the Deputy Under Secretary for TPCC, it's my mission to ensure equitable, consistent, high-quality care coordination and transition support for members of the

Armed Forces, including wounded warriors and their families by collaborating with Federal and State agencies. The TPCC assumed responsibility for policy and programs related to the DES, Servicemembers' transition to veteran status, wounded warrior case and care coordination, and related wounded warrior pay and benefit issues. These assigned responsibilities include the totality of the Department of Defense (DOD) functions formerly assigned to DOD co-chairs of the interagency DOD and Veterans Affairs (VA) Wounded, Ill, and Injured (WII) Senior Oversight Committee (SOC) Lines of Action (LOAs) 1, 3, and 8. The TPCC also assumed DOD responsibilities for management and monitoring of performance against DOD/VA Benefits Executive Council (BEC) goals and for coordinating with VA in support of BEC activities. The TPCC has the authority to enter into agreements with VA and represent the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) as a member on councils and interagency forums established under the authority of the DOD/VA Joint Executive Council (JEC), the BEC and the SOC.

#### DISABILITY EVALUATION SYSTEM (LOA-1)

The mission of Disability Evaluation System (DES) Reform is to develop and establish a DOD and VA Disability Evaluation System that is seamless, transparent, and administered jointly by both Departments and uses one integrated disability rating system, streamlining the process for the Servicemember transitioning from DOD to VA. The system must remain flexible to evolve as trends in injuries and supporting medical documentation and treatment necessitates. The Department continues to make significant steps forward in regards to the DES Pilot to include periodic refinements to the process and expansion of the Pilot beyond the original three initial sites in the National Capitol Region.

#### *Overview*

Now, as in the past, the DOD remains committed to providing a comprehensive, equitable and timely medical and administrative processing system to evaluate our injured or ill Servicemembers' fitness for continued service. One way we have honored these men and women, was to develop and establish a Disability Evaluation System (DES) Pilot that provides one solution for a DOD and VA Disability Evaluation System using one integrated disability rating system. This system has several key features: simplicity; non-adversarial processes; single-source medical exam and disability ratings (eliminating duplication and the inconsistencies associated with it); seamless transition to veteran status; and strong case management advocacy. The system is flexible to evolve as trends in injuries and supporting medical documentation and treatment necessitates. LOA-1 has continued to make significant progress in regards to the DES Pilot to include the Pilot's initial expansion to an additional 18 locations across the Continental United States (CONUS).

#### *Pilot*

The DES Pilot integrates the DOD and VA disability systems to the extent allowed under current statute and includes several key features that distinguish it from the current DOD and VA disability systems. The key features of the Pilot include a single physical disability examination conducted according to VA examination protocols, with disability ratings defined by the VA and accepted by DOD for those conditions it must address under law—those that render the member unfit for military service. The Departments apply the shared results of the single disability examination and ratings to render their respective decisions (the fitness decision, disability level, separation disposition, and DOD disability benefits by DOD and disability level, Veteran disability benefits eligibility, and VA disability compensation level by VA). Another key feature of the Pilot is that the early involvement of the VA allows the Department to deliver disability compensation and benefits immediately upon transition to Veteran status for members of the Military Departments being separated for disability.

Our efforts to improve the DES is co-directed by the Deputy Director for Policy Compensation and Pension (C&P) Service from the VA and me as the DOD representative.

The vision for the DES Pilot is a Servicemember-centric, seamless and transparent disability evaluation system jointly administered and supported by the Departments. The Departments set the following objectives for the Pilot:

- Design a more transparent, efficient, and effective DES
- Evaluate reform initiatives
- Refine reform mechanisms
- Identify training requirements
- Identify staffing and system support requirements
- Identify legal and policy issues/constraints.

#### *Current Operational Status*

As of July 12, 2009, 2,944 Servicemembers are currently enrolled in the DES Pilot at 21 MTFs. Four hundred sixty-six (466) Servicemembers completed the DES Pilot by returning to duty, separating, or retiring. Active Component Servicemembers who completed the DES Pilot averaged 275 days from Pilot entry to VA benefits decision, excluding pre-separation leave. Including pre-separation leave, Active Component Servicemembers completed the DES Pilot in an average of 294 days. This is 1% faster than the goal for Active Component Servicemembers and 46% faster than the current or legacy DES and VA Claim process. Reserve Component/National Guard Servicemembers who completed the DES Pilot averaged 266 days from Pilot entry to issuance of the VA Benefits Letter, which is 13% faster than the 305-day goal.

#### *Customer Satisfaction*

On the whole, Pilot participants reported higher average satisfaction than legacy participants. Additionally, Pilot participants reported higher satisfaction for all MEB and the PEB. Notably, Servicemembers were significantly more satisfied with the procedural justice component of the PEB phase (i.e., they felt the PEB portion of the Pilot was fairer than did legacy DES participants). Finally, the Pilot participants were more satisfied than legacy DES participants on the Transition phase of the program. Family members of DES Pilot participants were most satisfied with medical providers and the medical care the Servicemember received in the DES Pilot process. Stakeholder (perceptions of the impact of the Pilot on Servicemembers and Veterans were favorable; their ratings reflected a DES Pilot process that was more responsive to Servicemembers and their families, fairer, more consistent, and timelier compared to the current DES program. Perhaps most importantly, stakeholders felt that people within their organization cared about the Servicemembers in the DES Pilot program. These results speak to the dedicated efforts of Physical Evaluation Board Liaison Officers, Military Service Coordinators, care providers, and others who are remaining responsive to the needs of their customers given the limited level of resources they have available. The VA is preparing to administer surveys to determine satisfaction with the pilot one year after separation. We look forward to that information in spring 2010.

#### *Expansion*

The Departments carefully planned for and expanded the DES Pilot beyond the initial three, National Capital Region locations, to 18 additional locations throughout the continental United States. In accordance with recommendations by the U.S. Government Accountability Office, this deliberate approach allowed the Departments to gather data on the effectiveness of the Pilot at a diverse set of locations. Expansion to these locations began October 1, 2008 and was completed May 31, 2009. The SOC is scheduled to meet in August, 2009, to evaluate future expansion opportunities.

Should the SOC decide to further expand the Pilot into the norm, significant DOD and VA planning and preparation will be essential to efficient and effective implementation.

#### *Initial Conclusions of the Pilot*

The Departments successfully implemented a more transparent, efficient, and effective disability evaluation system through the DES Pilot. The Pilot resulted in a significant improvement in case timeliness with perhaps the most important enhancement being the elimination of delays between separation or retirement and the award of VA disability benefits. Servicemembers were more satisfied with the process and the outcomes were improved over the legacy system.

Based on the proven performance of the Pilot, the Departments are evaluating effective ways to extend the advantages of the Pilot to all Servicemembers in the DES. Additionally, the Departments are reviewing the Joint DOD/VA DES process as a bridge to further DES reform.

#### CLOSING

We are extremely proud of the progress made to date and the success enjoyed in the Pilot. Our obligation to our Servicemembers, veterans, and their families is a lifetime pledge which requires our unwavering commitment to complete the work which has been started. There remains more work to do. Our valiant heroes and their families deserve our support and dedication to ensure their successful transition through recovery, rehabilitation, and return to duty or reintegration into their communities.

With those thoughts in mind, the Departments successfully implemented a more transparent, efficient, and effective disability evaluation system through the DES Pilot. The Pilot resulted in a significant improvement in case timeliness with perhaps the most important enhancement being the elimination of delays between separation or retirement and the award of VA disability benefits.

Based on the proven performance of the Pilot, the Departments are evaluating effective ways to extend the advantages of the Pilot to all Servicemembers, Veterans, and their families in the DES.

Thank you for your generous support of our wounded, ill and injured servicemembers, veterans and their families. I look forward to your questions.

Chairman AKAKA. Admiral Dunne, a popular statistic going around is that the claims backlog is nearing 1 million. That is 1 million claims yet to be fully resolved.

Is that figure an accurate indicator of DBA's claims inventory? If it is not, where is that number coming from?

Admiral DUNNE. Mr. Chairman, I would say that the calculation of that large number is based on taking a look at all the work that our regional offices are involved with. The number of 406,000 for compensation and pension claims inventory, which I referred to earlier, is the number of active claims that we are working on for veterans who are waiting for some compensation or pension from us.

If we take a look at a larger number by adding up some of the other categories—everything from making adjustments for hospitalization of a veteran, incarceration of a veteran, doing changes of address, et cetera—we track all of those as workload elements at which they must also be accomplished, but they are not directly related to a decision on a veteran getting compensation or pension, sir.

Chairman AKAKA. This question is for you, Admiral Dunne and also for Mr. Koch on the Disability Evaluation System.

How are the departments working to make certain that the Disability Evaluation System Pilot Program is being implemented in the same way at participating sites?

Admiral DUNNE. Sir, in order to maintain the consistency that we need and to ensure that the military treatment facilities have the capabilities that they need to serve our servicemembers—future veterans—first, we conducted a very extensive evaluation of what was needed in the National Capitol Region when we started in November 2007—what capabilities we needed both on the VA side and on the DOD side.

We use that as lessons learned in order to conduct training for each of the individual military treatment facilities and VA offices who would be involved at the now 21 sites. So, all of those individuals involved received training, having the benefit of what we learned at the first three sites. And we have continued to follow through on that as we expand it on to the 21, sir.

Chairman AKAKA. Mr. Koch?

Mr. KOCH. Yes, sir. Mr. Chairman, I do not have a great deal to add to what Admiral Dunne has said. We are constantly monitoring the progress of these efforts at all 21 sites and adding to the inventory of trained personnel to assist with the care of our servicemembers.

So, to some extent, it is a constant becoming; it is a work in progress. And some of the things that we had started out to do,

similar to the Army with its AW2 program, it has evolved as it has gone along. We have built on what we have learned there with our Recovery Care Coordinators; and, of course, on the other side with the Veterans Affairs, there are the Federal Recovery Coordinators that do this work as well.

But there are a range of issues that we have got to continue to attack, and we are doing that within the evaluation of the pilot as well as within the working group, which I chair as well for the DES evolution.

Chairman AKAKA. Admiral and Mr. Koch, how can VA and DOD do a better job at screening servicemembers so that those who enroll will actually complete DES and make wiser use of resources?

Mr. Koch?

Mr. KOCH. Yes, sir. The process begins at the intake of the wounded, ill, or injured warrior. We look at, of course, the nature of the wounds that may be considered catastrophic. These would be people that we do not expect to be able to go back to active duty, and they are going to have to change their expectations for their future. And we have to try to manage those expectations so that we do the best we possibly can for them.

There is a process set up for them to proceed through the system from the point of intake through the healing process—rehabilitation—and to reach a point at which a determination will be made on our side—on the DOD side—whether they are fit or unfit for duty.

Now, that sounds like a very cut and dry determination. In fact, it is not because, as I said in my oral testimony, many of these people who have suffered wounds that would have been completely disabling in the past are going through some marvelous procedures of recovery. Now if they want to stay in, the chances of us being able to retain them are greater than they ever were in the past.

So, through this process, which we are evolving, we think that it is going to be what it is set out to be, which is smooth, simple, equitable and optimal. Again, we constantly monitor this to assure that we meet the standards that we have set for ourselves.

Chairman AKAKA. Do you have any comment on that, Admiral?

Admiral DUNNE. Yes, Mr. Chairman. On the VA side, as we perform the medical evaluations that we do, working with DOD, there is close monitoring of the results of that, of course. I believe as we look at it through the Senior Oversight Committee, which includes taking a look at the data of servicemembers who are not eventually separated or retired, that that is good feedback for the services to evaluate and evolve their program, as we are working on right now, sir.

Chairman AKAKA. Thank you.

Senator JOHANNIS, your questions?

Senator JOHANNIS. Thank you, Mr. Chairman.

Admiral, I think I will start this question with you, but I would encourage the other members of the panel to jump in here.

One of the things we did when I was a mayor—and I was very active in the U.S. Conference of Mayors—is we established a best practices sort of system. We would always joke with each other that we were not looking for original ideas, we were looking for ideas that worked that we could bring back home and implement.



Does the VA in its disabilities process have anything like that? And I will tell you what I have in mind. I was looking at the statistics for the Lincoln office, and they are just simply better than the national average. Now, there might be a dozen reasons for that.

But is there anything out there where you look at what is happening across the country and say to yourself, I wonder why those 12 offices are doing so much better than the average, and actually try to take those models and implement them? Talk to me about that.

Admiral DUNNE. Yes, sir. We are looking for all sorts of good ideas. I think I will start by setting the example myself. That is, over the past 16 months I have visited over 30 of our regional offices, including the Lincoln office, to be able to talk firsthand to the employees who are actually doing the work to learn directly from them what their challenges are, what issues they have that could either make them more effective, or a best practice that perhaps they are using locally that we could share with the other 56 offices and implement that.

We have a program where twice a year, we get all the Regional Office Directors together. In fact, we will be doing that at the end of August. One of the segments of that meeting is all about best practices and where? As a result of our periodic reviews and inspections, we become aware of something that one office is doing, whether that be through training or otherwise. We share those with all the directors and provide them enough information to be able to take back and apply them at their office if they see that they could benefit from them.

That is one example, but we are continually looking to the ROs by communicating with them periodically at all levels in order to take advantage of those ideas. In addition to that, by publishing our results office by office, we allow the different offices to be aware of who is performing better and they talk amongst themselves to figure out why some are better. But we do try to oversee that process and keep track of it.

Senator JOHANNIS. Anyone else have any thoughts on that?

Mr. KOCH. Senator, you have talked about looking for good ideas. One of the first good ideas we had and implemented was building a collegial relationship between our two departments—the DOD and the Department of Veterans Affairs. That has been very productive and we continue to share our efforts, share information, and build on each other's learning process.

So, as Admiral Dunne indicated, there is almost no substitute for visiting these centers. These polytrauma centers and other hospitals that we have are quite remarkable, and at each point, we learn something that we can bring back. We learn, as you might imagine, more from being in the field than we do from sitting here in Washington. So, that is a process that is ongoing and very valuable.

There is, as you suggest, it seems to me, some unevenness in various centers that we are involved in. I think you can trace this to efforts to break the mold and to do things that we have never done before. In the Great Lakes, for example, in northern Chicago, we are not satisfied with the progress that we are making there,

but what we are trying to do is unique and it is extremely difficult to do.

In many cases, these problems are found to be rooted in the effort of information sharing in the sense of information technology. Building these systems to work across disparate systems is not easy to do. And the less people seem to know about the information technology business, the more ambitious they seem to be about the terms of reference that they levy on us.

We began, for example, with creating a system for sharing medical information, which is a very good idea, but then you add to that, to the same system, personnel records and benefits records, and you have increased the problems exponentially. So that gets us in a little bit of a different area, but it is an example of some of the kinds of problems we have.

So, it is a constant learning and it is a constant process of sharing what we learn. I think we are doing a pretty good job of it.

Senator JOHANNIS. I am out of time, Mr. Chairman, but if I might offer one other suggestion. Regarding best practices—because I did a lot of things, as a Governor, as a mayor, that, quite honestly, somebody else had thought of, which looked so good that we implemented it, and it really turned out well for us.

The second thing I wanted to ask, though I am not going to ask you to answer it here, but maybe with a follow-up letter to the Chairman with copies to us. As we have tried to improve this, I worry at times that maybe we have done things that have only made it worse. So, I am going to turn the tables here.

Is there anything out there that has happened in terms of our effort to solve this problem that you would like us to revisit? I have one thing in mind: the AMC, the Appeals Management Center. We hear from veterans that it can be a black hole; things go in there and disappear. Maybe that is an individual case, maybe it is not. But that is only an example.

I would ask you to give some thought to this idea, that maybe in our effort to improve things, we have actually created another level of bureaucracy that is making it difficult for the veteran to overcome. I would like to hear from you on that. Please do not be shy. We have broad shoulders in this business.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Johannis.

Let me call on Senator Murray.

Senator MURRAY. I am happy to wait for the other Members.

Chairman AKAKA. Fine.

Senator Tester?

Senator TESTER. That is very kind. Thank you very much, Mr. Chairman.

Admiral Dunne, you stated that you have 406,000 pending. What is that level compared to a year ago?

Admiral DUNNE. About 25,000 or 30,000 more than a year ago, sir.

Senator TESTER. OK. And the ratings claims are 80,000 each month? What is that compared to a year ago?

Admiral DUNNE. About 5,000 a month more, sir.

Senator TESTER. Five thousand more?

You stated in your testimony that you have 125 days as your goal, but you have got 145,000—and this may be wrong because I was taking notes—145,000 claims over 125 days?

Is that correct?

Admiral DUNNE. Correct. Yes, sir.

Senator TESTER. Are those also fluid? You said the 406,000 were fluid.

Admiral DUNNE. Oh, yes, sir.

Senator TESTER. Is 145,000—

Admiral DUNNE. The 145,000 is part of the 406,000, so it is a subset. We are trying to move those through as fast as we can.

Senator TESTER. All right. So is it a fair question to ask, of those 145,000, how long do they go past the 125 days? I mean, are we talking—

Admiral DUNNE. As short a time—

Senator TESTER [continued]. One hundred eighty days, or 240?

Admiral DUNNE. Well, that is an average number, sir. And what we do, based on the computer, is we take all the claims and we keep track of how many days they have been there.

Senator TESTER. I guess the question is, is there a point and time on a claim, when it gets to a certain number of days, that you guys say, we fix this; we fix it now?

Admiral DUNNE. Yes, sir. We have a team—

Senator TESTER. And what is that day?

Admiral DUNNE [continuing]. The Tiger team. When it gets to be a year old, it goes to a Tiger team that works specifically on it to try to find what issue is slowing it down.

Senator TESTER. And how many of those claims get to 365 days?

Admiral DUNNE. At the present time, there is on the order of 11,000, sir.

Senator TESTER. OK. The chairman asked a question about 1 million claims, and you said that is all the work that is being done, and you listed changes of address and some other things.

Do you guys track that backlog of that additional 600,000?

Admiral DUNNE. We track all of them, sir. Everything that comes in that is a work item is given an end product and we track it all.

Senator TESTER. All right.

If there is a change of address and we do not discover it for a while, it makes the ability to service that veteran a lot more difficult. That is just one example.

So, you have got approximately 600,000 out there that you are doing various, much more minor things on, is how I interpret that. Do you track that—

Admiral DUNNE. Yes, sir, we do.

Senator TESTER [continuing]. To see what the backlog is on those? I mean, what is your goal on those?

Admiral DUNNE. There are about 219,000 items in the inventory right now, sir, and we complete those on average, in about 88 days. Some of them we were able to complete the day they come in; others take longer.

Senator TESTER. OK. Sounds good. So the million figure that the Chairman brought up is not accurate. Because if my figures add up, you have about 625,000 total work that you have been doing, 219 and 406.

Admiral DUNNE. Sir, we have to include appeals in there as part of the workload also, which the RO has to use some of their personnel for.

Senator TESTER. OK. I assume that there are timelines for the appeals process, too.

Admiral DUNNE. Yes, sir. We established those.

Senator TESTER. Can you tell me what those are off the top of your head?

Admiral DUNNE. I would have to get those for you specifically in terms of targets.

Senator TESTER. That would be great.

Do you have the needed employees you have now to reduce the backlog? Because it has been growing.

Admiral DUNNE. Sir, there is a difficult balance that has to be struck between simply adding more people to the process, which then creates also additional administrative responsibilities. I am not sure exactly where that perfect balance is.

Senator TESTER. I appreciate the position you are in because the claim rates are going up 5,000 a month from what it was last year, and the pending claims have gone up based on your answer to the question.

The question is, does VA have a plan to reduce that backlog?

Admiral DUNNE. Absolutely.

Senator TESTER. Whether it is employees or technology or whatever, when will that plan be implemented so that we can start to see that backlog go down?

Admiral DUNNE. Sir, we are working on several issues right now, both technology-wise and training of personnel, which will have effects over time. How fast, it is very difficult to say that a certain action that we take will result in X number of days or X number of claims being affected because each claim is truly unique.

Senator TESTER. I understand.

Admiral DUNNE. We have a technology plan, which I am working with the Chief Information Officer and the Chief Technology Officer to put in place on top of our business process—the reevaluation—which is going on now. We have the pilot going on in Little Rock and a pilot going on in Providence that are directly looking at the process that we go through, how we handle things, in trying to improve that, sir.

Senator TESTER. I understand. I understand the position you are in, and I have some empathy for it. But I also have some empathy for the veteran out there who is in that backlog group.

My time has also run out. But I would just say we have not hit break even yet. We are still going the wrong direction. That somewhat distresses me. I know that the pressures have been greater because of Afghanistan and Iraq and others, but the truth is we have to get to a point where we start reducing the backlog, and we are not there yet, and that is somewhat distressing.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you, Senator Tester.

Let me call on our Ranking Member, Senator Burr, for any opening remarks and questions.

**STATEMENT OF HON. RICHARD BURR, RANKING MEMBER,  
U.S. SENATOR FROM NORTH CAROLINA**

Senator BURR. Mr. Chairman, thank you for recognizing me.

Admiral, I apologize for my tardiness this morning. I would ask unanimous consent that my opening statement be a part of the record, and I will be happy to fall in the back of the line to ask questions after every other Member has completed the first round.

Chairman AKAKA. Without objection, it will be added to the record.

[The prepared statement of Senator Burr follows:]

PREPARED STATEMENT OF HON. RICHARD BURR, RANKING MEMBER,  
U.S. SENATOR FROM NORTH CAROLINA

Thank you, Mr. Chairman. Welcome to you and to our witnesses. I appreciate you calling this hearing to discuss ideas on how to improve the Disability Evaluation System for our Nation's veterans. For the men and women who have served and sacrificed for our Nation, they deserve a system that meets their needs without hassles or delays.

To truly live up to that goal, experts have stressed for more than five decades that we need to update and streamline the disability system. But, decades later, many wounded warriors still face a lengthy, bureaucratic process to find out whether they will be medically discharged from service and what benefits the military will provide. Then, these injured veterans may go through a long, complicated process to find out what VA benefits they will receive.

We will hear today about the steps that have been taken to try to improve this situation, such as the joint VA/DOD pilot program for transitioning servicemembers and ongoing efforts to modernize information technology systems. Also, there have been large staffing increases at VA, with field staff more than doubling in less than 10 years.

Despite those efforts, I think it's clear that simply adding more staff and making minor changes hasn't fixed the problems. The claims process, as a whole, still takes far too long for many veterans, in North Carolina and across the country.

It takes more than five months on average for VA to make an initial decision on a claim for veterans' benefits and, if the veteran decides to appeal, the delays can go on for years. In fact, Professor Allen noted in a recent article that the average time from when a veteran files a claim with VA until getting a decision by the Court of Appeals for Veterans Claims is between five and seven years!

I think a process that takes that long is indefensible. Our veterans and their families deserve better.

That's why, at a hearing earlier this year, I asked our witnesses to take a clean piece of paper and redesign the entire disability process, as if we were standing up a new system today. In response, the Committee received some very constructive recommendations, and I thank everyone involved in crafting those responses.

Today, we will hear from the Disabled American Veterans about the proposal they developed in response to my request. That proposal includes recommendations for technological improvements, compressing timeframes throughout the claims process, eliminating unnecessary procedural steps, and helping avoid time-consuming remands.

I applaud DAV for these constructive proposals. I think these types of changes could go a long way toward streamlining the claims process and, more importantly, toward reducing the delays and frustrations our Nation's veterans and their families now face. That's why I am pleased to be working with DAV to draft a bill that would help make those changes a reality.

Mr. Chairman, I hope my bill will be a good step in the right direction. I look forward to working with you to advance that legislation and other changes that can help get decisions to veterans faster. This system has been plagued with problems for far too long. So, I hope this Committee will move aggressively to make the system work better for veterans, now and in the future.

I thank the Chair.

Chairman AKAKA. Senator Begich?

**STATEMENT OF HON. MARK BEGICH,  
U.S. SENATOR FROM ALASKA**

Senator BEGICH. Thank you very much, Mr. Chairman.

Thank you all for being here. I believe this is your second or so hearing regarding the DES. I'd like to follow up on two questions, one each by Senator Johanns and Senator Tester.

First, on the best practices, to be honest with you, I was not satisfied with your answer, and here is why. When you mentioned the best practices you said—I am going to try to paraphrase your comments, and that is—that you had the groups kind of talk about it.

What I learned as mayor is when there are best practices, and you have multiple agencies with different practices, one may not acknowledge that the other one has a best practice. To let them just discuss it does not work.

How do you pull the trigger to make sure that when you see something that is successful—I do not know enough about Nebraska's example in Lincoln, but let's assume that has best practices there. How do you say to the rest of them this is working; we are doing it this way. Because the way you made it sound, honestly, I was not satisfied with that. When you leave it to the agencies or the different organizations, no one believes they have bad practices.

Admiral DUNNE. Senator, I will give you an example. One of the things that I learned from traveling around to the offices is that at the present time people that are working claims have to send letters to veterans. They have to print those letters out on printers. They share printers. They have to walk around the room to get it. They also have to sort through the outbox to figure out which product from the printer is theirs and which belongs to another VSR.

I directed that we start funding that so that we can get a printer on everybody's desk, and they can all print their own correspondence and handle it themselves; save time and save confusion. So, we are going to go do that. That is one example, sir.

Senator BEGICH. Let me ask you, also, in regards to that—I think Senator Tester asked a question of the claims. I think you said around 11,000 at some point have gotten to a year.

Maybe I am wrong about this, but is the goal 125 days? Is that right?

Admiral DUNNE. The strategic target is to complete all claims on an average of within 125 days, sir. If we can do them sooner than that, we will do them sooner than that.

Senator BEGICH. How did you select a year, which is almost three times what the target is? In other words, it seems significantly long when you think about it. If your target is 125 days but you are waiting a year to intervene on those kind of—I do not know if the right phrase is complicated claims—but claims that are not resolved, it is three times what your average is before you kind of step in and say we got to deal with this.

How did you come up with three times?

Admiral DUNNE. Senator I did not mean to imply that we did not take a look at a claim until it got to be over a year, but when it did—each of the regional offices has their own monitoring system. They are able to monitor, through the computer, the age of all their claims and they work them. But if they get to that point of a year, then that is when we turn them over to a Tiger team.

Admiral DUNNE. You had mentioned around 4,000 or so new employees that were added.

Is that net after attrition and other exits?

Admiral DUNNE. A net of 4,200 new employees since January 2007, sir.

Senator BEGICH. What do you need to get to the level to—I think to follow up again with Senator Tester—get ahead of the game? How many more employees?

Admiral DUNNE. Again, ahead of the game, sir. I would say at this point, having evaluated it for 16 months, we need to implement the IT portion of this because the significant savings that we need to move things around, we need a digital capability to do it. I will give you an example of a claim.

When a claim comes in and it is processed, then there is a need to go back and communicate with the veteran, and send that veteran a letter and say this is what you have claimed, this is what we need, additional evidence, et cetera, and give that veteran 30 days to respond. If the veteran sends additional information in, then that comes in to the mailroom, and someone has to take it and move that piece of paper to wherever that claim file might be. That takes time; it takes people.

If we have a digital capability, when that new piece of evidence is scanned in, it can be scanned in with the bar code and immediately go to the electronic claim file, which would then trigger a management item that would tell someone there is new evidence in this claim folder; you can act on it now.

Senator BEGICH. Let me ask you—and I am just about out of time here. First, regarding personnel that you believe you may or may not need, do you have the necessary resources to hire those personnel? And the second piece is on the digital component. Do you have enough resources to implement what you want to do with regards to digital resources?

Admiral DUNNE. Sir, I would say that we have the correct people. At this point, we have the correct funding. And I believe that the budget requests the additional resources that we need.

Senator BEGICH. Great. Then, I guess, last question.

When you set on this course, did you develop a strategic plan—I am assuming you did—that lays out kind of your target dates and goals, how you will achieve where you want to be, and how do you keep track of that? Do you have such a document?

Admiral DUNNE. Sir, I am in the process of creating such a timeline with the Chief Information Officer and the Chief Technology Officer.

Senator BEGICH. Can you share that with us when you—

Admiral DUNNE. Absolutely.

Senator BEGICH. Great. Thank you very much.

Thank you, Mr. Chairman.

Chairman AKAKA. Thank you very much, Senator Begich.

We will next hear from Senator Murray—her opening statement and questions. We will be continuing with the questions.

Unfortunately, my presence is required at the markup of another committee. In my absence, Senator Murray will be chairing this hearing to conclusion. She is, you know, an active Member of this

Committee, and I know that she cares deeply about the issue that we are discussing.

So now, I would like to turn the gavel over to Senator Murray.

**STATEMENT OF HON. PATTY MURRAY,  
U.S. SENATOR FROM WASHINGTON**

Senator MURRAY [presiding]. Mr. Chairman, thank you very much. I will submit my opening statement for the record.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF HON. PATTY MURRAY, U.S. SENATOR FROM WASHINGTON

Chairman Akaka, Senator Burr, thank you very much for holding today's hearing to discuss VA's disability claims and appeals process.

*Improvements Made by VA and Congress*

Over the last several years, this Committee has held a number of hearings to explore ways we can improve the timeliness and quality of our disability compensation system. Congress has provided funding to increase staffing at the Veterans Benefits Administration, promote specialized training, and urged the adoption of information technology solutions.

In response, VA has redistributed workloads, begun to shift to a paperless environment; and implemented pilots to test new innovative methods for improving the claims process.

Those efforts have yielded some results. Over the last 10 years, VA has increased the number of claims it has processed by 60 percent. It has also reduced the average time to complete a rating claim from 178.9 days in Fiscal year 2008 to 161.3 days at the end of June 2009.

*More Work Remains*

Yet, despite all of the progress and all of the hard work being done, far too many veterans continue to wait far too long to have their claim reviewed.

Part of this, as we all know, has to do with the massive increase in claims being filed; part of it has to do with the increasing complexity of those claims; and part of it has to do with legislation and regulations that we have used to expand VA benefits.

*Importance of Fairly and Quickly Compensating Wounds of War*

It goes without saying that this country owes a debt of gratitude to the men and women who have sacrificed to defend our freedoms.

But we owe our veterans more than gratitude. As the Veterans Disability Benefits Commission wrote in its report, "just as citizens have a duty to serve in the military, the Federal Government has a duty to preserve the well-being and dignity of disabled veterans by facilitating their rehabilitation and reintegration into civilian life."

By providing services and benefits to veterans in a timely and sufficient way, not only do we express the gratitude of grateful nation to our wounded warriors, but we also help smooth their transition back into civilian life.

*Problems with Current System*

Yet, too often when I speak with veterans, I am frequently reminded that the VA is often seen as a veteran's adversary, not a veterans advocate. Between lost or destroyed records, unruly and unorganized files, and an incentive system that many VBA employees perceive to value the quantity of claims processed more than the quality of those claims, Veterans often perceive the deck to be stacked against them.

General Omar Bradley once famously said, "We are dealing with veterans, not procedures—with their problems, not ours."

As we move forward with the modernization and improvement of the veteran's compensation system, we need to keep that sentiment in mind.

Thank you Mr. Chairman.

Senator MURRAY. Let me just summarize it by saying that we have provided a lot of funding and promoted specialized training and passed legislation, and I know that there is a lot of increasing complexity with veterans' filings and that we are facing an in-



creased number of veterans. But I have to say I am still—because I talk to veterans—really worried.

I am frequently reminded that a lot of veterans see the VA as their adversary, not as an advocate: lost paperwork, misorganized files, an incentive system that many VBA employees perceive to value the quantity of claims processed more than the quality of those claims. So we still have a lot of work to do, because I think the veterans often see that when they go to file a claim, the deck is stacked against them, and we have got to keep working on this.

So with that in mind, I wanted to ask some questions of you this morning, Admiral Dunne and Mr. Koch.

In GAO's September 2008 report on the VA/DOD Disability Evaluation System Pilot, GAO reported that your two agencies had not established criteria for determining whether the pilot should be deemed a success and expanded to the rest of the system.

Now, I understand that you are going to be issuing your final report to Congress in August, which is coming up very quickly, but can you tell the Committee, both of you, whether or not you have developed strong criteria to measure the success of this pilot and determined the feasibility of expanding this?

Admiral DUNNE. Senator, I think the best criteria that we have established so far is feedback from the servicemembers themselves and the veterans, which will be reflected in the report that we are providing. We are going straight to the veterans and the family members and asking them how satisfied they are with the process, with the different stages of the process, to determine whether what we think is progress is actually seen by them as progress, and learn from that, so that we can adjust the DES Pilot as necessary.

Senator MURRAY. From your perspective, what is the important criteria to determine whether this is doing well or not?

Admiral DUNNE. Whether or not the servicemembers feel that they are being treated fairly, that they are getting consistent results, and that it is being done in the minimum amount of time, with recognition that they need time for medical healing and to adapt to the fact that their military career has been cut short.

Senator MURRAY. Mr. Koch, do you have anything to add?

Mr. KOCH. Yes. I would add that one of the things we discovered—first of all, as Admiral Dunne indicated, we have extensive survey efforts to find out what the servicemembers feel about the way they are being treated. One of the things we discovered as we progress through this is that the earliest generations of veterans and their families—in particular, talking to the wives who have to deal with injured servicemembers—that the earlier group has a higher level of dissatisfaction than more recent participants in the process.

So, what it is telling us is that we are getting better at what we do, but we still have to go back and recapture those earlier people who have gone through this at a point when we were just learning how to do better what we were doing.

Senator MURRAY. How much money is the VA putting in and how much is DOD putting in to this pilot?

Mr. KOCH. Oh, into the pilot?

Senator MURRAY. Into the pilot.

Admiral DUNNE. Senator, I would have to get the exact figures for you, but our approach has been that we do what is necessary. I do not mean to say we have been cavalier about the funding of it, but we have just gone off and determined what has to be done, which the Secretary has directed us to go do it.

Senator MURRAY. OK. If you could get that answer back to me, I would appreciate that.

If you do decide that this pilot should be expanded, how are you going to roll it out consistently?

Admiral DUNNE. Senator, the next step will be that the Senior Oversight Committee is going to meet near the end of August and will evaluate the report preliminary to providing it to Congress. Should they accept the report and be satisfied with the results or provide guidance to make some changes, those will be implemented directly with each of the military treatment facilities before implementation.

We have cued up right now a list of seven MTFs which we plan to recommend to the Senior Oversight Committee that we include them within the pilot. We have already conducted training for those organizations. If we get additional guidance from the Senior Oversight Committee, we would conduct that training with those MTFs before we implemented it.

Senator MURRAY. OK. Will you share that information with us as you move forward on it?

Admiral DUNNE. Absolutely, Senator.

Senator MURRAY. OK. Let me change direction a little bit.

Earlier this month, the director of the VA's Center for Women Veterans came before this Committee and testified that her office was planning on working with DOD and VA, through the White House Interagency Council on Women and Girls, to make sure that the combat experience of female servicemembers and veterans is properly documented in their DD-214s.

This is extremely important. I am hearing from a lot of women who have been in Iraq, some in Afghanistan, who have come home and do not have the proper documentation saying that they were in combat areas. I wondered if either of you are aware of that effort, and can you give us any progress on that so these women get their proper service credentials when they come home.

Admiral DUNNE. Senator, I am aware of the fact that we are working with DOD, two parts of it, to get the DD-214 transferred to us electronically so that will also speed up the process of us adjudicating claims; and to make sure that DOD has all the requirements that we need from that DD-214 document so that they can be incorporated into this electronic exchange of information.

Senator MURRAY. OK. The problem begins in DOD where women—particularly, but also some men who are in combat—experience their records being notoriously incomplete or vague. It particularly impacts women, where people are not so excited about writing something in their DD-214.

So, Mr. Koch, are you aware of this problem and can give us any input?

Mr. KOCH. I am aware of it, Senator, and we are finding that this, again, is a learning process. The sort of war that we are in-

volved in is requiring us to think in new ways about how we handle this. I mean, it is just not cut and dried and anymore.

I do not mean to be craven about it; I am not making excuses about it, but what we are trying to get our arms around are the multiple deployments, people who are trying to catch up with their records; we are trying to catch up with their records. And we do, but there are backlogs. In some cases, we do not know that we have missed something until a servicemember calls it to our attention, and that may take some time. So it is something that the Department is concerned about and is trying to address as quickly as we can.

Senator MURRAY. Well, I am going to continue to push everybody on this because when somebody goes over and serves our country and then—simply because somebody does not write something on a form—comes home and is denied their care, to me is just really unjust. This is something I care a lot about, and I will continue to push all of you on this.

Admiral Dunne, let me ask you. GAO's testimony notes that the VA is expecting an increase in claims as the result of an October 2008 regulation change that affects the VA rating for TBI, for Traumatic Brain Injury. Given the complexity of rating TBI claims, what is the VA doing now to prepare its staff with this expected increase in TBI claims?

Admiral DUNNE. Senator, the regulation that was put in place last October was the most up-to-date, best information—medical evaluation—that we could obtain as a result of meeting with many experts, both on the DOD side and on the VA side.

Our anticipation is that we will get additional claims, but our claims processors—the folks who actually do the rating—received training on the new regulation and how to apply it. And we think as a result of the work that Mr. Pamperin and his folks did, that the rating schedule in that area is much easier to understand and easier for the medical folks to provide the information that we need to put into the schedule.

Senator MURRAY. OK.

Mr. PAMPERIN. Ma'am, in addition to that, part of that projection of increased workload is an outreach effort that we have made for the people who are already service-connected for TBI, advising them of the change in the schedule and encourage them to come in if they feel that they have more than subjective symptoms. We have done extensive training on TBI. We have issued training letters on that, and I believe that we are ready.

Senator MURRAY. OK. Well, this is something, too, that this Committee, as you know, has followed very closely, especially on knowing that a lot of men and women have come home and are sitting somewhere in their community with symptoms, and have no idea that it is Traumatic Brain Injury. We have had a lot of resources put into this, so we want to make sure those folks on the ground out there are trained and adequately following these new procedures. So we will be following this closely, and I appreciate that.

Senator Burr?

Senator BURR. Thank you, Madam Chairman.

Admiral, again, welcome. Thank you, and I thank your colleagues for your service to our country's veterans. I really appreciate it.

Admiral, in the stimulus package, we provided \$150 million, and the purpose of it was to hire the individuals to create a surge in the claims process. According to the VA's 2010 budget request, you suggested that the goal was to achieve an additional 10,000 cases from that surge effort.

How many new hires does that \$150 million provide?

Admiral DUNNE. Senator, I believe that we will be able to hire over 2,000 temporary employees. At the present time, we have already hired almost 1,300 of them. So, some of them have already started and we are in the process of training them so that they can take on some of the other work—that which we can quickly train them and get them started on.

Senator BURR. Do you stand by the goal of 10,000 claims being processed based upon the surge capacity?

Admiral DUNNE. Senator, I would tell you that that is not based on any specific equation that I could put numbers into, et cetera. We just had to take a look at how many people we thought we could hire. The training that we can do to get them proficient in some task. They obviously will not be able to rate claims, but they can help us move different support functions through the regional office faster. So while they will not have a direct impact on claims, we believe it will be an ancillary impact, and that is our best judgment on what we think we can make happen.

Senator BURR. I appreciate that, and for the purpose of my colleagues to understand that there is a learning curve that these people have to go through, that you cannot go out in the marketplace and hire people to walk in on day one and start making disability determinations. One really cannot walk in and process claims.

I might note that this is not a cheap investment. If, in fact, we got 10,000 claims off of it, that is \$15,000 a claim. When you stop to think about it in those terms, you realize just what the size of the investment is to try to address this backlog, and to do it by increasing the number of claims that can be processed by people.

I might say, the most refreshing thing I think I will hear today, I heard earlier, is that we need to think in new ways. I appreciate that thought, because I think that is what some of us on the Committee have been saying for sometime. We have got to a point where we have got to think outside the box. We have got to look at doing things in ways that we have not done before. We have got to reach out and look at technology, and pull it in and say, how can you help us do this. But we also have to look at the process that we have and ask ourselves, where can we make changes that we are comfortable with that shorten the period of time yet provide the right opportunities to a veteran to make sure that their case has fully been heard.

Now, the DAV submitted a proposal to the Committee outlining a number of recommended changes to the claims process. In part, their proposal recommends eliminating certain procedural steps that they see as unnecessary.

Admiral, do you agree with the basic premise that wherever possible we should try to eliminate unnecessary procedural steps in the claims and appeals process?

Admiral DUNNE. Absolutely, Senator. I am working on that right now.

Senator BURR. Then I would take for granted you are aware of some of the steps that probably should be eliminated or should be considered for elimination.

Admiral DUNNE. Senator, I have my own list, yes.

Senator BURR. Today's testimony from the Government Accounting Office mentions, and I quote, "Each time appellants submit new evidence, VA must review and summarize the case for the appellant again, adding to the time it takes to resolve the appeal."

As we will hear later, "the proposal from the DAV would attempt to address this issue by providing the Board of Veterans' Appeals with the authority to review the newly submitted evidence in the first instance unless the individual who files disagrees."

Is that reasonable?

Admiral DUNNE. Sir, when we get into the appellate category, I have to defer to the lawyers because I might see something where I would say we could do this faster, but I would not want to deny a veteran his legal rights for consideration of certain items.

Senator BURR. But if it could uphold that legal right, then we should do everything to avoid these types of delays?

Admiral DUNNE. Any delay. I am happy to get rid of sources of delays, sir. So, as long as we take care of the veterans in the process and they are amenable to it, I am in favor of it.

Senator BURR. OK.

Earlier this year at one of our hearings, I think a number of organizations testified that the VA Appeals Management Center should be dissolved. They called it a black hole. And I realize there have been attempts to make changes within the center. I would like you to be very candid with us.

Can you update us as to those changes and successes? Then, at what point should we collectively look at that and either say it has now worked or we need to eliminate it and move on?

Admiral DUNNE. Senator, we have made some changes. One of the changes we made is we put a new director at the AMC here in Washington. He has made progress already. I think he will continue to make progress.

One of my sources of information, of course, is talking with the veteran service organizations. I meet with them routinely—at a minimum, once a month—to get their inputs. I plan to continue to work with them on this and other issues where we can identify problems.

But, I truly believe that consolidating this into one area is the best way to go in order to serve our veterans. I do not deny that we have had some problems, but that is part of putting the process together, and I think we will continue to improve it.

Senator BURR. So, would I take away from that that we are hopeful that a leadership change will resolve the deficiencies that are there? Or are there other challenges that we are faced with—local job market, et cetera—that come into play?

Admiral DUNNE. Senator, I would say that this appellate process is also affected by the fact that it is paper-borne as well. So, to the extent that we can bring IT solutions into the basic claims process, that also will help the appellate process.

One of the big points that I am always making with the folks that work on claims is that we need to continue to improve our accuracy because the goal is to touch a claim once. We want to create a reputation with our veterans that when we take their claim, we handle it, we give them an answer—it is the right answer—and that there will be a reduced number of appeals as a result of that consistency and accuracy, in addition to using IT solutions, sir.

Senator BURR. Well, I thank you for that.

Last question, Admiral, and it is slightly off of today's topic, so I hope you will give me the leeway to do that.

I understand that the VA recently heard from a number of family caregivers who have concerns about VA's fiduciary program. My office has heard from some of the same caregivers that voiced some concerns to the VA. These are wives and parents and siblings of severely injured veterans who have dedicated their lives to caring for the needs of those individuals—their injured loved ones—and they feel that the VA's fiduciary policies are demeaning and burdensome.

Do I have your assurance that you will take their concerns seriously and will ensure that the VA's fiduciary policies are not only looking out for the interest of the injured veterans but also are affording the respect, trust and dignity that we owe these family caregivers?

Admiral DUNNE. Senator, I would tell you that I am sworn to do that very thing, and I intend to do that. I can tell you specifically that Mr. Pamperin here has already reached out to several of the VSOs to meet with them and understand what their concerns are with the fiduciary process.

That is always a difficult thing whenever a fiduciary has to get involved on behalf of a veteran. We want to make sure that it is done properly. We also want to recognize that we are in a new environment and there are younger veterans and families involved. So, we perhaps need to revise our rules and processes, and that is exactly what we intend to evaluate and pursue, sir.

Senator BURR. Admiral, I appreciate your candid answer and, again, thank all three of you for your service to the veterans.

Thank you, Madam Chairman.

Senator MURRAY. Senator Johanns, do you have any additional questions?

Senator JOHANNNS. No.

Senator MURRAY. OK. I just have a few additional questions. Admiral Dunne, you piqued my interest.

Can you tell us what steps in the claim process are on your list for possible removal?

Admiral DUNNE. I would be happy to, Senator. I will give you an example of some of the items.

One is apportionment. When we get involved with a veteran, family member, et cetera, where there is separation, one party will apply to us for a portion of the veteran's benefits in order to be properly supported. At the present time, there is a very lengthy,

detailed process—essentially, in the absence of a court decision, for us to go in and play Solomon and decide what the percentage breakdown should be.

I am trying to determine the proper way to approach this so that our employees are not asked to play judge and jury but rather to have a metric that they go by, which would be fair to all concerned, and that would save us a considerable amount of time.

We have seen some progress as a result of the fully developed claim pilot, which Congress authorized us to do. In that environment, where the veteran takes advantage of that, we have been able to turn those claims around under the 90-day goal that was set in the legislation. So, we intend to pursue that. We are also seeing some success as a result of the checklist, which is added to the letter—another pilot that Congress authorized us to perform—and we would like to perfect that as well.

Senator MURRAY. OK. Very good. I appreciate that.

One of the things I hear from veterans all the time is that their paperwork is lost. I understand complex systems and everything, but, Admiral Dunne, let me start with you.

What action can the VA and DOD take to make sure that somebody's ship or unit location can be readily accessed by VA employees so that they can substantiate a claim?

Admiral DUNNE. Senator, I think the long-term answer is our virtual lifetime electronic record, which, as you know, the President charged both the Secretary of Defense and Secretary of VA with pursuing. We are hard at work at that. I think that is the long-term solution.

In the short term, some of the things that we have accomplished—as you recall, last October we did have a problem with shredding of documents, et cetera. I believe that the records management program we have put in place as a result of that situation is yielding benefits, and we are going to pursue that. One piece of paper lost, one piece of evidence, is too many. So, we just have to continue to work at it and keep people's attention focused on the fact that that piece of paper is a veteran; it is not just a piece of paper.

Senator MURRAY. Thank you. I appreciate that.

Mr. Koch, what can the DOD do to keep better records so that we do not hear continuously from veterans that their paperwork has been lost, cannot be found, and VA cannot substantiate it?

Mr. KOCH. Senator, I am not sure that the issue is the quality of recordskeeping, but the management of those records once they are created. I, frankly, do not know what the answer to that is. I am sorry. I wish I could give you something more straightforward, but I can not. People lose records—I think, particularly, medical records.

Something as simple as putting these things into a thumb drive that a servicemember could carry like an electronic dog tag might make sense. But then you would have the question of keeping these things updated, and that is always a difficult thing to do, so that every time you go to get shots, that has to be recorded. And sometimes it is difficult to keep these things together and to keep them up to date.

So, there is a question of our responsibility to find a solution to this, and the servicemembers share a responsibility as well. Sometimes one side or the other does not do it. Of course, as we understand very well, those are the exceptions that come to our attention and that give us so many headaches.

