

Expediting Claims or Exploiting Statistics: An Examination of VA's Special Initiative to Process Rating Claims Pending Over Two Years

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STATEMENT OF

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FOR THE RECORD

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

Expediting Claims or Exploiting Statistics: An Examination of VA's Special Initiative to Process Rating Claims Pending Over Two Years

WASHINGTON, D.C.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, I want to thank you for the opportunity to provide testimony for today's hearing.

Over the last decade the Veterans Benefit Administration (VBA) disability claims workload

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has grown from 330,000 to nearly 905,000. During the first six years that increase was a relatively modest 60,000 claims. However, from early 2009 to the present, pending disability claims more than doubled.

Historically, VA tracked claims that were pending longer than 180 days. From 2003 to 2009, claims pending over 180 days ranged from a low of 75,000 to a high of 108,625. In 2009, VA established a goal that no claim should pend more than 125 days. The lower number meant more claims exceeded the goal. In 2010, VA reported 179,863 disability claims pending over