What is not recorded is the vast majority of records that are properly kept and are properly handled, which is not to negate, as Admiral Dunne has said, one slip-up is one slip-up too many. But in a perfect world, we would not have those slip-ups. We are trying to create a perfect world, but I do not think in my lifetime we are going to succeed at it.

Senator MURRAY. Well, we have to keep working at it for sure because this is what we hear more than, I think, anything, is somebody's complete frustration that they cannot get a piece of paper that allows them to be able to substantiate and process a claim. So, the burden is on you.

Senator Burr, you had another question?

Senator BURR. Yes, ma'am, one last one.

I chuckled, Mr. Koch, at the answer because I sat here thinking, you know, MasterCard and Visa can find everybody in America. And when they find them, they know exactly what they make and they know exactly what risk they are taking.

I think sometimes there are real merits to us looking outside of organizations that we are in and tapping into people that, as you said earlier, think in new ways. It is not always incumbent on us to think of all those new ways, but it is incumbent on us to look out and find those entities that can help us make that transition to new ways. I certainly encourage the VA to do that in every appropriate area.

Admiral, last year, the Congress directed the VA to submit a report regarding a study conducted by Economics Systems, Inc. on the issues of earnings, loss, quality-of-life payments, and transition payments. In part, the law required VA to set forth what actions VA plans to take in response to the study, a timeline for taking those actions, and any legislative changes. But I do not see any planned actions or timelines laid out in the VA's report.

Can you clarify whether VA plans to take any actions in response to that study?

Admiral DUNNE. Senator, we evaluated the study. I would say that in the short 6-month period of time Econ Systems had to do that, they did a good job of evaluation, et cetera. But what I learned from that report is there is more information that we need in order to make any decisions or make any recommendations.

I also recognize that I believe we need an opportunity, a time period for the Congress, all our stakeholders, to read that report and evaluate what is in there because some of the recommendations in there are truly national policy recommendations which do deserve evaluation and debate. And for us to have at this point, with only the information we have—put forth a definitive “this is what should be done,” I think would not be serving our veterans properly, sir.

Senator BURR. As a follow-up, does the VA have a position right now as it relates to compensating veterans for any loss in quality-



of-life caused by their service-connected disability or can I take the report as an indication that the VA does not support it?

Admiral DUNNE. Sir, I would take it as a recognition by VA that there is more information that is needed and that there is more discussion that needs to take place with many experts before we would be prepared to say yes or no on any of those recommendations.

Senator BURR. Admiral, I will not put you on the spot today, but I would love for you to go back and converse with the Secretary because I think what we need from you is what is the next step. Rather than to have this lay dormant for some period of time, I think it is absolutely essential that you tell us whether the next step are congressional steps, the next steps are VA steps, the next step is to stimulate the national debate.

But I think that we have had a number of commissions report, and I think many of us have expressed our strong desire that the most recent two not join with the other commission reports which have found their way to the shelf of dust. I think that they were very specific as it related to the need to move to a system that compensated for the loss of quality-of-life. I think there was a consensus within the VA then, and for the most part, I think, in Congress.

I just want to make sure that with this momentum we try to come to some finality in the loss, that we get to that point. If at the end of the day we determine we have a system that cannot do that, then we have to decide whether we change the system to accommodate it, or, in fact, we may find that we can do this and incorporate it in the same system.

I happen to believe, as you know, that the disability system needs to be, for the lack of a better word, updated to reflect where we are and the new ways that we have got to think in the future. I think a quality-of-life payment is probably very appropriate in the context of the overall change to the system.

Admiral DUNNE. Yes, sir.

Senator BURR. I thank you and look forward to the comments from you or the Secretary on what the next step is.

Admiral DUNNE. Understood, sir. I will get you an answer.

Senator BURR. Thank you, Admiral; Madam Chair.

Senator MURRAY. If there are no further questions from the senators, I want to thank this panel for your testimony and your work. There will be time left to submit any questions from senators. Again, thank you so much for your testimony this morning.

With that, we are going to move to our second panel. Please come forward and take your seats.

I want to welcome our second panel this morning. I will introduce them as they are getting seated.

Our first witness is going to be Michael Allen. He is a professor of law at Stetson University. Next, we have Daniel Bertoni, the Director of the Disability Issues from the Government Accountability Office, GAO. Our final witness is retired Air Force Lieutenant-Colonel John Wilson. He is the Associate National Legislative Director of the Disabled American Veterans.

I thank all of you for being here this morning and appreciate your appearing before this Committee. Your full testimony will appear in the record. Professor Allen, we are going to begin with you.

**STATEMENT OF MICHAEL P. ALLEN, PROFESSOR OF LAW,  
STETSON UNIVERSITY**

Mr. ALLEN. Thank you, Senator Murray, Ranking Member Burr and Members of the Committee. Thank you for the invitation to testify here this morning. Most of the other witnesses have talked about, or will talk about, the claims processing at the administrative level. I am going to focus my remarks on the end of the process, which is the appellate review—the judicial appellate review of those determinations—because, as the Members of the Committee have noted at many different times in the past, what goes in at the beginning is going to make a difference at the end of the pyramid.

This coming October marks the 20th anniversary of what we now know as the U.S. Court of Appeals for Veterans Claims. Until Congress enacted the Veterans' Judicial Review Act of 1988, there was effectively no judicial review of veterans' benefits determinations outside of the VA administrative process itself. So, the VJRA was itself a milestone in the commitment, the evolving commitment, to veterans in the United States, and I think it is an opportune time to look back and see what has happened in the last two decades.

I should say that the addition of independent judicial review of these veterans' benefits determinations has been successful, and I think we can lose sight of that when we try to think about ways to improve the system.

As I explain more fully in my written testimony, it has been successful in a number of ways. One, it has dramatically increased the uniformity and predictability of administrative decisions. Second, it has enhanced the actual but also the perceived fairness of the process and it has improved administrative decisionmaking. But despite its successes, independent judicial review has caused or contributed to serious problems in the system.

First, and most importantly, as the Committee has noted now and in past hearings, are the delays that veterans face as part of the claims process. One cause of that is the dual layer of appellate review, meaning appellate review first at the Veterans Court and then a second appellate review at the U.S. Court of Appeals for the Federal Circuit. There is no other similar level of dual layer of appellate review right now in the Federal system.

Second, there are, and as this Committee has noted in the past, large numbers of remands. Those large numbers of remands do not just occur from the board to the regional office within the administrative system. They occur from the Veterans Court back to the board, and this increases delay.

Third, there is an inability to adjudicate class actions or aggregate litigation at the Veterans Court. And in lots of other contexts, class actions can have bad or good connotations, depending upon the political views. But, really, the issue here is not the traditional class action; it is the ability to handle a large number of claims that all have the same legal issue at once. Those factors have led to increased delay.

There is also tension between the Federal Circuit and the Veterans Court. There are tensions between the Veterans Court and the Secretary at times. Another problem with judicial review has been an issue that Senator Murray alluded to in her questions to the last panel, which is that the veteran can get caught in the space between the administrative process and the judicial process, because whether or not the VA process continues to be non-adversarial, people can debate that.

But that is the stated purpose of the system. There is a transition point from that system to judicial review before the federal courts where it is a traditional adversary system, and veterans face a difficult challenge moving from one to another. So, there are these problems with judicial review.

So, what I would urge is for Congress to consider—and I hate to use the word “commission” again, Senator Burr—a commission or I will call it a working group perhaps, to study the system. What changes can be made in the process from beginning to end, including judicial review now that we have 20 years under our belts.

The key to this idea is that there is the widest possible buy-in from affected groups: veterans, the Department and all its facets, Congress and the relevant judicial bodies. And I do not think this commission should be limited in what it can consider.

To paraphrase Ranking Member Burr at a hearing in February, “This commission should start with a blank piece of paper to design this system with no preconceived notions. It has got to keep the interest of veterans in mind, their paramount constitutional issues of due process and separation of powers, and the public’s interest in the expenditure of resources.”

But beyond that, the system should take the time to step back and see where we have been because, after all, only a few hundred yards from here in 1865, Abraham Lincoln gave his famous second inaugural address in which he called on the Nation to stand up for the people who stood up for the country and their dependents. We are still doing that today. So for me, it is a distinct honor to even be a small part of the process. Thank you.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF PROF. MICHAEL P. ALLEN,  
STETSON UNIVERSITY COLLEGE OF LAW, GULFPORT, FL

Mr. Chairman, Ranking Member Burr, and Members of the Committee: Thank you for the invitation to testify this morning concerning the current state of appellate review of veterans’ benefits determinations and how this review might be improved. It is a distinct honor to be here to discuss this critically important topic for the men and women who have answered the call to serve the Nation.

I am a Professor of Law at Stetson University College of Law in Gulfport, Florida. For the past five years, I have had the pleasure of studying the existing system for reviewing veterans’ benefits determinations. As I will explain, one should not lightly discount the benefits of the current system given the reality that twenty years ago there was no such review. However, there are clearly steps that could be taken to improve the existing system. The time is ripe to do so. I applaud the Committee for its attention to this important matter.

My testimony this morning is based in large part on prior work I have done in this area. That work is discussed in more detail in two law review articles to which I refer the Committee for additional information: Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission to Consider its Future*, 58 CATH. U. L. REV. 361 (2009) and Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals*

for the Federal Circuit, 40 U. MICH. J.L. REFORM 483 (2007). [See Appendix for article from Prof. Allen.]

As I explain below, I believe that Congress should appoint a commission or other working group to consider possible improvements in the process by which veterans' benefits determinations are reviewed. While I have my own thoughts about this matter (some of which I will share in my testimony), the key to any successful revision of the system will be buy-in from the widest possible cross-section of interested groups. As such, the commission or working group should be comprised of representatives of all relevant constituencies including veterans, the Department in all its facets, Congress, and the appropriate judicial bodies. Only in this way will the successes of the past twenty years be maintained and the way paved for an even brighter future.

#### THE CURRENT SYSTEM IN CONTEXT

Until 1988, there was effectively no judicial review of administrative determinations concerning the benefits to which veterans and their spouses and dependants might be entitled under relevant law. As the Supreme Court noted (quoting a congressional report), the Veterans Administration operated in "splendid isolation." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. Rep. No. 100-963, pt. 1, p. 10 (1988)). This state of affairs changed with the passage of the Veterans' Judicial Review Act of 1988 (the "VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). The centerpiece of the VJRA was the creation of what is today called the United States Court of Appeals for Veterans Claims (the "Veterans Court").

In order to assess the current state of appellate review of veterans' benefits determinations, and the role of the Veterans Court in that process, it is useful to step back and consider a high-level overview of the system. The Members of this Committee already have a deep understanding of these matters. As such, what follows is simply a general outline of what is a far more detailed system.

A veteran wishing to receive a benefit to which she believes she is entitled begins the process by submitting an application with one of the VA's regional offices (RO). If the veteran is satisfied with the benefits awarded, the process is at an end. However, there are a number of reasons why the veteran may be dissatisfied with the RO's decision.

When the veteran is dissatisfied with the RO's decision, she has the option to pursue an appeal within the Department by filing a "Notice of Disagreement" (NOD) with the RO. The NOD triggers the RO's obligation to prepare a "Statement of the Case" (SOC) setting forth the bases of the decision being challenged. If the veteran wishes to pursue her appeal after receiving the SOC, she must file VA-Form 9 with the RO indicating her desire that the appeal be considered by the Board of Veterans' Appeals ("Board").

Congress provided that veterans are entitled to "one appeal to the secretary [of the Department of Veterans Appeals]" when denied benefits. See 38 U.S.C. § 7104(a). That appeal in actuality is taken to the Board. The Board is led by a Chairperson, appointed by the President and confirmed by the Senate, and a Vice-Chairperson, designated by the Secretary. The Board is comprised of approximately 60 Veterans Law Judges and over 250 staff counsel and other support personnel.

The Board bases its decision "on the entire record of the proceeding and upon consideration of all evidence and material of record and applicable law and regulation." See 38 U.S.C. § 7104(a). In addition to the material developed at the RO, the Board may also conduct personal hearings with the veteran at which new evidence may be added to the record. A final Board decision concludes the administrative process.

If a veteran is dissatisfied with a final Board decision, she may elect to appeal that decision to the Veterans Court, which has exclusive jurisdiction to review such matters. The Secretary may not appeal an adverse Board decision. See 38 U.S.C. § 7252(a). Congress created the Veterans Court under its Article I powers. See 38 U.S.C. § 7251. The Court is comprised of judges appointed by the President with the advice and consent of the Senate to serve fifteen-year terms. See 38 U.S.C. § 7251(a), (b), (c). The Veterans Court has the "power to affirm, modify or reverse a decision of the Board or to remand the matter, as appropriate." See 38 U.S.C. § 7252(a). The Veterans Court is an appellate body that Congress specifically precluded from making factual determinations. See 38 U.S.C. § 7261(c). The Court has ruled that its jurisdiction is limited to denial of (or other dissatisfaction with) individual claims determinations. Specifically, the Court has held that it is without power to adjudicate class actions or other aggregate litigation concerning more generic issues that may affect groups of veterans. See, e.g., *American Legion v. Nicholson*, 21 Vet. App. 1 (2007) (en banc) (holding that court lacked jurisdiction to adju-

dicating claims brought by an organization as opposed to an individual veteran); *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991) (rejecting contention that court had the authority to adjudicate class actions).

Any aggrieved party may appeal a final decision of the Veterans Court to the United States Court of Appeals for the Federal Circuit. See 38 U.S.C. § 7292. Review of Federal Circuit decisions is available by writ of certiorari in the Supreme Court of the United States. See 28 U.S.C. § 1254 (providing for Supreme Court appellate jurisdiction concerning decisions of the courts of appeals). Review in these Article III courts is limited by statute. Specifically, in the absence of a constitutional issue, the Federal Circuit (and at least by implication the Supreme Court) may review only legal questions; it specifically is precluded from ruling on a factual determination or on the application of law to the facts in a particular case. See 38 U.S.C. § 7292(d)(2).

Figure A summarizes the current procedures for considering challenges to the determination of entitlement to veterans' benefits:

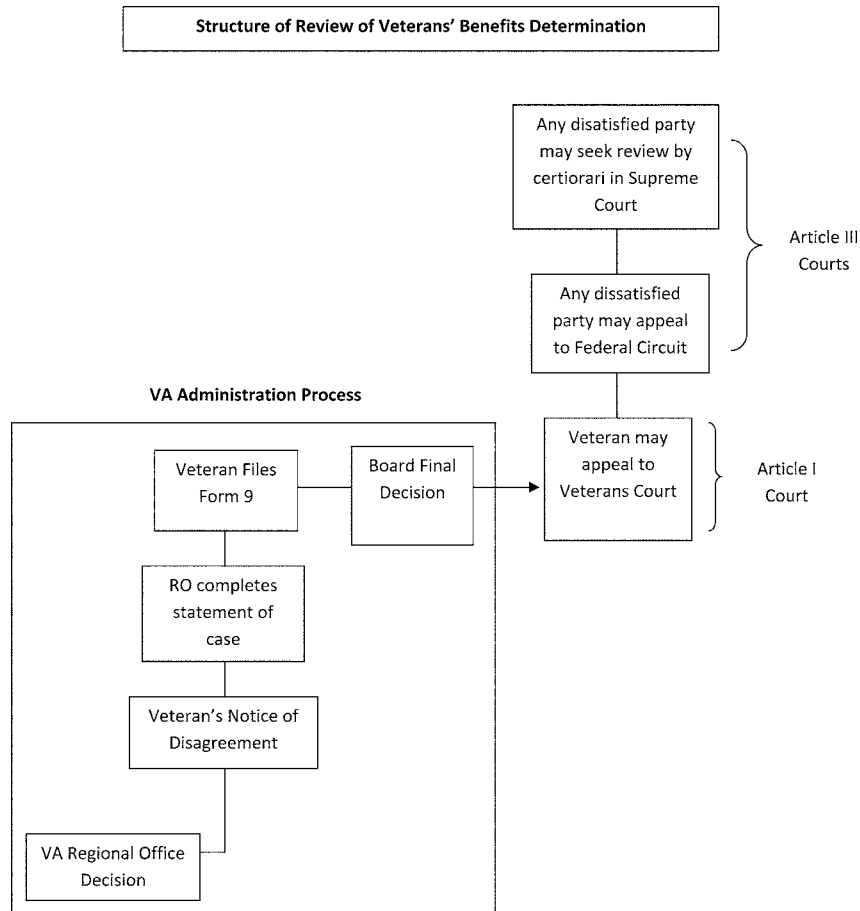


Fig. A

There is no question that at every stage in the process the current system operates under a staggering workload. This Committee has held numerous hearings over the past few years addressing this very real problem. There is no need here to dwell upon the statistics at the various adjudicatory levels in the process. For present pur-

poses, the summary below is sufficient to establish that the system is operating at (or perhaps above) capacity:

*Matters Before the Board*

In Fiscal Year 2008, there were 40,916 cases received at the Board (with 43,351 Form-9s filed). In FY 2008, the Board issued 43,757 decisions. See Fiscal year 2008 Report of the Chairman, Board of Veterans' Appeals, available at <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>.

*Matters Before the Veterans Court*

In Fiscal Year 2008, there were 4,128 new cases filed at the Veterans Court. The Veterans Court decided 4,446 cases during that period. See United States Court of Appeals for Veterans Claims, Annual Reports, available at [http://www.uscourts.cavc.gov/documents/Annual\\_Report\\_-\\_20081.pdf](http://www.uscourts.cavc.gov/documents/Annual_Report_-_20081.pdf).

*Matters Before the Federal Circuit*

In Fiscal Year 2008, there were 170 appeals filed with the Federal Circuit from decisions of the Veterans Court. See Table: U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending During the Twelve-Month Period Ended September 30, 2008, available at <http://www.cafc.uscourts.gov/pdf/b08sep08.pdf>. This accounted for approximately 12% of the Federal Circuit's filed appeals during that period. See Chart: United States Court of Appeals for the Federal Circuit, Appeals Filed by category FY 2008, available at <http://www.cafc.uscourts.gov/pdf/ChartFilings08.pdf>.

EVALUATION OF THE CURRENT SYSTEM

Now is an excellent time to take a step back and consider how the current system of appellate review of veterans' benefits determinations operates. This October, we will celebrate the twentieth anniversary of the first convening of the Veterans Court. This important milestone provides a time for reflection. That would be so even if the system was not being flooded with claims and even if one believes it is operating without difficulty. In my opinion, we owe it to veterans to evaluate the functioning of the revolutionary changes of two decades ago.

My remarks will focus primarily on the judicial review portion of the process. That is, I will largely confine my testimony to appeals taken from the Board to the federal court system. In this portion of my testimony, I will highlight the successes of judicial review and then mention some of its shortcomings.

*Successes of Judicial Review*

It is easy to focus on areas on which the current system can be improved. However, it is important to remember the many successes that have resulted from the addition of independent judicial review of veterans' benefits determinations. I highlight four such benefits.

First, independent judicial review has produced a body of law that has at least begun to provide uniformity and predictability for those seeking veterans' benefits. When the Veterans Court began operation twenty years ago there were essentially no judicial opinions governing benefits determinations. The "law" in the area consisted almost entirely of the statutes passed by Congress and the actions taken by the Veterans Administration in its "splendid isolation." Today, we are into the twenty-third volume of the *Veterans Appeals Reporter* containing precedential opinions of the Supreme Court, the Federal Circuit and the Veterans Court. These decisions provide broad rules governing the claims adjudication process throughout the agency and across the country. All actors in the system are in a position to know the law when it is settled and to make reasonable predictive judgments about outcomes in individual cases. Such uniformity and predictability could certainly be said to be staples of the rule of law itself. Their development over the past twenty years is an important success of judicial review under the VJRA.

Second, over the past twenty years the Veterans Court has grown into a strong, independent body. It is easy to forget the challenges that faced the Veterans Court at its inception. The judges of the Court were confronted with a situation almost unheard of in American law. They were not only writing on a clean slate in terms of the content of veterans' benefits law, they were also required to build an institution from the ground up. Where was the Court physically to be located? How was it to pay its bills? How did it fit into other governmental structures? Answering all these questions was as important to the success of the enterprise as was producing solid judicial opinions.

Once it was established physically, the Court then needed to focus on its substantive work. One of the striking aspects of the history of the Veterans Court is

the conscious way in which the judges of the Court over time developed the institution as a court. It is one thing for Congress to say that it is creating a court of law; it is quite another for that institution to become one. The Veterans Court's efforts to make itself into an institution commanding respect is itself a benefit of the judicial review process.

Third, judicial review has provided greater procedural protection for veterans that has increased both the actual fairness of the system as well as a perception of fairness in the process. There is no question that one still hears complaints about fairness, but those complaints pale in comparison to the complaints one heard when there was no independent process to review administrative decisions. One should not lightly discount how important the provision of independent judicial review has been to the actual and perceived fairness of the system as a whole.

Fourth, judicial review has improved the quality of administrative decisionmaking in the system. Do not get me wrong. There are still deficiencies in the decisions rendered at the administrative level. However, the Veterans Court's rigorous enforcement of the statutory requirement that the Board provide adequate reasons and bases for its decisions, see 38 U.S.C. § 7104(d)(1), has made a real difference in both the transparency of decisions as well as the perception of a fair process.

#### *Problems with Judicial Review*

Despite its very real successes, the current structure of judicial review has caused or contributed to problems that should be addressed. I briefly highlight four such issues.

First, judicial review has increased delays associated with the review of benefits determinations. As this Committee has noted time and again in hearings, there are unacceptable delays in reviewing benefits determinations at almost every level of the current system. An excellent overview of this issue can be found in the material associated with this Committee's February 11, 2009, hearing concerning *Review of Veterans' Disability Compensation: What Changes are Needed to Improve the Appeals Process?*. Of course, with no other changes to the system any addition of a review by an independent body would add some measure of delay. The issue is that the way in which judicial review is structured has increased delay beyond that required by providing for such review in the first instance. There are three prime examples of such needless delay:

- The current system has two levels of appellate review (leaving aside the possibility of review by certiorari in the Supreme Court). A veteran dissatisfied with a Board decision may appeal as of right to the Veterans Court. In addition, any party dissatisfied with the Veterans Court's decision may appeal as of right to the Federal Circuit. This double layer of appellate judicial review is unique in the Federal system. It certainly adds time to the appellate process. Of course, that time may be justified by other factors, such as a perceived increase in the accuracy of decisions. Nevertheless, any consideration of the current system needs to address this duplicative appellate process.

- As the Committee has noted, the prevalence of remands in the system leads to increased delays in the resolution of disputes. Remands are an issue at the administrative level due to the practice of allowing claimants to have an initial adjudication followed by one review at the Board level. The practical effect of this practice is what has been called a "hamster wheel" process by which cases are shuttled from the Board to the RO and then back again as new facts are adduced. Remands are also a problem at the judicial level. Here, the issue stems in large part from the statutory limitation on the finding of facts at the Veterans Court. The Court was meant to be an appellate body. As such, when an error is found—say, an inadequate statement of reasons and bases by the Board—the Veterans Court's usual course is to remand the matter for re-adjudication instead of reversing the Board's decision and ordering that benefits be awarded. Such remands, even if one assumes them to be mandated by current statute, unquestionably add time to the resolution of disputes.

- A final example in this area concerns the Veterans Court's holdings that it does not have the authority to entertain class actions or other forms of aggregate litigation. In the cases cited earlier in my testimony, the Court reasoned that it was limited to cases in which a veteran challenged a specific, individual Board decision. Again, assuming that this reading of the law is correct, one cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication.

Second, the current system of judicial review has built into it a serious risk of prejudice to veterans. This prejudice flows from the movement of the veteran from the administrative system that is designed to be non-adversarial to the judicial process which is patterned on traditional adversarial litigation. This movement can

leave veterans, particularly those unrepresented at the filing of a judicial appeal, at risk of running afoul of rules designed to implement an adversarial system. For example, the time periods within which veterans are required to take certain actions in the administrative system are generally longer and more flexible than the time periods they will confront before a court. Such issues in transition are a significant hurdle for many veterans moving between systems.

Third, there is at times an unusual tension between the Veterans Court and the Federal Circuit. Under the current structure, both these courts play important roles in the system. However, one cannot read the opinions of these bodies without being left with the firm conviction that there are occasions on which each court displays a certain lack of respect for the other. I have discussed this issue in more depth in the articles to which I referred earlier. For now, my point is that this tension is a product of the current structure of judicial review.

Fourth, while the Veterans Court has worked diligently to establish itself as an independent institution over the past twenty years, the Department has not always acted in ways that reflect the respect the Court is due. I believe the Department's attitude is at least partly caused by the Veterans Court's status as an Article I tribunal with Article III oversight in the Federal Circuit. A prime example of this attitude can be found in the Department's actions concerning two Veterans Court decisions with which the Secretary strongly disagreed. One case concerned the Veterans Court's decision that a veteran was entitled to independent ratings for tinnitus in each ear. *Smith v. Nicholson*, 19 Vet App. 63 (2005), rev'd 451 F.3d 1344 (Fed. Cir. 2006). The second dealt with a statutory presumption concerning exposure to certain pesticides by those persons serving on naval vessels in the in-land waters of the Republic of Vietnam. See *Hass v. Nicholson*, 20 Vet. App. 257 (2006), rev'd sub nom *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). In each instance, the Secretary unilaterally ordered that the Board stay the adjudication of all cases affected by the Veterans Court's rulings while he sought an appeal. In neither instance did the Secretary seek a judicial stay order. It is inconceivable to me that the Secretary would have acted in this respect toward an Article III judicial body. Perhaps he would not have done so if the Veterans Court was the last realistic venue for appellate review (whether the Court retained its Article I status or not). These actions reflect a serious and dangerous impediment to the recognition of independent judicial review. In both instances, the Veterans Court issued decisions critical of the Secretary's actions. See *Ribaudo v. Nicholson*, 20 Vet. App. 552 (2007) (en banc) (concerning Haas); *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006) (concerning Smith). I am not convinced, however, that the Secretary's attitude will necessarily change if the current structure remains in place.

In short, while the addition of judicial review has provided many important benefits to veterans, it has also caused or contributed to certain drawbacks in the system. The question then becomes: what should be done?

#### WHAT SHOULD BE DONE?

In past hearings, Members of this Committee have made an important point about changes to the current system of review of benefits determinations. Specifically, Members have noted that one should consider both focused changes in the current system as well as the distinct question concerning more sweeping alterations. I believe that this distinction is important. While my testimony is principally focused on the latter issue, I begin this portion of my comments by mentioning at least some targeted matters that could be undertaken more immediately than any type of sweeping reform.

##### *Some Targeted Matters*

There are certain steps that could be taken within the current system to address some of the drawbacks I have discussed above. I again principally limit my testimony to the judicial review of benefits determinations. I should note that some of the matters I mention are already in the works in one form or another:

- Congress has already taken one critically important step to address some of the issues facing the system as currently constituted: the addition of judges to the Veterans Court. In the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, Congress authorized the addition of two judges to the Veterans Court, bringing its complement to nine. Those additional judges are temporary, with Congress set to re-assess the matter in 2012. I urge Congress and the President to act as expeditiously as possible to fill these positions (which come into force in December 2009) and to monitor the effect of these additional judgeships on the workload of the Veterans Court.



- The Veterans Court itself has also taken steps to address some of the difficulties veterans face, in particular issues involving the movement from the non-adversarial administrative process as well as the delays veterans face in the system generally. For example, under the leadership of Chief Judge Greene, the Court has adopted a mediation program that appears to be helpful in resolving cases. The Court has also taken steps to address the assembly of the appellate record that should help reduce delay. Finally, the Court has largely moved to a paperless system that should also have a positive effect on the time to disposition. I urge Congress to support the Veterans Court in these and similar efforts.

- One of the difficulties with assessing the successes and shortcomings in the current system is obtaining relevant empirical information. Relevant information is collected and disseminated by different bodies (e.g., the Board, the Veterans Court, and the Federal Circuit). As such, it is often difficult to compare apples to apples. Without an empirical foundation, it is both challenging and potentially dangerous to make changes in the system. I urge Congress to consider whether there are means for a standardized collection of information relevant to issues facing veterans in the system.

- As I mentioned, the Veterans Court has held that it is without the authority to adjudicate class actions or other aggregate litigation. I believe Congress should amend Title 38 of the United States Code to provide that the Veterans Court may adopt a class action/aggregate litigation procedure. I do not believe Congress should mandate that the Veterans Court adopt such a procedure. There are too many interconnected issues for such a mandate to necessarily improve the system. But the Veterans Court should have the clear authority to adopt such a rule if the judges of that Court, in consultation with those who practice in this field, conclude it would be beneficial to the prompt and fair adjudication of claims on a system-wide basis.

- Finally, the Veterans Court could more aggressively exercise its authority to reverse Board decisions instead of remanding them for further factual development. Deciding when a Board decision is inadequate due to the failure to provide reasons and bases for a decision or simply legally erroneous is a matter of degree. It is fair to say that at this point the Veterans Court is far more inclined to find that Board decisions are insufficiently supported by explanations, a decision that leads to remand and delay. The Veterans Court should consider whether more such decisions could actually be considered simply erroneous, a result that would lead to reversal and an award of benefits. While I believe that such a re-evaluation should be done, I do not believe it should be mandated by legislation. The Court is in the best position to make such decisions.

#### THE BIGGER PICTURE

This brings me to the more macro level questions concerning the current system of review of veterans' benefits determinations. As I alluded to at the beginning of my testimony, Congress should establish a commission or other working group to study the judicial review of veterans' benefits determinations. The Commission should be led by a chairperson or chairpersons who are widely respected and seen to be independent, particularly of influence from the Department. The leader or leaders of the Commission must also be politically savvy as well as capable of the follow through necessary to make the Commission's work meaningful in the real world.

The Commission should be composed of representatives of all the relevant constituencies affected by and involved in the award of veterans' benefits. These constituencies include: veterans (and other claimants in the system), most likely represented through the various Veterans Service Organizations; the Department in all its facets (thus the RO adjudicators, the Board, the litigation arm of the Department and the Secretary, probably through the Office of the General Counsel, should all be included); the Veterans Court; the Federal Circuit; and Congress itself.

Congress should also ensure that the Commission has adequate resources with which to perform its functions. The Commission should be provided with a staff for, among other things, data collection and analysis as well as space in which to work. It should also have funds available sufficient to allow the Commissioners to travel so that public hearings can be held to obtain the greatest input of views as part of its work.

The Commission should be charged with evaluating the current state of appellate review of veterans' benefits determinations and making recommendations concerning what changes might be made to that system. There should be no constraints imposed on the Commission with respect to the options it might consider and/or propose. Finally, the Commission should be directed to submit a report to Congress within a defined period of time. That report should describe the Commission's activi-

ties, provide relevant background and statistical information, and set forth specific proposals for changes to the system warranted by the Commission's investigation.

While the Commission should not be limited in terms of the matters it considers, it should keep three interests in mind during its investigation and deliberations:

#### *The Interests of Veterans*

The paramount interest the Commission must consider is that of the veteran. The nation should never forget—and I am confident none of the people involved in the process do—that the entire structure of veterans' benefits law exists for the purpose of providing support to the men and women who served this country. Thus, the Commission must ensure that it proposes nothing that harms the interests of the beneficiaries of the system.

Veterans' interests fall into five broad categories:

- *Accuracy*: Veterans have an interest in ensuring that decisions concerning the award of benefits be as accurate as possible. The gains in accuracy that have likely been achieved over the past twenty years due in part to judicial review should be preserved.

- *Fairness*: It is critically important that the system of awarding benefits and reviewing such decisions both be fair and be perceived as being fair. Veterans need to believe that the system provides an opportunity for their claims to be adjudicated in a manner that is, broadly speaking, consistent with the rule of law. Thus, the gains in the nature of VA decisionmaking (e.g., better reasoned decisions) need to be preserved. In addition, the substantive fairness of the process needs to be preserved as well. Finally, one needs to be concerned with the speed of the decision-making process.

- *Transparency*: Closely related to fairness is veterans' interest in a transparent process. Largely as a result of the influence of the Veterans Court (although aided by Congress), the process of awarding benefits has become more open. That trend should be preserved.

- *Predictability*: It is important that the Department and veterans and their counsel be in a position to predict how issues will be resolved. Of course, there will always be a level of uncertainty in any legal system populated by humans. Nevertheless, the value of enhanced predictability of results is important systemically.

- *Finality*: No legal system can exist for long in any functional respect if disputes never come to an end. Veterans, as well as the VA, have an interest in having disputes resolved once and for all. The value of finality should not drive the system. There should be means of correcting errors, but those means need to be balanced against the interests of repose. Thus, finality itself is a value that should be considered when evaluating the current—or a future—system concerning the award of veterans' benefits and the judicial review of such decisions.

#### *Institutional Concerns*

A second interest that the Commission must consider concerns the preservation of American constitutional values. In particular, the importance in the American constitutional order of the maintenance of separate and independent centers of political authority must be a part of the Commission's deliberations. This is a structural concern. Thus, it is important to preserve an independent institutional check on the political branches' authority to award veterans' benefits.

The Veterans Court was created as an Article I tribunal, meaning that its members do not enjoy the tenure and salary protections afforded judges serving in the coordinate Article III judiciary. Under well-established law, there is no structural constitutional violation flowing from the assignment of the adjudication of disputes concerning veterans' benefits to such an Article I tribunal. Veterans benefits are a "public right." That is, entitlement to benefits flows from statutes instead of the common law or the Constitution itself. See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.22 (1982) (describing "payments to veterans" as an example of a public right (citation omitted)); Congress has wide latitude to assign the adjudication of disputes concerning such public rights to non-Article III adjudicators such as the Veterans Court. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985).

The institutional concern the Commission must consider is less formalistic than a suggestion that one must necessarily have the Article III judiciary (beyond the Supreme Court) involved in the process to make it legitimate. Of course, that is one way in which one could preserve institutional concerns regarding separation of powers. But there are other ways in which such power divisions can be established and maintained. The key is that one needs to ensure that the system of review employed

in the process contains sufficient independence that there is a meaningful check on the unilateral authority of the political branches.

*The Public Interest*

Finally, any consideration of the judicial review of veterans' benefits decisions needs to take into account the public's interest in maintaining a system that, while fair to veterans, also safeguards the great resources devoted to veterans and their dependants. The public has a right to ensure that the funds allotted to the Department for the payment of veterans' benefits are spent according to the directions of Congress.

As I near the end of my remarks, I wanted to highlight some of the more important issues the Commission for which I have called should address. This list is by no means exhaustive. Rather, it is meant to illustrate some of the matters that I see as most significantly in need of attention. Moreover, I do not necessarily suggest that any of the steps I mention should be taken. The key is that they be considered. I mention five primary matters:

- The Commission should consider whether the Federal Circuit should remain as part of the system for review of veterans' benefits determinations. There is no question that having a second layer of as-of-right appellate review adds delay to the system. On the other hand, some could argue that any additional delay is justified by the error-correcting function of the Federal Circuit. The question the Commission should consider is whether any such error-correcting function is worth the cost in delayed resolution. There is no requirement that the Federal Circuit remain as part of the process. For example, the United States Court of Appeals for the Armed Forces is an Article I court with review by way of the writ of certiorari in the Supreme Court. While I have reached no firm conclusion on this point, I lean toward removing the Federal Circuit from the process. The fact is that delayed resolution in the system is a significant problem. The removal of the Federal Circuit is a relatively easy way to reduce delay.

- If the Federal Circuit remains in the appellate review system, the Commission should consider whether that court's jurisdiction should be expanded. As I have mentioned, at present the Federal Circuit is precluded from reviewing factual determination or the application of law to fact. This prohibition leads to a fair amount of ink being spilled as to whether a certain issue is one dealing with a pure legal question or rather it concerns the application of law to fact. If the Federal Circuit is deemed to add value to the process, consideration should be given to whether the benefits of the current jurisdictional restrictions outweigh the costs.

- A third issue the Commission should consider is whether the Veterans Court should be converted into an Article III body. Such a conversion, if warranted, could take place regardless of whether the Federal Circuit remained as part of the appellate review process. Article III status could augment the respect the Veterans Court receives from the Secretary as well as other courts. In addition, Article III status would allow the court to more easily utilize the support mechanisms for the Federal judiciary. Of course, there are also potential negative effects of a conversion, including less turnover in judges and, perhaps, greater politicization of the appointment and confirmation process.

- The Commission should consider the appropriate place of the Board in the appellate process. As Members of the Committee have noted in the past, the Board came into existence in a time when there was no judicial review. Given the fundamental shift twenty years ago ushering in the current era of judicial supervisor, a fresh look should be taken at the Board's function as well as its structure.

- Finally, the Commission should evaluate the jurisdiction of the Veterans Court. The Court is currently prohibited from making factual determinations. I suspect that any review would likely conclude that the Court should remain an appellate tribunal without fact-finding authority. However, the prohibition on fact-finding does have an effect on delays in the system because the Veterans Court often feels compelled to remand matters in which it has found an error instead of reversing Board decisions outright. The Commission should consider whether there are statutory changes that could be made that would preserve the Veterans Court's status as an appellate body but also decrease needless remands.

CONCLUSION

In conclusion, I want to stress that nothing I have said here today should be taken to cast aspersions on anyone involved in the current system for the award and review of veterans' benefits. I firmly believe that the people who have elected to devote a good portion of their professional lives to working in this system have nothing but the best interests of veterans at heart. In many respects, they are he-

roes themselves because they are a contemporary example of President Abraham Lincoln's call in his famous Second Inaugural Address (as slightly edited to reflect today's society) for the Nation "to care for him [and her] who shall have borne the battle and for his widow [or her widower], and his [or her] orphan."

Thank you again for allowing me to testify today.

Senator MURRAY. Thank you.  
Mr. Bertoni?

**STATEMENT OF DANIEL BERTONI, DIRECTOR, DISABILITY SERVICES, GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. BERTONI. Senator Murray, Members of the Committee, good morning. I am pleased to be here to discuss the Department of Veterans Affairs Disability Compensation Claims process. I want to preface my remarks by saying some of the numbers I will reference today will be slightly different than what we have been hearing. We focused for this Committee on our ongoing work only on compensation claims. We have isolated DIC and pension out of our analyses, so the numbers will be slightly different although the trends are consistent.

Last year, VA paid over \$31 billion of disability benefits to 3 million veterans. For years, VA's claims process has been a subject of concern due to long waits for decisions and large numbers of pending claims. My statement today is based on prior and ongoing work for this Committee and discusses trends and compensation claims as well as the steps the agency is taking to improve service delivery.

In summary, over the last decade, disability workloads have improved in some areas and worsened in others. Since 1999, VA has steadily increased the number of initial claims processed annually by 60 percent to 729,000, and the agency has realized substantial gains in the number of claims processed over the last three fiscal years.

Last year, compensation claims were pending an average of 123 days, down from 152 days in 1999, but still in excess of VA's goal of 116 days. Despite these gains, the inventory of claims waiting a decision has increased 65 percent to 340,000. Those pending more than 6 months have increased by 20 percent. More recent data shows that pending claims declined slightly between 2007 and 2008. However, the average time VA took to complete a claim increased from a low of 181 days in 2004 to 196 days in 2008.

Regarding disability appeals, VA has also experienced some gains and setbacks. Since 2003, the number of appeals processed increased by 22 percent and the number of pending cases decreased from 126,000 to 95,000. Unfortunately, average processing time has trended upward from 543 days in Fiscal Year 2003 to 639 days—over 21 months—last year.

Various factors have contributed to the trends in disability workloads, including substantial increases in the number of claims received, growing claims complexity and laws, court decisions and regulations changes, which have expanded workloads over time.

VA has taken several steps to expedite service to veterans. First, the agency has hired thousands of additional claims processing and appeals board staff and plans to use Recovery Act funds to hire 1,500 additional support staff going forward.

This infusion of staff has helped VA process more claims, and that explains the positive trends in recent data. However, VA has cautioned that per person productivity will decrease in the short term because it takes from 3–5 years for staff to become fully trained and proficient. We have also noted that quickly absorbing these staff will likely pose substantial human capital challenges going forward in regard to training and deployment.

Second, beyond increasing staff, VA has also expanded its efforts to redistribute key workloads to 15 resource centers. These centers process claims for backlogged offices, often specializing in distinct phases of the process, such as claims development or ratings. In fiscal year 2008 alone VA redistributed over 140,000 ratings cases. And although such actions could improve processing time and consistency, VA has not yet collected key data to evaluate the effectiveness of these centers.

Third, VA has expanded efforts to assist servicemembers in filing claims prior to leaving the military when their personnel and medical records are most accessible and up to date.

In 2008, VA received 32,000 claims through this program known as Benefits Delivery at Discharge or BDD. To improve consistency, all BDD rating activities are consolidated at two VA regional offices, and on average, processing times for these claims are shorter than for other claims. However, we have recommended that VA take additional steps to improve its measure for BDD timeliness and quality and to ensure access to members of the National Guard and Reserves who represent 1 in 4 disability applicants.

While VA has a number of other initiatives underway, I will conclude by noting that it is piloting a joint disability evaluation process with DOD to improve the transparency, timeliness and quality of disability evaluations. Key pilot features include a single physical exam and a single disability rating prepared by the VA for determining both military retirement and VA disability benefits. If the pilot is successful, the likely outcome will be worldwide implementation of this streamlined system and a substantial change in the way many veterans first receive VA benefits.

We have noted, however, that broader expansion will require development of a comprehensive service delivery plan, sound performance measures, and resolution of key operational challenges, such as who will perform the single physical exam at locations where there is no VA facility nearby. Both agencies have been working to address these and other concerns.

Senator Murray, this concludes my statement. I am happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Bertoni follows:]

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United States Government Accountability Office

**GAO**

Testimony  
Before the Committee on Veterans'  
Affairs, United States Senate

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**VETERANS' DISABILITY  
BENEFITS**

**Preliminary Findings on  
Claims Processing Trends  
and Improvement Efforts**

Statement of Daniel Bertoni, Director  
Education, Workforce, and Income Security



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GAO-09-910T

July 29, 2009

**GAO**  
Accountability • Integrity • Reliability  
**Highlights**

Highlights of GAO-09-910T, a testimony to the Committee on Veterans' Affairs, United States Senate

**Why GAO Did This Study**

The Senate Veterans' Affairs Committee asked GAO to present its preliminary findings on the Department of Veterans Affairs' (VA) disability claims process. This statement discusses (1) the trends in VA compensation claims and appeals, and (2) the steps VA is taking to improve disability claims processing.

This testimony is based on ongoing work. GAO's findings are based largely on VA performance data and information obtained from VA documents and through interviews with VA officials. This testimony is also based on past GAO work on this subject, updated as appropriate to reflect VA's current workload and initiatives.

View GAO-09-910T or key components. For more information, contact Daniel Bertoni at (202) 512-7215 or bertond@gao.gov.

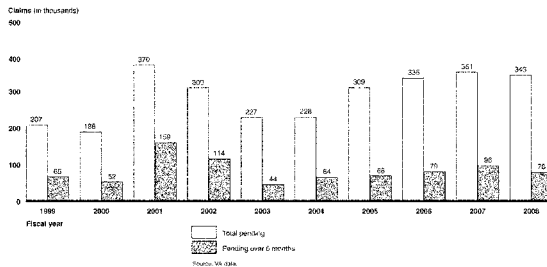
**VETERANS' DISABILITY BENEFITS**

**Preliminary Findings on Claims Processing Trends and Improvement Efforts**

**What GAO Found**

Over the past several years, VA disability claims workloads at both the initial and appellate levels have improved in some areas and worsened in others. For example, the number of disability claims VA completes annually at the initial level increased about 60 percent—from about 458,000 in fiscal year 1999 to about 729,000 in fiscal year 2008. However, during this same period, the number of claims pending at year-end increased 65 percent to about 343,000. Several factors affect these and other disability claims workloads, including increases in disability claims received, growing complexity of claims, court decisions and changes in regulation. Disability claims workloads at the appellate level have also improved in some areas and worsened in others. For example, over the past several years, the number of appeals resolved increased 22 percent, from more than 72,000 cases in fiscal year 2003 to almost 88,000 cases in fiscal year 2008. However, it took on average 96 days longer in fiscal year 2008 to resolve appeals than in fiscal year 2003. One factor that affects workloads at the appellate level is the submission of new evidence or claims that must be evaluated.

**Pending Compensation Claims, End of Fiscal Years 1999-2008**



VA has taken several steps to improve claims processing, but the effect of some of these actions is not yet known. For example, VA increased claims processing staff about 58 percent from fiscal years 2005 to 2009, which has helped to increase the total number of decisions VA issues annually. However, VA expects individual staff productivity to decline in the short-term in part because of the challenge of training and integrating new staff. In addition, VA has established 15 resource centers to which it redistributes claims and appeals for processing from backlogged regional offices. Although VA has not collected data to evaluate the effect of its workload redistribution efforts, these efforts may ultimately increase the timeliness and consistency of VA's decisions. VA is also implementing a pilot with the Department of Defense (DOD) to perform joint disability evaluations that has the potential to streamline the disability process for prospective veterans. Finally, VA has begun other initiatives, which we are in the process of reviewing, such as targeting certain claims for fast-track processing and leveraging technology.

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Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to comment on the Department of Veterans Affairs' (VA) disability compensation claims process. In fiscal year 2008, VA paid \$30.7 billion in benefits to nearly 3 million veterans through its disability compensation program. For years, the claims process has been the subject of concern and attention by VA, Congress, and veterans service organizations, due in large part to long waits for decisions and large numbers of claims pending a decision. Further, we and VA's Inspector General have identified concerns about the consistency of decisions across regional offices.

You asked us to discuss preliminary findings of our ongoing work for this Committee examining VA's disability compensation claims process. Specifically, my statement today addresses (1) trends in VA compensation claims and appeals workloads and (2) steps VA is taking to improve its claims processing. To identify trends in VA's disability claims and appeals workloads, we analyzed compensation claims processing data from VA's Veterans Benefits Administration (VBA) and Board of Veterans' Appeals (Board). To identify steps VA is taking to improve its claims process, we reviewed VA's budget submissions, strategic plans, and other documents such as external studies and VA's Office of Inspector General reports; interviewed VA officials and veterans service organization representatives; and examined ongoing initiatives or those that VA completed within the last 3 fiscal years. In addition, we visited four VBA regional offices and the Board to learn more about these initiatives. In selecting the regional offices—Chicago, Illinois; Seattle, Washington; Togus, Maine; and Winston-Salem, North Carolina—we considered regional offices that would provide: (1) insights about ongoing initiatives such as pilots; (2) a mix of offices located in different geographic settings (e.g., urban and rural); and (3) a mix of offices that are above and below VBA's averages for select case-processing measures. Our work, which began in November 2008, is being conducted in accordance with generally accepted government auditing standards. Given testimony timelines we have not yet completed our assessment of the reliability of VA data. We plan to issue a final report at a later date.

In summary, over the past several fiscal years, VA disability compensation claims workloads at both the initial and appellate levels have improved in some areas and worsened in others. For example, at the initial level, the number of claims VA completes annually increased about 60 percent from fiscal year 1999 to fiscal year 2008. However, the number of claims pending during this period increased by more than 65 percent to about



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343,000, and the average time VA took to complete a claim increased about 9 days. A number of factors contribute to these results, including an approximately 53 percent increase in VA's claims workload, more complex claims, and court decisions that have expanded benefit entitlement. Workloads at the appellate level have also improved in some areas and worsened in others. For example, for the past several fiscal years, the number of appeals resolved increased 21 percent from more than 72,000 in fiscal year 2003 to almost 88,000 in fiscal year 2008. On the other hand, it took VA 96 days longer in fiscal 2008 to resolve appeals than it did in fiscal year 2003. One factor that contributes to the challenge in further improving workloads at the appellate level is the submission of new evidence or claims that must be evaluated.

VA has taken several steps in an effort to improve claims processing, such as increasing staffing, redistributing workloads, implementing a joint pilot with the Department of Defense (DOD) to perform disability evaluations and other initiatives, but the effect of some of these actions is not yet known. For example, VA increased claims processing staff an estimated 58 percent from fiscal years 2005 to 2009, which has helped to increase the total number of decision VA issues annually. However, VA expects individual staff productivity to decline before it ultimately improves in part because of the challenge of training and integrating new staff. In addition, VA also established 15 resource centers to which it redistributes claims and appeals workloads from backlogged regional offices. These centers currently process thousands of cases annually. Such efforts may ultimately increase the timeliness and consistency of VA's decisions; however, VA has not collected data to evaluate the effect of its workload redistribution efforts. Another step VA has taken is partnering with DOD in piloting a joint process for performing disability evaluations for servicemembers who are going through the military's disability evaluation system. According to VA, preliminary pilot results suggest that the new process expedites delivery of VA benefits to servicemembers upon discharge from the military. This pilot represents a positive step toward streamlining the disability process and expediting benefits for servicemembers upon discharge from the military. However, we have noted that critical implementation challenges will need to be addressed prior to worldwide implementation. Moreover, given the relatively small number of cases in the military's disability evaluation system compared to the number of claims processed under VA's disability compensation program, the pilot will have a limited impact on VA's claims backlog. Finally, VA is taking other steps that could improve the claims process, such as targeting other claims for fast-track processing and leveraging technology.

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## Background

VA pays monthly disability compensation to veterans with service-connected disabilities (injuries or diseases incurred or aggravated while on active military duty) according to the severity of the disability.<sup>1</sup> VA also pays additional compensation for some dependents—spouses, children, and parents—of veterans.<sup>2</sup> In fiscal year 2008, the disability compensation program represented 78 percent, or \$30.7 billion, of the cash benefits paid through VBA's Compensation and Pension Service. In addition, VA's pension program pays monthly benefits to wartime veterans who have low incomes and are permanently and totally disabled for reasons that are not service-connected.<sup>3</sup>

VA's disability compensation claims process starts when a veteran submits a claim to one of VBA's 57 regional offices. A service representative is then responsible for assisting the veteran in obtaining the relevant evidence to evaluate the claim. Such evidence includes veterans' military service records, medical examinations, and treatment records from VA medical facilities and private medical service providers. Also, if necessary for reaching a decision on a claim, the regional office arranges for the veteran to receive a medical examination or opinion. Once a claim has all the necessary evidence, a rating specialist evaluates the claim and determines whether the claimant is eligible for benefits. If the veteran is eligible for disability compensation, the rating specialist assigns a percentage rating. Veterans with multiple disabilities receive a single composite rating. In addition, veterans can reopen claims for additional benefits over time from VA, for example, if a service-connected disability worsens or arises in the future. If the veteran disagrees with the regional office's decision, he or she may begin the appeals process by submitting a written notice of disagreement to the regional office. In response to such a notice, VBA provides further written explanation of the decision, and if the veteran still disagrees, the veteran may appeal to the Board. The Board, whose members are attorneys experienced in veterans' law and in reviewing

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<sup>1</sup>VA's ratings are in 10-percent increments, from 0 to 100 percent. Generally, VA does not pay disability compensation for disabilities rated at 0 percent. Since December 2008, basic monthly payments have ranged from \$123 for 10 percent disability to \$2,073 for 100 percent disability.

<sup>2</sup>38 U.S.C. § 1115 provides for payment of additional benefits for qualifying dependents of veterans whose disability is rated not less than 30 percent.

<sup>3</sup>VA also pays pensions to surviving spouses and unmarried children of deceased wartime veterans. In addition, VA pays dependency and indemnity compensation to some deceased veterans' spouses, children, and parents.

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benefit claims, may grant or deny the appeal or return the case to VBA to obtain additional evidence necessary to decide the veteran's claim.

In addition to receiving disability benefits from VA, veterans may receive disability benefits from the Department of Defense (DOD). If the military determines that a servicemember is unfit for duty because of conditions incurred in the line of duty, the military assigns a combined percentage rating for those unfit conditions using VA's rating system as a guideline. This one-time rating, along with years of service and other factors, determines subsequent disability benefits from DOD. Unlike through VA, veterans cannot reopen claims for additional benefits over time through DOD's disability determination process.

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### VA's Disability Claims and Appeals Processing Has Improved in Some Areas and Worsened in Others

Over the past 10 fiscal years, the total number of compensation claims decisions completed annually by VA and the average days compensation claims were pending improved, while the total number of claims pending at year end and the average days to complete a claim worsened.<sup>1</sup> From fiscal year 1999 to fiscal year 2008, VA increased the number of initial compensation claims processed annually by nearly 60 percent from about 458,000 to about 729,000<sup>2</sup> (see fig. 1). Moreover, VA experienced substantial year-to-year increases in the number of claims completed between 2006 and 2008.

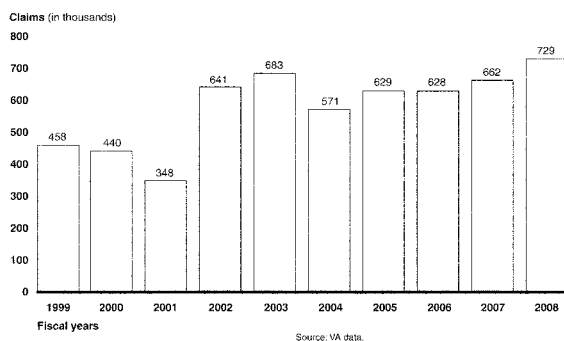
In fiscal year 2008, compensation claims were pending an average of 123 days compared to 152 days in fiscal year 1999 (see fig. 2). While slightly higher than the average 115 days claims were pending in fiscal year 2003, this represents a marked improvement over the average 188 days claims were pending in fiscal year 2001. VA's fiscal year 2009 average days pending goal for rating-related actions is 116 days.

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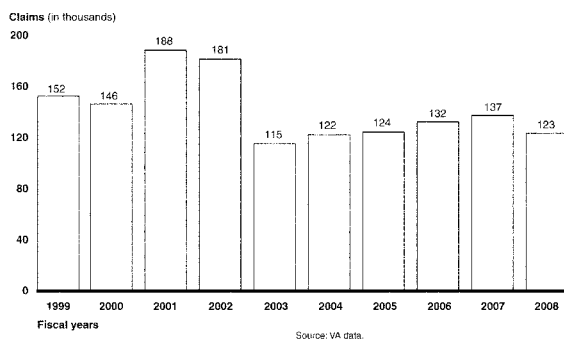
<sup>1</sup>The average days to complete a claim is the average processing time of decisions reached during a specific time period. The average days pending is the average time that pending claims at a point in time have been awaiting a decision. For example, the average days pending for a fiscal year is calculated on the last day of the year.

<sup>2</sup>The reported compensation claims data are comprised of three VBA categories: initial compensation claims with eight or more issues, initial compensation claims with seven or less issues, and reopened compensation claims.

**Figure 1: Compensation Claims Completed, Fiscal Years 1999-2008**



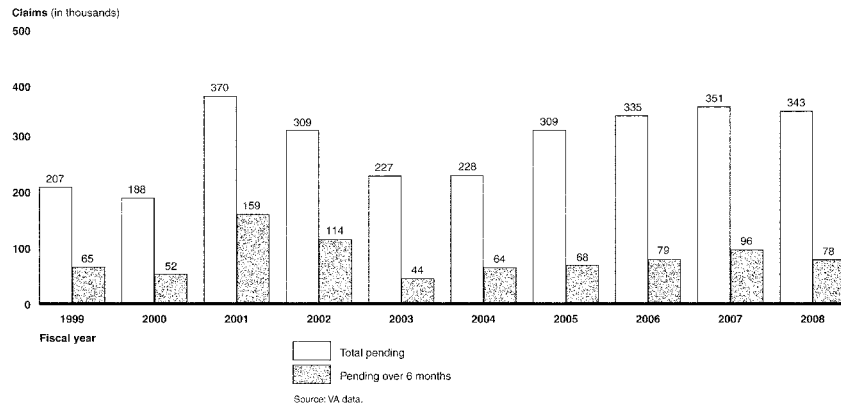
**Figure 2: Average Days Compensation Claims were Pending, End of Fiscal Years 1999-2008**



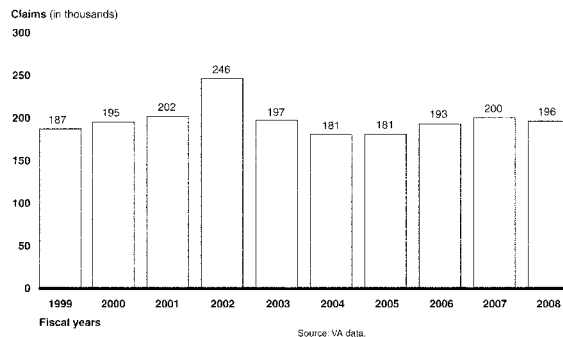
VA's inventory of pending compensation claims has varied over time, but on whole has increased significantly over the last decade. From the end of fiscal year 1999 to the end of fiscal year 2008, pending claims increased by

more than 65 percent from about 207,000 to about 343,000 (see fig. 3). During the same time period, the number of claims awaiting a decision longer than 6 months increased by 20 percent from about 65,000 to about 78,000. However, more recent data show that pending claims declined slightly from the end of fiscal year 2007 to 2008, and those pending more than 6 months declined almost 20 percent.

**Figure 3: Pending Compensation Claims, End of Fiscal Years 1999-2008**



The average time VA took to complete a claim has also varied over time, although the agency experienced significant increases from fiscal years 2004 to 2007. In fact, the average number of days VA took to complete claims increased from a low of 181 days in fiscal year 2004 to 200 days in fiscal year 2007. However, recent data show that VA took on average 4 days less to complete a claim in fiscal year 2008 than in fiscal year 2007 (see fig. 4).

**Figure 4: Average Days to Complete Compensation Claims, Fiscal Years 1999-2008**

Several factors have contributed to the trends in VA's disability workloads. First, there has been a steady increase in the number of claims filed—including those filed by veterans of the Iraq and Afghanistan conflicts. The number of compensation claims VA received annually increased about 53 percent, from about 468,000 in fiscal year 1999 to about 719,000 in fiscal year 2008. In part, VA attributes increased claims receipts to its enhanced outreach to veterans and servicemembers. VA reported that in fiscal year 2007, it provided benefits briefings to about 297,000 separating servicemembers, up from about 210,000 in fiscal year 2003. Ongoing hostilities also contribute to increased claims. For example, according to VA, the claim rate of veterans from ongoing hostilities is 35 percent. In addition, claims filed by veterans currently receiving compensation whose conditions have worsened contribute to increased claims. VA anticipates that the number of reopened claims will increase as current disability benefit recipients—many of whom suffer from chronic progressive disabilities such as diabetes, mental illness, and cardiovascular disabilities—submit claims for increased benefits as they age and their conditions worsen. In fiscal year 2008, VA received about 488,000 reopened claims for disability benefits, up 42 percent from about 345,000 in fiscal year 1999. Finally, according to VA officials, prior legislation and VA regulations have also expanded benefit entitlement, adding to the volume of claims received. In recent years, court decisions related to a 1991 law have created new presumptions of service-connected disabilities

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for many Vietnam veterans and prisoners of war.<sup>6</sup> In addition, VA anticipates an increase in claims stemming from an October 2008 regulation change that affects how VA rates traumatic brain injuries (TBI). According to a VA official, a letter was sent to approximately 32,000 veterans notifying them that their TBI rating could potentially increase even if their symptoms had not changed.

Another factor impacting VA's claims workloads—particularly the average time to complete a claim—is the complexity of claims received. VA notes that it is receiving claims for more complex disabilities related to combat and deployments overseas, including those based on environmental and infectious disease risks and TBI. In addition, according to VA officials, veterans cited more disabilities in their claims in recent years than in the past, and these claims can take longer to complete because each disability must be evaluated separately. The number of compensation claims VA decided with 8 or more disabilities increased from 11 to 16 percent from fiscal years 2006 to 2008. Further, a number of statutes<sup>7</sup> and court decisions<sup>8</sup> related to VA's disability claims process may have affected VA's ability to improve claims processing timeliness. For example, according to VA officials, the Veterans Claims Assistance Act of 2000 added more steps to the claims process, lengthening the time it takes to develop and decide a claim.

Similarly, VA has experienced workload improvements and challenges in the area of disability appeals. For example, over the past 6 fiscal years,<sup>9</sup> the number of appeals resolved increased about 22 percent from over 72,000 in fiscal year 2003 to almost 88,000 in fiscal year 2008 (see fig. 5). Between fiscal years 2003 and 2008, VA also reduced the number of

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<sup>6</sup>See e.g., *Haas v. Nicholson*, 20 Vet. App. 257 (2006). The Agent Orange Act of 1991, Pub. L. No. 102-4, broadens the presumption of exposure to herbicides in Vietnam. See also, 38 C.F.R. § 3.309 (diseases subject to a presumptive service connection).

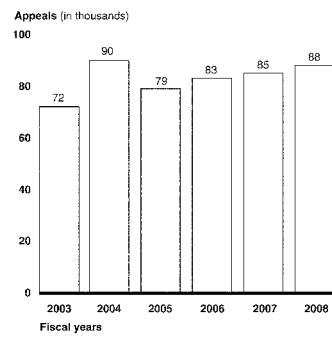
<sup>7</sup>Veterans Benefits Improvement Act of 2008, Pub. L. No. 110-389; Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454; Veterans Benefits Act of 2003, Pub. L. No. 108-183; Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475.

<sup>8</sup>See e.g., *Haas v. Nicholson*, 20 Vet. App. 257 (2006); *Moody v. Principi*, 360 F.3d 1306 (Fed. Cir. 2004); *Szenraj v. Principi*, 357 F.3d 1370 (Fed. Cir. 2004); *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003).

<sup>9</sup>We analyzed rating-related compensation appeals from VA's appeals database. In meeting testimony deadlines, we were unable to fully explore reasons for some low record counts in this database prior to fiscal year 2003, and therefore are limiting our reporting of appeals trends to fiscal years 2003 through 2008.

pending appeals by 24 percent from about 126,000 to about 95,000 (see fig. 6).

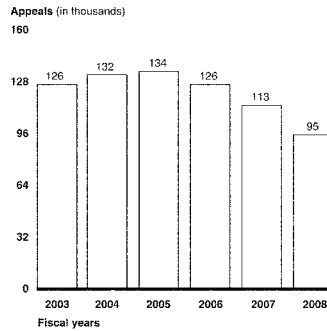
**Figure 5: Number of Compensation Appeals Resolved, Fiscal Years 2003-2008**



Source: GAO analysis of VA data.



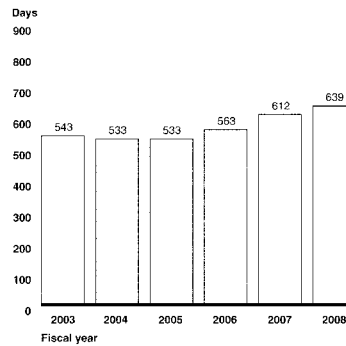
**Figure 6: Number of Pending Compensation Appeals, End of Fiscal Years 2003-2008**



Source: GAO analysis of VA data.

However, the average time it took VA to process appeals of compensation claims—from when a veteran files a notice of disagreement to when the appeal is resolved—has trended upward from 543 days in fiscal year 2003 to 639 days—or approximately 21 months—in fiscal year 2008 (see fig. 7). Several factors contribute to the time it takes VA to resolve appeals. According to VA officials, each time appellants submit new evidence, VA must review and summarize the case for the appellant again, adding to the time it takes to resolve the appeal. Furthermore, appeals cannot be forwarded to the Board for a decision until all of a veteran's pending claims are resolved, regardless of whether they relate to the appeal. Therefore, cases that are pending resolution of other issues can forestall final resolution for the appellant. Also, according to VA officials, processing time is further lengthened when appeals are remanded back to VBA by the Board for further work, such as correcting procedural errors and obtaining additional evidence. According to VA, in fiscal year 2008, about 18 percent of the Board's decisions were remanded because of VBA errors that were avoidable. Many other appeals are remanded because requirements—such as the legal requirements discussed previously—change after the appeal is sent to the Board.

**Figure 7: Average Days from Notice of Disagreement to Resolution of Compensation Appeals, Fiscal Years 2003-2008**



Source: GAO analysis of VA data.

### VA Continues to Take Steps to Improve Claims Processing

VA has taken several steps to improve claims processing, including increasing claims processing staff, redistributing certain workloads, implementing a joint pilot with DOD to perform disability evaluations, and developing a number of other initiatives to expedite benefits to veterans. VA expects these efforts to yield improvements, but their effects are not yet known and we have identified challenges with some of these efforts. For example, over the past 4 years, VA has hired a significant number of disability claims staff, who are expected to improve the timeliness of initial claims and appeals processing. From fiscal year 2005 to fiscal year 2009, VA expects VBA's claims processing staff to increase by 58 percent from about 7,550 to an estimated 11,948. During the same period, VA expects the Board's staff to increase by 20 percent, from 433 to an estimated 519. In addition, VA plans to use funds from the American Recovery and Reinvestment Act of 2009 (ARRA) to hire and train about 1,000 temporary employees and about 500 permanent employees, who will replace staffing losses that VBA experiences through normal attrition. The temporary employees will assist in developing disability claims and perform other administrative tasks to free decision-makers to complete more complex claims processing tasks.

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We have reported that an infusion of a large number of staff has the potential to improve VA's capacity. However, quickly absorbing these staff will likely pose human capital challenges for VA, such as how to train and deploy them. The additional staff has helped VA process more claims and appeals overall, but as VA has acknowledged, it has also reduced individual staff productivity. For example, while VA has issued more claims decisions annually since hiring the additional staff, the number of rating-related claims processed per staff person declined from 101 in fiscal year 2005 to 88 in fiscal year 2008. According to VA, this decline in productivity is attributable primarily to new staff who have not yet become fully proficient at processing claims and to the loss of experienced staff due to retirements. VA expects its productivity to decline further before it improves, in part because of the challenge of training and integrating new staff. According to VA officials, it takes about 3 to 5 years for newly hired rating specialists to become proficient given the complexity of the job. Training new staff also reduces productivity in the near-term because experienced staff must take time to train and mentor them, and therefore may have less time to process their own claim workloads. According to the VBA official in charge of training, VBA has developed curricula that use practical application of key concepts to accelerate the learning curve for new staff.

VA expects that the staff hired with ARRA funding will increase the number of claims processed and reduce average processing times in 2010. However, even though their responsibilities are expected to be limited to less complex claims processing tasks, these additional staff could also pose human capital challenges in the near-term while they are being trained and integrated into the process.

In addition to increasing staffing, VA has also expanded its practice of redistributing disability workloads, which is intended to improve the timeliness and consistency of decisions. Since 2001, VA has created 15 resource centers that are staffed exclusively to process claims or appeals from backlogged regional offices at distinct phases in the claims process.<sup>49</sup> The number and types of claims redistributed from backlogged offices are determined on a monthly basis based on changing workloads. For example, from 2001 to 2002, VA created nine resource centers to

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<sup>49</sup>VA also redistributes workload from backlogged regional offices to regional offices without resource centers but with more capacity than the backlogged office. VA refers to moving workloads—to either a resource center or another regional office—for processing as "brokering."

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exclusively rate claims from other offices. The number of claims redistributed for rating has increased from about 88,000 in fiscal year 2006 to about 140,000 in fiscal year 2008. Claims initially had to meet specific criteria to be eligible for redistribution, such as having seven or fewer disabilities. However, VA relaxed these criteria in May 2008, which has allowed more claims to be redistributed. In addition, since 2007, VA has created four additional resource centers to exclusively develop claims for rating, and in 2009 it created two more resource centers focusing exclusively on reconsidering appealed claims before they are sent to the Board. The claims development resource centers work on obtaining information necessary for rating claims, while the appeals resource centers work on reviewing appeals and providing written summaries of cases for the veteran. According to VA officials, redistributing backlogged claims to resource centers improves average processing times because VA can better leverage its ever-changing capacity across its offices. Although such efforts could improve the timeliness as well as the consistency of its decisions, VA has not collected data to evaluate the effect of its workload redistribution efforts.

VA has also expanded its efforts to assist servicemembers filing claims prior to leaving military service and has consolidated the processing of such claims at specific regional offices. For example, since 2006, disability compensation claims filed by some servicemembers before they leave the military and become veterans—known as Benefits Delivery at Discharge (BDD) claims—are rated at two regional offices instead of at each of the 57 regional offices.<sup>11</sup> In addition, in February 2008, we reported that VA had increased the number of military locations where servicemembers could file BDD claims. VA received about 32,000 BDD claims in fiscal year 2008. According to VA officials, the goal of BDD is to expedite delivery of benefits to new veterans as soon as possible after leaving the military. Consolidating certain tasks, such as rating BDD claims at a limited number of regional offices, could improve consistency because of greater control in communicating procedures and conducting training, but VA officials

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<sup>11</sup>In September 2008, we reported that DOD and VA have relied on local memoranda of understanding at 130 military bases to execute the BDD program. However, some bases faced difficulties executing the program due to changes in base command and lack of communication between the agencies or resource constraints, which negatively affected the efficiency of access to the BDD program. As such, we recommended that VA and DOD take additional steps to ensure best practices about the BDD program are disseminated across locations. GAO, *Veterans' Disability Benefits: Better Accountability and Access Would Improve the Benefits Delivery at Discharge Program*, GAO-08-901, Washington, D.C., Sept. 9, 2008).

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said the agency lacks data to measure the impact of consolidating BDD claims rating because VA did not consistently track BDD claims prior to the consolidation. We have identified the need for VA to systematically address concerns about the consistency of its decisions.<sup>12</sup> VA's Inspector General has studied one indicator of possible inconsistency, which is a wide variation in average payments per veteran from state to state. In May 2005, the Inspector General reported that variation in rating decisions was more likely to occur for some disabilities like post-traumatic stress disorder (PTSD) than for others, where much of the information needed to make a determination is susceptible to interpretation and judgment. VA took several steps to improve decision consistency, including conducting a pilot project to monitor consistency of rating-related claims decisions, reviewing the consistency of decisions on PTSD claims, and developing a schedule for reviews of other disabilities. Given the increasing numbers of veterans from the hostilities in Iraq and Afghanistan with PTSD claims, the BDD program may offer opportunities to enhance consistency in rating such impairments.

In addition to increasing staffing and redistributing and consolidating certain workloads, VA is also implementing a joint pilot with DOD to perform disability evaluations. Begun in November 2007, the pilot process applies to servicemembers navigating the military's disability evaluation system, which determines whether servicemembers are fit for duty or should be released from the military. In the pilot, VA completes disability ratings for servicemembers found unfit for duty. Key features of the pilot include a single physical examination conducted to VA standards, disability ratings prepared by VA for use by both DOD and VA in determining disability benefits, and additional outreach and case management provided by VA staff at DOD pilot locations to explain VA results and processes to servicemembers. The goals of the pilot are to increase transparency and to reduce confusion about the disability evaluations conducted, and if military separation or retirement is necessary, to expedite VA disability compensation benefits upon discharge. If deemed successful at pilot locations, DOD and VA intend to implement the process worldwide.

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<sup>12</sup>GAO, *Veterans' Benefits: Quality Assurance for Disability Claims and Appeals Processing Can Be Further Improved*, GAO-02-806 (Washington, D.C.: Aug. 16, 2002); and *Veterans Benefits: VA Needs Plan for Assessing Consistency of Decisions*, GAO-05-99 (Washington, D.C.: Nov. 19, 2004).

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Implementing the pilot process worldwide may be challenging. VA and DOD are using local agreements to establish the pilot process as it expands to new locations. These agreements reflect local collaboration on pilot implementation, notably to ensure that participants receive timely examinations especially when there is no VA facility located nearby. While local agreements may be an effective tool for implementing change involving many parties, we found in our review of the BDD program that their effectiveness may diminish over time due to changes in base command, lack of communication between agencies, and resource constraints.<sup>13</sup> In addition, in September 2008, we reported that while DOD and VA had established measures for the disability evaluation system pilot's performance and a mechanism for tracking performance, they had not established criteria for determining whether the pilot was successful and should be expanded on a large scale.<sup>14</sup> For example, DOD and VA did not establish how much improvement in timeliness or other indicators would be needed before deciding that the pilot was successful. The agencies plan to issue their final report to the Congress in August 2009; however, it is unclear whether they will have identified criteria or collected sufficient performance data on key indicators in order to move forward with large-scale implementation.

If implemented widely, the pilot process could change the way many veterans first receive disability benefits from VA. According to recent testimony from a DOD official, preliminary pilot results suggest that the new process expedites delivery of VA benefits to servicemembers following discharge from the military. Moreover, implementing the pilot process widely could reduce VA's reported average processing times because VA begins tracking the timeliness of these claims from the date a servicemember is discharged. However, the number of claims affected by widespread implementation of the pilot process would probably be small compared to the total number of compensation claims processed by VA. VA processes many compensation claims from veterans who are no longer in the military. In fiscal year 2005, the military's disability evaluation system caseload was approximately 23,000 compared to the nearly 650,000 compensation claims received by VA that year.

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<sup>13</sup>GAO-08-901.

<sup>14</sup>GAO, *Military Disability System: Increased Supports for Servicemembers and Better Pilot Planning Could Improve the Disability Evaluation Process*, GAO-08-1137 (Washington, D.C.: Sept. 24, 2008).

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VA has also begun other initiatives such as testing other ways to process claims and leveraging technology. For example, in February 2009, VA launched a pilot called Expedited Claims Adjudication in four regional offices. This pilot, a joint effort between the VBA and the Board, is intended to help accelerate the processing time of claims and appeals. Claimants who opt into the pilot agree to respond to VA within timeframes that are shorter than generally required. In return, the expectation is that claimants will receive decisions from VA more quickly. Because this pilot began only recently, little data are available about its effectiveness. In addition, VA is leveraging technology to improve claims processing. For example, in recent years, VA has upgraded its claims processing software in phases. Such upgrades are intended to improve processing timeliness and to improve data quality by minimizing the need for data entry. Further, as of October 2008, claims processing staff review scanned versions of all BDD claims. According to VA officials, this process is currently as efficient as paper-based processing, but may eventually be more efficient and enable further distribution of workloads as changing capacities and demands require. VA is working to overcome technical challenges that inhibit widespread implementation of paperless processing. We are in the process of reviewing these initiatives as part of our ongoing study.

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In conclusion, workload data indicate that VA has made progress in some areas of its disability claims and appeals process, but it continues to experience challenges in reducing the time it takes to process claims and appeals and in reducing the number of claims awaiting decisions. VA has taken a number of steps to improve its disability claims process, but significant increases in claims workloads combined with multiple conditions per claim continue to pose challenges to VA's progress. Productivity will be key to addressing the growing number of veterans awaiting a decision on VA claims and appeals, underscoring the need to address human capital challenges associated with training and integrating VA's new staff—a growing and significant portion of all its claims processors—and the need to track and monitor performance data for major initiatives in order to ensure that they are functioning as designed and achieving optimal returns on investment.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions that you or other members of the committee may have.

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**GAO Contact and  
Acknowledgments**

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Senator MURRAY. Thank you very much, Mr. Bertoni.  
Colonel Wilson.

**STATEMENT OF JOHN L. WILSON, LT. COL, USAF (RET.), ASSO-  
CIATE NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMER-  
ICAN VETERANS**

Colonel WILSON. Madam Chair, Members of the Committee, I am glad to be here today on behalf of the Disabled American Veterans.

As you know, the claims process is complex and lengthy. VA estimates that it will decide over 940,000 claims in 2009, but it may well be 1 million considering the total workload. It is also important to note that the VA has decided close to 200,000 more claims than it decided just 2 years ago, which is a likely indication that the VA is making good use of the additional staffing provided by Congress over that same period. What is discouraging is that the VA may actually receive just as many new claims as it decides this year, which is also close to 200,000 more than just a couple of years ago.

Short of growing VA's workforce indefinitely, what solutions are available to us? The DAV believes it has a viable solution. We have presented this Committee with the DAV's 21st Century Claims Process proposal, which is intended to simplify the process while preserving resources and reducing expenditures.

Our proposal begins with the initial stages of the claims process and continues through the entire appellate process. Our recommendations are carefully aimed at making efficient a rather inefficient process without sacrificing a single earned benefit.

They include: (1) amending legislation to indicate that the VA will assist a claimant in obtaining private medical records only when such assistance is requested by the claimant on a form prescribed by the Secretary; (2) amending legislation to allow the VA on its own to waive all VCAA requirements when it determines that evidence of record is sufficient to award all benefits sought; (3) amending legislation so VA could issue appeal election letters at the same time as the initial rating decision; (4) amending legislation to 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; (5) amending legislation in a manner that would specifically incorporate an automatic



waiver of regional office 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 or her representative, expressly chooses not to waive such jurisdiction.

These and other suggested changes could result in reduced pre-appellate stage processing time between 30 and 90 days, and as high as a 3-year reduction for certain post-remand appellate cases.

My written testimony contains many more details regarding these suggestions, to include how they could be incorporated into a new digital claims process as part of a new electronic record and imaging scanning center. Implementation of this legislative package will result in a dynamic responsive claims process with flexibility for future growth.

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 improvements in its entire claims process that are essential to achieving the broader goals of prompt and accurate decisions on claims. Likewise, only then will the VA be able to incorporate training, quality assurance, and accountability. Such programs have been demanded by the veterans community.

It has been a pleasure to appear before this honorable Committee today and I look forward to your questions.

[The prepared statement of Colonel Wilson follows:]

PREPARED STATEMENT OF JOHN WILSON, ASSOCIATE NATIONAL LEGISLATIVE  
DIRECTOR, DISABLED AMERICAN VETERANS

Mr. Chairman, Ranking Member and Members of the Committee: 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.

The claims process is complex as a result of the scope of benefits that the VA is mandated to consider and potentially deliver. The DAV has presented this Committee with our comprehensive suggestions for what we have dubbed the 21st Century Claims Process. Our suggestions would help reduce the Veterans Benefits Administration claims backlog.

DAV's 21st Century Claims Process represents an ambitious but achievable goal. The proposal benchmarks certain milestones be achieved by VA with assistance from Congress. Essentially, our plan focuses on creation of digital architecture to receive and manage all claims, as well as legislative changes to streamline the process.

The legislative recommendations are not only vital to the success of this proposed process, but will also bring cost-savings efficiency to the current claims process—efficiency perhaps equaling more than 100,000 reduced work hours annually and reducing initial average claims processing time by at least 30–90 days.

We have shared this proposal with committee staff, current and former VA officials, and other veterans' service organizations. Their recommendations were incorporated where feasible.

In DAV's plan, the initial claims process (pre-appellate stage) essentially consists of adjudication stage one, adjudication stage two, and a rating team. Adjudication teams one and two will perform functions similar to the current triage and pre-determination teams, but in a revised and more efficient format.

The backbone of the entire 21st Century Claims Process is the Imaging Scanning Center (ISC)/drop box-mail point and a data-centric claims management system. An opportunity to benchmark an effective system records management system and data-centric application with adjudication features can be found at the Social Security Administration.

In our current draft of this process, all paper claims and paper in support of claims will be routed to the ISC for immediate imaging and inclusion in the electronic record. The electronic records warehouse center should be housed centrally

and accessible by all points in VBA. The ISC and electronic records center (electronic warehouse) will be linked directly to each other with a dedicated and secure, high-speed connections.

Another benefit to the proposed system would be that any evidence received by the ISC would be viewable in the official record the following day. It currently takes many days, or even weeks, for VA to incorporate new evidence into a claims folder. Lost or incorrectly destroyed records would be a problem of the past. In addition, data-centric forms would be developed.

Upon receipt of the claim by "team one," the claim would be analyzed on a data-centric form with one of the design features displaying the veteran's intent with respect to the type of benefit(s) claimed. This will facilitate immediate establishment of "end product codes" (or viable replacement system). In addition to utilizing data-centric forms for rapid claims identification and establishment, such data-centric forms and resulting codes will also be utilized to determine the kind of "notice" VA is required to send the claimant, and (as near as possible) the type of assistance VA is required to offer the claimant in developing the case.

For example, consider a veteran requesting an increased rating for a single service-connected disability that does not have supporting private treatment records (PTRs), and therefore only needs a current VA examination. The claims form would clearly annotate that the veteran is requesting an increased rating for XYZ disability and has not received treatment outside of VA. Under the current process, the veteran is required to undergo the entire development process, despite that fact that the veteran only requires a current VA examination. Therefore, legislative amendments to VA's "duty to notify/assist" are necessary so as not to require VA to undertake futile development in such a case.

If the same scenario occurred but the veteran had PTRs, such info must be clearly indicated on the claims form. The modified notification letter would then inform the veteran that VA requests he/she obtain the PTRs and submit them to VA (mailed to ISC) within 30 days. The same notification would also clearly and in understandable language inform the veteran that if, and only if, he/she cannot or will not obtain PTRs, then VA will assist if the veteran submits VAF 21-4142 (enclosed with notification only in cases where PTRs are indicated on the claims form).

In addition to the this change regarding development of private records, another legislative change to current Duty to Assist requirements should be incorporated that would allow the VA on its own to waive all notice and assistance under the Veterans Claims Assistance Act (VCAA) of 2001 when the VA determines that the evidence of record is sufficient to award all benefits sought. Such a change would be instrumental in expediting numerous types of claims wherein the VA must currently follow all VCAA requirements despite having evidence sufficient to award benefits. (E.g., certain claims under 38 CFR §§3.22, DIC benefits for survivors of certain veterans rated totally disabled at time of death; 3.309, Disease subject to presumptive service connection; 3.312, veteran's death considered service-connected when the evidence establishes disability was either the principal or contributory cause of death; 3.350, Special monthly compensation; 4.16, Disability Ratings for Compensation Based on Individual Unemployability; 4.28, temporary total rating based on convalescence; 4.29, Ratings for service-connected disabilities requiring hospital treatment or observation.; 4.30, Convalescence ratings; etc).

The recommendation to allow the VA to waive, on its own, all notice and assistance for claims when the VA can award all benefits sought should be utilized in conjunction with section 221 of Public Law 110-389, the Veterans Benefits Improvement Act of 2008. This section, among other things, directs the Secretary to carry out a pilot program at four VA regional offices to assess the feasibility and advisability of providing to claimants and their representatives a checklist of information and evidence required to substantiate a claim.

However, if utilized in conjunction with this recommendation, such a checklist could be crafted in accordance with specific regulations as mentioned above. A memorandum of understanding (MOU) could then be drafted between the VA and all service organizations housing representatives within each regional office. The MOU should specify that each representative screen cases that qualify under certain prescribed guidelines, and then deliver such cases directly to one or two designated VA rating specialists for no less than a two-week turn around for rating such a case.

In the 1990s, VBA conducted a pilot program in the St. Petersburg regional office under the title, "Partner Assisted Rating and Development System." (PARDS). Our recommendation is similar to the PARDS pilot.

This approach would not require VA employees to spend valuable time screening cases that could qualify under this expedited plan. It would also engage representatives in a more structured and less interest-conflicting manner. If executed properly

and maximized to its fullest potential, such a procedure could have the potential to produce close to 100,000 rating decisions per year within two weeks processing time.

Regarding other claims, the items team one can complete under this plan will require one to three days, but should not require more than one week. Under the current disability timeline, these same functions take 44 days on average.

Following completion of team one functions, the electronic claim immediately goes to team two. With the exam requested and the notification sent to the claimant (or waived), team two will require little or no action on the case. Team two serves primarily as a more advanced stage of development for those cases with more complexity, such as those requiring stressor or other service information verification, development of private records, or complexities returned from the rating team. Team two will not be forced to deal with many of the activities that complicate functions of its current equivalent, the pre-determination team. Therefore, team two will be able to take more time and potentially produce more accurate rating decisions for more complex cases.

The actions of teams one and two must take place in a fluid, but accurate manner. If executed properly, many cases received by VA will be ready to rate within 30 days because the notice response (to the current VCAA process) will be complete as will any required compensation and pension (C&P) examinations. The rapid initiation and synchronized completion of these two milestones are the keys to success in this revised process.

Many cases will inevitably require extended processing times due to development that cannot be streamlined because of inter-agency roadblocks, (i.e., combat-stressor development from the Department of Defense's Center for Research of Unit Records). However, many other cases, such as ones similar to the examples above, could be ready to rate much faster than 60 days because of considerably fewer developmental requirements.

The 21st Century Claims Process achieves, on average, at 30 days what the current paper-locked, procedure-heavy system achieves at approximately 150–160 days.

Once ready to rate within 30 days, the final rating team will have 30 days in which to issue a decision, a process that currently takes 13 days on average. With more time to review cases by the rating teams, contained within a much shorter overall processing time, decisionmakers can focus far more on quality than the current system allows, but without sacrificing production standards. This process will be greatly enhanced by even a modest rules-based automated rating system—one that will quickly and accurately process cases wherein there is nearly no room for debate, such as hearing loss and tinnitus ratings or paragraph 29/30 (hospitalization and convalescence) ratings, among others.

When VA issues a rating decision, an appeal election letter will be included. This will prevent VA from having to mail more than 100,000 letters annually to claimants appealing their decision and will reduce the appellate processing time by 60 days. The letter will explain that any notices of disagreement submitted without electing a post-decision review (DRO) process will automatically be reviewed under the traditional appeal process. (The same thing currently happens if a claimant does not respond to the appeal election letter). This could be accomplished either by a legislative or administrative change. If addressed legislatively, 38 U.S.C. 5104(a) would be modified to permit inclusion of an appeal election letter. As noted earlier, the VA does have the option, through proper rulemaking procedures, to amend current guidance and make an administrative change to accomplish the same task.

A claimant wishing to appeal a decision will have 180 days in which to do so versus the current one year. This will require a legislative change. 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 today and in the future. We must be open to change for such a goal to succeed.

To put this issue into perspective, the average time it took the VA to receive a notice of disagreement (NOD) in 2008 was 41 days. In fact, 92,000 out of just over 100,000 NODs were received within the first six months of 2008.

This is also an opportunity to bolster certain statutory rights for which the law is currently silent. When amending the appellate period from one 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 appellant may, upon request, extend his/her appellate period by six months beyond the initial six months. We also suggest an amendment to provide for equitable tolling of the appellate period in cases of mental or physical disability so significant to have prevented a VA

claimant from responding within the specified time. Again, the Social Security Administration has a generous good cause exemption that could apply here as well.

If the appeal is not resolved, the VA will issue a Statement Of the Case with an amended VAF-9. The amendment will explain that evidence submitted after the appeal has been substantiated to the Board of Veterans Appeals (Board) will be forward directly to the Board and not considered by the regional office unless the appellant or his/her representative elects to have additional evidence considered by the Regional Office (RO). This opt-out clause merely reverses the standard process without removing any choice/right/etc. from an appellant. This change will result in drastically reduced appellant lengths, much less appellant confusion, and nearly 100,000 reduced VA work hours by eliminating the requirement to issue most supplemental statements of the case. A legislative change, amending 38 U.S.C.A. 7104 in a manner that would incorporate an automatic waiver of jurisdiction of Regional Office jurisdiction authorizing VA to allow the veteran to instead opt-out of his/her case being transferred to the BVA.

The Appeals Management Center (AMC) is essentially a failure and should be disbanded. The AMC received nearly 20,000 remands from the Board in fiscal year (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 cannot be allowed to exist anywhere in the VA claims process. Returning these cases to their respective jurisdictions will help ensure accountability, and most likely reduce the number of cases that proceed to the Board.

The VA will require an additional "administrative team" that is not technically part of the claims or appeals process teams. This groups' function will be to handle daily tasks required by VA but that are not necessarily part of the "claims process." These tasks include subordinate or administrative functions such as complying with records' requests under the Freedom of Information Act, serving as attorney fee coordinators, responding to informal claims, and many others that are administrative only. Currently, post- or pre-adjudication teams handle many functions for which they do not receive work credit and/or are otherwise not a required part of the claims process. Placing these functions under the responsibility of an administrative team dedicated solely for such tasks will free up resources that can be utilized specifically for claims processing, resulting in increased efficiency

#### ADMINISTRATIVE/LEGISLATIVE CHANGES

1. Amend 38 U.S.C. § 5103A (b) to indicate that VA will assist a claimant in obtaining private medical records when such assistance is requested by the claimant on a form prescribed by the Secretary. This will pave the way for some of the changes discussed above. (Process time saved—30 to 90 days (estimate) on average; work hours saved—unknown but very significant.)

2. Amend 38 U.S.C. §§ 5103, 5103A to allow the VA to on its own waive all VCAA requirements when it determines that evidence of record is sufficient to award all benefits sought. (Process time and work hours saved are unknown but very significant.)

3. Title 38 U.S.C.A. § 5104(a) states, among other things, 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). An appeal election choice is part of that notice; therefore, the VA could modify 38 CFR § 3.2600 in order to facilitate the changes suggested above. (Process time saved—60 days per appeal (estimate); work hours—approximately 50,000 (estimate).)

4. 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 one year to six months by amending 38 U.S.C. § 7105.

5. 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. (Process time saved—60 to 180 (estimate) days for affected appeals at local offices; up to 2 years for appeals otherwise subject to remand; work hours—in excess of 50,000 at local offices (estimate), unknown but significant at the Board)

6. Average total savings, 30 to 90 days pre-appellate stage. Average total savings for pre and post appellate cases (cumulative); 90 days minimum in most cases and as much as 90 to 330 days pre-remand. Potentially 3 years post-remand for affected cases.

All of the above changes can and should be implemented as soon as possible. They will adapt to the current process and produce short term results.

7. Disband the Appeals Management Center and return remanded appeals to original rating team.

8. VA will be required to amend its claims form (VAF 21-526) as well as create and specify the form that must be used (post 21-526) for all re-opened and new formal claims.

#### CONCLUSION

We are confident these recommendations, if enacted, will help streamline the protracted claims 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, we have provided your staff as well as the staffs of Chairman Filner, Ranking Member Buyer, and Ranking Member Burr, with a copy of the DAV's proposal.

Senator MURRAY. Thank you very much to all of you for your testimony.

Mr. Bertoni, let me begin with you. You testified that the VA has not collected data to evaluate the impact of using the research centers to redistribute workload. We have heard that mentioned by several of our colleagues this morning with concerns about that.

Can you tell us what measurement you would recommend the VA use to evaluate the effectiveness of these centers?

Mr. BERTONI. Sure. I think critical to any of these processes is timeliness, accuracy, and consistency. I think it behooves any manager, as opposed to going out talking to the troops, trying to discuss issues on site—that is all important and good—but I think there is no substitute to the data to help management make good data-driven decisions. So, if you have a resource center and there are indications—and you do the analysis, and there are indications of problems in certain areas—you can make remedial interventions.

To date, I do not believe that is occurring. I think even very recently, I do not believe there were any quality assurance reviews being conducted. So, that would be, first and foremost, very critical: what type of quality assurance reviews are being done; what is the MI data showing; and what do you do with that data going forward to make the interventions that need to be done?

Senator MURRAY. OK. Thank you very much for that.

Mr. Allen, you talked about the current structure for judicial review of veterans' benefits, and it has two appellate levels: the Veterans Court and Federal Circuit, which you indicate increased delays and could be duplicative.

You raised the option of removing the Federal Circuit from the structure of the veterans' benefits determination process as one way of perhaps reducing some of the delays in this system. It did not sound like you were a hundred percent committed to that, but can you tell us why you sort of lean toward the Federal Circuit?

Mr. ALLEN. Sure, Senator. Let me start out by saying that it seemed to me that when Congress created the Veterans Court, one of the things it was trying to do was create an independent body to review these issues outside of the VA and that that body would

be the expert in that area of the law. But since this was a new process, it provided for this second layer of review at the Federal Circuit.

Now, I should say that the level of review at the Federal Circuit is not plenary; it is not total. The Federal Circuit does not have jurisdiction to review any matter of fact or, quite oddly, any application of law to fact. It, in theory, should only review pure questions of law.

Now, it made perfect sense to structure the system, at least in my view at the time, like that. Today, I think that unbalanced. It is not worth having the Federal Circuit involved anymore. And I do not say that lightly because that is a major change.

What it goes to is, what are the competing values that one wants. Because if the value that was absolutely top on the list was making sure that the maximum number of judges' eyes looked at a case, figuring that that would reduce overall inaccuracy in decisions—well then, it might make sense to have this two-level court.

To use a silly analogy, if your absolute, 100 percent, number 1 value in a day is making sure that your pants do not fall down, wearing belt and suspenders makes perfect sense. It is not irrational because that is your value. But I think that for the Federal Circuit employment here, it is not having the maximum number of eyes look at a case because over time, having that second layer review has increased delay. I am sure for myself that it has not increased the quality of veterans' law sufficiently to justify its current place in the system.

Senator MURRAY. OK.

Colonel Wilson, have you given any thought to a proposal to remove the Federal Circuit from the veterans' benefits determination process and what that would mean?

Colonel WILSON. No, ma'am, I have not, but will be glad to respond later.

Senator MURRAY. If you could respond to the Committee, I would appreciate it.

RESPONSE TO REQUEST ARISING DURING THE HEARING BY HON. PATTY MURRAY TO JOHN L. WILSON, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Response. DAV is not in favor of removing the U.S. Court of Appeals for the Federal Circuit from the veteran's benefits determination process. It is our view that this next level of appellate review is critical in ensuring cases on appeal are afforded proper and thorough consideration. This next level of review is vital because the U.S. Court for Veterans Claims has the authority to hear cases by judges sitting alone or in panels. No other U.S. appellate court permits one judge to decide appeals. The Court's caseload does not prohibit each appeal being decided by a panel, yet this is typically the case for such appeals. As a result, a veteran's status before the Court is diminished when compared to other citizens' cases heard before other appellate courts. Status as a veteran should not reduce the quality of judicial review to which he or she is entitled. Therefore, we are not in favor of removing the Federal Circuit from this process. The Federal Circuit has limited jurisdiction to hear appeals from the Veterans Court and we do not believe removing the Federal Circuit from the appeals process is in the best interest of veterans.

Senator MURRAY. Mr. Bertoni, would you have any input on that?

Mr. BERTONI. I would say we have not looked into that or any considerations there. But I would say there would be a range of stakeholders that you would have to bring in.

Senator MURRAY. That is why you suggested commission—

Mr. BERTONI. Yes, that is right, Senator.

Senator MURRAY. Senator Burr?

Senator BURR. Mr. Allen, you are right. It is a major shift, but I think we are challenged to look at it in a different context. I was serious months ago when I suggested to the service organizations, let's start with a blank sheet of paper, and come in and tell us how you design it in the 21st century. To the credit of DAV, they took on the task, and I am appreciative of that.

You are right when you mention the word "commission." What little bit of hair I had on the back of my neck did stand up. So let me ask, what additional information do you believe a commission would find that we do not have readily available to us today?

Colonel WILSON. I thought of two ways to respond to that. The first and most direct is, I do not know what additional information the commission would have that you do not. I do not mean to refer back to Secretary Rumsfeld, however, there are things that we know we do not know. But more importantly, Senator—

Senator BURR. And that was sort of the basis of why you had the creation of the VA appellate process and the federal court.

Colonel WILSON. Yes.

Senator BURR. We did not know what we were going to run into.

Colonel WILSON. Absolutely. And second, though, Senator, I think that the key—because I think this has been the key over time as various veterans' benefits have been discussed—is it reaches a tipping point when enough of the relevant constituencies come together on an idea. I do not know whether something can truly be successful if it is, in fact, deemed to be imposed.

Senator BURR. How long do you think a commission would need to take to accomplish the work that you perceive a commission should attempt to accomplish?

Colonel WILSON. Part of it would be how broadly the commission should be structured. In my perfect world, I would say that it should actually be a commission that looks at the claims processing from cradle to grave. Because the situation we have now, some have described as a spider web which is not quite right, I think, because is an older spider web—the administrative process—on which a new spider web has been grafted. So, anything you do to one part is going to affect another.

I think that now that we have a system that we have seen, if a commission starts from the beginning and looks at the end, because things that are done at claims processing at the administrative level are going to make a difference in the judicial review arena as well, and vice versa. So if the process were from beginning to end, I think this could probably be done, with commitment, in 6 months.

Senator BURR. You mentioned in a recent Law Review article, and I quote, "Perhaps the most significant shortcomings of the current system of veterans' benefit determinations and their judicial review is the delay that veterans face." I think many veterans would agree with the assessment you have made.

How would you suggest we strike the right balance between speeding up the system and protecting the rights of veterans?

Colonel WILSON. That is a very tough question. At the hearing in February, I think, Senator Begich mentioned that there are sort of two generic approaches one can take. What I have been talking about is the big picture, beginning to end. But there are also targeted things that can be done in the system right now to help reduce delay. Some of them, Congress has done. Congress authorized new judgeships for the Veterans Court that are going to come into force in December 2009, in theory, to help reduce that workload. There are things being done at the Veterans Court to decrease delay and to increase efficiency. For example, the provision of technology, there are things being done with the system.

But I think that we have to be honest about the fact that any reduction in, say, for example, the number of remands—which on a systemic scale is bad—is going to affect, in any given case, the fact that a veteran's claim is going to stop somewhere on the road earlier than it would otherwise have done. And so, I think that we have to start with the assumption that that is the case.

I think a lot of this can be enforcing what Congress has put in the statutes to make the VA process have the benefit of the doubt going to the veteran, and I think that that is a good point.

Senator BURR. Mr. Bertoni, you are familiar with DAV's recommendations. Am I correct?

Mr. BERTONI. We have not done much analysis. I am vaguely familiar with what they recommended, yes, in terms of the—on the appellate—

Senator BURR. Are you aware of them enough to make a recommendation as to whether you think if we enacted them, they could save some of the delays that have been identified?

Mr. BERTONI. No, but I could talk generically about reengineering processes and why that is a good thing, and then sort of segue into that.

We always said that benefit processing organizations should be looking to reengineer their processes, to look for efficiencies in streamlining their processes. To the extent that you can do that, then you take those redesigned processes and build your automation systems around them. Then you actually have gained two efficiencies: your process is better and your automated system is better.

To the extent that what they are proposing can eliminate steps and compress timeframes, we would think that would be possibly a good solution. The only concern that I have in the limited knowledge I have is that if you create a system where the paperwork is pushed up the flag pole to the next level, I think for a while you can be more efficient. But if the numbers start to come in at substantially higher levels, if they do not have the resources and staff and reengineered processes up there, you might get into a situation where you have just moved the problem to the next phase. We have seen that in other programs like the Social Security Administration.

Senator BURR. Let me ask you, if you could—I cannot remember whether your comments have included an observation on the stimulus money that went to the VA (\$150 million for 2,200 positions which expires in 14 months) to basically process 10,000 claims. And



I realize that is something that was pulled out of the sky on the run, but let me ask you. Good investment?

Mr. BERTONI. Well, I have seen the plan. The number I have seen is 150 million and 1,500 employees, in written form. I believe it is 500 permanent and 1,000 temporary employees. Clearly, absorbing the staff at the rate at which they have been going is going to be a challenge.

You mentioned the appeals resource centers. Anecdotally, we have heard some noise there, that absorbing staff and trying to find trained staff or get staff trained enough has caused some issues. So, I think the organization, since 2005, has been injecting a great number of staff in, and they have had some issues with training, deployment, and getting folks up to a proficient level. They have acknowledged it is going to lead to sort of a downturn in productivity for some time. However, it also shows that they are producing more. In the last couple of years, it looks like there is some good trending in the data.

So, I think over time, if they can integrate staff into the processes in a timely manner and get them trained, I think you should be able to see some better training in the numbers. However, it is going to really depend on how they design their service delivery plan to make sure they have people processed and technology in the right places at the right time. It is not a matter of simply putting staff where you have space. You could really run into some real inequities in terms of experience in certain areas if they do it that way.

Senator BURR. Thank you.

Thank you, Madam Chair.

Senator MURRAY. Thank you.

I have one additional question, then I am going to turn it over to Senator Brown for his questions and comments and to hand him the gavel to chair the final time of this Committee. So, thank you for being here.

Mr. Bertoni, I just wanted to ask you, as you know the DES pilot could be implemented worldwide. You have testified that the DOD and VA have not established how they will define success for that pilot.

In your opinion, what would indicate success?

Mr. BERTONI. I agree with the indicators of customer satisfaction and timeliness. I mean, I think those are two very important things. I do not think that VA and DOD have put enough thought in terms of what is the performance bar for accuracy and consistency. How much improvement in any of these elements do you want to see that would warrant worldwide implementation?

I do not believe they are there. The last thing you want to do is have more decisions—quick decisions but bad decisions. So I do believe they need to get behind the accuracy and consistency ball and really design some criteria and targets to shoot for.

Another concern we have is they are about to issue a report in August, and they are going to be rolling out or standing up at least several sites in the latter part of this pilot, which by their own designation are high risk or high risk of failure. They are very unique characteristics. It is unclear to us how they will be able to cutoff analysis to begin drafting this report and still incorporate the data

that those sites will yield to give you all a good sense of how effective this pilot is by August.

Senator MURRAY. OK. Thank you very much for that input.

Senator Brown, thank you for being here, and I turn the gavel over to you.

**STATEMENT OF HON. SHERROD BROWN,  
U.S. SENATOR FROM OHIO**

Senator Brown [presiding]. Thank you, Senator. I appreciate that.

Thank you for joining us. I appreciate your public service, all of you, and your support for veterans.

I represent Ohio, and Ohio has, if not unique, some more severe problems perhaps than the rest of the country. I want to get to something specific later on that way.

But let me ask you—we all hear about this all the time. We hear about the bottleneck, we hear about the frustration that so many veterans have. Talk through with me where the real bottleneck is. Is it the initial claims process? Is it the appeals process? How do I better explain to veterans why there are 145,000 claims that are older than 125 days? Each of you, I would just like to hear your thoughts about it.

Mr. Allen, you want to start?

Mr. ALLEN. Sure, Senator. I think part of it depends on the individual veteran who comes up to you and where their claim is in the process. Starting at the back end: if you are a veteran who has been dissatisfied at the administrative level—which you have appealed now to the federal court system—you are going to be shocked by the way it works there because now you have a traditional adversary system in which there is time built in for the assembly of an appellate record and the debriefing that goes into that, where in that process itself is going to take 120 days if you are lucky, and then the case is right for decision. Then if you are still not happy, one part or the other, can appeal to the Federal Circuit.

So, part of this is that the downside of judicial review is increased process. If you are at the administrative level, other people are going to be able to discuss this better than I would. But certainly, the statutory provision that allows for “one appeal to the Secretary”—which is essentially the Board in this case—means that the board will remand matters for initial adjudication over and over and over again to the regional office to allow one appeal to the Secretary.

So, in that sense, I do agree with Mr. Wilson that it would make sense in terms of delay to allow the veteran to waive that right, essentially; to allow the veteran to affirmatively say I know I have the right to have it remanded and considered first before the RO, but I will let the Board do it, because I think that is a big part of administrative delay.

Senator BROWN. Mr. Bertoni?

Mr. BERTONI. I do not think I could isolate any particular aspect of the process from front to back as a particular bottleneck. I think throughout the process there are program design inefficiencies that have slowed the way cases are processed through the system.

I do believe one key aspect or problem that starts very early on is the inability to develop the medical record and difficulties establishing service connection. I think that some of the initiatives that they are trying to do right now, in terms of benefits delivery at discharge, where 70 percent of departing servicemembers are leaving through these sites, where you could get early information on the medical history and the personnel record when it is most fresh, you can establish service connection more easily.

So I do believe there are some things going on, especially the DES pilot, where those issues can be resolved early on. Certainly, there are program design issues throughout the system that are causing slow downs in processing, but I think that upfront development and being able to establish service connection can help throughout.

Senator BROWN. So, Mr. Bertoni, you think that the meetings that Secretary Shinseki and Secretary Gates have had, the information technology to help IT, that they are working on, and the fact that the VA will have access to those records much earlier in the process—really, from the day that a man or woman signs up and joins the military—and that it will be more seamless and all, that should help in terms of this backlog?

Mr. BERTONI. If you could create those interfaces, the ability to quickly share medical information in an online fashion, I think that is going a long way. But be mindful that it is not just a matter of taking a 400-page paper manual file, and evolving it into an electronic system. I do believe you need to build into that system the ability to query, to search, and to be able to pull out documents that you need specifically to reach a decision.

So, it is a matter of having this electronic interface, and having it be a very user-friendly system that can help those who develop the claim also pull out the information they need.

Senator BROWN. Colonel Wilson, your thoughts on my original question, about the bottleneck.

Colonel WILSON. Yes. Thank you, Senator. It is certainly a complex issue, as well intended to. One of the issues is simply that when a veteran files a claim and appeals, during appeal, should it wish to provide additional information, supplemental statements of the case are created for each particular time that veteran submits information for that particular appeal.

When I was in the field, I saw as many as 9, 10, and 12 supplemental statements of the case being issued for a veteran on their appeal because they had not bothered to talk to their representative and say what is going on here, "They have asked me for information and I sent it forward, and I have got another delay and another delay." I have to caution them, please do not submit any more additional evidence. Stop, you have certainly submitted enough; it is duplicative as a matter of fact. They do not understand the process. So, this is one of the complications that is raised—a very complex issue.

So, if you allow the veteran to instead opt out of this current process where the regional office has a review, opt 4, which I think is already the case, the Board of Veterans Appeals to have a review, you then, therefore, also eliminate the supplemental statement of the case. By the way the VA tracks as many as only up

to five SSOCs; there could be far more than that. As I indicated I have seen 9, 10, and 12 from certain veterans.

When you figure that SSOC is 1 hour of work for a simple case, and you have thousands of them, you have thousands and tens of thousands of man-hours that you can save as a result. It moves the appeal process further, gets the appeal decision back to the veteran sooner.

The other issue that you face is the VA working in the proper direction with its infrastructure issues in the IT arena. Moving to the electronic record, as is being talked about with the DOD and VA, is outstanding; absolutely the right way to go. It may likely take an additional investment of resources as was testified to before this Committee previously.

So, those are a couple of the issues that cause the continued problems that the VA has in being responsive to the veteran in a timely manner.

Senator BROWN. Thank you.

From your comments, Colonel Wilson, about delay, and, Professor Allen, your comments about judicial review taking to 120 days, just that alone, that process—there are some 145,000 claims, as we have discussed, over 125 days old. What is the right number of those, considering these factors? What should be our goal because of the slower judicial review process? What number should we be aiming at? What is fair to veterans?

Your thoughts on that?

Mr. ALLEN. Well, in terms of the judicial element, once you have sort of crossed the Rubicon and decide you want independent judicial review in an adversary setting, in a court system, there is only so much that can be done to reduce “delay.”

Senator BROWN. So what is that number taking those out? Where should we be?

Mr. ALLEN. This is not necessarily something that veterans want to hear, but I think, realistically at the appellate court level, the claims are being adjudicated at about the right speed if we want to maintain a traditional adversary system. There are things that can be done in certain cases that the court is doing, I understand—an aggressive mediation program—to try to get things resolved earlier. But, in terms of the speed to decision at the appellate court level, I think that that is about right. In fact, I think the Veterans Court produces decisions, on average, faster than other federal courts of appeals, but it is still a significant chunk of time.

Senator BROWN. That’s little consolation to someone going through the process, but I understand that.

Mr. ALLEN. That fundamentally is the tradeoff about whether or not this type of judicial review is worth the candle. I think it is, but that is also why in my response to Ranking Burr—

Senator BROWN. Can you estimate of the 145,000 how many of those are actually part of judicial review?

Mr. ALLEN. None. None technically, at least not yet. Each year approximately 4,500 to 5,000—depending on the year—cases are appealed from the Board of Veterans Appeals to the Veterans Court. Last year, I think it was just under 4,200 cases that went to the Veterans Court.

Senator BROWN. Any comments from Colonel Wilson or Mr. Bertoni about that?

Colonel WILSON. No, Senator. I could not offer a perspective on what the proper timeframe should be for that at this particular time. I would be glad to respond in writing, however.

Senator BROWN. OK.

RESPONSE TO REQUEST ARISING DURING THE HEARING BY HON. SHERROD BROWN TO JOHN L. WILSON, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Response. In addressing speed of decisions by the Court and the proper timeframe, the primary emphasis should be on a quality decision. Quality decisions will ultimately drive timeliness and accuracy. The Courts should use the time necessary to provide quality decisions.

Further, the Court could enhance the quality of its' decisions if it would modify its current policy and decide all issues of law raised by an appellant and provide an opinion as to how the law affects the disability in question. When Congress passed the Veterans' Judicial Review Act of 1988 (VJRA) and created the Court, it was granted the authority to decide all relevant questions of law and to hold unlawful and set aside or reverse any finding of material fact adverse to the claimant, which is clearly erroneous. Unfortunately, due to long delays in claims processing at the VA, it can take veterans years to get their appeals before the Court.

The result is that the veteran must appeal to the Court a second time and, in some cases, a third or fourth time to obtain a decision on the merits of his or her appeal. It is DAV's opinion that legislation should be enacted that would require the Court to decide each assignment of error made by an appellant in an appeal to the Court and to reverse any such errors found; and grant the Court the authority to modify or remand any Board decision found to contain any error or errors, that the authority to modify should include the power to order an award of benefits in appropriate cases, and that an appellant should be expressly permitted to waive confessions of error made by the appellee.

The basis for this position is a matter of policy rather than object analysis however. The Court believes leaving appellants the added latitude of resubmitting an appeal on an undecided issue is beneficial to the veteran. When asked for the statistical analysis to support this position none could be provided. So, the Courts will continue their current practice of not deciding all issues based on policy only.

An analysis of the Annual Reports for 2000–2009 finds a remand rate of 62.6% for 2008 and 60.5% for 2009. This calculation is based: on the total cases affirmed or dismissed in part, reversed/vacated & remanded in part; reversed/vacated & remanded; or remanded. In 2008, of the 4,446 cases decided, 2,787 were remanded resulting in a remand rate of 62.6%. In 2009, of the 4,379 cases decided, 2,651 were remanded resulting in a remand rate of 60.5%.

It would seem the Courts and veterans would be better served by a reduced remand rate if all issues of law as they relate to the appeal in question were decided. Having the Court address all issues on appeal would, from the perspective of the veteran, also enhance the quality of decisions and likely improve the timeliness of decisions.

Mr. BERTONI. I was just going to say, in terms of the initial claims, I do not know what the number is either, but I would look at what has been accomplished. If you look at the Benefits Delivery at Discharge program, their average is 2–3 months versus 6–7 months for non-BDD claims. So, I think any veteran receiving a claim within 2–3 months would probably be pretty satisfied with that.

As far as the appellate end, 639 days—21 months—I can say is probably too long. I do not know what the numbers should be.

Senator BROWN. Veterans are not just frustrated but there's the difficulty of survival for some number of veterans that are in this process, who have to wait and wait and wait. All that is pretty troubling of course.

I hear veterans often ask if there is a way that VA could provide some preliminary classification so that they could get some assistance while this process went forward—in those cases that, perhaps, are a little more obvious or a little simpler.

Is there a way that the VA can define preliminary classification and move forward with that?

Mr. BERTONI. Preliminary classification with—are we saying a temporary disability or—

Senator BROWN. Yes.

Mr. BERTONI. I have heard folks make that point. The issue we have here, I think, in doing a preliminary classification is it could cause problems for both the administration and the veteran.

Number 1, if you do that and 6 months down the road you finally do complete the case, or 2 years down the road, and you find that the veteran is not disabled or at a much lower disability rate, that person could potentially be slapped with a fairly high overpayment.

Given the rules that VA has in terms of waiver, after some administrative and bureaucratic gyrations that amount would probably be waived. But now you are left with the VA or Federal Government having to eat that payment. So, that is one scenario.

Senator BROWN. Is there a way of doing that in cases that you can reduce significant—and I apologize for going over, Senator Burr. Is there a way of doing that so that those cases which have a great deal more certainty, so that the likelihood of error will be very, very small? It is perhaps a price that the taxpayers and the VA pay for these overpayments, if you will, but you do it and you define it in a way with much more certainty so that overpayments are rare.

Mr. BERTONI. There is. It is done in the Social Security Administration. It is called “compassion and allowances.” They are doing some of this in VA with some of the target subpopulations that they are looking to sort of expedite. These are cases most likely to be approved, so they are doing that. I do not know the range of subpopulations with the numbers, but that is a model.

Senator BROWN. But it is done in a relatively small number of cases now, to your knowledge.

Mr. BERTONI. I do not know the numbers, but it is not done on the macro level.

Senator BROWN. From your examination of this from GAO, can you tell if you could expand it to a good many more veterans without a high rate of overpayment?

Mr. BERTONI. That is part of what we are doing. This is ongoing work. Preliminarily I do not have that answer, but we are aware of several pilots that are ongoing where that is exactly the concept. These cases are good candidates for approval and they are on a fast-track basis. Whether they could find more or revise the criteria to bring more cases in, I do not know that right now, but it is something we are looking at.

Senator BROWN. OK. Thank you.

Senator Burr?

Senator BARR. Thank you, Mr. Chairman. I was going to ask Mr. Wilson a couple of questions, but I am going to forego those and just make an observation.

As we have talked about the disability claims process, we have all sort of looked at the middle and the end and tried to point to all the things we think cause the delays. We have extensive debates about what the appropriate amount of time is. When do you restart the clock? I think that is what Mr. Wilson talked about with the new evidence. It restarted the clock, and this brought further delays. There was a point that it was not beneficial to veterans.

Let me just suggest that I hope all of us might back up and possibly look at the beginning of the process—when the first interaction takes place—and ask ourselves if we put as much effort toward the re-training and re-tooling of our VA personnel and charge them more with slowing down the process of moving that claim forward until they are confident that all of the pertinent information that that claimant might need for the claim is there, and become a little more invested in each individual claimant, then I think, one, we would be able to then identify what we do not need, very easily, because there would not be this addition of new evidence. Somebody would be there helping them construct that file at the beginning.

If, in fact, the medical information was not in it—you requested it of the veteran—and after a period of time you move the claim into the process without it, well, you have got a VA employee who knows that at some point this is going to bog down. This is just going to stop dead, and then it is going to set off all these little triggers. The VA at some point, as Mr. Wilson says, goes back to the veteran and says, well, we need this. They ask, was there somebody in the theater that saw this? As you build that case, that is where the delays come from.

Now, I know I am probably suggesting something that is way too simple for us to accomplish, but I think that—I refer back to those commissions, and here is my frustration. I have seen us put commissions together to identify changes to big things; and sometimes we get little changes to big things, but we do not get big results.

I think we have got to think about this process, about how we can change it tomorrow for veterans. I am not suggesting the only place we need to look that the beginning is, but I do not think that we can satisfactorily solve all of our problems without making sure at the earliest possible point we get all the information needed to make determinations. So, when I ask how do you find the right balance between the veterans' rights and the speed of the process, it is having the most information to make an educated decision early in the process so that you know whether the individual is going to pursue it further, meaning to the appellate court, or, in fact, whether the veteran might look at the process up to that point and determine they have been treated fairly and now is the time to exit the system and let somebody else come in.

It's my personal observation, because I have been as focused as everybody else on having too much in the middle and too much at the end, on how many times we restart the clock, and whose responsibility is it to make sure that that does not happen too often. We have a habit of throwing the hot potato to somebody else.

Maybe we can all agree that we have got to do a better job up front, slowing the process down, making sure we have all the infor-

mation; more importantly, making sure that the first interaction with the Veterans Administration is with somebody whose sole objective is to get the information they know that individual is going to need throughout the process. If we fall short after that, well, we will deal with it. I think we can do a much better job at the beginning because some of the things that we all refer to, quite frankly, are achievable at the earliest possible point in the process.

I want to thank all three of our witnesses as well as the administration for being here today. I thank the Chair for his indulgence for my observations, and I look forward to hopefully progress on this in calendar year 2009. Thank you.

Senator BROWN. Thank you, Senator Burr.

We have a vote call in a couple of minutes, and I just really have one question that I would like each of you to explore before we wrap up. I would particularly like to thank Admiral Dunne and Mr. Koch for staying and listening to the questions. Witnesses often do not do that—listen to the next panel—and I thank you very much, both of you, for staying.

I know this hearing is about claims processing, and we each have our stories about our own States. I want to ask you briefly about a related matter. Mr. Bertoni possibly could be the most helpful on this, but if others want to weigh in, that's great.

Ohio consistently receives some of the lowest disability compensation in the country year after year, and nobody quite understands why. I mean, our delays—the slowness of the processing may be worse in Ohio, and that is not really clear from information we have. But we do know we have some of the lowest disability compensation in the country year after year after year.

I know it is partly demographics, but how much of this can be attributed to individual claims processing? Is there a structural issue with the Cleveland region that you can see, Mr. Bertoni?

Mr. BERTONI. I do not know that answer. I think the one to get behind that would be VA. I know they have started a program, which I believe is called the Interrater Comparison Program, where they are basically taking a case in a particular area and having a number of raters examine it, rate the case, and see where there are breakdowns in terms of consistency or where there is inconsistency.

So, I think that exercise is very important. To have that kind of analysis where you have three folks rate a like case with like impairments and see how far or how close they are in terms of the rating determination I think is a first step to sort of getting behind whether there is substantial variation that needs to be addressed.

Senator BROWN. Anybody else want to—

Mr. BERTONI. They have just started to do this, I believe.

Senator BROWN. So, a year from now we may know the answer to this?

Mr. BERTONI. I think that is a question for VA, but I do not know how long that exercise will be going on.

Senator BROWN. VA has never done anything like that. We have asked questions of them and tried to get answers on this, and they really do not seem to know the answer. This is the first time they have sort of approached that model to be able to determine people.

Mr. BERTONI. I know the VA or the IG took a stab at this several years back, and I do not believe their analysis was conclusive ei-



ther. But, again, I do know about this fairly recent experience. They are doing this analysis and, hopefully, it will yield some information relative to why there may be inconsistencies.

Senator BROWN. Colonel Wilson, I am sure you have heard from DAV members in Ohio about this. Do you have any thoughts or have you been able to give them any insight into this?

Colonel WILSON. No, sir, no specific insight on that particular location. I would offer that the various veterans service organizations have long contended that although the quantity of work is important—to move cases quickly—that quality of work must be a part of that process as well.

We believe if you change the work credit system—I do not care where the location of the regional office is—work credit system changes to require accountability, both up and down for good work, take it away for work that is not as good, will improve the process for all, and eventually as well in Ohio.

Senator BROWN. OK.

Mr. Allen, any insight you might have?

Mr. ALLEN. I do not know enough about that, Senator.

Senator BROWN. OK. Well, thank you.

Thank you all for your testimony, and thank you especially for your service to this Nation's veterans. The Veterans' Affairs Committee is adjourned. Thank you.

[Whereupon, at 11:25 a.m., the Committee was adjourned.]



## A P P E N D I X

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### PREPARED STATEMENT OF ROBERT JACKSON, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Chairman, Ranking Member Burr and Members of the Committee: Thank you for the opportunity to provide testimony before this Committee on VA disability compensation. The 1.8 million men and women of the Veterans of Foreign Wars of the U.S. appreciate the voice you give them at these important hearings.

As we all know, over the past two years the VA has funded the hiring of hundreds of new rating specialists in order to reduce the growing backlog of veterans' disability compensation claims. We also know that it takes at least two years for a rating specialist to be trained, and at least another year getting comfortable with the VA claims system to get to the point to where the rating specialist becomes somewhat proficient in assessing veterans claims. We note this because we believe it is important to understand that simply increasing the number of VA rating specialists will not significantly reduce the claims backlog in a fashion considered timely by this Committee, Veterans Service Organizations, and most importantly the very veterans this system was developed to serve. This is merely a starting point in order to advance our discussion to a self-evident truth:

There is no quick fix to VBA . . . only the opportunity for steady and deliberate improvement.

There has been a silent paradigm shift over the past 30 years. If for no other reason than judicial review, the Veterans Claims Assistance Act (VCAA) and the budgetary environment that exists today, it may be time to acknowledge that the VA cannot be staffed at such levels as will allow it to produce quality decisions in the same period those earlier generations of VA workers achieved.

The converse of this may be to acknowledge that the better production and timeliness levels achieved in the 1950s and '60s may very well have been accomplished because there was less attention paid to procedural rights and that the VA may have exhibited a rather cavalier attitude when it came to interpreting the law and its own regulations.

Whether you agree with either view of history, you have to admit the world in which the VA operates has changed and it may no longer be realistic to expect accurate benefit decisions in a short period of time. There are still things that can be done to improve production, reduce backlogs (although perhaps not at the rate we all would like to see) and ensure claims are completed with quality.

#### PROVISIONAL CLAIMS PROCESSING SYSTEM

Within two years of the conclusion of World War II, more than 16 million service men and women were released from active duty. Millions filed claims with VA for compensation. Why wasn't the VA overwhelmed? There are numerous answers to the question, including:

- Veterans claimed fewer disabilities than at present.
- There were no due process requirements in the law and VA procedures required little more than acknowledgement of a claim and notice of the final decision.
- VA was not obligated to help veterans obtain private records
- VA could and did make decisions after receipt of service medical records but before all records were received. When additional records were received, VA reviewed those records in context with other evidence of record and made a new decision.
- VA frequently evaluated disabilities based on service discharge examinations.

All of these facts allowed the VA to make claim decisions quickly. Reexaminations were frequent and allowed VA to increase or reduce evaluations as disabilities worsened or improved.

Today, claims development takes longer. Quite simply, Congress recognized that past procedures and practices by VA were not always veteran friendly, did not adequately tell veterans what was needed and often led to decisions based on less than all the available evidence. Decisions are longer because Congress decided that veterans should be told what evidence was considered and why benefits were denied or granted. Appeals take longer to resolve because of increased evidentiary and notice requirements, the introduction of an additional review level with Decision Review Officers and the need to satisfy all judicial mandates.

The fact is there is nothing inherently wrong with any of these changes. Those decisions are needed to fix recognized problems and abuses.

However, the question still remains; how do you devise a system that allows VA to make decisions rapidly without increasing mistakes, is not costly either to the veteran or the American people, and continues to provide veterans with the protections that have been built into the law over the past 60 years?

Jerry Manar, VFW's Deputy Director for National Veterans Service, along with four other retired VA alumni, has developed a process that incorporates the best practices of a post WWII claims system to make expedited provisional decisions based on existing records. This proposal, which calls for the creation of a test program entitled the Provisional Claims Processing Program, would grant benefits on limited information quickly but with quality.

The Program would be limited to servicemembers leaving the Armed Forces or recently discharged veterans. An initial evaluation would be conducted based on existing evidence, and the veteran would have the opportunity to accept the provisional rating. If the veteran declines the provisional rating, the claim would be processed through the normal claims process.

If the veteran accepts the provisional rating, full development, a VA examination and a new decision would be required four years after the initial provisional rating. Provisional decisions made under this program would have no precedent value and service connection for all disabilities, including any new condition the veteran chooses to place into contention, would be made during the review at the four-year point.

This program would restore the rapid delivery of benefits based on current rating standards, while still maintaining veterans' rights under a system of protections carefully crafted by Congress over the past 60 years. It should dramatically increase decisions on original claims while allowing the bulk of VA's field staff to concentrate on resolving the existing backlog.

More importantly, this program would provide a win for new veterans. In exchange for agreeing to wait for a final decision, they receive a provisional decision and benefits in a matter of weeks instead of more than six months. If properly structured the VA could fulfill the promise it made with the BDD program that a decision could be made prior to discharge.

Further, veterans have the right to choose which program they participate in AFTER they know what the provisional decision awards. If they disagree with the provisional decision, they need not accept it. And, since they know that the current program may take six months or more to produce a decision, their conscious choice to accept the wait should reduce the number of complaints and consequent pressure on Congress.

This proposal offers a viable short-term solution to the growing backlog of claims and we would hope the Congress would consider this proposal or some similar program as a means of assisting the VBA in improving the claims processing system.

#### GETTING IT RIGHT THE FIRST TIME

We also believe some of the greatest benefits can be found by fixing the front end of the claims operation. Most court decisions today focus on procedural problems stemming from notice to claimants and development, or failures to properly develop evidence. The VCAA was created because VA would sometimes take shortcuts in the claims development period, failing to give claimants adequate notice of what they needed to produce to prove their claims. However, as we have seen since its passage, it is quite possible to become bogged down in the notice requirements while attempting to dot every "i" and cross every "t".

We support the VCAA because we believe it helps level the playing field for veterans. The VA has the knowledge of what is required in order to grant or increase benefits to veterans. They are required to pass that knowledge on so that claimants know, too, and can focus their energies in obtaining the necessary evidence to perfect their claim.

This is not rocket science. If a veteran claims service connection for the residuals of a knee injury, the VA can tell her that she needs to show that she has a disability of the knee now, that she injured the knee in service or something that happened

in service caused a knee problem and to provide VA with medical evidence that shows the current problem to be related to the event in service. These are the same three things that have always been required to prove service connection.

The requirements for obtaining an increase in benefits are equally finite: a claimant must show that their service-connected disability has worsened sufficiently to obtain a higher evaluation. In order to obtain an increase for that knee problem, the veteran must show the existence of arthritis in the joint which limits motion or causes pain, or demonstrates instability in the joint.

Again, this is not rocket science. Software could be developed that allows a VSR in a Pre-Determination team to simply answer a question on a computer screen concerning whether the claim is for service-connection or an increase and what the claimed condition is. Now, as you suspect, the computer can generate paragraph after paragraph explaining what is required and if the veteran is claiming 12 conditions then the letter can become quite long. Yet, if the object is to ensure that claimants have the information necessary to perfect their claims then it can be done with properly programmed computers. Further, software programs could be made available to claimants in a simple, easily accessed, public web site. Any curious veteran could enter the web site, answer a series of simple questions and receive detailed information on what is needed to obtain the benefit.

#### UTILIZING TECHNOLOGY AS A TOOL TO CREATE EFFICIENCIES

We have testified before this Committee in the past, and continue to believe, that if VA takes advantage of the rapid advances in technology they will be able to create efficiencies that currently do not exist. For instance, the VA currently has thousands of all electronic claims files. These cases are largely Benefits Delivery at Discharge (BDD) cases and the electronic claims files offer VA a unique opportunity to create a separate office to handle all electronic claims, allowing the VA to experiment and create an environment unencumbered by paper files. Imagine the possibility of having two or three Rating VSR's located in separate sections of a building reviewing one claims file and making decisions on different elements of the claim simultaneously. The efficiencies that such a system creates could be significant.

We understand that VA has established a claims processing laboratory in Providence, RI to explore and develop these efficiencies. We welcome this effort and look forward to viewing the results of this work in the years to come.

What about the millions of existing paper claim files? VA rightfully believes that copying these files would be cost prohibitive. We agree. However, VA receives thousands of requests each year for copies of claims files. Currently, each file is photocopied and sent to the claimant. What if each office was equipped with a scanner so that instead of photocopying the file, it is scanned. The claimant would still receive a paper copy of the file and at the same time, the VA would have yet another electronic record.

Mr. Chairman, these suggestions and ideas, in and of themselves, will not solve the backlog, timeliness and quality issues plaguing the VA today. However, if adoption of these and similar proposals each result in steady and deliberate improvement, we believe the cumulative effect will be sufficient to achieve reductions in workload and improvements in quality and service to veterans, their families and survivors.

Thank you for allowing the VFW to provide written testimony on this issue.

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ADDITIONAL SUBMISSION OF PROF. MICHAEL P. ALLEN,  
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**SIGNIFICANT DEVELOPMENTS IN VETERANS LAW  
(2004–2006) AND WHAT THEY REVEAL ABOUT THE  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS  
AND THE U.S. COURT OF APPEALS FOR THE  
FEDERAL CIRCUIT**

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Michael P. Allen\*

*Nearly twenty years ago, Congress for the first time created a system for judicial review of decisions denying veterans benefits. Specifically, Congress created an Article I Court: the United States Court of Appeals for Veterans Claims. Veterans dissatisfied with actions of the Department of Veterans Affairs regarding benefits could appeal to the Veterans Court. The United States Court of Appeals for the Federal Circuit provided appellate oversight of the Veterans Court. There simply is nothing like the Veterans Court elsewhere in American law. Yet, despite its uniqueness, there has been little scholarly attention to this institution.*

*This Article begins to fill the gap in the literature through a focused consideration of the decisions of the Veterans Court and the Federal Circuit from 2004 to 2006. It has three principal parts. First, it describes the current structure of judicial review in the area and provides a statistical analysis of its operation during the relevant period. Second, the Article explores the substantive development of veterans law from January 2004 through March 2006. Finally, based on that substantive law, the Article draws conclusions about the operations of both the Veterans Court and the Federal Circuit.*

INTRODUCTION

Nearly one out of every four people in the United States is eligible to receive some type of benefit administered by the United States Department of Veterans Affairs (the VA).<sup>1</sup> The benefits are wide-ranging, including disability compensation, pensions, life insurance, medical care, and educational assistance.<sup>2</sup> The scope of

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1. See Department of Veterans Affairs, Fact Sheet: Facts About the Department of Veterans Affairs (May 2006) at 1, [www.va.gov/opa/fact/docs/vafacts.pdf](http://www.va.gov/opa/fact/docs/vafacts.pdf). Individuals potentially eligible for benefits include veterans as well as some family members and survivors. *Id.* For ease of reference in this Article, I refer to “veterans benefits” even though some of the benefits at issue are more accurately described as benefits to dependents or survivors of veterans.

2. *Id.* at 1–3 (providing an overview of benefit programs the VA administers).

these programs is staggering. For example, in fiscal year 2005, the VA “provided \$30.8 billion in disability compensation, death compensation and pension to 3.5 million people.”<sup>3</sup> The importance of these benefits will only increase in the future as veterans return home from the ongoing conflicts in Iraq, Afghanistan, and other theaters in the “Global War on Terror.”<sup>4</sup>

For much of our Nation’s history, the United States has been strongly committed to providing veterans with benefits for their service. Exemplifying this commitment, President Abraham Lincoln specifically included a call to support veterans and their families in the famous conclusion to his second inaugural address near the end of the Civil War:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>5</sup>

Perhaps paradoxically, given the political and societal importance of these benefit programs, veterans were essentially unable to obtain any judicial review of decisions denying them benefits for much of American history.<sup>6</sup> That changed in 1988 when Congress provided for such review, creating a system that is unique in American law.<sup>7</sup> But despite the continued importance of veterans benefits programs and the innovative structure of judicial review associated with them, few scholars have focused on this area of the law.<sup>8</sup> This Article begins to fill the gap.

This Article grew out of an invitation to speak at the Ninth Judicial Conference of the United States Court of Appeals for Veterans

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3. *Id.* at 1.

4. The VA now lists the “War on Terrorism (2001 – Present)” as one of “America’s Wars” for record-keeping purposes. See Department of Veterans Affairs, Fact Sheet: America’s Wars (November 2005) at 1, [www.va.gov/opa/fact/docs/amwars.pdf](http://www.va.gov/opa/fact/docs/amwars.pdf).

5. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in *ABRAHAM LINCOLN: SELECTED SPEECHES AND WRITINGS* 449 (Library of America ed., 1st Vintage Books 1992), (on file with the University of Michigan Journal of Law Reform), available at [www.bartleby.com/124/pres32.html](http://www.bartleby.com/124/pres32.html) (emphasis added).

6. The history of judicial review of veterans benefits decisions is discussed in detail below. See *infra* Part I.A.

7. See Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C. (1988)); see also *infra* Part I.A. (discussing the establishment of judicial review in this area).

8. I discuss the limited academic commentary that does exist throughout this Article.

Claims (the Veterans Court), the entity Congress created in 1988 as the principal venue for judicial review in the area of veterans benefits.<sup>9</sup> To prepare for that event, I reviewed every precedential opinion concerning veterans law issued from January 2004 through March 2006 by the three federal courts that have jurisdiction in the area: the Supreme Court of the United States, the United States Court of Appeals for the Federal Circuit (the Federal Circuit), and the Veterans Court. That review revealed two overarching issues that form the essential structure for this Article.

First, there was rich growth in the substantive law governing veterans benefits during the period of my review. In addition to specific “stand-alone” decisions that were unquestionably important, distinct patterns also emerged in the development of veterans law. This Article explores those patterns. They show not only where veterans law has been but also, perhaps more importantly, where it may be going.

Second, my review of the precedential decisions identified broader themes concerning the structure of judicial review in the area. These themes allow us to ask, and even tentatively answer, some intelligent questions about the workings of the Veterans Court after nearly two decades in existence, as well as the relationship between the Federal Circuit and the Veterans Court.

The Article proceeds as follows. First, I summarize the structure and history of judicial review of veterans benefits, describe the Veterans Court and its method of operation, and provide an overview of judicial review during the two-year period at issue.<sup>10</sup> Next, I discuss the significant patterns within the various decisions over the past two years as a matter of substantive law.<sup>11</sup> Thereafter, I draw from the decisions of both the Federal Circuit and the Veterans Court some broader themes about those entities, their relationship to one another, and their role in the judicial review of veterans benefits decisions.<sup>12</sup> Finally, I conclude by suggesting that the experience of the Veterans Court is important for a wide range of issues and that scholars should focus on this entity as it nears its twentieth anniversary. I begin the process by suggesting a modest research agenda.

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9. See Veterans' Judicial Review Act § 301, 102 Stat. at 4113–21; see also *infra* Part I.A for a detailed description of the Veterans Court and its place in the structure of judicial review of veterans benefits claims.

10. See *infra* Part I.

11. See *infra* Part II.

12. See *infra* Part III.



## I. JUDICIAL REVIEW OF VETERANS BENEFITS DECISIONS

The judicial review of administrative veterans benefits decisions is unique in American law. A basic understanding of this issue is crucial to appreciate the majority of this Article. This Part first describes the current structure of such judicial review and the history behind that structure.<sup>13</sup> Thereafter, it considers how that review operated statistically in the period from January 2004 through March 2006.<sup>14</sup>

*A. The History and Structure of Judicial Review of  
Veterans Benefits Decisions*

“Warriors have been rewarded for their service—or their widows and children have been provided support—since the beginnings of organized society.”<sup>15</sup> This commitment to veterans and their families was also a part of the early American experience<sup>16</sup> and has remained a part of our country’s culture.<sup>17</sup> However, the commitment to providing veterans with benefits in exchange for their service to the Nation has not included a commitment to providing an independent review of decisions concerning those benefits. Instead, for much of our Nation’s history, Congress expressly precluded almost all judicial review in the area.<sup>18</sup>

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13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. IHOR GAWDIK, ET AL., FED. RESEARCH DIV., LIBRARY OF CONG., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM vii (Mar. 1992) (on file with the University of Michigan Journal of Law Reform) [hereinafter VETERANS BENEFITS AND JUDICIAL REVIEW] (study prepared by the Federal Research Division of the Library of Congress under an interagency agreement with the Veterans Court).

16. See *id.* at 21–32 (discussing the provision of benefits to war veterans in Colonial America).

17. See *id.* at 35–70 (discussing development of veterans benefits law from the Revolutionary War through the late 1980s).

18. See *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (noting 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)). For detailed commentary about the history and operation of the preclusion of judicial review in this area, see WILLIAM F. FOX, JR., THE LAW OF VETERANS BENEFITS: JUDICIAL INTERPRETATION 3–11 (2002); VETERANS BENEFITS AND JUDICIAL REVIEW, *supra* note 15, at 40–70; Frederick Davis, *Veterans’ Benefits, Judicial Review and the Constitutional Problems of “Positive” Government*, 39 IND. L.J. 183, 185–90 (1964); Kenneth B. Kramer, *Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veteran Benefits*, 17 OHIO N.U. L. REV. 99, 99–102 (1990); Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303, 307–15 (2004);

Decisions granting or denying veterans benefits are initially made and reviewed on appeal within the executive agency charged with responsibility in this area, the VA.<sup>19</sup> In brief, eligible persons apply for veterans benefits at one of the VA's various Regional Offices (RO) or other local offices located across the country.<sup>20</sup> If a claimant is dissatisfied with the decision of the RO, that person must submit a Notice of Disagreement (NOD).<sup>21</sup> After receiving an NOD, the RO is required to prepare a Statement of the Case (SOC) summarizing the bases for its decision.<sup>22</sup>

After receiving the SOC, the claimant must perfect an appeal of the decision by filing certain forms with the Board of Veterans' Appeal (the Board or BVA).<sup>23</sup> The Board is the entity within the VA that decides appeals on the majority of benefits matters.<sup>24</sup> Before Congress established judicial review in 1988, the Board's decisions were final for all intents and purposes.<sup>25</sup>

The story of how this preclusion of judicial review survived for so long is complex. In the beginning, the absence of review was tied to the development of the relationship between the federal courts and the "political" branches of government.<sup>26</sup> Thereafter, a number of rationales supported preclusion, including the legal doctrine that government benefits were mere gratuities to which no person had a right, coupled with the fear that opening the courts for

Charles G. Mills, *Is the Veterans' Benefits Jurisprudence of the U.S. Court of Appeals for the Federal Circuit Faithful to the Mandate of Congress?*, 17 *TOURO L. REV.* 695, 695-98 (2001); Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims of Veterans' Benefits: A Preliminary Analysis*, 27 *STAN. L. REV.* 905, 906-07 (1975); Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 *WASH. U.L.Q.* 889, 890-98 (1989).

19. The VA was created in 1930. *VETERANS BENEFITS AND JUDICIAL REVIEW*, *supra* note 15, at 65. Congress elevated the VA to cabinet-level status in 1988. See Department of Veterans Affairs Act of 1988, Pub. L. No. 100-527, 102 Stat. 2635 (1988) (codified as amended in scattered sections of 38 U.S.C.).

20. BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS' AFFAIRS, UNDERSTANDING THE APPEAL PROCESS 7-8 (Jan. 2000) [hereinafter UNDERSTANDING THE APPEAL PROCESS].

21. See 38 U.S.C. § 7105(a)-(b) (2000) (setting forth the requirement to submit an NOD and describing its contents).

22. See 38 U.S.C. § 7105(d).

23. See 38 U.S.C. § 7105(d)(3).

24. See 38 U.S.C. §§ 7101-7104 (describing the composition and jurisdiction of the Board); see also UNDERSTANDING THE APPEAL PROCESS, *supra* note 20, at 6-10 (setting forth the basic contours of the appeal process).

25. See, e.g., Fox *supra* note 18, at 5-17.

26. See, e.g., Hayburn's Case, 2 U.S. (2 Dallas) 409, 413 (1793) (holding that the federal courts could not participate as "commissions" in awarding veterans benefits because their decisions would be subject to revision by executive branch officials); see also *VETERANS BENEFITS AND JUDICIAL REVIEW*, *supra* note 15, at 40-45 (discussing early unsuccessful Congressional attempts to enlist the federal courts in review of veterans benefits decisions).

review would inundate the legal system.<sup>27</sup> But for much of the second part of the twentieth century, it appears that the principal obstacle to establishing judicial review was disagreement among groups representing veterans.<sup>28</sup> The reasons for this disagreement were multifaceted, but for our purposes, the turning point occurred in the late 1980s when the views of all the veterans organizations converged on the desirability of some type of judicial review.<sup>29</sup>

After much debate over the form that judicial review would take,<sup>30</sup> Congress passed, and President Ronald Reagan signed into law, the Veterans' Judicial Review Act.<sup>31</sup> The Act effected several significant changes in the law of veterans benefits.<sup>32</sup> For present purposes, the centerpiece of the Act was its creation of the Veterans Court<sup>33</sup> pursuant to Congress's power under Article I of the Constitution to "constitute tribunals inferior to the Supreme Court."<sup>34</sup> Under the Act, the Court is independent of the VA and composed of seven judges, who are appointed by the President and confirmed by the Senate to fifteen-year terms.<sup>35</sup> The Veterans Court's jurisdiction is tied to that of the BVA, which continues its appellate role within the VA.<sup>36</sup> Thus, for the first time, the Act provided for a meaningful and predictably available independent review of VA benefits decisions.

27. See, e.g., Fox, *supra* note 18, at 5.

28. See, e.g., Lawrence B. Hagel & Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming into the World of Meaningful Due Process*, 46 *MICH. L. REV.* 43, 44-45 (1994) (describing disagreement about judicial review).

29. Fox, *supra* note 18, at 15; see also *id.* at 45-46.

30. See *id.* at 13-16 (describing legislative compromises leading to the current system); Goldstein, *supra* note 18, at 897-904 (same).

31. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in scattered sections of 38 U.S.C.).

32. For general commentary on the 1988 Act, see Fox, *supra* note 18, at 17-27; Goldstein, *supra* note 18, at 890-98.

33. See 38 U.S.C. § 7252 (2000). Originally, the Veterans Court was known as the United States Court of Veterans Appeals. See Veterans' Judicial Review Act of 1988, 102 Stat. at 4105. It was renamed the United States Court of Appeals for Veterans Claims in 1998. See Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (1998) (codified at 38 U.S.C. § 7251).

34. U.S. CONST. art. I, § 8, cl. 9.

35. See 38 U.S.C. § 7253 (2000); see also Fox, *supra* note 18, at 18-19 (discussing the composition and structure of the Veterans Court).

36. See 38 U.S.C. § 7252 (2000). This section also explicitly precludes the Veterans Court from reviewing "the schedule of ratings for disabilities . . . or any action of the Secretary in adopting or revising that schedule." *Id.* § 7252(b). The import of this jurisdictional restriction was a significant issue during the period I studied. See *infra* Part IIA.

The scope of the Veterans Court's review has several important features for the purposes of this Article.<sup>37</sup> First, only dissatisfied claimants may appeal a BVA decision to the Veterans Court;<sup>38</sup> for the government, the BVA is the final decision maker. Second, Congress clearly intended the Veterans Court to be an *appellate* tribunal and specifically prohibited it from making initial factual determinations.<sup>39</sup> Third, the Veterans Court has great latitude in determining the composition of the Court that hears appeals. In particular, Congress provided: "[t]he Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court."<sup>40</sup>

As the first Chief Judge of the Veterans Court described it, he was the head of "a brand-new court, and one without any antecedent . . ."<sup>41</sup> Ideally, as the Court approaches its twentieth anniversary, many venues will exist to discuss and debate its successes as well as areas for improvement. This Article does not propose to conduct such a full historical review of the Court and its operations.<sup>42</sup> It is, however, a beginning of such an endeavor because it considers the Court's operation during a period of significant change. Six of the Court's seven members took the bench between December 2003 and December 2004.<sup>43</sup> Indeed, only Chief Judge Greene has served on the Court for more than two-and-a-half years as of this writing.<sup>44</sup> Thus, while this Article does

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37. The following discussion is a high-level overview of the structure of judicial review of veterans benefits decisions. I have by no means attempted to provide a comprehensive treatment of this complex area. Instead, my goal is to present a foundation for understanding the rest of the Article.

38. See 38 U.S.C. § 7252(a) ("The Secretary may not seek review of any such decision [of the Board].").

39. 38 U.S.C. § 7261(c) (2000).

40. 38 U.S.C. § 7254(b). I discuss this authority to use single-judge adjudication at several points below. See *infra* Part I.B. (discussing statistics about the procedure) and Part III.A.1 (discussing potential defects of the procedure).

41. Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Appeals: Searching Out the Limits*, 46 ME. L. REV. 5, 5 (1994).

42. For an early assessment of the Veterans Court, see *Veterans Law Symposium*, 46 ME. L. REV. 1, 66 (1994); see also Fox, *supra* note 18, at 27–28 (discussing the "early days" of the Veterans Court).

43. The website of the Veterans Court provides biographies of the judges of the Court. See U.S. Court of Appeals for Veterans Claims Web Page, <http://www.vetapp.uscourts.gov> (last visited Jan. 18, 2007) (on file with the University of Michigan Journal of Law Reform). Judges Bruce Kasold and Lawrence Hagel took the bench in December 2003. Judge William Moorman took office in November 2004. Finally, Judges Alan Lance, Robert Davis, and Mary Schoelen all joined the Court in December 2004. *Id.*

44. Chief Judge William P. Greene, Jr. became a member of the Court in November 1997. See *id.*

not provide a history of the Court, the period under study is highly reflective of a new era of this judicial experiment.<sup>45</sup>

The Veterans Court, however, is only the first venue of judicial review in the area of veterans benefits. Any party aggrieved by a final decision of the Veterans Court, including the VA Secretary, may appeal to the Federal Circuit and, from a decision of that court, to the Supreme Court of the United States.<sup>46</sup> However, the appellate relationship between the Veterans Court and the Federal Circuit that Congress established does not mirror the usual relationship between an “inferior” tribunal and a “superior” court. This special relationship is most evident in the restrictions imposed on the jurisdiction of the Federal Circuit when it reviews decisions of the Veterans Court. As the Federal Circuit recently summarized:

This Court [the Federal Circuit] reviews decisions of the Veterans Court deferentially. Under 38 U.S.C. § 7292(d)(1), we must affirm a Veterans Court decision unless it is “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law.” 38 U.S.C. § 7292(d)(1) (2000). Except for constitutional issues, we may not review any “challenge to a factual determination” or any “challenge to a law or regulation as applied to the facts of a particular case.” 38 U.S.C. § 7292(d)(2) (2000).<sup>47</sup>

In sum, the Federal Circuit has the power to review decisions of the Veterans Court with respect to matters of law, but very little else. This restriction on jurisdiction explains the significant number of Federal Circuit decisions that dismiss appeals on jurisdictional grounds.<sup>48</sup> In addition, the jurisdictional restriction likely contributes to the tensions between the Federal Circuit and the Veterans Court that are evident from the decisions over the past two years.<sup>49</sup>

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45. The Court itself appears to recognize the transition. The theme of the Ninth Annual Judicial Conference for the Court held in April 2006 was “New Beginnings.” See Ninth Annual Judicial Conference Materials (2006) (on file with the University of Michigan Journal of Law Reform).

46. See 38 U.S.C. § 7292 (2000).

47. *Kalin v. Nicholson*, 172 F. App’x 1000, 1002 (Fed. Cir. 2006).

48. See *infra* Appendix B at 1–3 (setting forth jurisdictional dismissals at the Federal Circuit in the period under review and describing the bases for the purported lack of jurisdiction).

49. See *infra* Part III.B for a detailed discussion of the relationship between these courts.

Of course, I do not mean to diminish the important role that the Federal Circuit plays in shaping veterans benefits law. It oversees the legal judgments of the Veterans Court and, as such, performs a critical function in developing the ground rules that govern VA action.<sup>50</sup> In addition, the Federal Circuit has exclusive jurisdiction “to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . .”<sup>51</sup> Such direct regulatory challenges are important in developing the law for a number of reasons, not the least of which is that they allow resolution of pure questions of law before regulations become effective. In other words, there is no need to wait for an issue to arise in a given appeal as would be necessary if regulatory challenges required the case-by-case adjudication that is the hallmark of Veterans Court action.<sup>52</sup> Thus, the Federal Circuit has an important but limited role in the judicial review of veterans benefits decisions.<sup>53</sup>

This subpart has explained the basic structure of judicial review concerning veterans benefits. The next subpart examines statistically how that review operated from 2004 to 2006. Thereafter, Part II analyzes the substantive decisions rendered during the period under review.

*B. The Statistical Operation of Judicial Review of  
Veterans Benefits Decisions: 2004–2006*

With apologies to the Clerks of Court for the Veterans Court and the Federal Circuit, I have compiled my own statistics covering the work of both courts from January 2004 through March 2006.<sup>54</sup> I begin with a consideration of the Federal Circuit in the area of veterans law and then turn to the Veterans Court.<sup>55</sup>

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50. See 38 U.S.C. § 7292(d) (2000).

51. 38 U.S.C. § 7292(c).

52. The Federal Circuit decided one such direct regulatory challenge during the period addressed in this Article. See *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005) (upholding VA regulations allowing the Board of Veterans Appeals to obtain and consider internal VA medical opinions in the context of an appeal). I discuss this substantive issue in more detail below. See *infra* Part II.D.1.

53. For further discussion of the role of the Federal Circuit in this area, see Fox, *supra* note 18, at 26–27; see also *infra* Part III.B (discussing the role of the Federal Circuit in the provision of veterans benefits).

54. At points in this study I refer to matters after March 2006. For example, if there was further action involving a particular decision, such as an affirmance or reversal, I note it. I did not, however, include such matters in the statistical information I discuss in this subpart of the Article, which is restricted to the twenty-seven month period beginning January 1, 2004 and continuing through March 31, 2006.

55. I have no doubt that the experts in the respective clerks’ offices at the Veterans Court and the Federal Circuit might disagree with some of the categorization decisions I

## 1. The Federal Circuit

During the time covered by this Article, the Federal Circuit issued written opinions on non-jurisdictional matters in sixty-three cases on appeal from the Veterans Court.<sup>56</sup> In addition, the Federal Circuit summarily affirmed nine Veterans Court judgments without issuing opinions.<sup>57</sup> I refer to these combined seventy-two cases as “merits decisions.” The Federal Circuit also issued opinions in thirty-three cases during this period in which the issue was jurisdictional.<sup>58</sup>

Table 1 below summarizes how the Veterans Court fared in the Federal Circuit’s merits decisions, whether by summary affirmance or through a full opinion.

TABLE 1  
FEDERAL CIRCUIT MERITS DECISIONS DISPOSITION—OVERALL

Type of Disposition	Percentage of Cases
Affirmed	73.6%
Reversed	25.0% <sup>59</sup>
Other	1.4% <sup>60</sup>

The Federal Circuit affirmed the Veterans Court’s judgments in nearly three out of every four cases in which the Circuit Court

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made. I present these figures for the purpose of drawing some general conclusions about the landscape that existed in this area during the period of my study. For this purpose, I believe my statistics are adequate.

56. Appendix A to this Article sets out a list of the decisions I placed in this category. The table of decisions summarizes the issue(s) in each case, the decision of the Veterans Court, and the holding of the Federal Circuit. I have not included in this count the decision of the Federal Circuit in *In re Van Allen*, 125 F. App’x 299 (Fed. Cir. 2005), which considered whether the Federal Circuit should issue a writ of mandamus to the Veterans Court. This decision is listed as part of Appendix B.

57. These cases are listed in Appendix B to this Article.

58. These decisions are listed in Appendix B to this Article. The jurisdictional issues essentially broke down into two categories: (1) cases in which the issue involved a factual dispute or the application of law to facts; or (2) appeals from nonfinal Veterans Court orders, such as remands to the BVA. I have not classified as “jurisdictional” cases in which the Federal Circuit discussed the jurisdiction of the Veterans Court or the BVA. Rather, I include such matters as merits decisions.

59. I have included in the reversal category one case in which the Federal Circuit technically vacated the Veterans Court decision and remanded for further proceedings. See *Johnson v. Nicholson*, 127 F. App’x 475 (Fed. Cir. 2005). I included the case in that category because the Federal Circuit determined that the Veterans Court had made a legal error in remanding a case to the BVA for compliance with the duties to notify and assist when the veteran had waived a right to remand on this basis. *Id.* at 477.

60. In one case the Federal Circuit affirmed in part and vacated in part. See *Sharp v. Nicholson*, 403 F.3d 1324 (Fed. Cir. 2005).

reached the merits.<sup>61</sup> However, these statistics tend to mask a serious issue that lies below the surface of the opinions. Tension often exists between the two courts over fundamental matters. That tension has the potential to adversely impact the development of veterans benefits law.<sup>62</sup>

The type of adjudication at the Veterans Court (single judge or panel)<sup>63</sup> did not appear to make a significant difference in reversal rates. Overall, single Veterans Court judges rendered fifty-seven of the seventy-two merits decisions. In other words, 79.1% of the Federal Circuit merits decisions dealt with single-judge opinions and 20.9% dealt with panel opinions. Table 2 summarizes how single-judge and panel judgments of the Veterans Court fared at the Federal Circuit during the past two years. The statistics in Tables 1 and 2 show very little variance in reversal/affirmance rates among all merits decisions and either single-judge or panel opinions.

TABLE 2  
FEDERAL CIRCUIT MERITS DECISIONS DISPOSITION—  
VETERANS COURT SINGLE-JUDGE VS. PANEL DECISIONS

Judgment Type	Affirmance	Reversal	Other
Single Judge	75.4%	24.6%	0%
Panel	66.7%	26.6%	6.7%

As most practitioners before the Veterans Court know, the Court's use of single-judge dispositions is a matter of much

61. I should note that the official statistics provided by the Federal Circuit reflect an even lower reversal rate during the relevant period. According to information available on the Federal Circuit website for 2004, the reversal rate for cases appealed from the Veterans Court was eleven percent. For 2005, the reversal rate was seven percent. *See* U.S. Court of Appeals for the Federal Circuit Web Page, <http://www.fedcir.gov> (follow "Information and Statistics" hyperlink; then click on the desired year beside the "Statistics" heading) (last visited Jan. 18, 2007) (on file with the University of Michigan Journal of Law Reform) [hereinafter Federal Circuit Web Page]. Direct comparisons between my statistics and those of the Circuit Court are difficult for two main reasons. First, the Federal Circuit operates on a fiscal year system in which a "year" runs from October 1 through September 30. The work I have done is based on a calendar year. Second, and more importantly, the Federal Circuit and I are quite likely counting different things in our calculation of reversal rates. I do not know the full extent of the Federal Circuit's approach so I cannot fully assess the differences in our approaches. Nevertheless, as the text makes clear, differences in reversal rate are not important for present purposes. The key issue is the overall comparison of reversal versus affirmance, which is consistent between the statistics presented here and those contained in the Federal Circuit's reports.

62. *See infra* Part III.B for a discussion of this unique and sometimes stormy relationship.

63. There were no en banc matters considered in Federal Circuit opinions during the relevant time.



interest—some would say much dispute. I also believe that there are significant concerns with such dispositions, though I recognize that the reality of the Court’s caseload makes them essential to its operations. I return to a discussion of this issue below.<sup>64</sup> For now, I simply note that single-judge opinions are not significantly more likely to be reversed on appeal at the Federal Circuit, at least not in the past two years.<sup>65</sup> Therefore, this does not appear to be a persuasive objection to single-judge dispositions at the Veterans Court.

## 2. The Veterans Court

While the Federal Circuit has decided relatively few cases, matters are quite different at the Veterans Court.<sup>66</sup> The Clerk of the Veterans Court has published a summary of the Court’s “Annual Reports” from 1996 to 2005. From reviewing just one year’s Annual Report, it is quite apparent that the Veterans Court has a far more significant role in developing veterans law than the Federal Circuit could ever achieve.

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64. See *infra* Part III.A.

65. Given the importance of single-judge decisions to the working of the Veterans Court, it is surprisingly difficult to obtain solid statistics on the matter. For example, although the Clerk of the Veterans Court makes available Annual Reports addressing a number of issues about the Court’s functioning, the type of case disposition is not among the matters reported. See UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (1997–2006) (on file with the University of Michigan Journal of Law Reform) [hereinafter VETERANS COURT ANNUAL REPORT (Year)], available at [http://www.vetapp.uscourts.gov/annual\\_report/](http://www.vetapp.uscourts.gov/annual_report/). Nonetheless, it is clear that a great majority of the Court’s cases are decided by single judges. One commentator has recently asserted that for the years 1999, 2000, and 2002, 92.9% of the Veterans Court’s “opinions and orders” were decided by single judges. See Sarah M. Haley, Note, *Single-Judge Adjudication in the Court of Appeals for Veterans Claims and the Devaluation of Stare Decisis*, 56 ADMIN. L. REV. 535, 548 (2004); see also FOX, *supra* note 18, at 242 (asserting that approximately eighty percent of the case dispositions in the Veterans Court are by single-judge memoranda); Ronald L. Smith, *The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims*, 13 KAN. J.L. & PUB. POL’Y 279, 282 (2004) (reporting that in Volume 16 of the VETERANS APPEALS REPORTER there were only 86 published decisions compared with 1073 “memorandum decisions”). Mr. Smith’s conclusions concerning the relatively small number of panel and en banc decisions (i.e., those that are published) largely match mine. Compare VETERANS COURT ANNUAL REPORTS (2004) & (2005), *supra* (setting forth Court’s statistics on total number of decisions), with Appendix C (summarizing all panel and en banc decisions in the twenty-seven month period under consideration in this study).

66. Appendix C to this Article sets forth a summary of all precedential decisions of the Veterans Court in the period from January 1, 2004 through March 31, 2006. The table provides the basic facts of each case, the holdings of the Veterans Court, and other relevant information such as the current status of any appeals.

In 2005, 3466 new cases were filed at the Veterans Court.<sup>67</sup> During that year, the Court issued 1281 “merits” decisions and 624 “procedural” decisions.<sup>68</sup> Finally, the Court considered 877 applications for attorneys’ fees under the Equal Access to Justice Act (EAJA).<sup>69</sup> In total, then, the Veterans Court decided a staggering 2782 cases in 2005, categorized as follows: merits decisions (46%), procedural decisions (22.4%), and EAJA matters (31.5%).

Much can be gleaned from the statistics on Veterans Court decisions. For example, if one removes matters concerning requests for extraordinary writs,<sup>70</sup> there were 1209 non-writ merits decisions in 2005. Table 3 sets forth the disposition of these cases.<sup>71</sup>

TABLE 3  
VETERANS COURT NON-WRIT MERITS DECISIONS  
DISPOSITION IN 2005

Type of Disposition	Percentage of Cases
Affirmed BVA Decision	22.4%
Reversed BVA Decision	21.3%
Mixed Outcomes (i.e., affirmed in part, reversed in part, vacated in part)	3.3%
Remanded to BVA	53.0%

Thus, when the Veterans Court actually decides a question on appeal, it is equally likely to reverse the BVA (21.3%) as to affirm a decision (22.4%). Review of affirmance versus reversal rates, therefore, suggests that the Veterans Court is not constitutionally unfriendly to veterans, at least this was the case in 2005.<sup>72</sup> From the

67. See Veterans Court Annual Report (2005), *supra* note 65. The information the Clerk of Court provides is based on the Court’s fiscal year, which ends September 30. Thus, the information for “2005” is for October 1, 2004 through September 30, 2005. As with the Federal Circuit, a direct comparison of the information I developed and that presented by the Court will not be possible.

68. *Id.*

69. *Id.* The EAJA provides a mechanism by which prevailing parties in certain types of litigation may recover their attorneys’ fees. See 28 U.S.C. § 2412 (2000). In 1992, Congress authorized the Veterans Court to award fees under the EAJA. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, 4513 (1992) (codified at 28 U.S.C. § 2412(d)(2)(F)).

70. The Veterans Court has the authority under the All Writs Act (as do other federal courts) to “issue all writs necessary or appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law.” 28 U.S.C. § 1651 (2000).

71. All information used to prepare Table 3 appears in the Veterans Court Annual Report (2005), *supra* note 65.

72. It appears that matters were even better from veterans’ perspectives in 2004. According to the Clerk’s statistics, of the non-writ merits decisions (that were not remanded) rendered by the Veterans Court from October 1, 2003 through September 30, 2004, 12.1%

perspective of veterans, the true difficulty is that over half of the merits decisions in 2005 were remanded to the BVA for some type of further proceeding.<sup>73</sup> This reality has potentially serious consequences, to which I return below.<sup>74</sup>

\* \* \* \* \*

This Part has described the structure of judicial review of veterans benefits decisions and the landscape of such review over the past two years. The next Part analyzes the substantive decisions of the Federal Circuit and the Veterans Court during the relevant period.

## II. SIGNIFICANT THEMES IN VETERANS LAW: 2004–2006

A review of all the Federal Circuit and Veterans Court opinions in the period covered by this study reveals a number of significant decisions. This Part of the Article, however, does not rehearse all of those developments.<sup>75</sup> Rather, it will highlight the four principal themes in veterans benefits law from January 2004 through March 2006. Those themes tell much about where veterans law has been and also about where it is likely going. This Part considers each of these four themes in turn: (1) the Veterans Court's jurisdiction; (2) the mandate to "take due account of the rule of prejudicial error"; (3) the requirement to read certain pleadings sympathetically and its connection to the question of unadjudicated claims; and (4) certain issues concerning medical examinations. At the conclusion of this Part, I break my self-imposed rule and address one decision that has particular significance. That discussion also serves as a transition to Part III.<sup>76</sup>

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were affirmed, 24.5% were reversed, and 2.7% were a mixed disposition. See Veterans Court Annual Report (2004), *supra* note 65.

73. Remand statistics were better for veterans in 2005 than in 2004. In 2004, 60.6% of the non-writ merits decisions were remanded. See *id.*

74. See *infra* Part II.C.2.

75. I have included a summary of the significant "stand-alone" decisions in veterans benefits law as Appendix D to this Article.

76. I have provided basic information throughout this Article concerning the substantive content of veterans benefits law. At times, I have even provided substantial detail about a given issue. However, I have assumed in this portion of the Article that readers have some understanding of this area of the law.

*A. Jurisdiction, Jurisdiction, Jurisdiction*

One of the most significant themes in the decisions over the past two years concerns the jurisdiction of the Veterans Court. Both the Federal Circuit and the Veterans Court itself have been extremely active in resolving jurisdictional questions. These various decisions set the stage for further development in the years to come and also reflect the tensions that exist between the two courts. Roughly speaking, these decisions fall into two jurisdictional categories: (1) equitable tolling, which extends a claimant's time to file a Notice of Appeal (NOA) at the Veterans Court; and (2) what I refer to as esoteric expansions of Veterans Court jurisdiction. I discuss each area below.

1. Equitable Tolling<sup>77</sup>

It is fair to say that the Veterans Court and the Federal Circuit have quite different assessments of the timeliness standard to which claimants should be held when filing an appeal with the Veterans Court. These differences reveal much about the relationship between these courts as well as the transition that claimants face from the "non-adversarial" VA proceedings to the adversarial appellate process. I return to these broader issues in Part III. For now, this subpart focuses on the jurisdictional doctrine itself.

A claimant who is dissatisfied with a BVA decision may seek review in the Veterans Court by filing an NOA with the Veterans Court within 120 days after the BVA mails its notice of decision to the claimant.<sup>78</sup> A recurring issue faced by both the Federal Circuit and the Veterans Court is whether they will consider a claimant's reasons for late filing of the NOA. During the past two years, the Federal Circuit has made clear that the Veterans Court should take a less restrictive view of the circumstances under which the 120-day period can be "equitably tolled."<sup>79</sup>

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77. The equitable tolling developments of the past two years continue the work started by the Federal Circuit in 2002 and 2003. *See, e.g.,* *Bailey v. Principi*, 351 F.3d 1381 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc).

78. *See* 38 U.S.C. § 7266(a) (2001) (providing in relevant part that "a person adversely affected by [a BVA] decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . .").

79. Of course, the Federal Circuit itself limited the application of equitable tolling in *AF v. Nicholson*, 168 F. App'x 407 (Fed. Cir. 2006). In *AF*, the Federal Circuit affirmed a Veterans Court judgment that equitable tolling principles do *not* apply to the time

Early in the period covered by this Article, the Federal Circuit set the tone for many of its subsequent decisions, at least jurisdictionally. The Federal Circuit reversed the Veterans Court's dismissal of an appeal as untimely when the veteran had misfiled his NOA with the BVA instead of the Court within the 120-day period.<sup>80</sup> The Circuit Court held that such a misfiling, within the appeal period, showed the requisite "due diligence" and thus qualified for equitable tolling.<sup>81</sup>

The Circuit Court addressed a different, and probably more significant, aspect of equitable tolling in *Barrett v. Nicholson*.<sup>82</sup> In that case, the Federal Circuit reversed the Veterans Court's judgment and held that a mental illness may justify equitable tolling of the appellate filing period.<sup>83</sup> Specifically, the Federal Circuit articulated the following test:

[T]o obtain the benefit of equitable tolling, a veteran must show that the failure to file was the direct result of a mental illness that rendered him incapable of rational thought or deliberative decision making or incapable of handling his own affairs or unable to function in society.<sup>84</sup>

The next year in *Arbas v. Nicholson*,<sup>85</sup> the Federal Circuit again reversed the Veterans Court on the issue of equitable tolling. This time, the Circuit Court held that a physical impairment could

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requirements in 38 U.S.C. § 5110(a) (providing the effective dates of benefits) because those rules are not statutes of limitations. *Id.*

80. *Brandenberg v. Principi*, 371 F.3d 1362, 1363 (Fed. Cir. 2004). The Veterans Court had grudgingly reached a similar conclusion in an earlier case. *See Bobbitt v. Principi*, 17 Vet. App. 547, 551 (2004) (critically discussing the Federal Circuit's general reasoning about equitable tolling, but stating that the Veterans Court was bound to follow the decisions).

81. *Brandenberg*, 371 F.3d at 1363-64.

82. *Barrett v. Nicholson*, 363 F.3d 1316 (Fed. Cir. 2004).

83. *Id.* at 1317. *Barrett* also calls into question a Veterans Court decision issued one month before in which the Veterans Court rejected equitable tolling in a Post-Traumatic Stress Disorder (PTSD) case. *See Thornhill v. Principi*, 17 Vet. App. 480, 483-86 (2004).

84. *Barrett*, 363 F.3d at 1321 (internal quotation marks, citations, and brackets omitted). The Circuit Court also noted that parties who were represented during the period of incapacity would face a higher burden and that, for all veterans, more would be required than simply a medical diagnosis alone "or vague assertions of mental problems." *Id.* The Federal Circuit later gave more guidance on the tolling standard it laid out in *Barrett*. In *Van Allen* the court affirmed the Veterans Court holding that evidence of a mental impairment fifteen years before the purported tolling period was not sufficient to satisfy the standard. *Van Allen v. Nicholson*, 129 F. App'x 611, 612-13 (Fed. Cir. 2005).

85. *Arbas v. Nicholson*, 403 F.3d 1379 (Fed. Cir. 2005).

also justify equitable tolling if a veteran could otherwise satisfy the *Barrett* standard.<sup>86</sup>

The disagreements in this general area are not limited to equitable tolling. The Federal Circuit has also taken a different approach than the Veterans Court toward the form of NOAs under the Rules of the Court of Appeals for Veterans Claims.<sup>87</sup> In *Durr v. Nicholson*,<sup>88</sup> the Federal Circuit considered the Veterans Court's dismissal of an appeal as untimely under Rule 3.<sup>89</sup> The Veterans Court had ruled that an appeal was untimely because the claimant's NOA did not specifically identify the BVA decision he was appealing, and it did not include his telephone number, his VA claims file number, or his address.<sup>90</sup> The Circuit Court rejected each of these rationales for dismissing the appeal and, along the way, criticized the Veterans Court for taking too broad a view of the jurisdictional impact of its own rules of procedure.<sup>91</sup>

The Federal Circuit may have formulated the law of equitable tolling and the timeliness of appeals, but it is the Veterans Court that must implement the law in the great majority of cases. While the Veterans Court is complying with the *Brandenberg/Barrett/Arbas* principles, it has not embraced the spirit of those decisions.

*Claiborne v. Nicholson* provides a good example of the Veterans Court's attitude.<sup>92</sup> In that case, an elderly, unrepresented veteran filed an NOA approximately 30 days after the 120-day appeal period had expired.<sup>93</sup> The veteran sought the protections of equitable tolling by asserting that his age and a mental illness (dementia) caused him to file the NOA late.<sup>94</sup> The veteran submitted three brief statements from doctors as well as medical literature

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86. *Id.* at 1381.

87. VET. APP. R. PRACTICE & P. [effective Sept. 13, 2004] (on file with the University of Michigan Journal of Law Reform), available at [http://www.vetapp.gov/documents/Rules\\_of\\_Practice\\_and\\_Procedure.pdf](http://www.vetapp.gov/documents/Rules_of_Practice_and_Procedure.pdf).

88. *Durr v. Nicholson*, 400 F.3d 1375 (Fed. Cir. 2005).

89. *Id.* at 1375–76. Rule 3 is entitled “How to Appeal.” It provides information about matters such as where to file the NOA, how to serve it, the content of the document, and the payment of filing fees.

90. *Durr*, 400 F.3d at 1380–81.

91. *Id.* at 1380–83.

92. *Claiborne v. Nicholson*, 19 Vet. App. 181 (2004), *aff'd*, 173 F. App'x 826 (Fed. Cir. 2006).

93. *See id.* at 182 (noting that the relevant BVA decision was mailed on July 24, 2002 and that the veteran's NOA was deemed filed as of December 28, 2002).

94. *Id.* The veteran also claimed that stress caused by the illnesses of his wife and daughters contributed to his mental confusion. *Id.*

discussing dementia.<sup>95</sup> The Veterans Court rejected equitable tolling and dismissed the appeal as untimely filed.<sup>96</sup>

The Federal Circuit affirmed without opinion the Veterans Court's decision in *Claiborne*.<sup>97</sup> Yet, despite this agreement as to the result, it is difficult to reconcile the Veterans Court's attitude in the opinion with the very concept of equitable tolling. When one reads the Veterans Court opinion, it is striking not so much because of its result—it is possible, as the Federal Circuit apparently concluded, to reach the conclusion the Veterans Court did—but rather by the overly-restrictive attitude the Veterans Court displayed about equitable tolling more generally. For example, the Veterans Court supported its decision in part by noting that the veteran's medical evidence stated only that he was "severely impaired" in his mental processes and by comparing this terminology to the Federal Circuit's requirement that a claimant be "incapable."<sup>98</sup> The Court was, of course, correct in its quotation of both sources, but its approach to equitable tolling does not place much weight on the notions of fairness that formed the foundation of the Federal Circuit's decisions.<sup>99</sup> In other words, even though both the Federal Circuit and the Veterans Court reached the same conclusion in *Claiborne*, that convergence may mask an important foundational difference between the courts over the extent that equitable tolling should be allowed.

I do not mean to suggest that the Veterans Court has abdicated its responsibility to follow the law set by the Federal Circuit. De-

95. *Id.* at 183–84. On two of the reports, the doctors merely checked boxes indicating that the veteran was "severely impaired" as a result of dementia and that this dementia had a negative impact on his decision-making during the relevant period. *Id.* at 183. The other medical opinion was a more traditional one, which ultimately concluded that the veteran had "symptoms . . . compatible with an early dementia, probably degenerative type" during the relevant period. *Id.* at 184.

96. *Id.* at 188. This was actually the second time that the Veterans Court reached this conclusion. In a single-judge order the Veterans Court dismissed the appeal in 2003. *See Claiborne v. Principi*, 18 Vet. App. 321 (2003). The Federal Circuit vacated that decision and remanded the case for further consideration in light of *Barrett*. *Claiborne v. Principi*, 103 F. App'x 387, 388 (Fed. Cir. 2004).

97. *See Claiborne v. Nicholson*, 173 F. App'x 826 (Fed. Cir. 2006).

98. *Claiborne v. Nicholson*, 19 Vet. App. 181, 187 (2005).

99. *See, e.g., Brandenburg v. Principi*, 371 F.3d 1362, 1363–64 (Fed. Cir. 2004); *Barrett v. Principi*, 363 F.3d 1316, 1318–21 (Fed. Cir. 2004). In another case, the Veterans Court declined to decide whether the *Barrett* principles applied to the late filing of an NOD, the document necessary to start the appellate process *within* the VA. *See McPhail v. Nicholson*, 19 Vet. App. 30, 33–34 (2005). The Veterans Court held that the appellant had abandoned all claims of error on appeal. *Id.* at 33. The Federal Circuit affirmed the Veterans Court decision, holding that the veteran had not alleged below that he had actually filed an NOD at any time. *McPhail v. Nicholson*, 168 F. App'x 952, 952–53 (2006). The Circuit Court declined to reach the issue of whether the *Barrett* principles applied in that situation. *Id.*

spite the obvious disagreement between the two courts on this issue, the Veterans Court has rendered two decisions that are particularly significant in the development of equitable tolling doctrine. First, in *Jones v. Principi*,<sup>100</sup> the Veterans Court held that the statutory “duty to assist”<sup>101</sup> does not apply to an appellant’s assertion that he or she is entitled to equitable tolling at the Veterans Court.<sup>102</sup> The Veterans Court reasoned that the statutory duty to assist was limited to the provision of VA benefits and not to the preservation of procedural rights such as establishing the timeliness of an appeal.<sup>103</sup>

Second, the Veterans Court recently announced a three-part test to assess the appropriateness of equitable tolling under “extraordinary circumstances.”<sup>104</sup> Specifically, the Veterans Court held that equitable tolling would be appropriate when the following conditions were satisfied:

- (1) “the extraordinary circumstance must be beyond the appellant’s control”;<sup>105</sup>
- (2) “the appellant must demonstrate that the untimely filing was a direct result of the extraordinary circumstances”;<sup>106</sup> and
- (3) “the appellant must exercise ‘due diligence’ in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal within the 120-day judicial-appeal period.”<sup>107</sup>

Thus, the Veterans Court has established a test that, on its face, appears to implement the Federal Circuit’s instructions that filing deadlines are important but not inflexible. Of course, only time will tell whether the Veterans Court will implement the spirit of the Circuit Court’s rules when applying the test. It does seem certain

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100. *Jones v. Principi*, 18 Vet. App. 500 (2004), *appeal dismissed sub nom. Jones v. Nicholson*, 431 F.3d 1353 (Fed. Cir. 2005).

101. Congress has specified that the “Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.” 38 U.S.C. § 5103A(a)(1) (2000). This statutory duty is referred to as the “duty to assist.”

102. *Jones*, 18 Vet. App. At 501–03.

103. *Id.* at 502.

104. *McCreary v. Nicholson*, 19 Vet. App. 324, 332 (2005).

105. *Id.*

106. *Id.*

107. *Id.*



that there will be further development in the law of equitable tolling in the years to come.

## 2. Esoteric Expansion of Veterans Court Jurisdiction

The other strand of decisions in this area concerns the Federal Circuit's relatively liberal view of the scope of Veterans Court jurisdiction, which is governed by 38 U.S.C. §§ 7252.<sup>108</sup> The full import of these decisions is not yet clear. There may not be any further developments along the lines discussed below. On the other hand, the decisions over the past two years might be only the beginning of exploring § 7252's meaning.

The first esoteric expansion of jurisdiction enables judicial review of VA decisions that accredit attorneys and others to represent claimants before the VA.<sup>109</sup> In *Bates v. Nicholson*, an attorney whose accreditation had been revoked petitioned for a writ of mandamus in the Veterans Court and requested the Court to direct the Secretary to issue a Statement of the Case (SOC).<sup>110</sup> The Secretary had refused to issue a SOC on the ground that the BVA did not have jurisdiction over a dispute about accreditation.<sup>111</sup> The Veterans Court denied the writ on the ground that the BVA would not have jurisdiction over the matter and, therefore, the Veterans Court lacked the authority under the All Writs Act to intervene.<sup>112</sup> The Federal Circuit reversed the Veterans Court's judgment and directed the Court to issue the requested writ.<sup>113</sup> The Federal Circuit's decision signals that both the BVA and the Veterans Court should have a hand in representation issues.

Although the Federal Circuit's decision in *Bates* is important for the narrow purpose of representation before the VA, the reasoning in the case has potentially more significant consequences. The Circuit Court effectively held that 38 U.S.C. § 511(a)'s reference to "a law that affects the provision of benefits by the Secretary"<sup>114</sup> should

108. 38 U.S.C. §§ 7252, 7261 (2000).

109. See 38 U.S.C. §§ 5901, 5904(a) (2000).

110. *Bates v. Nicholson*, 17 Vet. App. 443, 443-44 (2004), *rev'd*, 398 F.3d 1355 (Fed. Cir. 2005).

111. See *id.* at 443-44.

112. See *id.* at 444-46.

113. *Bates*, 398 F.3d at 1366. Thereafter, the Veterans Court issued the writ in compliance with the Federal Circuit's mandate. See *Bates v. Nicholson*, 19 Vet. App. 197, 198 (2005).

114. 38 U.S.C. § 511(a) (2000) concerns the finality of the Secretary's benefit decisions. It insulates those decisions made pursuant to "a law that affects the provision of benefits" from judicial review except in limited circumstances, one of which is review by the Veterans

be read broadly. Specifically, the Circuit Court determined that the phrase refers to any “single statutory enactment that bears a Public Law number in the Statutes at Large.”<sup>115</sup> The application of that rule in *Bates* led to a finding of jurisdiction because the statutory accreditation provision was held to be part of a single statute dealing with veterans benefits. How that rule will apply in other situations remains to be seen, but it certainly has the potential to expand the Veterans Court’s jurisdiction in unforeseen ways.

The second esoteric expansion of jurisdiction concerns § 7252’s restriction on the Veterans Court’s jurisdiction. That section provides:

The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.<sup>116</sup>

During the past two years the Federal Circuit issued two decisions in connection with this issue. The first decision is unremarkable given the statutory language. Specifically, in *Wanner v. Principi*,<sup>117</sup> the Veterans Court determined that it had jurisdiction to consider whether a particular diagnostic code was consistent with the underlying statute.<sup>118</sup> The Federal Circuit reversed and held that § 7252(b) should be read broadly: “The statutory scheme . . . consistently excludes from judicial review all content of the ratings schedule as well as the Secretary’s actions in adopting or revising that content.”<sup>119</sup> Thus, it seemed that the Federal Circuit had formulated a bright-line rule to keep the Veterans Court from hearing ratings schedule matters.

The potential expansion of jurisdiction—and a fair amount of confusion—came from the Federal Circuit only three weeks after

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Court. See 38 U.S.C. § 511(b)(4) (2000). Thus, by reading § 511(a) broadly, the Federal Circuit effectively read the Veterans Court’s jurisdiction broadly as well.

115. *Bates*, 398 F.3d at 1361.

116. 38 U.S.C. § 7252(b) (2000). Congress has directed that the Secretary “adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries.” 38 U.S.C. § 1155 (2000). In essence, this ratings schedule operates once a veteran has established that he or she has a service-connected disability. At that point, the ratings schedule specifies how much the veteran’s earning capacity is reduced. The higher the rating, the more the veteran will receive from the VA each month. For a general discussion of the ratings schedule, see VETERANS BENEFITS MANUAL § 3.1.3, at 57 (Barton F. Stuchman & Ronald B. Abrams eds., LexisNexis 2006).

117. *Wanner v. Principi*, 17 Vet. App. 4 (2003).

118. *Id.* at 13–15.

119. *Wanner v. Principi*, 370 F.3d 1124, 1129 (Fed. Cir. 2004).

*Wanner* when the Circuit Court decided *Sellers v. Principi*.<sup>120</sup> At issue in *Sellers* was whether 38 C.F.R. § 4.130<sup>121</sup> expressly adopted the DSM-IV's definition of Post-Traumatic Stress Disorder<sup>122</sup> and, therefore, whether the VA erred by not considering those symptoms in the case at hand.<sup>123</sup> The VA argued on appeal to the Federal Circuit that the Veterans Court had violated the jurisdictional restriction in § 7252(b) by reviewing a ratings schedule.<sup>124</sup> The Circuit Court rejected this argument, holding that the veteran's "argument goes not to the content of the ratings criteria, but rather to the correct interpretation of section 4.130, specifically the relationship between the DSM-IV and the general rating formula."<sup>125</sup> At no point in *Sellers* did the Federal Circuit cite its decision in *Wanner*.

It is unclear how *Wanner* and *Sellers* can be reconciled. Indeed, I am tempted to paraphrase the Supreme Court's comments about obscenity here, namely that the Federal Circuit knows what violates § 7252(b) when it sees it, but it cannot define it.<sup>126</sup> The Veterans Court has also struggled with these potentially inconsistent decisions.<sup>127</sup> This area should be monitored in the coming years to see how the apparent inconsistency between *Wanner* and *Sellers* is resolved. The resolution could have a significant impact on the scope of the Veterans Court's jurisdiction.<sup>128</sup>

120. *Sellers v. Principi*, 372 F.3d 1318 (Fed. Cir. 2004).

121. 38 C.F.R. § 4.130 (1996) sets forth the schedule of ratings for mental disorders.

122. "DSM-IV" refers to the *Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION (DSM-IV) (Am. Psychiatric Ass'n 1994). The DSM-IV is highly influential in mental health circles. As one popular internet site put it: "The book is typically considered the 'bible' for any professional who makes psychiatric diagnoses in the United States and many other countries." AllPsych Online, *Psychiatric Disorders*, <http://allpsych.com/disorders/dsm.html> (last visited January 30, 2007) (on file with the University of Michigan Journal of Law Reform).

123. *Sellers*, 372 F.3d at 1323-24.

124. *Id.*

125. *Id.* at 1324.

126. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that, while he could not define obscenity, "I know it when I see it").

127. See, e.g., *Byrd v. Nicholson*, 19 Vet. App. 388 (2005); *Smith (Ellis) v. Nicholson*, 19 Vet. App. 63 (2005).

128. Another potential esoteric expansion of jurisdiction also looms on the horizon. In *King v. Nicholson*, a veteran appealed the BVA's decision that it lacked jurisdiction to review a VA medical center determination that a particular outpatient therapy "was not an appropriate course of treatment." *King v. Nicholson*, 19 Vet. App. 406, 407 (2006). The BVA seemed to have a solid ground for its decision given the wording of 38 C.F.R. § 20.101(b): "Medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond the Board's jurisdiction." 38 C.F.R. § 20.101(b). The Veterans Court surprisingly vacated the BVA's judgment and remanded the case. *King*, 19 Vet. App. at 411. The Veterans Court held, in part, that the Board had failed to consider whether the prohibition in 38

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Finally, there is one other jurisdictional case that does not fit into either of the earlier categories but is nonetheless significant. In *Kirkpatrick v. Nicholson*,<sup>129</sup> the Federal Circuit ruled that BVA decisions remanding matters to a VA Regional Office are not “decisions” and, therefore, cannot be appealed to the Veterans Court.<sup>130</sup> In addition, the Circuit Court held that this rule of “non-finality” allows no exceptions, as there are in limited circumstances when the Veterans Court remands matters to the BVA.<sup>131</sup> While this principle is not surprising, it is doctrinally important because it delays judicial consideration of a veteran’s claim. In any event, the decisions I have discussed in this subpart underscore the importance of jurisdiction to the functioning of the Veterans Court.

*B. The Obligation to “Take Due Account of the  
Rule of Prejudicial Error”*

Another important theme that emerged during the past two years involves the requirement that, in reviewing BVA decisions, the Veterans Court “shall . . . take due account of the rule of prejudicial error.”<sup>132</sup> In *Conway v. Principi*,<sup>133</sup> the Federal Circuit held that duty-to-notify claims are not excepted from this statutory command.<sup>134</sup> The Circuit Court stated that the requirement “applies to all Veteran’s Court proceedings”<sup>135</sup> and remanded the matter to the Veterans Court to apply the rule of prejudicial error.<sup>136</sup>

The Veterans Court dutifully followed the Federal Circuit’s direction and issued a significant opinion interpreting § 7261 (b) (2) and defining the procedures that should be used to “take due

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C.F.R. § 20.101 (b) applied to a categorical refusal by the VA to use a given medical procedure or only to an individualized denial of treatment. *Id.* The impression given (although not stated as a holding) was that the regulation might not be as broad as it appears. Nothing may ultimately come of this issue, but it provides another example of a potential area for unique jurisdictional growth.

129. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005).

130. *Id.* at 1365–66.

131. *Id.*

132. 38 U.S.C. § 7261 (b) (2) (Supp. III 2003).

133. *Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004).

134. *Id.* at 1374. Like the duty to assist, the “duty to notify” is largely a creature of statute. *See* 38 U.S.C. § 5103 (a) (2000). Under this statutory provision, the Secretary must notify a claimant of certain information, including, most importantly, “any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.” *Id.*

135. *Conway*, 353 F.3d at 1374.

136. *Id.* at 1375.

account” of prejudicial error.<sup>137</sup> In *Mayfield v. Nicholson*,<sup>138</sup> the Veterans Court adopted the following general principles to guide its application of the “rule of prejudicial error.”<sup>139</sup> First, the Veterans Court provided several formulations for defining “prejudicial error.” The central theme was that prejudicial error implicates the “essential fairness of the [adjudication].”<sup>140</sup> In this regard, the Court made clear that a showing of prejudice does not require a conclusion that the outcome would necessarily have been different without the error.<sup>141</sup> The Veterans Court next addressed which party would carry the burden of proving that an alleged error was prejudicial.<sup>142</sup> The Court assigned the burden to the claimant and further indicated that the burden was a heightened one.<sup>143</sup> If a claimant satisfied this burden, then the Secretary would shoulder the burden (again a heightened one) to show that the error was not prejudicial.<sup>144</sup> Finally, the Veterans Court provided guidance for applying the rule of prejudicial error specifically in the context of a claim concerning a breach of the duty to notify.<sup>145</sup>

137. See *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd*, 444 F.3d 1328 (Fed. Cir. 2006).

138. *Id.*

139. An interesting feature of *Mayfield* is that much of the opinion is dicta. Writing for the panel, Judge Steinberg held that the notice provided by the Secretary was sufficient under the statute. *Id.* at 123–29. Thus, the Veterans Court’s extensive discussion about the meaning of prejudicial error seems unnecessary. See *id.* at 111–23. In any event, whether dicta or not, the Veterans Court has applied the *Mayfield* analysis in later cases in which errors were found. See, e.g., *Kent v. Nicholson*, 20 Vet. App. 1, 8–16 (2006); *Dingess v. Nicholson*, 19 Vet. App. 473, 492–501 (2006); *Pelea v. Nicholson*, 19 Vet. App. 296, 307–09 (2005), *appeal dismissed*, 159 F. App’x 1003 (Fed. Cir. 2005); *Rodriguez v. Nicholson*, 19 Vet. App. 275, 291–95 (2005), *appeal pending*, No. 06-7023 (Fed. Cir.).

140. *Mayfield*, 19 Vet. App. at 116 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553–54 (1984)).

141. See *id.*

142. *Id.* at 116–20.

143. *Id.* at 119–20 (requiring that the appellant “[assert] with specificity how an error was prejudicial.”).

144. *Id.* at 120 (stating that, after claimant satisfies his or her burden, “it becomes the Secretary’s burden to demonstrate that the error was clearly nonprejudicial to the appellant—that is, that the error is not one that affected the essential fairness of the adjudication.” (internal quotation marks and brackets omitted)).

145. *Id.* at 120–21. The Court in *Mayfield* and later decisions made clear that a failure of the “first” notice requirement—the requirement for the VA to advise the claimant of the evidence that would be necessary to sustain the claim—was, by definition, an error implicating the fairness of the adjudication. See, e.g., *Pelea*, 19 Vet. App. at 307; *Mayfield*, 19 Vet. App. at 122. The Veterans Court also specifically addressed the rule of prejudicial error in connection with a duty-to-notify claim in *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). In that case, the Court focused on how the duty to notify operated when the initial disability rating and the effective date of benefits were at issue. See *id.* at 484–86. For a good summary of *Mayfield* and the rule of prejudicial error in the context of the duty to notify generally, see VETERANS BENEFITS MANUAL, *supra* note 116, at §§ 15.3.3.5 to 15.3.3.5.1.

Practitioners eagerly awaited the Federal Circuit's assessment of the Veterans Court's guiding rules in *Mayfield*. But those interested in this issue will have to wait longer. On April 5, 2006, the Federal Circuit reversed the Veterans Court's judgment in *Mayfield*.<sup>146</sup> However, the Circuit Court declined to address the Veterans Court's holdings concerning the application of the rule of prejudicial error.<sup>147</sup> Instead, the Federal Circuit held that the Veterans Court had erred by relying on evidence that the BVA had not relied on when it considered the issue.<sup>148</sup> The Circuit Court remanded the matter to the Veterans Court, leaving for another day a decision about the *Mayfield* procedure.<sup>149</sup> This issue will assuredly be a major one in the immediate future.

### *C. Of Sympathetic Readings and Unadjudicated Claims*

The third major theme in veterans law over the past two years concerns two distinct topics: the requirement to read pro se pleadings sympathetically and the question of when claims remain unadjudicated (and therefore pending at the VA) as a matter of law. While distinct, these topics share common ground, which likely explains why both the Federal Circuit and the Veterans Court have tied the issues together. I have attempted to separate them to the extent possible given their treatment in the cases. This subpart begins with a discussion of the sympathetic reading requirement and then turns to the question of unadjudicated claims.

#### 1. Sympathetic Reading of Pro Se Pleadings

A significant development in the past two years was the Federal Circuit's reiteration—and perhaps strengthening—of the duty to “sympathetically read” submissions by pro se claimants. That duty is not new, having been articulated in 2001 in *Roberson v. Principi*.<sup>150</sup> But the Veterans Court apparently did not apply the *Roberson* rule as aggressively as the Federal Circuit had envisioned. For example, the Veterans Court took the position that the *Roberson* duty did not

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146. *Mayfield v. Nicholson*, 444 F.3d 1328 (2006).

147. *Id.* at 1336–37.

148. *Id.* at 1333–36.

149. *Id.* at 1337.

150. *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001).

apply to claims of clear and unmistakable error (CUE)<sup>151</sup> in earlier decisions.<sup>152</sup> However, the Federal Circuit reversed the Veterans Court in *Andrews v. Principi*, leaving no doubt that “*Roberson* requires the RO and the Board to sympathetically read all pleadings filed pro se, including CUE motions.”<sup>153</sup> At the same time, the Circuit Court made subsidiary holdings about the duty to read pleadings sympathetically that better delineated the boundaries of the doctrine. Specifically, the Federal Circuit held: “*Roberson* does not require sympathetic reading of pleadings filed by counsel”;<sup>154</sup> and “failure to raise an issue in a CUE motion filed by counsel before the VA is fatal to subsequently raising the issue before the Veteran’s Court.”<sup>155</sup> The full impact of *Andrews* remains to be seen, but it could be significant given the prevalence of CUE claims and pro se litigants in the benefits system.

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151. CUE is an issue that the Veterans Court and Federal Circuit encounter frequently. When a claimant alleges that an earlier decision denying benefits at the administrative level was the product of CUE, he or she is attempting to alter a final adjudication. Accordingly, not just any error is sufficient to establish CUE in an earlier decision because such a finding could undermine a final judgment. As defined in the Code of Federal Regulations:

Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

38 C.F.R. § 20.1403(a) (2006). As a prominent text in veterans law has recognized, “a CUE motion is a difficult one to win.” VETERANS BENEFITS MANUAL, *supra* note 116, § 14.4, at 1056. For a general discussion of the concept, see FOX, *supra* note 18, at 163–73.

I note that the shorthand phrase “CUE claim” is technically inaccurate. The correct description is that an allegation of CUE is a mechanism through which to revise a prior, final decision. See, e.g. 38 U.S.C. § 5109A(d) (2000). I will often use the shorthand phrase “CUE claim” as the Veterans Court and Federal Circuit often do.

152. See *Andrews v. Principi*, 18 Vet. App. 177, 184–87 (2004), *aff’d on other grounds*, 421 F.3d 1278 (Fed. Cir. 2005).

153. *Andrews v. Principi*, 421 F.3d 1278, 1284 (Fed. Cir. 2005); see also *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) (reiterating that *Roberson* requires a sympathetic reading of all pro se pleadings submitted to the VA); *Szemraj v. Principi*, 357 F.3d 1370, 1372–73 (Fed. Cir. 2004) (same). The Veterans Court appears to be taking the Federal Circuit’s commitment to sympathetic reading quite seriously. See, e.g., *Beverly v. Nicholson*, 19 Vet. App. 394, 404–06 (2005) (remanding case to BVA to determine whether appellant’s pro se submissions to the BVA reasonably raised an informal claim to reopen an earlier decision).

154. *Andrews*, 421 F.3d at 1284.

155. *Id.* at 1284–85.

## 2. The Unadjudicated Claim

The second issue in this strand of case law defines when a claim may be considered “unadjudicated” and, therefore, pending at the VA. This question is particularly important because of the Federal Circuit’s strong commitment to finality once a claimant has exhausted all avenues for direct appeal. If a claim is unadjudicated, on the other hand, the finality concerns are not implicated. As made clear yet again during the past two years, there are only two exceptions to this rule of finality: (1) submitting new and material evidence to reopen the finally adjudicated claim; and (2) alleging CUE in the earlier decision.<sup>156</sup> This issue relates to the duty to sympathetically read pro se pleadings because the Federal Circuit has ruled that the VA’s violation of its *Roberson* duty does not render a claim unadjudicated. As the Circuit Court stated in *Andrews*, “when the VA violates *Roberson* by failing to construe the veteran’s pleadings to raise a claim, such claim is not considered unadjudicated but the error is instead properly corrected through a CUE motion.”<sup>157</sup>

In addition to the sympathetic reading connection, the Federal Circuit has specified that the breach of a VA *procedural* duty in an earlier decision does not render a matter unadjudicated.<sup>158</sup> Similarly, in *Bingham v. Nicholson*, the Circuit Court affirmed the Veterans Court’s holding that the VA’s failure to consider one *theory* of recovery does not render a denied claim unadjudicated.<sup>159</sup> Thus, neither a procedural defect nor an inattention to alternative theories will suffice to keep a claim pending at the VA. In sum, the clarification of the law in this area is a significant theme worthy of mention in the period under study.

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156. *Norton v. Principi*, 376 F.3d 1336, 1338 (Fed. Cir. 2004) (citing *Cook v. Principi*, 318 F.3d 1334, 1336 (Fed. Cir. 2002)). See *supra* note 151 for a discussion of CUE. “New and material evidence” is also a term of art. Essentially, the concept is based on a need to preserve finality, and it dictates that an earlier decision will not be revisited unless the factual basis of the decision has changed. See 38 U.S.C. § 7104(b) (2000) (specifying that a claim previously denied by the BVA “may not thereafter be reopened and allowed and a claim based on the same factual basis may not be considered”). For a general discussion of the concept, see FOX, *supra* note 18, at 153–62.

157. *Andrews*, 421 F.3d at 1284.

158. *Norton*, 376 F.3d at 1338–39.

159. See *Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005).



*D. The Doctor Will See You Now: Medical Matters*

As one might expect given the nature of many veterans benefits, medical matters played an important role in this area of the law over the past two years. The principal decisions essentially fall into two categories: (1) those addressing when the BVA itself may seek expert medical opinions from within the VA; and (2) those providing guidance about medical examinations generally and the role of doctors during such exams particularly. The latter point also encompasses what the BVA may and may not do when considering doctors' reports. This subpart discusses each of these issues in turn.

## 1. The BVA and Obtaining Expert Medical Opinions

Both the Federal Circuit and the Veterans Court addressed the BVA's authority to obtain and consider medical opinions from *within* the VA.<sup>160</sup> A rule promulgated in 2001 and formally adopted in 2004 allowed the BVA to obtain an expert medical opinion from within the VA "when, in its judgment, such medical expertise is needed for equitable disposition of an appeal."<sup>161</sup> The Veterans Court initially considered whether this regulation was valid, eventually holding en banc that it was in *Padgett v. Nicholson*.<sup>162</sup> However, the mandate and opinion in *Padgett* were later withdrawn when the veteran died.<sup>163</sup>

The *Padgett* saga could have caused much uncertainty about the BVA's authority to obtain and consider expert medical opinions from within the VA. However, the Federal Circuit avoided the confusion by resolving a direct challenge to the regulation and allowing the BVA to obtain and consider such information. In *Disabled American Veterans v. Secretary*,<sup>164</sup> the Circuit Court upheld the regulation as consistent with the relevant statutory language.<sup>165</sup>

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160. It is clear that the BVA can obtain expert medical opinions from non-VA doctors. See 38 U.S.C. § 7109 (2000); see also 38 C.F.R. § 20.901(d) (2006) (implementing terms of § 7109).

161. 38 C.F.R. § 20.901(a).

162. *Padgett v. Nicholson*, 19 Vet. App. 133, 138–45 (2005) (en banc), *withdrawn*, *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (en banc).

163. *Padgett v. Nicholson*, 19 Vet. App. at 336. An appeal of the Court's decision to dismiss the case due to the veteran's death is currently pending before the Federal Circuit. See *Padgett v. Nicholson*, 20 Vet. App. 236 (2005).

164. *Disabled American Veterans v. Secretary*, 419 F.3d 1317 (Fed. Cir. 2005).

165. *Id.* at 1319–23.

Thus, it appears settled that the BVA may obtain expert medical opinions both from within and outside of the VA system.

## 2. Medical Examinations

The Veterans Court issued a number of precedential decisions during the past two years concerning the role of medical examinations in the benefits process. I begin with an interesting decision in which the “duty to assist” took on a dimension that arguably harmed the veteran. In *Kowalski v. Nicholson*,<sup>166</sup> the Veterans Court considered a claim for service connection with respect to hearing loss.<sup>167</sup> The veteran had submitted a letter from his audiologist that he argued provided support for his claim.<sup>168</sup> The VA Regional Office concluded that it needed additional medical evidence and scheduled the veteran for a medical exam.<sup>169</sup> The veteran declined to report for the exam, claiming that the evidence he had submitted was sufficient for the RO to make a decision.<sup>170</sup> One of the issues on appeal was whether the VA could order a claimant to submit to a medical examination under those conditions.

The Veterans Court held that the VA had the regulatory authority to schedule the veteran for an additional hearing examination unless such an order was arbitrary and capricious, which was not the case in *Kowalski*.<sup>171</sup> Moreover, the Court noted that “under these circumstances, any failure by VA to schedule for him an examination before rejecting his claim could have violated VA’s duty to assist him.”<sup>172</sup> Thus, *Kowalski* is important both for its narrow medical examination holding and for its suggestion that the duty to assist may require the VA to act over the veteran’s objections in certain circumstances.

In a series of opinions, the Veterans Court also addressed the role of doctors in the medical examination and the BVA’s use of the information provided by doctors based on such examinations. The key holdings in this area, both new and reiterations, are summarized here. First, the BVA may not disregard a conclusion reached by a doctor after examining the veteran solely because the

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166. *Kowalski v. Nicholson*, 19 Vet. App. 171 (2005).

167. *Id.* at 173.

168. *Id.* at 173–74.

169. *Id.*

170. *Id.*

171. *Id.* at 177–78.

172. *Id.* at 178.

doctor relied on information provided by the veteran, *unless* the BVA finds that the information is unreliable<sup>173</sup> or there are contradictory facts in the record.<sup>174</sup> In addition, the BVA may not substitute its own “medical judgments” for those of doctors who have examined the claimant *even if* the BVA has properly rejected a given medical opinion.<sup>175</sup> Finally, the Veterans Court cautioned doctors that they should not go beyond their medical role in preparing their opinions.<sup>176</sup> This reiteration of previous holdings may prove particularly important in the context of VA doctor examinations. Thus, in its 2004–2006 decisions, the Veterans Court provided important guidance to the VA about medical examinations, which are often so crucial to a veteran’s claims.

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This Part has described the four most significant themes in veterans benefits decisions over the past two years. The next Part analyzes broader issues concerning the structure of the Veterans Court and its relationship with veterans and the Federal Circuit. Before doing so, however, I would be remiss not to mention what may very well be the most significant decision of the Veterans Court during the period I studied: *Ramsey v. Nicholson*.<sup>177</sup>

In *Ramsey*, two petitioners sought writs of mandamus directing the Secretary to rescind certain directives he had issued in response to an earlier Veterans Court decision. In that earlier decision, *Smith (Ellis) v. Nicholson*,<sup>178</sup> the Veterans Court held that, for a veteran with bilateral tinnitus (ringing in both ears), the relevant statutes required the VA to assign separate disability ratings for *each* ear instead of a single rating for both ears together.<sup>179</sup>

173. *Coburn v. Nicholson*, 19 Vet. App. 427, 432–33 (2006); *Kowalski*, 19 Vet. App. at 179–80. Interestingly, the Veterans Court also held that while a veteran and his or her spouse may “opine as to their needs as they are related to [the veteran’s disability], they are not qualified to provide the medical nexus between their disabilities and the perceived [aid and assistance] needs [of the veteran].” *Howell v. Nicholson*, 19 Vet. App. 535, 539 (2006). As such, medical opinions relying solely on such statements are inadequate. *Id.*

174. *Kowalski*, 19 Vet. App. at 179–80.

175. *Coburn*, 19 Vet. App. at 433 (“[W]e caution the Board that, although it may reject medical opinions, it may not then substitute its own medical judgment for those rejected.”).

176. See *Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004) (reprimanding a VA psychiatrist who had inappropriately addressed in his report whether the claimed in-service stressors for PTSD had been substantiated).

177. *Ramsey v. Nicholson*, 20 Vet. App. 16 (2006).

178. *Smith (Ellis) v. Nicholson*, 19 Vet. App. 63, 78 (2005).

179. See *id.* The Federal Circuit eventually reversed the Veterans Court’s opinion in *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006).

Needless to say, the VA was not pleased with the Veterans Court decision concerning tinnitus. Accordingly, it appealed the *Smith* decision to the Federal Circuit.<sup>180</sup> But the VA also took more aggressive steps to address *Smith*. In particular, the VA Secretary directed the Chairman of the BVA to stay the adjudication of “tinnitus rating cases affected by [*Smith*].”<sup>181</sup> The Secretary took this action without seeking authority from any court.<sup>182</sup> In effect, the Secretary’s order rendered the Veterans Court decision a mere nullity while the matter was on appeal to the Federal Circuit.

The Veterans Court agreed that the Secretary (as well as the Board Chairman) has the inherent authority to issue stays.<sup>183</sup> The Court held, however, that this authority was limited when a Veterans Court decision was already in place. In the words of the Veterans Court:

We hold now that the Secretary’s authority to stay cases at the Board does not include the unilateral authority to stay cases at the Board (or RO) pending an appeal to the Federal Circuit of a decision of this Court. To allow such a stay would permit a unilateral action by the Secretary to stay the effect of one of this Court’s decisions pending the Secretary’s appeal to the Federal Circuit. . . . Such unilateral action by the Secretary is contrary to the concept of judicial review . . . .<sup>184</sup>

The proper procedure was for the Secretary to seek a stay of decision from the appellate court that had jurisdiction over the case when the stay was requested.<sup>185</sup> As a result, the Veterans Court did not grant the writ, instead giving the Secretary thirty days to seek a stay from the Federal Circuit.<sup>186</sup>

To understand the significance of *Ramsey*, one must remember that the Veterans Court is still very much in its infancy. The Court will not turn twenty until 2008.<sup>187</sup> A key ingredient in the Court’s success will be that it is—and is perceived to be—an *independent*

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180. See *Ramsey*, 20 Vet. App. at 18–19 (noting that the VA’s appeal in *Smith* was docketed as No. 05-7168 on July 11, 2005).

181. *Id.*

182. *Id.* at 20.

183. *Id.* at 26–37. Judge Schoelen dissented on this point. See *id.* at 40–43 (Schoelen, J., dissenting).

184. *Id.* at 37–38.

185. *Id.* at 38–39. In this instance, the Federal Circuit had jurisdiction over the appeal. *Id.* at 39.

186. *Id.* at 39.

187. See *supra* Part I.A (discussing creation of the Veterans Court).

judicial check on the VA. If the Secretary of Veterans Affairs could choose to comply with some decisions and not others, the Court would become merely a shadow of what it was intended to be. *Ramsey*, then, was a defining moment in cementing the authority of the Veterans Court as just that: *a court*. Yet, other dangers remain for the Court and its mission. I turn to those matters in Part III.

### III. A BROADER PERSPECTIVE ON THE VETERANS COURT AND THE FEDERAL CIRCUIT

In addition to setting the boundaries and frontiers of veterans benefits law, the developments from 2004 to 2006 are also instructive about the nature of judicial review in this area and its two principal institutions. The decisions communicate much about the functioning of the Veterans Court as it nears its twentieth anniversary, the relationship between the Veterans Court and the Federal Circuit, and, finally, the relationship between veterans and the Veterans Court. In each of these areas, the decisions in the past two years reveal certain tensions that could make Congress's bold experiment less successful than it otherwise might be. In this Part, I discuss separately each of the issues highlighted above.

#### *A. The Veterans Court: The Internal Tension Between Its Roles as Error Corrector and Lawgiver*

The Veterans Court has two essential roles that, somewhat paradoxically, cannot be performed well simultaneously.<sup>188</sup> On the one hand, Congress created the Court to bring uniformity, transparency, and cohesion to veterans law through judicial review of executive action.<sup>189</sup> It was intended to be a "lawgiver" in an area that had, historically, been immune from such common lawmaking.<sup>190</sup> At the same time, the Court is clearly meant to correct errors

188. Other commentators have recognized a general tension in all appellate courts between their error correction and law development roles. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices on the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 712–15 (2000); David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 301–08 (1984).

189. For a good discussion of Congress's motivations in creating the Veterans Court and imposing judicial review on veterans benefits issues, see FOX, *supra* note 18, at 13–23; Goldstein, *supra* note 18, at 894–912; see also *supra* Part I.A (discussing the creation and early work of the Veterans Court).

190. See FOX, *supra* note 18, at 18–19 (discussing the Veterans Court's role in creating case law in an area where none had existed before); Nebeker, *supra* note 41, at 5 (describing

made in individual cases within the VA's administrative adjudication system.<sup>191</sup> These activities are not mutually exclusive and could complement each other without much difficulty, except for the crushing caseload at the Court.<sup>192</sup> The Veterans Court's need to resolve a large number of cases has caused it to neglect its lawgiving role in many respects.<sup>193</sup> I discuss this issue below principally in the context of single-judge adjudication, though I also comment on the use of full court panels (i.e., en banc consideration).

### 1. Single-Judge Adjudication

The Veterans Court uses single-judge opinions to resolve the great majority of its cases.<sup>194</sup> This device has created an "iceberg jurisprudence." Like an iceberg with much of its structure under water, the Veterans Court makes much of its law "below the surface" using single-judge opinions. These single-judge decisions are perfectly suited to correcting errors in individual cases.<sup>195</sup> They are

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the Veterans Court as being "without antecedent" in referring to its mission to engage in judicial review where none had existed earlier).

191. See, e.g., 38 U.S.C. § 7261 (2000) (setting forth standard of review with indisputable reference to decisions of the Board in particular cases).

192. See VETERANS COURT ANNUAL REPORTS (1996)–(2005), *supra* note 65 (noting that "new cases filed" at the Veterans Court from 1996 through 2005 ranged from a low of 1620 in 1996 to a high of 3466 in 2005). Dean Fox has recently suggested, however, that in the context of broader veterans benefits issues, the Veterans Court's caseload is disappointing because "many veterans simply give up after a final, negative BVA decision." William F. Fox, Jr., *Deconstructing and Reconstructing the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL'Y 339, 342 (2004) (noting that the BVA docket in recent years has been over 30,000 cases and that the BVA decides about 20,000 cases per year but that only a few thousand cases are appealed to the Court each year); see also Kenneth M. Carpenter, *Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants*, 13 KAN. J.L. & PUB. POL'Y 285, 292 (2004) (providing similar statistics based on BVA annual reports).

193. The Veterans Court's dual roles were both undermined by the legislation that created the Court. For example, Congress prohibited the VA Secretary from appealing decisions to the Court. See 38 U.S.C. § 7252(a) (2000). Thus, the Veterans Court is restricted to making law in cases where the veteran is denied benefits, and the Court does not correct errors that favor the veteran. Nevertheless, the Veterans Court does perform the dual functions I have described, albeit only when a veteran has been denied benefits.

194. See *supra* note 65 (explaining the difficulty in obtaining statistics on the frequency of single-judge opinions and presenting some information on that subject).

195. This may have been why Congress expressly provided for the use of single judges in the Veterans Court. See 38 U.S.C. § 7254(b) (2000) ("The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court."). A commentator recently suggested: "[n]o other federal appellate court may exercise similar power to have a single judge decide an appeal on its merits." Smith, *supra* note 65, at 279. Attorney Smith also suggested that Congress may have permitted single-judge adjudication out of fear that the Court would be overwhelmed with appeals. *Id.*; see also Haley, *supra* note 65, at 543 (making the same point).

not, however, designed to fulfill the lawgiving function and should not be used in that way.

Dissenters may argue that the Veterans Court does not “make law” in single-judge cases because, by definition, single-judge opinions are issued only when no law needs to be made in a given case. It is true that single-judge opinions are not precedential<sup>196</sup> and, by definition at least, cannot be used to establish new rules of law.<sup>197</sup> But this view is overly formalistic and neglects the reality of at least some single-judge adjudication.

This is not the place to engage in a systematic analysis of the Veterans Court’s fidelity to the rule that single-judge adjudication is not proper when rules of law are being formulated or adjusted. But there certainly appears to be reason to question whether single-judge adjudications are in fact as limited as the Court’s rules

196. See, e.g., *Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1992) (recognizing that en banc and panel decisions are precedential while single-judge resolutions are not); see also VET. APP. R. PRACTICE & P. 30(a) (prohibiting citation to non-precedential decisions of the Court except for matters concerning “the binding or preclusive effect of that action (such as via the application of the law-of-the-case doctrine)”). The continued viability of Rule 30(a) is questionable under proposed amendments to the Federal Rules of Appellate Procedure that the United States Supreme Court recently forwarded to Congress. One of these amendments provides: “[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.” See Letters of John G. Roberts, Chief Justice, Supreme Court of the United States to J. Dennis Hastert, Speaker of the House of Representatives and Dick Cheney, President of the Senate (Apr. 12, 2006) (on file with the University of Michigan Journal of Law Reform), available at <http://www.supremecourtus.gov/orders/courtorders/frap06p.pdf>.

197. After an appeal has been filed with the Veterans Court, it is assigned to a “screening judge” to determine how that case will be “set for the calendar.” See VET. APP. INTERNAL OPERATING P. I(b) [effective May 25, 2004] (on file with the University of Michigan Journal of Law Reform) [hereinafter IOP], available at <http://www.vetapp.uscourts.gov/documents/IOP2004.pdf>. Thus, the screening judge, which is a rotating position, makes the initial determination as to whether the case will be considered by a single judge or a panel. *Id.* If the screening judge determines that a matter is appropriate for single-judge determination, the screening judge decides the matter. *Id.* at I(b)(4).

To qualify for single-judge treatment, the screening judge must find that the appeal:

- (1) does not establish a new rule of law;
- (2) does not alter, modify, criticize, or clarify an existing rule of law;
- (3) does not apply an established rule of law to a novel fact situation;
- (4) does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
- (5) does not involve a legal issue of continuing public interest; and
- (6) the outcome is not reasonably debatable.[.]

*Id.* at II(b); see also *Frankel v. Derwinski*, 1 Vet. App. 23, 25–26 (1990) (initially setting forth the factors now included in the IOP). A procedure exists whereby two judges of the court may compel panel consideration of an appeal. See IOP, *supra*, at II(c). No statistics are available concerning the frequency with which a screening judge’s decision is overruled.

suggest. For example, critics have asserted recently that the Veterans Court is not following its own Internal Operating Procedures (IOP) and the *Frankel* criteria when deciding whether a case is suitable for single-judge action.<sup>198</sup> As practitioners know, *Frankel* sets forth six criteria by which to determine whether summary disposition is appropriate in a given matter.<sup>199</sup> Those criteria are now largely embodied in the Court's IOP as the means by which to ascertain whether single-judge adjudication is appropriate. Criticisms have also included purported examples of single-judge opinions that did not comport with the Court's professed standards.<sup>200</sup> I reviewed the 2004 cases decided by the Federal Circuit in which the underlying Veterans Court judgment was rendered by a single judge.<sup>201</sup> In a number of these cases, the legal rule at issue was at least arguably unsettled.<sup>202</sup> Thus, either the lawmaking function was being utilized even though that law could not later be cited, or an opportunity to engage in lawmaking was avoided by an inappropriate use of a single-judge disposition.

However, searching for cases in which a single judge violated the Veterans Court's IOP (by, for example, applying a new rule of law) may not be worth the effort. The law evolves through case-by-case application of legal principles, even when the principles are already established and the factual background is familiar. This type of common lawmaking is thwarted, or at the very least stunted, by broad use of non-precedential, single-judge memorandum decisions. As a result, the Veterans Court is not fulfilling its important role as formal lawmaker to the extent it otherwise could.

I suggest that the Veterans Court should reconsider its single-judge procedures in order to better strike the balance between lawgiving and error correction. The Court has the benefit of

198. See, e.g., Haley, *supra* note 65, at 549-63; Smith, *supra* note 65, at 281.

199. *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990).

200. See, e.g., Haley, *supra* note 65, at 549-58; Smith, *supra* note 65, at 281-82.

201. See *infra* Appendix A.

202. See, e.g., *Barrett v. Principi*, No. 02-2382, 2003 U.S. App. Vet. Claims LEXIS 417, at \*4-5 (Veterans Court, June 5, 2003) (granting a motion to dismiss granted and rejecting equitable tolling for a mental illness), *rev'd*, 363 F.3d 1316 (Fed. Cir. 2004); *Brandenburg v. Principi*, No. 03-0016, 2003 U.S. App. Vet. Claims LEXIS 406, at \*2-5 (Veterans Court, May 29, 2003) (granting a motion to dismiss and rejecting equitable tolling on the basis that claimant misfiled the NOA with the RO), *rev'd*, 371 F.3d 1362 (Fed. Cir. 2004); *Hayslip v. Principi*, No. 01-0269, 2003 U.S. App. Vet. Claims LEXIS 7, \*2-3 (Veterans Court, Jan. 2, 2003) (applying Veterans Claims Assistance Act retroactively), *rev'd*, 364 F.3d 1321 (Fed. Cir. 2004); *Wagner v. West*, No. 99-419, 2000 U.S. App. Vet. Claims LEXIS 1021, at \*7-15 (Veterans Court, Oct. 19, 2000) (assigning burden of proof for rebuttal concerning the presumption of in-service aggravation of certain injuries/diseases), *rev'd sub nom. Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).



eighteen years of experience with its caseload as well as the luxury now of established law to govern its operations. These conditions enable the Court to commit itself more directly to the lawgiving function. A good first step is for the Court to reconsider the *Frankel* criteria that govern single-judge adjudication. In addition, to fulfill its lawgiving function more completely, the Veterans Court should consider hearing more cases in panels.<sup>203</sup>

First, Congress made a special place for the Veterans Court in the system of judicial review of veterans benefits decisions.<sup>204</sup> The Court will speak with a more authoritative voice when it does so through opinions formally considered by a group of experts in veterans law. Moreover, an increase in panel opinions will create more precedential law.<sup>205</sup> This is particularly important in an area where, for nearly two-hundred years, agency interpretation was essentially the only law.<sup>206</sup>

Second, as a general matter, group decision-making leads to better opinions than individual judicial consideration.<sup>207</sup> Significant scholarship supports this fundamental position.<sup>208</sup> There are a number of reasons that group decisions are seen as superior. For example, groups of individuals are less likely to suffer from any form of bias (conscious or unconscious) or distorted reasoning than any person acting individually.<sup>209</sup> Fundamentally, the most important feature of group decisions is that they tend to be better reasoned and more considered because of the give-and-take among group members. As described recently by Judge Harry

203. I make a similar suggestion in the next subpart concerning en banc consideration. See *infra* Part III.A.2.

204. See *supra* Part I.A. (discussing the creation of the Veterans Court as well as its place in the structure of judicial review of veterans benefits decisions).

205. See *supra* notes 196–197 (discussing Veterans Court IOP as well as Court decisions restricting precedential law to opinions rendered by panels or the full court).

206. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (citing with approval a description of the VA as existing in “splendid isolation” with respect to the provision of veterans benefits before the creation of the Veterans Court).

207. This rationale for increasing panel consideration would apply to both the lawgiver and error corrector functions of the Veterans Court.

208. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 176–77 (1921) (arguing that appellate decision-making works best when judges work together to craft opinions); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (arguing that the collegiality among appellate judges leads to better reasoned opinions); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (arguing that group judicial decisions are less likely to be affected by any single judge’s unconscious biases); Harry W. Jones, *Multitude of Counselors: Appellate Adjudication as Group Decision-Making*, 54 TUL. L. REV. 541 (1980) (supporting group decision-making on a number of fronts).

209. See, e.g., Guthrie et al., *supra* note 208 (discussing a variety of cognitive issues that have a lower impact in group decisions).

Edwards of the United States Court of Appeals for the District of Columbia Circuit:

During deliberations, judges must hash out what precisely it is that the court will agree to hold. Arriving at a holding is not a binary phenomenon that reflects either “sincerity” or “strategy.” It is a complex conversation, both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at first espouse. As judges engage with their colleagues on a case, from oral argument and conference to opinion drafting and revising, their views evolve out of an interdependent push and pull. . . . If the end product looks different from what a judge had in mind at the beginning of the process, that fact reflects the very nature of the group process in which each judge can only contribute to a group product that is ultimately attributable to the court.<sup>210</sup>

Thus, both the Veterans Court as an institution and individual litigants would be better served by greater use of formal deliberative decision-making.<sup>211</sup>

Three objections could be made at this point. First, one might argue that the Veterans Court does, in fact, utilize group decision-making because it requires single-judge decisions to be circulated to all members of the Court before those decisions are issued.<sup>212</sup> Such a circulation procedure, however, is not a sufficient proxy for more traditional, formal group efforts. To begin with, members of

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210. Edwards, *supra* note 208, at 1660–61; *see also* Jones, *supra* note 208, at 543.

The livelier the discourse, the more open and genuinely collegial the exchange and opposition of ideas among the members of the court, the better reasoned the court’s decision is likely to be. And better reasoned decisions are, by and large, sounder decisions in their consequences, for the law and for society. Targets are hit more often by deliberate aim than by happy accident.

*Id.*

211. This conclusion is further supported by the high percentage of pro se litigants before the Veterans Court. *See* VETERANS COURT ANNUAL REPORTS (1996)–(2005), *supra* note 65 (setting forth annual pro se rates of filing and disposition). The adversary process can often compensate for some of the problems inherent in individual decision-making. *See* Jones, *supra* note 208, at 543 (discussing role of adversary system in this respect). In a system that features a large number of pro se litigants, however, the internal check of the adversarial system is diminished, which makes group decision-making all the more important.

212. *See* IOP, *supra* note 197, at II(c).

the Court have only five days to review single-judge opinions.<sup>213</sup> This time constraint will tend to inhibit a full review by the other judges, even if they could seek extensions. In addition, the opinion is essentially in final form by the time it is circulated. At that point, another judge's comments are corrective in nature instead of suggestions that help to shape the opinion in its more formative stages. More importantly, however, the benefits of group decision-making, such as those described by Judge Edwards,<sup>214</sup> do not simply come from another pair of eyes reading a decision. Rather, the benefits flow from a fully integrated, deliberative process that encourages give-and-take at a number of points along the decisional path. Such a rich conversation is not likely to be replicated in a review-before-issuance process.

Second, one might conclude that group decision-making is not necessary given the high affirmance rate of single-judge decisions by the Federal Circuit.<sup>215</sup> A significant affirmance rate, however, does not mean that single-judge *opinions* are equal to those rendered by panels or the full court in other respects. Rather, the affirmance rate suggests that single judges usually reach the correct *results*. While group decision-making may or may not have an impact on the bottom line, its more important role is in enhancing the quality of opinions.<sup>216</sup> In other words, more group decision-making would likely improve the reasoning behind the results.

A third, more meritorious objection concerns what I have described above as the Veterans Court's crushing caseload.<sup>217</sup> Workload unquestionably impacts the deliberative process of any appellate court.<sup>218</sup> It is common sense that a greater number of cases results in less overall effort devoted to any given case. This is a particular problem for the Veterans Court.<sup>219</sup> The sheer number of cases may mean that, even if the Veterans Court were inclined to move away from single-judge dispositions, it could not do so to the

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213. *Id.*

214. See *supra* text accompanying note 210.

215. See *supra* Part I.B, Table 2 (showing that single-judge decisions on which the Federal Circuit considered the merits in 2004–2006 were affirmed in 75.4% of cases).

216. See *supra* note 208 (collecting sources supporting group decision-making, many of which are concerned with the quality of decisions as well as the ultimate results).

217. See *supra* Part I.B.2 (discussing the Veterans Court's workload).

218. Others have made the same observation. See, e.g., Jones, *supra* note 208, at 550.

219. For example, for the 2005 judicial year, the Federal Circuit reported 1555 filings (a number fewer than the Veterans Court's filings) and had eleven judges and four senior judges to consider these cases (more judges than in the Veterans Court). Compare Federal Circuit Web Page, *supra* note 61 (setting forth statistics for the Federal Circuit), with VETERANS COURT ANNUAL REPORT (2005), *supra* note 65 (setting forth statistics for the Veterans Court).

desired extent. Nonetheless, this obstacle should not dissuade the Court from moving at all.

## 2. En Banc Consideration

A related issue in terms of the Veterans Court's lawgiving function<sup>220</sup> concerns the Court's resistance to considering cases en banc.<sup>221</sup> Indeed, from January 2004 through March 2006, the Veterans Court issued only two en banc opinions.<sup>222</sup> Moreover, of all the opinions the Federal Circuit issued in this period, not a single one addressed an en banc disposition by the Veterans Court.<sup>223</sup> The experience during the past few years seems to match that of the Court during its entire existence.<sup>224</sup> This bias against en banc consideration is reflected in the Veterans Court IOP: "Decisions by a full-Court panel are not favored except where necessary to secure or maintain a uniformity of the Court's decisions or to resolve a question of exceptional importance . . . ."<sup>225</sup>

As a result of its resistance to en banc consideration, the Court is missing a prime opportunity to influence the development of veterans law. Congress established a unique system for this Article I court to resolve all disputes in the area of veterans law.<sup>226</sup> Moreover, the Veterans Court occupies this role largely in a vacuum because judicial review did not previously exist in the area.<sup>227</sup> Thus, the Court is engaged in something that, in many respects, has not been

<sup>220</sup> This is an important consideration even if one assumes that the current standards for single-judge adjudication remain in place and are correctly applied.

<sup>221</sup> As a technical matter, the Court refers to en banc consideration as action by the "Full Court." See VET. APP. R. PRACTICE & P. 35.

<sup>222</sup> Both en banc opinions came in the same case. The first one dealt with the BVA's authority to obtain and consider medical opinions from within the VA and the Veterans Court's interpretation of the "clearly erroneous" standard of review. *Padgett v. Nicholson*, 19 Vet. App. 133 (2005) (en banc). The second opinion withdrew the first one due to the death of the veteran. *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (en banc), *vacating as moot*, 19 Vet. App. 84 (2005).

<sup>223</sup> See *infra* Appendix A (setting forth all precedential opinions by the Federal Circuit in appeals from the Veterans Court) and Appendix B (setting forth all jurisdictional decisions and summary affirmances by the Federal Circuit concerning appeals from the Veterans Court).

<sup>224</sup> A prominent treatise in the area states: "The Court rarely decided cases en banc. Since the Court's inception, it has decided fewer than fifty cases in this manner." VETERANS BENEFITS MANUAL, *supra* note 116, § 15.6.23, at 1220.

<sup>225</sup> IOP, *supra* note 197, § V(a).

<sup>226</sup> See *supra* Part I.A (discussing place of Veterans Court in judicial review of veterans benefits decisions).

<sup>227</sup> See *supra* Part I.A (describing history of judicial review of administrative veterans benefits decisions).

possible since the beginning of the Republic: writing on a clean slate. The forceful statements of the Veterans Court as a whole—that is with all the experts involved—should have a greater impact on relevant audiences like the VA and the Federal Circuit. At the very least, the benefits of group decision-making<sup>228</sup> would be realized if more judges were involved in each decision.

In sum, at this time in its life, the Veterans Court should see *many* issues of “exceptional importance” that justify en banc consideration. With the formal input of all its judges,<sup>229</sup> the Court would improve in its role as lawgiver. At a minimum, the Court should more actively and openly consider whether it hears an increased number of cases en banc in the coming years.<sup>230</sup> Such an increase in en banc hearings would greatly strengthen the Court’s role as lawgiver, even if the Court took no action concerning the

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228. See *supra* Part III.A.1.

229. Once again, I say “formal input” because the Court’s IOP provides that opinions are circulated to all judges, any one of whom may request that the Court vote on whether to hear the matter en banc. See IOP, *supra* note 197, § V(b). For many of the reasons I discussed above concerning single-judge decisions, that type of participation in the decision-making process does not substitute for formal en banc treatment.

230. There are some signs that such a discussion might be beginning. In a number of cases in the past two years, concurrences and dissents addressed requests for en banc consideration. See, e.g., *Scarborough v. Nicholson*, 19 Vet. App. 322, 322 (2005) (Kasold, J., dissenting from denial of en banc consideration); *Mayfield v. Nicholson*, 19 Vet. App. 220, 220 (2005) (Steinberg, J., concurring in denial of en banc consideration); *Id.* at 221 (Kasold, J., concurring in denial of en banc consideration); *Id.* at 222 (Hagel, J., dissenting from denial of en banc consideration); *Wells v. Principi*, 18 Vet. App. 33, 34 (2004) (Steinberg, J., dissenting from denial of en banc consideration); *Id.* at 49 (Kasold, J., dissenting from denial of en banc consideration); *Akers v. Principi*, 17 Vet. App. 561, 561 (2004) (Steinberg, J., concurring in denial of en banc consideration); *Id.* at 562 (Hagel, J., concurring in denial of en banc consideration); *Id.* at 564 (Kasold, J., dissenting from denial of en banc consideration). If this trend continues, the Court as a whole may eventually decide to consciously reevaluate the en banc process.

231. There are additional means by which the Veterans Court could address the tension between its two roles. One in particular is the adoption of a class action rule that would enable the Court to address important legal issues in a number of cases at the same time. Such a rule would allow the Court to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals. Adopting a class action rule would require the Court to overrule longstanding precedent. See *Lefkowitz v. Derwinski*, 1 Vet. App. 439 (1991). In my view, such action is warranted. The Court may eventually agree to reevaluate *Lefkowitz*: before he took the bench, Veterans Court Judge Lawrence Hagel advanced an argument in favor of class action treatment of cases at the Court. See Hagel & Horan, *supra* note 28, at 65.

*B. The Veterans Court and the Federal Circuit*

The relationship between the Federal Circuit and the Veterans Court is, in operation, unlike the relationship between most, if not all, other superior-inferior tribunals.<sup>232</sup> In reading the opinions of these courts, it appears that there is a certain sense of distrust between them. For example, the Veterans Court seems to believe that the Federal Circuit does not truly understand veterans law or the nature of the Veterans Court.<sup>233</sup> On the other hand, the Federal Circuit seems to believe that the Veterans Court does not understand its own role in this unique area of law.<sup>234</sup> As a result of this

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232. I initially described the structural relationship between these courts above. *See supra* Part I.A. I provide additional analysis of that issue in this subpart of the Article.

233. A prime example of the Veterans Court's attitude in this regard is found in *Bobbitt v. Principi*, 17 Vet. App. 547, 547-48 (2004), a case in which the Veterans Court had to decide whether an NOA was timely when it was misfiled at the BVA within 120 days of the decision at issue. The Veterans Court held that equitable tolling principles rendered the filing timely. *Id.* at 554. The interesting point for present purposes was the Veterans Court's attitude toward the Federal Circuit. For example, the Veterans Court expressed a belief that the Federal Circuit, at some level at least, did not understand the very nature of the Veterans Court. The Court stated: "[T]he Federal Circuit apparently presumes that this Court is part of VA and that placing VA on notice satisfies the section 7266 requirement that an NOA be filed at this Court." *Id.* at 553. The Veterans Court also lectured the Federal Circuit about the fact that the Veterans Court is part of an adversarial system, not a component of the "non-adversarial, pro-claimant adjudication environment" in the VA. *Id.* at 552. Finally, the Veterans Court critiqued the logic underlying the Federal Circuit's various equitable tolling cases even though the Veterans Court ultimately followed them. *Id.* at 552-54.

*Bobbitt* is not an isolated case in terms of the Veterans Court's attitude toward the Federal Circuit. In several cases, the Veterans Court has critiqued the Federal Circuit's reasoning when a matter has been remanded to the Veterans Court. For example, in one case the Veterans Court was called upon by the Federal Circuit to articulate "the proper standard(s) of its review of the Board determination in this case respecting CUE." *Andrews v. Principi*, 18 Vet. App. 177, 181 (2004) (quoting *Andrews v. Principi*, 25 F. App'x 997, 998 (Fed. Cir. 2001)). In response to that directive, the Veterans Court responded: "This Court established more than 11 years ago the proper standard of review for considering Board decisions determining whether CUE had been committed in previous RO decisions . . . . In accordance with the directives of the Federal Circuit, this Court here reiterates [that standard]." *Id.* at 181. *See also* *Suaviso v. Nicholson*, 19 Vet. App. 532, 534 n.1 (2006) (commenting that, in an earlier decision, the Federal Circuit had "inexplicably cited" only to certain matters); *Pelea v. Nicholson*, 19 Vet. App. 296, 307 (2005) (observing that, even though the Federal Circuit recognized that the Veterans Court had applied a rule correctly, "[n]evertheless, this case has been remanded to us."); *Bates v. Nicholson*, 19 Vet. App. 197, 198 (2005) (noting that the Federal Circuit remanded the case "notwithstanding" a certain regulation the Veterans Court had originally concluded prevented it from issuing the writ that the Federal Circuit was directing it to issue).

These cases reveal a truly unique relationship between an "inferior" and a "superior" court. While the Veterans Court has not refused to carry out the mandates of the Federal Circuit, its attitude in these opinions does not promote a cooperative approach to the growth of veterans law.

234. Prime examples of this attitude are found in the various Circuit Court opinions concerning equitable tolling and the related doctrines discussed above. *See supra* Part II.A.1.

tension, these two courts may not be working together as productively as Congress envisioned when it charged them with creating a uniform and effective means of judicial review in veterans law.

Yet, some of the responsibility for the tension between the Veterans Court and the Federal Circuit can be laid at the collective feet of Congress. Congress created a system in which the Veterans Court is “inferior” to the Federal Circuit in only some ways. Specifically, while the Federal Circuit has the authority to review judgments of the Veterans Court, in the absence of a constitutional question, the Federal Circuit “may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.”<sup>235</sup> Thus, in a large number of cases, the Veterans Court’s decisions are unreviewable for all intents and purposes.<sup>236</sup> This feature of the statutory relationship between the two courts likely contributes to the sometimes odd interaction between them.<sup>237</sup>

A number of possible solutions might ease the problematic relationship between the Federal Circuit and the Veterans Court. I outline three possibilities below: (1) expanding the Federal Circuit’s appellate jurisdiction; (2) eliminating the Federal Circuit’s appellate jurisdiction; and (3) making the Federal Circuit’s appellate jurisdiction discretionary.<sup>238</sup>

A first possible solution is to make the Federal Circuit *more* involved in the appellate process. For example, perhaps the ban on jurisdiction contained in § 7292(d) should be repealed and replaced with a more traditional appellate relationship.<sup>239</sup> Of course, adopting this option might—but would not necessarily—require

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The upshot of these decisions is that the Federal Circuit appears to view the Veterans Court as too harsh in its jurisdictional decisions given the nonadversarial atmosphere from which veterans emerge. *Id.*

235. 38 U.S.C. § 7296(d)(2) (2000).

236. This explains the significant number of jurisdictional dismissals in the Federal Circuit. See *infra* Appendix B (summarizing jurisdictional dismissals at the Federal Circuit between January 2004 and March 2006).

237. Other commentators have also noted the oddity of the appellate relationship between the Federal Circuit and the Veterans Court. See, e.g., Fox, *supra* note 18, at 221–24; Levy, *supra* note 18, at 322–24; Mills, *supra* note 18, at 702–09. Even Federal Circuit judges have commented on the relationship. See Comments of Federal Circuit Chief Judge Glenn Archer, *The Federal Circuit’s Limited Jurisdiction to Review Decisions of the Court of Veterans Appeals*, contained in the proceedings of THE THIRD JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF VETERANS APPEALS, 8 Vet. App. CLXXXVI-CXCI (Oct. 17, 1994).

238. This Article is not the place to fully debate these possibilities. Rather, this overview is intended to present a roadmap for future discussion.

239. Professor Levy has also recently noted the tensions between the Veterans Court and the Federal Circuit and suggested that Congress expand the Circuit Court’s jurisdiction. See Levy, *supra* note 18, at 322–24.

Congress to reevaluate fundamental aspects of the Veterans Court, including its fact-finding abilities. Ultimately, that might be a reason to reject this solution, but it should not prevent the option from being considered.

A second possibility is to remove the Federal Circuit from the appellate equation completely. Under this model, appeals from the Veterans Court would be to the Supreme Court of the United States via the writ of certiorari. Given the small number of cases the Supreme Court elects to hear each term, however, the likely impact of this proposal would be to make the Veterans Court the final judicial arbiter of veterans benefits in all but the most unusual cases.<sup>240</sup>

Finally, the Federal Circuit could remain involved in the process either as it is or with expanded jurisdiction and the option to refuse cases on appeal from the Veterans Court (i.e., the equivalent of a writ of certiorari). This possibility should be considered carefully before its adoption. If it was enacted without altering the current jurisdictional structure, it might cause additional problems (such as increased delay while a party sought such appellate review) without relieving the tension between the Federal Circuit and the Veterans Court.

In the meantime, the tension remains between the courts. It is critical that these two courts work together to ameliorate the problem while statutory solutions are considered. The turnover in Veterans Court judges in the past two years may help to relieve the tension.<sup>241</sup> But one can never be sure when the “us”/“them” dichotomy will appear. After all, the new judges have agreed to devote a considerable portion of their professional lives to the Court. One concrete, short-term means of addressing this problem would be for the Veterans Court to use its authority under § 7292(b) to certify appeals to the Federal Circuit on controlling issues of law.<sup>242</sup> Doing so might enable the courts to communicate

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240. Such a structure is in place for the United States Court of Appeals for the Armed Forces. See United States Court of Appeals for the Armed Forces, Establishment, [www.armfor.uscourts.gov/Establis.htm](http://www.armfor.uscourts.gov/Establis.htm) (last visited Jan. 24, 2007) (on file with the University of Michigan Journal of Law Reform).

241. See *supra* notes 43–44 (discussing changes in the composition of the Veterans Court in recent years).

242. See 38 U.S.C. § 7292(b)(1) (2000) (setting forth a procedure by which the Veterans Court may certify controlling questions of law to the Federal Circuit for resolution). It does not appear that the Veterans Court has ever used this statutory authority. A search of the LEXIS “US Court of Appeals for Veterans Claims” database for “7292(b)” turns up only five citations to the rule in the history of the Veterans Court, all of them denying motions to certify a question to the Federal Circuit.



with one another in a way that is not dictated by the parties. It could have the additional benefit of expediting a lengthy process. Whatever is decided, this issue should be addressed in an above-board manner. Not doing so could seriously undermine both courts and ultimately disadvantage veterans and the VA alike.

### *C. The Veterans Court and Veterans*

The final tension apparent in the decisions over the past two years is the most important in many respects: the relationship between veterans and the Veterans Court. Do veterans see the Court as a friend, an enemy, a source of delay, or some combination? Certainly, the Veterans Court should not consciously operate to please veterans as a group. Such an attitude would contradict the impartiality that is central to the judiciary in this country. However, given the Veterans Court's unique place in the veterans benefits system, it should concern itself with the impression veterans have of the Court and its operation.<sup>243</sup>

The decisions over the past two years reveal two factors in particular that *could* cause veterans as a group to lose faith in the Veterans Court as an institution: (1) the Court's attitude toward the switch between the "non-adversarial" VA adjudicative process and the adversarial proceedings before the Court; and (2) the Court's use of remands versus reversals. I discuss each of these areas below.

#### 1. Non-Adversarial and Adversarial Processes

The manner in which disputes are resolved within the VA makes the system of veterans benefits unique. The dispute resolution mechanism is formally both nonadversarial and paternalistic. This Article does not join the many debates that rage about these characterizations.<sup>244</sup> For present purposes, it suffices that the VA

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243. Many of the points discussed in this subpart are also applicable to the Federal Circuit, though probably to a somewhat lesser extent. The Veterans Court's role as the first line of appellate review combined with the jurisdictional limitations imposed on the Federal Circuit make the Veterans Court more of a target for dissatisfied claimants. Accordingly, this subpart's focus is on the Veterans Court.

244. See, e.g., Carpenter, *supra* note 192, at 60 (criticizing the paternalistic approach in the current system); Levy, *supra* note 18, at 2 (discussing in a balanced way various attributes of the current system of veterans benefits); Gary E. O'Connor, *Rendering to Caesar: A Response to Professor O'Reilly*, 53 ADMIN. L. REV. 343 (2001) (generally defending the current veterans

describes its benefits mission, including the administrative/adjudicative process, as nonadversarial and paternalistic.<sup>245</sup> Thus, a veteran pursuing benefits through the VA can easily become lulled into complacency by rules such as those requiring the VA to assist claimants<sup>246</sup> and to notify them of information necessary to make out their claims,<sup>247</sup> or those entitling veterans to the “benefit of the doubt” in certain instances.<sup>248</sup> The situation is made to seem even more nonadversarial by the restrictions placed on lawyers in the VA adjudicative process.<sup>249</sup>

All of this changes when a veteran appeals to the Veterans Court. At that point, claimants are immersed in a traditionally adversarial system, even though most of them are still representing themselves when they file their appeals.<sup>250</sup> From a veteran’s perspective, it may seem that the Veterans Court has been less than forgiving when veterans do not make a seamless transition from the nonadversarial VA environment to the world the Court occupies. In many of the cases in which the Veterans Court and the Federal Circuit have clashed, the Veterans Court attempted to rigidly enforce filing deadlines and other procedural requirements.<sup>251</sup> The Court would

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benefits system); James T. O’Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001) (presenting a highly critical assessment of the current veterans benefit system).

245. This approach to the provision of benefits is clear from the VA’s Mission Statement. That document reads in part as follows: “The men and women of the VA are dedicated to fulfilling the Department’s mission and vision and they commit their abilities and energy to continue the rich history of providing for those that have served America.” See Department of Veterans Affairs, Mission, Vision, Core Values & Goals, [www.va.gov/about\\_va/mission.asp](http://www.va.gov/about_va/mission.asp) (last visited Jan. 24, 2007) (on file with the University of Michigan Journal of Law Reform). It then continues by listing the following among the “core values” of the Department: (1) “Veterans have earned our respect and commitment, and their health care, benefits, and memorial services needs drive our actions.”; and (2) “We will value our commitment to veterans through all contingencies and remain fully prepared to achieve our mission.” *Id.*

246. See 38 U.S.C. § 5103A (2000).

247. See 38 U.S.C. § 5103.

248. See 38 U.S.C. § 5107 (2000); 38 C.F.R. § 3.102 (2006).

249. See, e.g., 38 U.S.C. § 5904(c) (2000); see also Levy, *supra* note 18, at 317–19 (discussing restrictions on use of attorneys in the VA adjudicative process). There is currently pending in Congress a bill that would greatly ease these restrictions. See Veterans Choice of Representation Act of 2006, S. 2694, 109th Cong. (2006). As of the writing of this Article, it is unclear whether this legislation will pass.

250. See VETERANS COURT ANNUAL REPORTS (2005), *supra* note 65 (showing a fifty-eight percent pro se rate at the time of filing in 2005). The pro se representation rate drops sharply by the time an appeal is closed, but the number of pro se litigants remains significant. See, e.g., *id.* (reporting a twenty-nine percent pro se rate at closure in 2005).

251. See *supra* Part II.A.1. (discussing cases in this category). Another example of the Veterans Court’s rigid approach can be seen in *Mapu v. Nicholson*, 397 F.3d 1375 (Fed. Cir. 2005). The veteran in *Mapu* was preparing to mail his NOA to the Veterans Court on the last day of the appeal period. *Id.* at 1377. Instead of sending the NOA by mail, which would have

improve its relationship with veterans by more consciously considering the real-world difficulties caused by the switch from the VA process to the Court environment.<sup>252</sup> For example, the Veterans Court could more actively embrace the concept of equitable tolling.<sup>253</sup> Moreover, such a change in attitude is warranted because it would recognize that veterans are at the nip point between two very different types of adjudication when they file their appeals with the Court.

## 2. Of Remands and Reversals

A second, and more practically significant matter, is the Veterans Court's use of remands instead of reversals when reviewing BVA decisions. Academics and practitioners alike have criticized the Court's remand/reversal practices.<sup>254</sup> The statistics suggest why this is so.<sup>255</sup> In a system already beset with delays—and remands within the VA itself between the BVA and the RO—veterans may perceive that the Veterans Court aggravates the situation. The Court must continue to address the remand issue if it is to preserve and augment its relationship with veterans.

Of course, exactly how the Veterans Court could reduce remands is another matter. Yet, certain steps can be taken with little

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resulted in a timely filing under the mailbox rule, the veteran sent the NOA by Federal Express for faster delivery. *Id.* The Veterans Court dismissed the appeal as untimely because it was received one day late and the mailbox rule did not apply to Federal Express. *Id.* The Federal Circuit affirmed. *Id.* at 1382. Both courts are no doubt correct in their interpretations of the statutes. At the same time, the negative response of veterans toward this decision and the courts that rendered it is not surprising. [can you provide a citation for the negative response of veterans?].

252. The transition from the nonadversarial VA system to the adversarial judicial process has long been a subject of concern for those within and outside the VA. *See, e.g.*, Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 30–31 (1994); Hagel & Hogan, *supra* note 28, at 46–47, 62–63.

253. *See supra* Part II.A.1 (discussing equitable tolling).

254. For academic commentary, *see* Fox, *supra* note 18, at 75–83; Fox, *supra* note 192, at 347; Levy, *supra* note 18, at 320–22. For a practitioner's view, *see* generally VETERANS BENEFITS MANUAL, *supra* note 116, § 15.3.

255. *See* VETERANS COURT ANNUAL REPORT (2002)–(2005), *supra* note 65 (noting remand rates per year); *see also supra* Part I.B (discussing remand issue). Others have noted that the remand rates at the Veterans Court appear to be significantly greater than those in other administrative law contexts. *See, e.g.*, Levy, *supra* note 18, at 320. One can be somewhat critical of Professor Levy's generalizations comparing two quite different reviews of administrative action. This is not the place to address whether this is a comparison of oranges and tangerines or oranges and hamburgers. For now, I simply note that others have made such a comparison.

effort. For example, the Veterans Court could remand fewer cases in which the critical issue is one of law.<sup>256</sup> Similarly, the Court could be more aggressive in its review of Board factual determinations. At times, the Court has support for ruling that a finding is clearly erroneous, and yet the Court remands instead.<sup>257</sup> Finally, the Court could resist the temptation to raise, on its own, “remandable matters” that the veteran does not wish to have adjudicated.<sup>258</sup> Each of these approaches would reduce remands independently. However, taken together, they could have a greater impact because they are connected to the Court’s attitude about the remand/reversal issue as a whole.<sup>259</sup>

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The decisions of the Veterans Court and the Federal Circuit concerning veterans benefits over the past two years have been rich in many respects. This Part has discussed three respects in which these decisions illustrate fundamental themes and tensions in the area. First, the decisions reflect the internal tensions at the Veterans Court concerning its roles as lawgiver and error corrector. Second, they provide vivid examples of the institutional tensions between the Veterans Court and the Federal Circuit. Finally, the decisions suggest that at some levels at least there is a potential disconnect between the Veterans Court and veterans as a group. The next Part briefly suggests how one might use these illustrations to fashion a research agenda.

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256. See, e.g., *King v. Nicholson*, 19 Vet. App. 406, 410–11 (2004) (remanding for consideration whether bar to regulation in 38 C.F.R. § 20.101(b) concerns a categorical rejection of medical treatment in all cases or only specific treatment decisions); *Theiss v. Principi*, 18 Vet. App. 204, 208–14 (2004) (concluding that VA regulation was invalid, but remanding for readjudication as to whether home schooling qualified as an “educational institution”).

257. Once again, cases falling into this category are matters of degree. I believe, however, that several cases can be included in this group. See, e.g., *Washington v. Nicholson*, 19 Vet. App. 362, 372–74 (2004) (Kasold, J., concurring in part and dissenting in part) (arguing that the majority erred in remanding the case when it could have held that the Board’s finding concerning medical nexus was clearly erroneous); *Gutierrez v. Principi*, 19 Vet. App. 1, 7–11 (2004) (remanding for consideration of Gulf War Syndrome diagnosis in a situation where the statutory requirements clearly appeared to have been met).

258. See, e.g., *Coburn v. Nicholson*, 19 Vet. App. at 439 (2006) (Lance, J., dissenting) (arguing that the majority inappropriately refused to accept a veteran’s waiver of certain issues that ultimately led to remand); see also *Johnson v. Nicholson*, 127 F. App’x 475, 475–77 (Fed. Cir. 2005) (holding that it is legal error to remand on a basis waived by the veteran).

259. There are, of course, more dramatic ways in which to reduce remands. For example, Congress could remove the barrier that prevents the Veterans Court from finding facts in the first instance. I am not yet ready to advocate such a change, but it may be worthwhile to consider whether such a statutory amendment would be beneficial.

## CONCLUSION AND A MODEST RESEARCH AGENDA

When I began my in-depth exploration of veterans law to prepare for my speech at the Veterans Court's Judicial Conference, I did not fully appreciate the richness of the jurisprudence in the area. The Veterans Court and the Federal Circuit adjudicate an extraordinary breadth of issues that have enormous impact on a large segment of the Nation's population. If nothing else, I hope this Article has piqued interest in a part of the legal system that has received scant attention.

My study has also convinced me that much could be gained by greater academic focus on the Veterans Court and its operations. For example, the Veterans Court's use of single judges as a means of appellate decision-making is largely unique.<sup>260</sup> Studying this device could lead to a reassessment of the means by which overburdened appellate courts consider cases. I have suggested that, as matters currently stand, I am skeptical of this device.<sup>261</sup> But further study may suggest that the single-judge method of decision-making has advantages that are not immediately apparent.

In addition, studying the Veterans Court is important in assessing the utility of subject-specific courts in the federal judiciary (and elsewhere). A wide body of literature already exists on this subject.<sup>262</sup> However, there appears to be renewed interest in the topic prompted in part by calls to create a de facto specialized immigration court by restricting appeals in this area to a single federal court.<sup>263</sup> A concentrated study of the Veterans Court should provide

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260. See *supra* Part III.A.

261. *Id.*

262. See, e.g., Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Christopher A. Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31 (2005); George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 J. AM. LEGAL HIST. 238 (1964); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113; Michael Landau & Donald Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717 (1999); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 111 (1990); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267 (2005). See also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) (discussing Article I courts generally); Daniel J. Meltzer, *Symposium: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 291 (1990) (discussing Article I courts generally).

263. See Securing America's Borders Act, S. 2454, 109th Cong. tit. 5, § 501 (2006) (restricting appeals in immigration matters to the Federal Circuit).

valuable insights into this potential approach to administering justice.

In conclusion, the Veterans Court is an experiment worthy of study for a number of reasons. I hope that this Article sparks an academic discussion of that bold experiment begun nearly twenty years ago.

APPENDIX A  
NON-JURISDICTIONAL FEDERAL CIRCUIT DECISIONS (JANUARY 2004–MARCH 2006)<sup>264</sup>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Conway v. Principi</i> , 353 F.3d 1369 (Fed. Cir. 2004)	<ul style="list-style-type: none"> <li>Duty to notify (38 USC § 5103 (a))</li> <li>Prejudicial Error (38 USC § 7261 (b) (2)) (Does prejudicial error rule apply to duty to notify claims?)</li> </ul>	Remands to BVA based on duty to notify, no application of prejudicial error rule	X			Reversed and remanded (Held: prejudicial error rule applies to duty to notify claims) Approximately 45 other cases were remanded to the Veterans Court in light of <i>Conway</i> . See 97 Fed. Appx. 314–318 (Fed. Cir. 2004).
<i>Dingess v. Principi</i> , 85 Fed. Appx. 217 (Fed. Cir. 2004)	Same as <i>Conway</i>	Same as <i>Conway</i>	X			Reversed and remanded Same as <i>Conway</i> . The Veterans Court issued its decision on remand on March 3, 2006. See 2006 U.S. App. Vet. Claims LEXIS 102 (Veterans Court, Mar. 3, 2006).
<i>Palranello v. Principi</i> , 85 Fed. Appx. 217 (Fed. Cir. 2004)	Same as <i>Conway</i>	Same as <i>Conway</i>	X			Reversed and remanded Same as <i>Conway</i>
<i>Szemraj v. Principi</i> , 357 F.3d 1370 (Fed. Cir. 2004)	Does <i>Roberson</i> duty "to fully and sympathetically develop the veteran's claim to its optimum" (for the unrepresented veteran) apply to CUE claim?	Affirms BVA (Held: <i>Roberson</i> does not apply to CUE)	X			Affirmed BUT (Held: <i>Roberson</i> does apply to CUE claim but error was harmless in this situation)
<i>Sandstrom v. Principi</i> , 358 F.3d 1376 (Fed. Cir. 2004)	Does "no interest" rule apply to CUE claims? BVA held it did.	Affirms BVA		X		Affirmed
<i>Moody v. Principi</i> , 360 F.3d 1306 (Fed. Cir. 2004)	Same as <i>Szemraj</i> re: <i>Roberson</i> duty in context of CUE	Affirms BVA on ground that <i>Roberson</i> does not apply	X			Reversed <i>Roberson</i> duty applies and error here was not harmless

<sup>264</sup> Decisions listed in rough chronological order as appearing in the *Veterans Appeals Reporter*. Decisions include those issued through March 31, 2006.

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Davis v. Principi</i> , 88 Fed. Appx. 397 (Fed. Cir. 2004)	Does 38 CFR § 4.15 apply to total disability ratings when 38 CFR § 4.16 also applies?	Affirms BVA in holding 4.15 not applicable	X			Reversed and remanded Held: § 4.15 does apply
<i>Barrett v. Principi</i> , 363 F.3d 1316 (Fed. Cir. 2004) <sup>265</sup>	Can mental illness toll 120-day period in which to file notice of appeal? (38 USC § 7266 (a))	Holds no equitable tolling and dismisses appeal for lack of jurisdiction	X			Reversed and remanded Held: equitable tolling may apply if veteran can show that the failure to file was the direct result of a mental illness that rendered him incapable of rational thought or deliberate decision making or incapable of handling [his] own affairs or unable to function [in] society. Key passage at 1321.
<i>Hayston v. Principi</i> , 364 F.3d 1321 (Fed. Cir. 2004) <sup>266</sup>	Does VCAA apply retroactively to cases finally decided by BVA before VCAA enactment?	Remands to BVA holding that VCAA applies retroactively	X			Reversed Held: VCAA does not apply retroactively to cases final at BVA before its enactment (even if the veteran's time to appeal or seek reconsideration had not yet run)
<i>Miley v. Principi</i> , 367 F.3d 1343 (Fed. Cir. 2004)	Does 38 USC § 7105 (b) (1) require documentary evidence that reflects the date a notice of decision was mailed?	Affirms BVA and finds no documentary evidence required	X			Affirmed Held: no documentary evidence required
<i>Terry v. Principi</i> , 367 F.3d 1291 (Fed. Cir. 2004)	Does 38 USC § 5121 (a) limit a survivor's benefits to those that accrued in the two years immediately preceding a veteran's death?	Affirms BVA that statute so limits the benefits	X			Reversed Held: statute limits benefits to two years in total but not to those that accrued only in the two years prior to a veteran's death
<i>Perry v. Principi</i> , 95 Fed. Appx. 339 (Fed. Cir. 2004)	CUE issue in which veteran claims earlier BVA decision incorrectly determined a claim under 38 USC § 5111	Affirms BVA finding of no CUE	X			Affirmed (Note: one issue dismissed on jurisdictional ground)

265. Some cases were remanded pursuant to *Barrett*. See, e.g., 103 Fed. Appx. 387 (Fed. Cir. 2004).  
 266. Several other cases were reversed and remanded on this ground as well. See, e.g., 109 Fed. Appx. 433 (Fed. Cir. 2004).



Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Wagner v. Principi</i> , 370 F.3d 1089 (Fed. Cir. 2004)	Must government show clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness for wartime service under 38 USC § 1111?	Affirms BVA (and at least implicitly holds that clear and unmistakable evidence standard does not apply to aggravation)	X			Reversed and remanded to apply correct standard (i.e.—that clear and unmistakable evidence applies to both preexisting condition and lack of in-service aggravation under 38 USC § 1111)
<i>Wanner v. Principi</i> , 370 F.3d 1124 (Fed. Cir. 2004)	Issue was CVC jurisdiction concerning review of certain issues involving ratings schedule, specifically whether a certain diagnostic code complied with the statute	Veterans Court holds it has jurisdiction		X		Reversed Held: no jurisdiction—adopts a restrictive interpretation of Veterans Court jurisdiction
<i>Brandenburg v. Principi</i> , 371 F.3d 1362 (Fed. Cir. 2004)	Does a mistiling with BVA instead of mistiling with a RO toll time in which to appeal to Veterans Court?	Holds no tolling	X			Reversed Held: equitable tolling applies in this situation
<i>Sellers v. Principi</i> , 372 F.3d 1318 (Fed. Cir. 2004) (with <i>Hayday v. Principi</i> )	Does 38 CFR § 4.130 concerning rating schedule for PTSD require VA to use symptoms listed in DSM-IV in place of criteria in the general rating formula?	Holds that DSM-IV symptoms supplement but do not replace the general rating formula criteria	X			Affirmed Held: Veterans Court has jurisdiction despite the presence of an issue related to the rating schedule
<i>Natali v. Principi</i> , 375 F.3d 1375 (Fed. Cir. 2004)	CUE in 1945 decision to sever service connection	Affirms BVA in holding no CUE	X			Affirmed Held: VA rebutted with clear and unmistakable evidence the presumptions of soundness and aggravation under <i>Wagner</i>
<i>Morton v. Principi</i> , 376 F.3d 1336 (Fed. Cir. 2004)	Is there an exception to rule of RO decision finally based on a failure of RO to follow a procedural rule (here the requirement to give 'detailed reasons' for reduction of rating under 38 CFR § 3.105 (e))?	Affirms BVA finding of finality	X			Affirmed Held: Cook sets forth the 2 avenues to avoid finality—CUE or new and material evidence
<i>Hathorne v. Principi</i> , 102 Fed. Appx. 679 (Fed. Cir. 2004)	Request for mandamus from Veterans Court to allow veteran input on VCAA	Denies writ	X			Affirmed
<i>Patrick v. Principi</i> , 103 Fed. Appx. 383 (Fed. Cir. 2004)	Presumption of soundness— rebuttal re: aggravation in-service	Holds VA rebutted presumption of soundness	X			Reversed Based on <i>Wagner</i>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Shedden v. Principi</i> , 381 F.3d 1163 (Fed. Cir. 2004)	In a CUE context, the veteran argued that 38 USC § 105 (a) created a presumption of service connection if a disease manifests itself during veteran's active service	Affirms BVA that no presumption applies and also that, even if did, the CUE assertion was not supported	X			<b>Affirmed</b> BUT, Circuit Court disagrees with Veterans Court concerning the presumption and holds that section 105 (a) does create a presumption of service connection if an injury occurs or a disease manifests itself during a veteran's active service
<i>Halpern v. Principi</i> , 384 F.3d 1297 (Fed. Cir. 2004)	The case concerned an EAJA fee application based on a remand to the BVA in which the Veterans Court ordered the BVA to dismiss the case for want of jurisdiction. The matter concerned the payment of attorneys fees pursuant to a fee agreement that had been rejected by the BVA	Denies fee application		X		<b>Affirmed</b> Uses different reasoning than Veterans Court but ultimately concludes that the petitioner was not a 'prevailing party'
<i>Kerit v. Principi</i> , 389 F.3d 1380 (Fed. Cir. 2004)	Does the presumption of soundness in 38 USC § 1111 become irrebuttable if the condition at issue is tested at induction but no problem is found?	Affirms BVA decision and rejects the argument that the presumption becomes irrebuttable	X			<b>Affirmed</b>
<i>Wilson v. Principi</i> , 381 F.3d 1203 (Fed. Cir. 2004)	Does section 403 of the Veterans Benefits Act of 2002 (concerning rates for non-attorney practitioners) apply to all matters pending before Veterans Court when it was enacted?	Grants EAJA application but reduces the amount requested for a non-attorney practitioner. In so doing Veterans Court does not apply section 403		X		<b>Reversed and remanded</b> Held: section 403 applies to all cases pending when it was enacted
<i>Rason v. Principi</i> , 113 Fed. Appx. 411 (Fed. Cir. 2004)	Veteran sought writ of mandamus from Veterans Court directing the VA to act more quickly on his claims	Denies request for writ	X			<b>Affirmed</b>
<i>Mapu v. Nicholson</i> , 397 F.3d 1375 (Fed. Cir. 2005)	Does Fed Ex 'post mark' qualify for 'post mark' rule of 38 USC § 7266 (c) and (d)?	Holds Fed Ex does not qualify		X		<b>Affirmed</b> (Also rejects equitable tolling argument)
<i>Bates v. Nicholson</i> , 398 F.3d 1355 (Fed. Cir. 2005)	Would BVA (and therefore Veterans Court) have jurisdiction over Secretary's termination of accreditation to represent claimants such that Veterans Court could issue a writ of mandamus instructing the Secretary to issue a SOC?	Holds that BVA has no jurisdiction		X		<b>Reversed</b> Interprets jurisdictional statute broadly and instructs Veterans Court to issue the writ

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Durr v. Nicholson</i> , 400 F.3d 1375 (Fed. Cir. 2005)	Timeliness of an NOA	Holds NOA untimely		X		Reversed Critiques Veterans Court for taking an overly restrictive view of Rule 3 of Veterans Court Rules of Practice
<i>Morris v. Nicholson</i> , 122 Fed. Appx. 473 (Fed. Cir. 2005)	Jurisdiction of BVA to review its prior decision after that decision had been appealed to and finally decided by Veterans Court	Holds that BVA has no jurisdiction under 38 CFR § 20.1400 (b) (1)	X			Affirmed
<i>Jordan v. Nicholson</i> , 401 F.3d 1296 (Fed. Cir. 2005)	May CUE arise from a change in the interpretation of a statute or regulation?	Affirms BVA decision of no CUE, reasoning that change in interpretation of a statute or regulation does not support a finding of CUE		X		Affirmed
<i>Stoll v. Nicholson</i> , 401 F.3d 1375 (Fed. Cir. 2005)	Does 38 USC § 1103 (a), barring the attribution of service connection for a veteran's death or disability when due to in-service tobacco use, bar a DIC claim by a widow of a veteran who was granted in-service connection for a tobacco-related disease before the effective date of § 1103(a) (but who had not held that designation for 10 years prior to his death)?	Holds that statute does bar the claim	X			Affirmed
<i>Hauck v. Nicholson</i> , 403 F.3d 1303 (Fed. Cir. 2005)	CUE Issue	Affirms BVA in holding no CUE	X			Affirmed Held: (1) for era before RO was required to submit a statement of its reasons, BVA must analyze the evidence before RO to determine that its conclusions are supported. Thus, doing so is not error. (2) CUE assertion is not supported by claim that BVA 'weighed' evidence in violation of 38 CFR § 3.102 because that 'reasonable doubt doctrine' only applies when there is reasonable doubt to begin with

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Sharp v. Nicholson</i> , 403 F.3d 1324 (Fed. Cir. 2005)	Do dependents have a property interest in "dependent benefits" under 38 USC § 1115 such that they may pursue those benefits after a veteran's death?	Affirms BVA in holding that dependents do not have a property interest		X		Affirmed in part and vacated in part Affirms answer to listed question but vacates decision by Veterans Court that the accrued benefits to which the dependents were entitled needed to be accrued within the 2 years prior to the veteran's death. (per <i>Terry</i> )
<i>Arbas v. Nicholson</i> , 403 F.3d 1379 (Fed. Cir. 2005)	May physical illness constitute a basis for equitable tolling of time within which to file an NOA?	Holds no equitable tolling	X			Reversed Held: so long as a physical infirmity prevented an appellant from engaging in rational thought or deliberate decision making or rendered him incapable of handling [his] own affairs or unable to function [in] society, equitable tolling is possible (questioning <i>Barrett</i> )
<i>Jackson v. Nicholson</i> , 124 Fed. Appx. 646 (Fed. Cir. 2005)	Was an issue waived that was raised for the first time in reply brief?	Deems issue waived	X			Affirmed
<i>Leonard v. Nicholson</i> , 405 F.3d 1333 (Fed. Cir. 2005)	Was veteran entitled to an earlier effective date for a TDIU rating when decision at issue was final and no new or material evidence was submitted and no assertion of CUE made?	Affirms BVA decision and reaffirms that the rule of finality may be overcome only in two situations: (1) reopening based on new and material evidence and (2) CUE. Neither was present		X		Affirmed Rejects the argument that a request for an earlier effective date is not a "claim" for finality purposes
<i>Johnson v. Nicholson</i> , 127 Fed. Appx. 475 (Fed. Cir. 2005)	Underlying claims concerned a dispute over rating for service-connected PTSD. The legal issue concerned the Veterans Court's remand based on duty to notify and assist	Vacates BVA decision and remands based on breaches of duties to notify and assist. Veteran purports to waive these defects, but Veterans Court orders remand in any event	X			Vacated and remanded Held: it is legal error to remand on basis waived by veteran, here the duties to notify and assist. Veterans Court is ordered to decide case on the merits
<i>Ashtbaugh v. Nicholson</i> , 129 Fed. Appx. 607 (Fed. Cir. 2005)	Claim concerned veteran's request for an earlier effective date for TDIU. He had not filed a claim upon service separation	Affirms BVA's decision holding that the veteran could not obtain an effective date prior to filing of a claim	X			Affirmed Held: there can be no "equitable tolling" concerning the effective date of a claim for benefits because the law concerning effective dates is not a statute of limitations
<i>Van Allen v. Nicholson</i> , 129 Fed. Appx. 611 (Fed. Cir. 2005)	Does equitable tolling save veteran from dismissal of his claim based on the late filing of NOA	Determines that the veteran has not established prerequisites for equitable tolling under <i>Barrett</i>	X			Affirmed Evidence of incapacity at earlier time is not sufficient to satisfy the direct result standard in <i>Barrett</i>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Akers v. Nicholson</i> , 409 F.3d 1356 (Fed. Cir. 2005)	Were applicants 'prevailing parties' for purposes of EAJA?	Veterans Court denies fee applications on basis that the applicants were not prevailing parties	X			Veterans Court decision affirmed (Note: this case was consolidated with <i>Bridell v. Nicholson</i> ) Affirms Veterans Court holding that neither applicant had prevailed on the merits under the <i>Buckhannon</i> standard
<i>White v. Nicholson</i> , 412 F.3d 1314 (Fed. Cir. 2005)	Was the Secretary's position at administrative and judicial portions of the case 'substantially justified'? The issue was related to the consideration of certain regulations by the Federal Circuit.	Holds that the VA's position was substantially justified	X			<b>Affirmed</b> Over a dissent, the Circuit Court held that the VA's position was substantially justified under the totality of the circumstances.
<i>Sigall v. Nicholson</i> , 132 Fed. Appx. 358 (Fed. Cir. 2005)	Was there CUE in a 1983 RO decision denying 100% rating for PTSD?	Holds that CUE issue not adequately presented because not pled with specificity	X			<b>Affirmed</b> Adopts (or reaffirms) the CUE, pleading-specificity requirement
<i>Kirkpatrick v. Nicholson</i> , 417 F.3d 1361 (Fed. Cir. 2005)	Was BVA order remanding case to RO appealable?	Holds that the order was not appealable	X			<b>Affirmed</b> Held: a BVA remand order is not a 'decision' within the meaning of 38 USC § 7252 (a), and Circuit Court's doctrine creating some exceptions to the rule of finality with respect to Veterans Court decisions (e.g., <i>Williams</i> ) does not apply to BVA decisions
<i>Jackson v. Nicholson</i> , 139 Fed. Appx. 277 (Fed. Cir. 2005)	Was veteran entitled to writ of mandamus based on VA delay in adjudicating claim at RO level?	Holds that veteran not entitled to writ	X			<b>Affirmed</b> Comments that the delay (at most 7 months) was 'frustrating' but did not yield the basis for issuance of the writ
<i>Andrews v. Nicholson</i> , 421 F.3d 1278 (Fed. Cir. 2005)	The issues on appeal involved the duty to sympathetically read pleading in context of CUE claims	Holds that sympathetic reading duty does not apply to CUE claims		X		<b>Affirmed</b> BUT significant disagreement with reasoning: Circuit Court holds that <i>Roberson</i> requires the VA to sympathetically read all pleadings filed pro se (but not those filed by counsel). Further, the court held that when the VA violates this duty the claim is not unadjudicated but rather a CUE claim may be asserted. Finally, and the reason for the affirmation here, a failure to raise an issue in a CUE motion when represented by counsel (as was Mr. Andrews) is fatal to raising it later.
<i>Johnston v. Nicholson</i> , 421 F.3d 1265 (Fed. Cir. 2005)	Another CUE case in which the veteran was represented by counsel	Rejects CUE argument because it was not raised before the BVA	X			<b>Affirmed</b> Reiterates the holdings from <i>Andrews</i> (above)
<i>Voracek v. Nicholson</i> , 421 F.3d 1299 (Fed. Cir. 2005)	Did veteran's submission qualify as 'new' and material evidence?	Holds that submission did not qualify	X			<b>Affirmed</b>

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Bingham v. Nicholson</i> , 421 F.3d 1346 (Fed. Cir. 2005)	Was a failure to consider one theory for service connectedness sufficient to render claim unadjudicated?	Holds that claim was not rendered unadjudicated		X		Affirmed
<i>Thomas v. Nicholson</i> , 423 F.3d 1279 (Fed. Cir. 2005)	What standard of proof is required for the VA to rebut the presumption of service connection for peacetime disabilities under 38 USC § 105 (a)?	Holds that the proper standard is 'preponderance of evidence'	X			Affirmed Held: preponderance of evidence is the proper standard
<i>Wilson v. Nicholson</i> , 2005 U.S. App. LEXIS 21870 (Fed. Cir., Oct. 7, 2005)	Was veteran entitled to writ of mandamus concerning request for 100% rating for PTSD?	No, based on veteran's failure to show a 'clear and indisputable right to the writ' and that there are no alternate grounds for relief	X			Affirmed
<i>McQueen v. Nicholson</i> , 154 Fed. Appx. 820 (Fed. Cir. 2005)	Was veteran entitled to a writ of mandamus due to VA's failure to implement terms of remand?	No, because veteran had not exhausted available administrative means to address his complaints	X			Affirmed
<i>Gebhart v. Nicholson</i> , 154 Fed. Appx. 207 (Fed. Cir. 2005)	Was veteran entitled to writ of mandamus directing VA not to prescribe him a certain drug?	No, the Veterans Court's All Writs Act authority is limited by the requirement that a matter must come within the BVA's jurisdiction. Matters concerning the prescribing of drugs are not within the BVA's jurisdiction. As such, the Veterans Court had no authority to issue the writ.	X			Affirmed
<i>Carat v. Nicholson</i> , 429 F.3d 1331 (Fed. Cir. 2005)	Was Philippine citizen who served in Philippine forces in Korea entitled to be considered a 'veteran'?	Holds that Philippine citizen was not a veteran under the language of 38 USC § 107 (a) (3)	X			Affirmed
<i>Terio v. Nicholson</i> , 2005 U.S. App. LEXIS 26915 (Fed. Cir., Dec 7, 2005)	Was veteran entitled to writ of mandamus as a result of successive remands ordered by BVA?	No, the veteran did not show that the VA was refusing to act or delaying matters in bad faith	X			Affirmed
<i>Jackson v. Nicholson</i> , 433 F.3d 822 (Fed. Cir. 2005)	Did 38 USC § 1151 require that an injury result from actions of the VA before that statute was amended effective 10/1/97?	Held that injury must result from VA actions before effective date	X			Reversed Held: the pre-10/1/97 statute did not require that the injury be caused by an action of the VA

Name and Citation	Issues	Veterans Court Disposition	Veterans Court Structure			Federal Circuit Disposition
			Single Judge	Panel	En Banc	
<i>Kidwell v. Nicholson</i> , 2006 U.S. App. LEXIS 633 (Fed. Cir., Jan. 10, 2006)	Was veteran entitled to a writ of mandamus when he had also filed appeals with respect to the same issues?	No, the appeals provided an adequately alternative means of proceeding	X			Affirmed
<i>AF v. Nicholson</i> , 2006 U.S. App. LEXIS 3149 (Fed. Cir., Feb. 8, 2006)	Do principles of equitable tolling apply to determine effective date of benefits awarded under 38 USC § 5110(a)?	Holds that equitable tolling is not applicable in this context	X			Affirmed Held: equitable tolling is applicable to statutes of limitations and the rules concerning effective dates of benefits are not statutes of limitation
<i>King v. Nicholson</i> , 2006 U.S. App. LEXIS 5111 (Fed. Cir., Feb. 27, 2006)	Could Veterans Court hear CUE allegation not presented to BVA first?	Veterans Court holds it does not have jurisdiction	X			Affirmed
<i>McPhail v. Nicholson</i> , 2006 U.S. App. LEXIS 5112 (Fed. Cir., Feb. 27, 2006)	If appellant does not raise an argument before BVA does Veterans Court have jurisdiction to consider the matter?	Veterans Court holds it does not have jurisdiction		X		Affirmed (Declines to consider whether principles of equitable tolling under <i>Barrett</i> apply with respect to the filing of an NOD)
<i>Kalin v. Nicholson</i> , 2006 U.S. App. LEXIS 5760 (Fed. Cir., Mar. 6, 2006)	Was evidence submitted by veteran to support re-opening of claim 'new and material'?	Holds that the evidence submitted was not new and material	X			Affirmed Held: Circuit Court lacked jurisdiction to review whether the evidence at issue was new and material. The court also held that the Veterans Court did not misapply 38 C.F.R. § 3.105 (a) in the context of this case. The court declined to address whether this provision requires a claimant, alleging CUE in a prior Board decision not to reopen a claim on the basis of new and material evidence, to show that the error was outcome determinative with respect to the merits of the underlying claim . . .
<i>Hampton v. Nicholson</i> , 2006 U.S. App. LEXIS 5944 (Fed. Cir., Mar. 9, 2006)	Was dismissal of petition for writ of mandamus as moot appropriate when Veterans Court had taken steps sought in petition in a separate appeal?	Holds that petition is moot	X			Affirmed
<i>Winseiff v. Nicholson</i> , 2006 U.S. App. LEXIS 6590 (Fed. Cir., Mar. 15, 2006)	Was claimant entitled to a writ of mandamus based on an alleged failure of the Secretary to comply with mandate of Veterans Court?	No, because alternative remedies for alleged violation were available	X			Affirmed
<i>Hampton v. Nicholson</i> , 2006 U.S. App. LEXIS 6806 (Fed. Cir., Mar. 17, 2006)	Was claimant entitled to a writ of mandamus seeking expedited relief concerning his allegation of CUE in an earlier decision of a VA RO?	No, claimant was not entitled to extraordinary relief and should pursue the normal claim appeal process	X			Affirmed

## APPENDIX B

## FEDERAL CIRCUIT DECISIONS (JANUARY 2004–MARCH 2006)

JURISDICTIONAL, SUMMARY AFFIRMANCE, DIRECT REGULATORY  
CHALLENGES, MISCELLANEOUS*Jurisdictional Dismissals*

1. *Kince v. Principi*, 87 F. App'x 170 (Fed. Cir. 2004) (appeal from interlocutory order).
2. *Caravello v. Principi*, 86 F. App'x 423 (Fed. Cir. 2004) (question of law applied to facts on CUE claim).
3. *Jim v. Principi*, 87 F. App'x 737 (Fed. Cir. 2004) (weighing of evidence and application of law to facts on CUE claim).
4. *Dippel v. Principi*, 87 F. App'x 740 (Fed. Cir. 2004) (one issue lacks jurisdiction due to factual issue; other issues lack jurisdiction due to appeal from non-final Veterans Court order).
5. *Hinkel v. Principi*, 89 F. App'x 216 (Fed. Cir. 2004) (purely factual question).
6. *Matias v. Principi*, 89 F. App'x 737 (Fed. Cir. 2004) (purely factual question).
7. *Maki v. Principi*, 91 F. App'x 133 (Fed. Cir. 2004) (purely question of fact concerning timeliness of appeal).
8. *Rossi v. Principi*, 91 F. App'x 141 (Fed. Cir. 2004) (purely question of fact concerning timeliness of appeal).
9. *Robles v. Principi*, 95 F. App'x 1005 (Fed. Cir. 2004) (purely factual question).
10. *Doherty v. Principi*, 99 F. App'x 899 (Fed. Cir. 2004) (purely factual question).
11. *Milton v. Principi*, 110 F. App'x 101 (Fed. Cir. 2004) (purely factual question).
12. *Peralta v. Principi*, 112 F. App'x 38 (Fed. Cir. 2004) (purely factual question).
13. *Williams v. Principi*, 114 F. App'x 386 (Fed. Cir. 2004) (application of law to facts).
14. *Cabalza v. Principi*, 114 F. App'x 391 (Fed. Cir. 2004) (application of law to facts).
15. *Jackson v. Principi*, 115 F. App'x 54 (Fed. Cir. 2004) (application of law to facts and/or purely factual question).
16. *Henderson v. Principi*, 117 F. App'x 766 (Fed. Cir. 2005) (purely factual question).
17. *Jones v. Principi*, 118 F. App'x 508 (Fed. Cir. 2004) (non-final Veterans Court decision; on remand).



18. *Pelegri v. Principi*, 122 F. App'x 993 (Fed. Cir. 2005) (non-final Veterans Court decision; on remand).
19. *Dolor v. Principi*, 123 F. App'x 988 (Fed. Cir. 2005) (purely factual question).
20. *Montalbano v. Nicholson*, 125 F. App'x 297 (Fed. Cir. 2005) (purely factual question).
21. *Mondero v. Nicholson*, 129 F. App'x 605 (Fed. Cir. 2005) (purely question of fact concerning timeliness of filing of NOA).
22. *Locklear v. Nicholson*, 132 F. App'x 366 (Fed. Cir. 2005) (failure to file a timely NOA with the Federal Circuit).
23. *Johnson v. Nicholson*, 132 F. App'x 367 (Fed. Cir. 2005) (purely factual question).
24. *Wright v. Nicholson*, 143 F. App'x 351 (Fed. Cir. 2005) (non-final Veterans Court decision).
25. *Guillory v. Nicholson*, 144 F. App'x 870 (Fed. Cir. 2005) (purely factual question).
26. *Martin v. Nicholson*, 151 F. App'x 928 (Fed. Cir. 2005) (non-final Veterans Court decision).
27. *Nastor v. Nicholson*, 153 F. App'x 735 (Fed. Cir. 2005) (failure to file a timely NOA with the Federal Circuit).
28. *Frasure v. Nicholson*, 157 F. App'x 272 (Fed. Cir. 2005) (non-final Veterans Court decision).
29. *Edwards v. Nicholson*, 157 F. App'x 272 (Fed. Cir. 2005) (non-final Veterans Court decision).
30. *Lowgren v. Nicholson*, 157 F. App'x 281 (Fed. Cir. 2005) (purely factual question).
31. *Jones v. Nicholson*, 431 F.3d 1353 (Fed. Cir. 2005) (non-final Veterans Court decision).
32. *Lopez v. Nicholson*, 172 F. App'x 1004 (Fed. Cir. 2006) (application of law to facts).
33. *Joyce v. Nicholson*, 443 F.3d 845 (Fed. Cir. 2006) (non-final Veterans Court decision).

*Summary Affirmances*<sup>267</sup>

1. *Raguine v. Principi*, 89 F. App'x 734 (Fed. Cir. 2004).
2. *Porter v. Principi*, 112 F. App'x 53 (Fed. Cir. 2004).
3. *Urban v. Nicholson*, 128 F. App'x 154 (Fed. Cir. 2005).
4. *Browne v. Nicholson*, 135 F. App'x 427 (Fed. Cir. 2005).

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<sup>267</sup> *Clairborne* and *Urban* were panel decisions at the Veterans Court. All other decisions listed here were rendered by single judges at the Veterans Court.

5. *Yates v. Nicholson*, 140 F. App'x 954 (Fed. Cir. 2005).
6. *Buggs v. Nicholson*, 146 F. App'x 482 (Fed. Cir. 2005).
7. *Paige v. Nicholson*, 145 F. App'x 680 (Fed. Cir. 2005).
8. *Adamczyk v. Nicholson*, 159 F. App'x 999 (Fed. Cir. 2005).
9. *Claiborne v. Nicholson*, 173 F. App'x 826 (Fed. Cir. 2006).

*Direct Regulatory Challenges*

*Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005) (upholding regulations allowing the BVA to obtain and consider internal VA medical opinions in context of appeal).

*Mandamus re: Veterans Court*

*In re Van Allen*, 125 F. App'x 299 (Fed. Cir. 2005) (rejecting request for writ of mandamus to Veterans Court to direct the clerk to docket his appeal; petitioner refused to identify the BVA decision from which he purported to be appealing).

APPENDIX C  
VETERANS COURT PANEL AND EN BANC DECISIONS  
(JANUARY 2004—MARCH 2006)<sup>368</sup>

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Baxter v. Principi</i> , 17 Vet. App. 407 (2004)	Panel	BVA decision affirmed in part and appeal dismissed in part. BVA is not required to examine whether presumption of regularity in mailing decision is rebutted unless "at a minimum" the veteran alleges non-receipt.	N	N	
<i>Sharp v. Principi</i> , 17 Vet. App. 431 (2004)	Panel	BVA decision affirmed. Veterans Court holds that widow of veteran lacked standing to claim retroactive benefits under 38 USC § 1115. Court also held that claim for accrued payments dealt only with the immediate two years prior to veteran's death.	N	N	Federal Circuit affirmed Veterans Court standing holding but reversed concerning the two-year requirement. 403 F. 3d 1324 (Fed. Cir. 2005).
<i>Johnson v. Principi</i> , 17 Vet. App. 436 (2004)	Panel	EAJA fee application denied. Veterans Court denies "prevailing party" status when case was remanded due to a Federal Circuit decision concerning VA regulations.	Y (vers)	N	
<i>Bates v. Principi</i> , 17 Vet. App. 443 (2004)	Panel	Petition for writ of mandamus dismissed. Veterans Court holds that BVA would be without jurisdiction to adjudicate a claim that the Secretary wrongfully revoked accreditation to practice before the VA and therefore Veterans Court was without power to issue the writ.	N	N	Reversed by Federal Circuit. 398 F.3d 1355 (Fed. Cir. 2005). On remand, Veterans Court orders writ issued directing the Secretary to issue a SOC. 19 Vet. App. 197 (2005).
<i>Leonard v. Principi</i> , 17 Vet. App. 447 (2004)	Panel	BVA decision affirmed. Veterans Court reaffirms that the rule of finality may be overcome only in two situations: (1) reopening based on new and material evidence and (2) CUE. Neither exception applied in this case in which a veteran was seeking an earlier effective date for a TDIU rating.	N	N	Affirmed on appeal to the Federal Circuit. 405 F. 3d 1333 (Fed. Cir. 2005).

268. This list is presented in chronological order and excludes orders of a procedural nature. It includes cases decided through March 31, 2006.

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Breedon v. Principi</i> , 17 Vet. App. 475 (2004)	Panel	Granted VA motion to dismiss appeal (jurisdiction) Non-final orders of BVA, including remands to RO, do not provide jurisdiction to Veterans Court.	Y (Kramer)	N	
<i>Hornhill v. Principi</i> , 17 Vet. App. 480 (2005)	Panel	Granted VA motion to dismiss appeal (jurisdiction) Veterans Court rejects arguments for equitable tolling of time within which to file the NOA.	N	N	
<i>Jurr v. Principi</i> , 17 Vet. App. 486 (2004)	Panel	Appeal dismissed on jurisdictional grounds Veterans Court holds that veteran's "memorandum" was not a proper NOA and thus the court was without jurisdiction to hear the appeal.	N	N	Reversed by Federal Circuit. 400 F. 3d 1375 (Fed. Cir. 2005).
<i>Jobbitt v. Principi</i> , 17 Vet. App. 547 (2004)	Panel	Order determined that jurisdiction was proper Veterans Court holds that a claimant's submission of a document in the nature of an NOA with the BVA instead of the court satisfied the Federal Circuit's requirements for equitable tolling.	N	N	
<i>Long v. Principi</i> , 17 Vet. App. 555 (2004)	Panel	Appeal dismissed as moot Veterans Court dismisses veteran's appeal claiming a violation of priority medical scheduling because VA regulations appear to resolve the issue.	Y (Kramer)	N	
<i>Miers v. Principi</i> , 17 Vet. App. 561 (2005)	En Banc	Request for En Banc consideration denied	Y (Steinberg and Haged)	Y (Kosoff)	
<i>Nelis v. Principi</i> , 18 Vet. App. 33 (2004)	En Banc	Request for En Banc consideration denied	N	Y (Steinberg and Kosoff)	
<i>Accosta v. Principi</i> , 18 Vet. App. 53 (2004)	Panel	BVA decision vacated and remanded Veterans Court holds that (1) the BVA failed to consider whether an earlier claim by the veteran remained pending at an RO and (2) the BVA erred in rejecting an informal letter as an NOD.	N	N	
<i>Cantu v. Principi</i> , 18 Vet. App. 92 (2004)	Panel	BVA decision reversed Veterans Court reverses the BVA's determination that a veteran was not entitled to payment of his medical expenses incurred at a private facility. (The relevant statutory provisions are 38 USC §§ 1710 and 1703).	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Bissonette v. Principi</i> , 18 Vet. App. 105 (2004)	Panel	<b>Earlier Veterans Court decision affirmed</b> Veterans Court affirms determination that an earlier Veterans Court adjudication precluded the current claim under doctrine of claim preclusion.	N	N	An appeal to the Federal Circuit was later dismissed. 125 Fed. Appx. 300 (Fed. Cir. 2005).
<i>Pelegrin v. Principi</i> , 18 Vet. App. 112 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that "duty to notify" requirements of VCAA apply to cases pending before the VA as long as not final at BVA. Veterans Court also provides "guidance" as to how duty to notify should be applied on remand. Finally, Veterans Court holds that the BVA inappropriately treated an open claim as a request to reopen.	Y (Ivers)	Y (Ivers)	An appeal to the Federal Circuit was later dismissed. 122 Fed. Appx. 993 (Fed. Cir. 2005).
<i>Tavares v. Principi</i> , 18 Vet. App. 131 (2004)	Panel	<b>Dismissed appeal due to late filed NOA</b> Court holds, over dissent's objection, that veteran had not demonstrated that conditions for equitable tolling were present. In particular, the majority takes a rather narrow view of conduct that lulls a veteran into believing that VA personnel will perfect an appeal.	N	Y (Kosold)	An appeal to the Federal Circuit was later dismissed. 120 Fed. Appx. 306 (Fed. Cir. 2004).
<i>Urban v. Principi</i> , 18 Vet. App. 143 (2004)	Panel	<b>Dismissed appeal on standing and ripeness grounds</b> Veterans Court holds that veteran was not "aggrieved" by the BVA decision awarding him a TDIU rating without also addressing the effective date question. That question would be addressed by the RO.	N	N	Summarily affirmed. 128 Fed. Appx. 154 (Fed. Cir. 2005).
<i>Andrews v. Principi</i> , 18 Vet. App. 177 (2004)	Panel	<b>BVA decision affirmed</b> This matter was on remand from the Federal Circuit after the Circuit Court had reversed a Veterans Court decision. The BVA had found no CUE in two RO decisions. The Circuit Court remanded with directions that the Veterans Court announce a standard of review for CUE allegations in this context and adjudicate the claim. The Veterans Court "reiterates" the standard of review it had been using (i.e., whether the BVA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); and rejects the veteran's claims of error. The Veterans Court also holds that the "sympathetic reading" of <i>Roberson v. Principi</i> , 251 F.3d 1378 (Fed. Cir. 2001), did not apply to CUE claims (note the sympathetic reading point was rejected by the Federal Circuit).	Y (Steinberg)	Y (Steinberg)	This decision was affirmed by the Federal Circuit. Importantly, the Federal Circuit did not agree as to the non-applicability of <i>Roberson</i> to CUE claims. 421 F.3d 1278 (Fed. Cir. 2005).

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Thiess v. Principi</i> , 18 Vet. App. 204 (2004)	Panel	<b>BVA decision vacated and remanded</b> The VA had denied the veteran an increased pension claimed on the basis of a child over 18 residing at home and attending a home school. The BVA affirmed the denial based on a precedential G.C. opinion. The veterans court vacates the decision and remands, holding that G.C. opinion did not provide an adequate basis for the BVA's decision and that the G.C. opinion and certain regulations were 'substantive' and had not been subject to notice-and-comment rulemaking.	Y (Kramer)	N	The court later rejected a motion for en banc consideration, with Kosold, J. dissenting. 18 Vet. App. 480 (2004).
<i>Mairano v. Principi</i> , 18 Vet. App. 217 (2004)	Panel	<b>EAJA application held timely</b> Veterans Court holds that EAJA fee application must be filed 30 days after judgment becomes final, not 30 days after mandate issues.	N	N	
<i>Bonny v. Principi</i> , 18 Vet. App. 218 (2004)	Panel	<b>EAJA fee application denied</b> Veterans Court holds that the VA position was "substantially justified" at both the administration and litigation stages. At the administrative level the VA relied on then-current law. At the litigation stage, the issue concerned a matter the court deemed difficult and close.	N	N	
<i>Padgett v. Principi</i> , 18 Vet. App. 223 (2004)	En Banc	<b>En Banc consideration denied</b>	N	Y (Steinberg)	Steinberg, J. dissents based on argument that panel decision incorrectly decides a novel issue concerning remand based on medical evidence. The opinion for which en banc consideration was denied was later withdrawn. 18 Vet. App. 188 (2004). It appears that at a later point the Veterans Court granted the parties' request for full court consideration. 18 Vet. App. 404 (2004). Thereafter, the Veterans Court affirmed the BVA decision in part and remanded for further proceedings. 19 Vet. App. 133 (2005). However, after the appellant died while the case remained pending on appeal, the Veterans Court (over two dissents) withdrew the opinion and dismissed the appeal. 19 Vet. App. 334 (2005).

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Hines v. Principi</i> , 18 Vet. App. 227 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that BVA did not provide an adequate statement of basis and reasons for denying CUE claim. The underlying claim concerned hypothyroidism. Veterans Court holds that the BVA did not adequately explain why it believed RO may have relied on a certain regulation.	N	Y (Kramer)	
<i>Conwin v. Principi</i> , 18 Vet. App. 246 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that the veteran's arguments were barred by res judicata because they could have been raised in an earlier Veterans Court appeal.	N	N	This case applies the same rule as <i>Bissonnette v. Principi</i> , 18 Vet. App. 105 (2004).
<i>Jones v. Principi</i> , 18 Vet. App. 248 (2004)	Panel	<b>BVA decision set aside in part and vacated and remanded in part</b> Case concerned (1) separate ratings for injuries to different muscle groups from a gun shot wound and (2) ratings for scars. Veterans Court holds with respect to issue number 1 that, as a matter of law, the veteran is entitled to separate ratings for each muscle group affected. As to issue number 2, the Veterans Court remands for the BVA to reconsider scar ratings based on the results of additional medical tests.	N	N	
<i>Sizemore v. Principi</i> , 18 Vet. App. 264 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that "combat with the enemy" in 38 C.F.R. § 3.304 (f) does not require that veteran be on receiving end of enemy fire. Veterans Court also finds violation of duties to assist and notify.	N	N	The opinion also contains some interesting discussion cautioning against VA doctors going beyond medical opinions in their reports.
<i>Evington v. Principi</i> , 18 Vet. App. 331 (2004)	Panel	<b>EAJA fee application granted</b> Veterans Court approves hourly rate of \$126.73 for an experienced non-attorney practitioner.	N	N	The court returned to this issue in a more general way in <i>Apodakis v. Nicholson</i> , 19 Vet. App. 91 (2005).
<i>Wanless v. Principi</i> , 18 Vet. App. 337 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court remands matter to BVA to more fully address the veteran's claim that the reduction in his benefits under 38 USC § 5313 (a)(1) was improper. The issue was whether a privately managed prison in Oklahoma qualified as a "state . . . penal institution."	Y (Steinberg)	Y (Greene)	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>DeBeard v. Principi</i> , 18 Vet. App. 357 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms as not clearly erroneous the BVA's determination that the veteran was not "blind" in his left eye under 38 USC § 1160 and 38 C.F.R. § 3363. Veterans Court further holds that BVA was correct to consider the blindness issue under all seven definitions of blindness in the applicable regulations.	N	N	This opinion also contains an interesting discussion of the interplay between <i>Garzher</i> and <i>Cheyron</i> .
<i>Anderson v. Principi</i> , 18 Vet. App. 371 (2004)	Panel	<b>BVA decision affirmed in part, vacated and remanded in part</b> Veterans Court deals with numerous issues related to veteran's claims regarding non-service-connected pension, infirmities secondary to in-service tobacco use, and depression secondary to an award of compensation under 38 USC § 1151. The bulk of the opinion concerns whether the veteran had submitted valid NODs for the various issues. The Veterans Court reaches different conclusions for different claims based on the facts of each situation.	Y (Steinberg)	N	Federal Circuit affirmed decision but disagreed with the Veterans Court's reasoning. 421 F.3d 1276 (Fed. Cir. 2005).
<i>Frasure v. Principi</i> , 18 Vet. App. 379 (2004)	Panel	<b>BVA decision vacated and remanded</b> The case concerned whether the appellant qualified as a "veteran" based on his merchant marine status in late 1945 and throughout 1946. Veterans Court holds that the BVA did not adequately explain its reasons and bases for rejecting certain evidence. Thus, a remand was necessary. The Veterans Court also holds that a Form DD 214 is not dispositive as to dates of active service (i.e., other evidence may be taken on this issue).	N	N	An appeal to the Federal Circuit was later dismissed. 156 Fed. Appx. 325 (Fed. Cir. 2005).
<i>Huston v. Principi</i> , 18 Vet. App. 305 (2004)	Panel	<b>BVA decision vacated and remanded in part</b> The case concerned two major issues: (1) a CUE claim and (2) a claim on direct appeal, both of which effectively sought an earlier effective date hearing loss. The Veterans Court severs the two issues, staying the second one. As to CUE, the Veterans Court remands to the BVA because the BVA had adjudicated the issue without offering the veteran the option of remand to the RO in the first instance.	N	N	The Federal Circuit remanded this case to the Veterans Court for proceedings consistent with <i>Conway</i> (i.e., the requirement to take "due account of the rule of prejudicial error"). This opinion is the Veterans Court's action on remand.



Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Nelson v. Principi</i> , 18 Vet. App. 407 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that RC decision was final and that the veteran's claim did not remain pending. In so doing, the Veterans Court rejects the veteran's argument that the Federal Circuit's decision in <i>Szernaj</i> (requiring that the VA sympathetically read pleadings) indicated that the RO had adjudicated the claim at issue. The Veterans Court relies on the Federal Circuit's decision in <i>Morlon</i> .	N	Y (Farley)	
<i>Hartman v. Principi</i> , 18 Vet. App. 432 (2004)	Panel	<b>Secretary's motion for panel consideration granted</b> Veterans Court grants motion for panel consideration on an issue of first impression concerning whether the notice provision of 38 USC § 5103 (a) applies to a "downstream" issue and, if so, how it applies.	N	N	
<i>Lueras v. Principi</i> , 18 Vet. App. 435 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA determination that veteran acted in bad faith in reporting wife's income. Thus, a waiver of recovery for an overpayment was properly denied. The Veterans Court also holds that the duty to notify in 38 USC § 5103 (a) does not apply to matters under Chapter 53 of Title 38.	N	N	
<i>Pierce v. Principi</i> , 18 Vet. App. 440 (2004)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court vacates BVA decision for failing to adequately explain the reasons and basis for decision. The matter is remanded for readjudication.	N	N	
<i>Bingham v. Principi</i> , 18 Vet. App. 470 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision about effective date in a reopened claim concerning hearing loss. Veterans Court holds that veteran's claim was not rendered open and unadjudicated because one theory was not rejected (here the theory of presumptive connection as opposed to direct connection).	N	N	This decision was affirmed by the Federal Circuit, 421 F.3d 1346 (Fed. Cir. 2005).
<i>Deshrow v. Principi</i> , 18 Vet. App. 478 (2004)	Panel	<b>BVA decision vacated and appeal dismissed</b> Veterans Court decision is based on death of veteran in this action for disability compensation.	N	N	
<i>Jones v. Principi</i> , 18 Vet. App. 500 (2004)	Panel	<b>Ordered appellant to develop facts to support equitable tolling</b> Veterans Court rejects argument that duty to assist in 38 USC § 5103 (a) applies to claims of equitable tolling related to filing of NOA.	N	N	An appeal to the Federal Circuit was later dismissed, 431 F.3d 1353 (Fed. Cir. 2005).

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Johnson v. Principi</i> , 18 Vet. App. 503 (2004)	Panel	Granted joint motion to vacate BVA decision and remand	N	Y (Kosold)	Kosold, J. dissents arguing that it is improper to vacate a BVA decision on agreement of the parties without a finding of error in the BVA decision.
<i>Augustine v. Principi</i> , 18 Vet. App. 505 (2004)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA determination that there was no CUE in 1972 rating decision dealing with loss of movement in elbow. Veterans Court holds that a loss of forearm supination and pronation does not amount to loss of natural elbow action under relevant law.	N	N	
<i>Duenas v. Principi</i> , 18 Vet. App. 512 (2004)	Panel	<b>BVA decision affirmed in part, vacated in part and remanded</b> Veterans Court holds that BVA erred in not adequately explaining why no VA medical exam was required in this case pursuant to the duty to assist in 38 USC § 5103(a). The issue in this case centered on the veteran's lay testimony of symptoms of a disability that may have been associated with in-service activity.	Y (Hugell)	N	
<i>Kalman v. Principi</i> , 18 Vet. App. 522 (2004)	Panel	<b>BVA decision reversed and remanded</b> Veterans Court reverses BVA determination that the veteran had withdrawn his appeal as to certain matters. The opinion underscores the point that withdrawals of appeals to the BVA will not be found lightly.	N	N	
<i>Heich v. Principi</i> , 18 Vet. App. 527 (2004)	Panel	<b>BVA decision set aside and case remanded</b> Veterans Court holds that it is bound by Federal Circuit decision in <i>Hix v. Gober</i> , 225 F. 3d 1377 (Fed. Cir. 2000), to find that a claim for enhanced DIC payments may be supported by posthumously submitted evidence. A G.C. opinion to the contrary is struck down.	N	N	
<i>Gutierrez v. Principi</i> , 19 Vet. App. 1 (2004)	Panel	<b>BVA decision vacated and remanded</b> The Veterans Court remands to BVA for adequate statement of reasons and basis for decision denying service connection under 38 USC § 1117 for "Gulf War syndrome."	N	N	
<i>Shele v. Principi</i> , 19 Vet. App. 11 (2004)	Panel	<b>Denied VA motion to dismiss</b> Court holds it has jurisdiction because appellant's NOA was timely, and appellant rebutted the presumption of regularity in BVA mailing of decision.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Martins v. Principi</i> , 19 Vet. App. 20 (2005)	Panel	<b>EAJA fee application granted</b> Court holds that failure to file notice of appearance does not bar fee award.	N	N	
<i>Matthews v. Principi</i> , 19 Vet. App. 23 (2005)	Panel	<b>BVA decision affirmed</b> Court holds that appellant failed to file NOD with BVA within the time mandated after an RO decision.	N	N	The Veterans Court reaffirmed this decision on a motion for reconsideration. 19 Vet. App. 202 (2005).
<i>McPhail v. Nicholson</i> , 19 Vet. App. 30 (2005)	Panel	<b>BVA decision affirmed</b> Court holds that appellant abandoned CUE argument on appeal, and therefore, the court does not address the argument that equitable tolling can apply with respect to RO decision.	N	N	<b>Affirmed on appeal by the Federal Circuit.</b> 2006 U.S. App. LEXIS 5112 (Fed. Cir., Feb. 27, 2006).
<i>Joyce v. Nicholson</i> , 19 Vet. App. 36 (2005)	Panel	<b>BVA decision affirmed in part, reversed in part, vacated in part and remanded</b> This is a complex and lengthy decision dealing with the presumptions of soundness and (principally) aggravation in the context of a CUE claim.	Y (Hage)	N	An appeal to the Federal Circuit was dismissed on the ground that the decision of the Veterans Court was not "final." 2006 U.S. App. LEXIS 7168 (Fed. Cir., Mar. 30, 2006).
<i>Smith (Ellis) v. Nicholson</i> , 19 Vet. App. 63 (2005)	Panel	<b>BVA decision reversed in part, vacated in part and remanded</b> There were two issues of importance in this case: (1) Veterans Court holds that there should be a dual rating for limbitus; and (2) Veterans Court holds it has jurisdiction to consider certain matters that are related to rating schedules (and must try to reconcile decisions of the Federal Circuit on this point).	Y (Ivers)	Y (Ivers)	This case is on appeal to the Federal Circuit. (No. 05-7168)
<i>O'Branovic v. Nicholson</i> , 19 Vet. App. 81 (2005)	Panel	<b>Request for writ denied</b> Petitioner requested writ of mandamus to order the BVA not to remand a case to RO. Veterans Court holds that writ requirements are not satisfied.	N	N	An appeal to the Federal Circuit was dismissed on the agreement of the parties. 2006 U.S. App. LEXIS 6937 (Fed. Cir., Mar. 2, 2006).
<i>Apodakis v. Nicholson</i> , 19 Vet. App. 91 (2005)	Panel	<b>EAJA fee request granted</b> The court establishes a formula for calculating the hourly rate for non-attorney practitioners.	N	N	
<i>Loving v. Nicholson</i> , 19 Vet. App. 96 (2005)	Panel	<b>BVA decision affirmed</b> Veteran's claim that a grade fell on him during a VA exam does not fit within meaning of 38 USC § 1151 (a) (1).	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Mayfield v. Nicholson</i> , 19 Vet. App. 103 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court defines meaning of giving "due regard to the rule of prejudicial error" (38 USC § 7261 (b)(2)) and provides guidance concerning burdens of pleading, production, and persuasion on this issue.	N	N	The Veterans Court declined to consider the case en banc, with two judges dissenting. 19 Vet. App. 220 (2005). <b>The Federal Circuit reversed. 2006 U.S. App. LEXIS 8145 (April 5, 2006).</b>
<i>Padgett v. Nicholson</i> , 19 Vet. App. 133 (2005)	En Banc	<b>BVA decision reversed in part, set aside in part and remanded</b> Veterans Court: (1) holds that BVA may obtain and consider VA medical experts opinion (without remand to RO) under 38 USC § 7109 (a), and (2) concludes that a BVA finding of fact may be "clearly erroneous" even if evidence in favor of the veteran is not "uncontroverted."	Y (Hagel)	Y (Hagel)	This opinion was later withdrawn after the death of the veteran. 19 Vet. App. 334 (2005) (over dissents of Sternberg and Kosold, JJ.).
<i>Hopkins v. Nicholson</i> , 19 Vet. App. 165 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that there was no CUE in a 1979 BVA decision because that BVA decision applied the current law to determine whether the claimant was the "wife" of a veteran where the claimant had married the veteran while still married to another man.	N	N	
<i>Kawalski v. Nicholson</i> , 19 Vet. App. 171 (2005)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds: (1) VA has authority to order medical exam for confirmatory purposes over veteran's objection (and in fact might have the obligation to do so under the duty to assist); and (2) the BVA may not reject a medical opinion solely because it is based on a history provided by the veteran.	N	N	
<i>Claborne v. Nicholson</i> , 19 Vet. App. 181 (2005)	Panel	<b>Appeal dismissed</b> Veterans Court dismisses appeal on ground that NOA was not timely filed and <i>Barrett</i> equitable tolling is not applicable. <i>Barrett v. Nicholson</i> , 353 F.3d 1315 (Fed. Cir. 2004). Specifically, the Veterans Court holds that the appellant did not meet the high standard for equitable tolling. Here the key was: (1) concusory medical evidence regarding the impact of dementia; and (2) even if (1) was not so, the medical opinions only said the veteran was "severely impaired" but not "incapable" as <i>Barrett</i> requires.	N	N	<b>Summarily affirmed by the Federal Circuit. 2006 U.S. App. LEXIS 6962 (Fed. Cir., March 14, 2006).</b>

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Romero v. Nicholson</i> , 19 Vet. App. 188 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA determination that effective dates for Agent Orange related benefits could be no earlier than 11/11/64. The claim at issue was a reopened one. Moreover, the evidence about the date of the original claim was not such that DIC claimant was entitled to benefits as of that date.	Y (Hagel)	N	This case is on appeal to the Federal Circuit. (No. 05-7190)
<i>Woznick v. Nicholson</i> , 19 Vet. App. 198 (2005)	Panel	<b>Writ granted</b> Veterans Court grants writ of mandamus directing the Secretary to issue a SSOC with respect to an RO decision. The Secretary had argued that the purported NOD actually dealt with new claims and that the underlying decision could not have been more favorable to the claimant so there was nothing to appeal.	N	N	
<i>Matthews v. Nicholson</i> , 19 Vet. App. 202 (2005)	Panel	<b>Motion for reconsideration granted; prior decision re-affirmed</b> Veterans Court reaffirms its affirmation of BVA decision concerning timeliness of underlying appeal. Veterans Court rules BVA had jurisdiction to determine its own jurisdiction.	N	N	The underlying decision is found at 19 Vet. App. 23 (2005). This case is on appeal to the Federal Circuit. (No. 05-7163)
<i>Jackson v. Nicholson</i> , 19 Vet. App. 207 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that the phrase "appellate decision" in 38 CFR § 3.156(b) refers to BVA decisions, not those of a judicial body. Thus, in the case at hand, the effective date of the claim could be no earlier than the date "new and material evidence" had been submitted on a claim to reopen.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7187)
<i>White v. Nicholson</i> , 19 Vet. App. 211 (2005)	Panel	<b>EAJA fee application granted</b> Veterans Court grants fee application with the exception of fee for file storage (\$100). Veterans Court determines this is not reasonable and otherwise not recoverable.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7055)
<i>Cromery v. Nicholson</i> , 19 Vet. App. 215 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision of no service connection for dementia. Veteran argued he should be entitled to an adverse presumption based on destruction of his service records in the 1973 fire. Veterans Court holds that it need not decide the issue in the absence of a demonstration of either bad faith or negligence on the part of the government.	N	N	This case is on appeal to the Federal Circuit. (No. 05-7172)

Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Mayfield v. Nicholson</i> , 19 Vet. App. 220 (2005)	En Banc	<b>En Banc consideration denied</b> Veterans Court denies en banc consideration. There are interesting concurring and dissenting opinions dealing with en banc process.	Y (Steinberg; Kosold)	Y (Hagel (w/ Ivers))	Underlying opinion at 19 Vet. App. 103 (2005). The decision was reversed by the Federal Circuit. 2006 U.S. App. LEXIS 8145 (April 5, 2006).
<i>Friedsam v. Nicholson</i> , 19 Vet. App. 222 (2005)	Panel	<b>Motion to stay granted</b> Veterans Court grants motion to stay after concluding that a "newly discovered" regulation might moot appeal if parties agree on its application.	N	N	
<i>Baldrige v. Nicholson</i> , 19 Vet. App. 227 (2005)	Panel	<b>EAJA fee application granted but severely reduced</b> Veterans Court establishes detailed requirements for documenting support of EAJA fee awards, particularly in cases with more than one lawyer representing the prevailing party.	Y (Kosold)	Y (Kosold)	
<i>Barton v. Nicholson</i> , 19 Vet. App. 249 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA's judgment that claimant was not eligible for educational-assistance benefits pursuant to the Montgomery GI bill.	N	N	
<i>Scarborough v. Nicholson</i> , 19 Vet. App. 253 (2005)	Panel	<b>EAJA fee application granted in part</b> On remand from Supreme Court, Veterans Court grants fee application but rejects argument for certain enhanced rates. The Veterans Court holds that practice before the Supreme Court is not specialized enough to qualify for the enhancement.	N	N	The court, over a dissent (Kosold, J.) denied en banc consideration. 19 Vet. App. 322 (2005). This case was on remand from the Supreme Court and the Federal Circuit.
<i>Serra v. Nicholson</i> , 19 Vet. App. 268 (2005)	Panel	<b>Recalled mandate and dismissed appeal as moot</b> The appellant died after judgment was entered but before mandate issued. The appellant's counsel did not notify the VA (or the court) of the death until mandate issued. In these circumstances, the Veterans Court holds that the mandate should be recalled and the case dismissed as moot.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Rodriguez v. Nicholson</i> , 19 Vet. App. 276 (2005)	Panel	<b>BVA decision reversed in part, vacated in part and remanded.</b> Case involved DIC benefits under 38 USC § 1318. The real issue involved the potential retroactive application of 38 CFR § 3.22 that purported to remove a claimant's ability to prove entitlement to this benefit under the "hypothetical entitlement" theory. Veterans Court holds that § 3.22, even if though interpretive, affects substantive rights. Therefore, the Veterans Court concludes the regulation could not be applied retroactively. The Veterans Court also concludes that the VA breached its duty to notify with respect to the claim and that this breach was prejudicial (or at least the VA failed to show it was not prejudicial).	N	N	This case is on appeal to the Federal Circuit. (No. 06-7023)
<i>Pelea v. Nicholson</i> , 19 Vet. App. 296 (2005)	Panel	<b>BVA decision vacated and remanded.</b> The widow of a Philippine made a claim for DIC benefits. Veterans Court holds that BVA failed to explain the relationship between two regulatory provisions and so the statement of reasons and basis is inadequate. The Veterans Court also determines that the VA breached its duty to notify as to the evidence necessary to support the claim and that this breach was prejudicial under <i>Mayfield v. Nicholson</i> , 19 Vet. App. 103 (2005), <i>rev'd</i> 444 F.3d 1328 (Fed. Cir. 2006).	N	N	An appeal to the Federal Circuit was later dismissed. 2005 U.S. App. LEXIS 28138 (Fed. Cir., Dec. 1, 2005).
<i>May v. Nicholson</i> , 19 Vet. App. 310 (2005)	Panel	<b>BVA decision vacated and remanded.</b> Veterans Court holds that a "CUE claim may not be filed as to a matter that is still appealable to [the Veterans Court], or is pending on appeal [at the Veterans Court] or at a higher court."	N	N	This case is on appeal to the Federal Circuit. (No. 06-7036)
<i>Scarborough v. Nicholson</i> , 19 Vet. App. 322 (2005)	En Banc	<b>En Banc consideration denied.</b>	N	Y (Kosold)	Kosold, J. argues in dissent that it was an error to allow the EAJA fee application to the extent it concerned fees required to cure counsel's own negligence.
<i>McCreary v. Nicholson</i> , 19 Vet. App. 324 (2005)	Panel	<b>Appeal dismissed.</b> Veterans Court adopts test for determining "equitable tolling" based on "extraordinary circumstances." The appellant must show that: (1) the extraordinary circumstances are "beyond [his] control"; (2) the "untimely filing was a direct result of the extraordinary circumstances and (3) he "exercis[ed] due diligence" in preserving his appellate rights, meaning that a reasonably diligent appellant under the same circumstances would not have filed his appeal within the 120-day judicial appeal period.* 19 Vet App. at 332.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>Padgett v. Nicholson</i> , 19 Vet. App. 334 (2005)	En Banc	<b>Earlier opinion withdrawn, BVA decision vacated, and appeal dismissed</b> Veterans Court holds it at because the appellant died while appealing the BVA decision seeking disability compensation, the earlier Veterans Court opinion had to be withdrawn, the underlying decision vacated, and the appeal dismissed. The essential basis for the decision was that claims for disability benefits do not survive the death of a veteran. Judge Kosold's dissent raises a number of issues related to the majority's action.	N	Y (Steinberg and Kosold)	This decision vacates the opinion appearing at 19 Vet. App. 133 (2005). The case is on appeal to the Federal Circuit. (No. 06-7037)
<i>Short Bear v. Nicholson</i> , 19 Vet. App. 341 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision rejecting clothing allowance under 38 USC § 1162 when only underwear was at issue. Veterans Court rejects a duty to notify error (if one was present) as non-prejudicial under <i>Mayfield</i> .	Y (Hagel)	N	
<i>Harris v. Nicholson</i> , 19 Vet. App. 345 (2005)	Panel	<b>Request for writ of mandamus denied</b> Veterans Court holds that: (1) petitioner had not exhausted his administrative remedies; and (2) he was attempting to use the writ as a mean to either revive a lapsed appeal period or appeal a non-appealable event/decision.	N	N	
<i>Hanlin v. Nicholson</i> , 19 Vet. App. 350 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court holds that "helpless child" benefits are separate from payments to a surviving spouse for purposes of fee agreement with the spouse.	N	N	
<i>Stolasz v. Nicholson</i> , 19 Vet. App. 355 (2005)	Panel	<b>BVA decision reversed and remanded</b> Veterans Court determines that a VA amendment to DC 6260 (concerning dual ratings for tinnitus) cannot apply to claims pending when the amendment was adopted in June 2003. Such application would have an impermissible retroactive effect.	N	N	
<i>Washington v. Nicholson</i> , 19 Vet. App. 362 (2005)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court holds that BVA decision did not adequately give its reasons and basis for rejecting veteran's lay testimony regarding in-service occurrence. Also, Veterans Court holds that VA failed in its duty to assist by not informing veteran of additional evidence he could submit when medical records are lost.	Y (Kosold)	Y (Kosold)	Kosold, J., dissents because he would reverse, not remand



Name and Citation	Panel or En Banc	Holding/issue(s)	Concurrence	Dissent	Other Info
<i>Gates v. Nicholson</i> , 19 Vet. App. 376 (2005)	Panel	<b>Motion to dismiss appeal granted</b> Veterans Court holds that pending motion for reconsideration renders BVA decision non-final for appeal purposes.	N	N	
<i>Fitz v. Nicholson</i> , 19 Vet. App. 377 (2005)	Panel	<b>Motion to recall mandate and request to review fee agreement denied</b> Veterans Court holds that it has authority to review fee agreements only in cases pending before the court.	N	N	
<i>Marsh v. Nicholson</i> , 19 Vet. App. 381 (2005)	Panel	<b>BVA decision reversed and remanded</b> The issue concerned whether an NOD was timely. The RO issued a substantive SOC without mentioning the timeliness issue. The BVA sua sponte dismissed. The Veterans Court holds that the presumption of regularity means that the RO would not have issued the SOC if it had believed the NOD was late. Therefore, the Veterans Court presumes it was timely. Moreover, the Veterans Court holds that the VA did not rebut the presumption.	N	N	
<i>Byrd v. Nicholson</i> , 19 Vet. App. 388 (2005)	Panel	<b>BVA decision affirmed</b> Veterans Court rejects veteran's argument that gun disease should be compensable under statute. The Veterans Court holds it lacks jurisdiction to consider the issue under the ratings schedule.	N	N	
<i>Beverly v. Nicholson</i> , 19 Vet. App. 394 (2005)	Panel	<b>BVA decision affirmed in part and remanded in part</b> Veterans Court affirms BVA determination that regulations and statutes prohibit government payment of costs for a community residential care facility. The Veterans Court remands matter to resolve whether the veteran made an informal request to reopen a claim for "special monthly compensation."	N	N	
<i>Stankovich v. Nicholson</i> , 2006 U.S. App. Vet Claims LEXIS 1 (Veterans Court Jan. 3, 2006)	Panel	<b>BVA decision modified in part, set aside in part, and remanded</b> Veterans Court holds that BVA did not provide an adequate statement of reasons and basis for choosing one DC over another in a claim involving Gulf War Syndrome.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<i>King v. Nicholson</i> , 19 Vet. App. 406 (2006)	Panel	<b>BVA decision vacated and remanded</b> Veterans Court remands to BVA for consideration whether 38 CFR § 20.101(b) precludes BVA jurisdiction over categorical rejections of certain medical treatments, as opposed to precluding jurisdiction in case-specific situations.			
<i>Forciere v. Nicholson</i> , 19 Vet. App. 414 (2006)	Panel	<b>BVA decision affirmed</b> Veterans Court affirms BVA decision rejecting service connection for PTSD based on an alleged sexual assault. Veterans Court holds VA did not breach its duty to assist. In addition, the Veterans Court discusses the effect of a joint motion to remand on later proceedings (a discussion that should be consulted when preparing joint motions to remand).	N	N	
<i>Coburn v. Nicholson</i> , 19 Vet. App. 427 (2006)	Panel	<b>BVA decision vacated and remanded</b> Case concerned a claim for in-service leg injuries. The case had been remanded for further development, including obtaining a medical exam. On this appeal, the issues involved whether the veteran had voluntarily waived certain issues on appeal. The court holds that the appellant did not knowingly waive the issues of a duty to develop the record, and the court remands for the BVA to provide an adequate statement of reasons and basis.	N	Y (Lance)	
<i>Coker v. Nicholson</i> , 19 Vet. App. 439 (2006)	Panel	<b>BVA decision affirmed in part, set aside in part, and remanded</b> Veterans Court affirms BVA decision denying a number of claims due, in part, to a failure of the veteran to articulate error on appeal. The Veterans Court vacates a BVA decision concerning the date of filing of an informal claim for a certain condition. The Veterans Court holds that the BVA must provide an adequate statement of basis and reasons.	Y (Kosold)	N	
<i>Snyder v. Nicholson</i> , 19 Vet. App. 445 (2006)	Panel	<b>BVA decision affirmed</b> Fees that VA pays directly to an attorney pursuant to 38 U.S.C. § 5904(d) must be based on the amount of past-due benefits the veteran will actually receive.	N	N	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<p><i>Sims v. Nicholson</i>, 19 Vet. App. 453 (2006)</p>	<p>Panel</p>	<p><b>BVA decision affirmed</b>                      Veterans Court holds: (1) duties to assist and notify do not apply to issues under Chapter 55 (they only apply to Chapter 51 claims for benefits); (2) regulations no longer require that a VSCM be involved in the adjudication of a claim; and (3) the presumption of competency under 38 CFR § 3.353(d) applies only when there is "reasonable doubt" as to competency.</p>	<p>N</p>	<p>N</p>	
<p><i>Dingess v. Nicholson</i> (with <i>Hartman v. Nicholson</i>), 2006 U.S. App. Vet. Claims LEXIS 102 (Veterans Court, Mar. 3, 2006)</p>	<p>Panel</p>	<p><b>BVA decisions affirmed in part and vacated and remanded in part</b>                      This decision is a highly significant one applying the duty to notify, 38 U.S.C. § 5103(a) to the assignment of an initial disability rating and an effective date. While the entire opinion must be read to appreciate it fully, the following general points are especially significant. (1) The duty to notify under § 5103(a) applies to all live elements of a claim, including the rating and effective date. (2) The content of the required notice is fact-specific. However, as a general matter the Court makes clear that the VA is not required "to provide notice on all potential disability ratings that can be awarded, effective dates that may be assigned, or other claims that may be filed, where dispute on those issues is not reasonably raised in the veteran's application. . . ." (3) The Court provides guidance on the general outlines of matters that will most often be the subject of the notice for both ratings and effective date. (4) Once an NOD has been received, and assuming that the initial notice was proper, § 5103(a) no longer applies although other aspects of VA-required assistance remain in place. (5) The Court applies <i>Mayfield v. Nicholson</i>, 19 Vet. App. 103 (2005), <i>rev'd</i> 444 F.3d 1328 (Fed. Cir. 2006), in a very detailed manner.</p>	<p>Y (Kosoff)</p>	<p>Y (Kosoff)</p>	
<p><i>Flores v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 103 (Veterans Court, Mar. 8, 2006)</p>	<p>Panel</p>	<p><b>BVA decision affirmed</b>                      Court affirms BVA finding of fraud and consequent forfeiture of rights to benefits. Significantly, the Court decides for the first time that its review of BVA finding of fraud is under the "clearly erroneous" standard.</p>	<p>N</p>	<p>N</p>	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
<p><i>Malec v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 104 (Veterans Court, Mar. 9, 2006)</p>	<p>Panel</p>	<p><b>BVA decision set aside and case remanded</b> The case concerned the proper amount to be recouped from "special separation pay" a veteran received when he also was awarded disability compensation for certain service-connected disabilities. The Veterans Court holds that the BVA did not adequately consider the period for which disability compensation was awarded and, therefore, could not adequately determine if the recoupment at issue was appropriate.</p>	<p>N</p>	<p>N</p>	
<p><i>Suariso v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 105 (Veterans Court, Mar. 10, 2006)</p>	<p>Panel</p>	<p><b>BVA decision affirmed</b> Veterans Court affirms BVA decision that evidence concerning attempt to re-open claim for non-service connected pension of Philippine widow was not "new and material."</p>	<p>N</p>	<p>N</p>	
<p><i>Howell v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 106 (Veterans Court, Mar. 23, 2006)</p>	<p>Panel</p>	<p><b>BVA decision set aside and matter remanded</b> Veterans Court holds that the BVA erred by relying on medical opinions that were "incompetent" with respect to special monthly compensation for aid and assistance. The Court also holds that visits to medical professionals do not negate the possibility of being "housebound."</p>	<p>N</p>	<p>N</p>	
<p><i>Ramsey v. Nicholson</i>, 2006 U.S. App. Vet. Claims LEXIS 165 (Mar. 31, 2006)</p>	<p>Panel</p>	<p><b>Request for writ of mandamus denied (conditionally)</b> This decision is a highly significant one for a number of reasons. The factual background here concerns <i>Smith v. Nicholson</i>, 19 Vet. App. 63 (2005), <i>rev'd</i> 451 F.3d 1344 (Fed. Cir. 2006) (the decision in which the Veterans Court held that finitus could result in dual ratings). After that decision, the Secretary issued an order stating that all cases pending at the Board implicated by <i>Smith</i> were to be stayed pending the Secretary's appeal to the Federal Circuit. Two affected claimants sought a writ of mandamus. The Court conditionally denies the writ, but (1) holds that the Secretary (and BVA Chair) have the general inherent authority to issue stays for case management purposes. (2) However, the Secretary (or BVA chair) do not have authority to issue stays pending an appeal of a Veterans Court decision. (3) Instead, the Secretary needs to seek a stay from the appropriate appellate court. Here that would be the Federal Circuit. (The Veterans Court gave the Secretary 30 days to seek such a stay).</p>	<p>Y (Schoelen)</p>	<p>Y (Schoelen)</p>	

Name and Citation	Panel or En Banc	Holding/Issue(s)	Concurrence	Dissent	Other Info
Kerr v. Nicholson, 2006 U.S. App. Vet. Claims LEXIS 151 (Fed. Cir., Mar. 31, 2006)	Panel	<p><b>BVA decision vacated and case remanded</b></p> <p>The case concerned a claim to reopen certain earlier cases. The significant holdings are as follows. (1) The Court holds that the Federal Circuit's decision in <i>Wagner</i> "represents a change in interpretation of law." The change is "procedural" and not "substantive." (2) "New" and "material" have technical meanings and the VA has notice obligations concerning these terms. (3) As to "material" evidence, the Court holds that a notice failure here will almost always be prejudicial. The rationale is explained in detail in the opinion. (4) As to "new" evidence, the Court makes clear that notice failures will generally not be prejudicial. Once again, the Court details its rationale. (5) Finally, the opinion is significant for its future application of the <i>Mayfield</i> standard.</p>	N	N	

## APPENDIX D

*Veterans Law Decisions of Note*

In this Appendix I provide a brief summary of the important veterans law decisions of both the Federal Circuit and the Veterans Court during the past two years. I have not included those cases dealt with at length in the main body of the Article. My test of significance requires that a decision have one of three attributes: (1) it is likely to affect a large number of claimants; (2) it will fundamentally alter the way in which the VA operates; or (3) it announces a jurisprudentially important rule of law.

## ACCRUED BENEFITS

- *Terry*: The Federal Circuit held that the limitation on the recovery of accrued benefits in 38 U.S.C. § 5121(a) refers to any two-year period prior to the veteran's death and not simply the two years immediately prior to the death.<sup>269</sup>

## BVA MAILING PRACTICES

- *Sthele*: The Veterans Court held that an appellant rebutted the presumption of regularity in mailing of a BVA decision. The holding is of particular importance because it casts broad doubt on the ability of the Board to rely on the presumption of regularity in the mailing of its decisions, at least under its current procedures.<sup>270</sup>

## "COMBAT WITH THE ENEMY"

- *Sizemore*: The Veterans Court held that the term "combat with the enemy" in 38 U.S.C. § 3.304(f) does not require that the veteran be attacked and includes the veteran *attacking* the enemy.<sup>271</sup>

## DUTY TO NOTIFY

- *Dingess*: The Veterans Court's decision is a highly significant one applying the duty to notify (38 U.S.C. § 5103(a)) to the assignment of an initial

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269. *Terry v. Principi*, 367 F.3d 1291 (Fed. Cir. 2004).

270. *Sthele v. Principi*, 19 Vet. App. 11 (2004). For an interesting perspective of one practitioner concerning *Sthele* and BVA mailing practices more generally, see TOMMY: A LAWYER'S GUIDE TO VETERANS AFFAIRS, Issue 1, 2005 at 5-6 (published by the Federal Bar Association's Veterans Law Section) (on file with the University of Michigan Journal of Law Reform).

271. *Sizemore v. Principi*, 18 Vet. App. 264 (2004).

disability rating and an effective date for benefits. While the entire opinion must be read to appreciate it fully, the following general points are especially significant. (1) The duty to notify applies to all five elements of a claim, including the rating and effective date.<sup>272</sup> (2) The content of the required notice is fact-specific. However, as a general matter, the VA is *not* required “to provide notice on all potential disability ratings that can be awarded, the effective dates that may be assigned, or other claims that may be filed, where the dispute on these issues is not reasonably raised in the veteran’s application . . . .”<sup>273</sup> (3) The Veterans Court provides guidance about the types of matters that will most often need to be included in notices dealing with ratings and effective dates.<sup>274</sup> (4) Once a Notice of Disagreement has been received (and assuming that the initial notice was proper), § 5103(a) no longer applies, though other aspects of VA-required assistance remain in place.<sup>275</sup>

#### EAJA MATTERS AND OTHER ISSUES CONCERNING ATTORNEYS’ FEES

- *Baldrige*. The Veterans Court’s opinion in this case is significant for several reasons. The Court (1) underscored the importance of detailed billing records in supporting any fee application;<sup>276</sup> (2) held that this obligation to provide detailed billing records is even more important when more than one lawyer is involved in the case;<sup>277</sup> (3) noted that, as a general matter, Veterans Court proceedings are not sufficiently complicated to justify teams of lawyers (although it suggested that the VA could legitimately have teams involved);<sup>278</sup> (4) asserted that when the Court wishes to reduce a fee request it can use gross percentages as opposed to line-by-line editing<sup>279</sup> (a point with which Judge Kasold dis-

272. *Dingess v. Nicholson*, 19 Vet. App. 473, 484–87 (2006).

273. *Id.* at 488.

274. *Id.* at 486–88.

275. *Id.* at 491–93.

276. *Baldrige v. Nicholson*, 19 Vet. App. 227, 234–35 (2005).

277. *Id.* at 236–41.

278. *Id.* at 238–39.

279. *Id.* at 241–43.

agreed<sup>280</sup>); and (5) provided detailed guidelines about the format of an attorney fee request in cases where more than one attorney represents the claimant.<sup>281</sup>

- *Scarborough*: Any case decided by the United States Supreme Court that touches on veterans law is *ipso facto* significant. In *Scarborough*, the Supreme Court reversed both the Federal Circuit and the Veterans Court and held that a timely EAJA attorney fee application can be amended after the thirty-day filing period has run in order to cure a deficiency in the initial application. In this case, that initial deficiency was the claimant's failure to allege that the government's position had not been substantially justified.<sup>282</sup>
- *Snyder*: The Veterans Court held that fees the VA pays directly to an attorney pursuant to 38 U.S.C. § 5904(d) must be based on the amount of past-due benefits the veteran will actually receive, not simply what he or she is entitled to receive.<sup>283</sup>

#### ENHANCED DIC PAYMENTS

- *Hatch*: The Veterans Court held that enhanced DIC payments may be based on evidence submitted after the veteran's death.<sup>284</sup>

#### JOINT MOTIONS FOR REMAND

- *Forcier*: The Veterans Court was called upon to decide whether a joint motion to remand entered into earlier in the case had an impact on whether the

280. *Id.* at 247–49 (Kasold, J., concurring in part and dissenting in part).

281. *Baldridge*, 19 Vet. App. at 240–41.

282. *Scarborough v. Principi*, 541 U.S. 401 (2004). On remand, the Veterans Court granted the original application and most of a supplemental application. *Scarborough v. Nicholson*, 19 Vet. App. 253 (2005). There were two interesting points in the Veterans Court's actions on remand. First, the Veterans Court refused to award an enhanced hourly rate for attorney Brian Wolfman (and two others) of the Public Citizens Litigation Group. It reasoned (incorrectly in my view) that practice before the United States Supreme Court was not sufficiently "specialized" such that an enhanced rate was warranted. *Id.* at 262–65. Second, the Veterans Court allowed the recovery of fees in the supplemental application, rejecting an argument that those fees did not result from the government's position, but rather from the claimant's lawyer's own mistake in filing the defective fee application in the first place. *Id.* at 261–62. This holding drew a strong dissent from Judge Kasold when the Court refused to hear the matter en banc. *See Scarborough v. Nicholson*, 19 Vet. App. 322 (2005) (Kasold, J., dissenting from denial of en banc consideration).

283. *Snyder v. Nicholson*, 19 Vet. App. 445 (2006).

284. *Hatch v. Principi*, 18 Vet. App. 527 (2004).



BVA decision should be affirmed. The Court held that the joint motion did not affect its decision given the general terms of the remand, among other things. This decision is required reading for any counsel contemplating entering into a joint motion to remand a case.<sup>285</sup>

#### “NO INTEREST RULE”

- *Sandstrom*: The Federal Circuit made clear that the “no interest rule” applies in the context of CUE claims, meaning that a veteran cannot argue that upon the finding of CUE he or she should receive “real” dollars as opposed to “nominal” dollars. In other words, a finding of CUE in a 1969 decision does not mean that a veteran can receive a payment adjusted to reflect 2006 dollar values.<sup>286</sup>

#### PRESUMPTION OF AGGRAVATION

- *Wagner*: The Federal Circuit held that clear and unmistakable evidence is required to rebut *both* the presumption of soundness *and* the lack of in-service aggravation.<sup>287</sup>

#### PRESUMPTION OF SERVICE CONNECTION

- *Shedden*: The Federal Circuit held that 38 U.S.C. § 105(a) creates a presumption of service connection if an injury or disease manifests itself during a veteran’s active service.<sup>288</sup>
- *Thomas*: The Federal Circuit held that the VA may rebut the presumption of service connection in peacetime set forth in 38 U.S.C. § 105(a) by a preponderance of the evidence.<sup>289</sup>

#### RETROACTIVITY GENERALLY

- *Rodriguez*: The Veterans Court held that (1) it is questionable whether the VA has any authority to unilaterally decide that a regulation should apply retroactively; and (2) in any event, a VA regulation

285. *Forcier v. Nicholson*, 19 Vet. App. 414 (2006).

286. *Sandstrom v. Principi*, 358 F.3d 1376 (Fed. Cir. 2004).

287. *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). In later cases the Circuit Court made clear that it was possible to rebut the presumption, *see Natali v. Principi*, 375 F.3d 1375 (Fed. Cir. 2004), but that it was not easy to do so, *see Patrick v. Principi*, 103 F. App’x 383 (Fed. Cir. 2004).

288. *Shedden v. Principi*, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004).

289. *Thomas v. Nicholson*, 423 F.3d 1279, 1280 (Fed. Cir. 2005).

cannot have a retroactive effect if it would have a negative impact on a claimant.<sup>290</sup>

#### SUBSTITUTION OF PARTY UPON DEATH OF CLAIMANT

- *Padgett*: The Veterans Court (en banc) held that, when a veteran dies while appealing a BVA decision to the Veterans Court, the appropriate disposition is to vacate the Board decision and dismiss the appeal for lack of jurisdiction.<sup>291</sup>

#### TINNITUS RATINGS

- *Smith (Ellis)*: The Veterans Court held that DC 6260 requires a dual rating for tinnitus, at least for claims decided prior to June 13, 2003 when a note was amended to the DC.<sup>292</sup>
- *Stolasz*: The Veterans Court held that the note to DC 6260 purporting to preclude a dual rating for tinnitus cannot be applied to claims that were pending when the regulation became effective (June 13, 2003) because to do so would have an impermissible retroactive effect.<sup>293</sup>

#### VETERANS CLAIMS ASSISTANCE ACT APPLICABILITY

- *Lueras*: The Veterans Court held that the VCAA duties to notify and assist are not applicable to Chapter 53 issues. The duties are applicable only to claims for benefits under Chapter 51.<sup>294</sup>
- *Sims*: The Veterans Court held that the VCAA duties to notify and assist are not applicable to Chapter 55 issues. The duties are applicable only to claims for benefits under Chapter 51.<sup>295</sup>

#### VCAA RETROACTIVITY

- *Hayslip*: The Federal Circuit held that the Veterans Claims Assistance Act did not apply to BVA decisions that were final before its enactment.<sup>296</sup>

290. *Rodriguez v. Nicholson*, 19 Vet. App. 275, 289–90 (2005), *appeal docketed*, No. 06-7023 (Fed. Cir. Nov. 10, 2005).

291. *Padgett v. Nicholson*, 19 Vet. App. 334 (2005) (per curiam), *appeal docketed*, No. 06-7037 (Fed. Cir. Dec. 13, 2005).

292. *Smith v. Nicholson*, 19 Vet. App. 63, 76–78 (2005), *appeal docketed*, No. 05-7168 (Fed. Cir. Apr. 18, 2006).

293. *Stolasz v. Nicholson*, 19 Vet. App. 353, 360–61 (2005).

294. *Lueras v. Principi*, 18 Vet. App. 435, 438–39 (2004).

295. *Sims v. Nicholson*, 19 Vet. App. 453, 456 (2006).

296. *Hayslip v. Principi*, 364 F.3d 1321, 1325–27 (Fed. Cir. 2004).

## VETERAN STATUS

- *Pelea*: The Veterans Court held that claimants do not lose the right to submit evidence on their claimed status as a veteran merely because the VA has submitted a request to the service department under 38 C.F.R. § 3.203 for service verification.<sup>297</sup>

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<sup>297</sup> *Pelea v. Nicholson*, 19 Vet. App. 296, 306–09 (2005), *appeal dismissed*, 159 F. App'x 1003 (2005).

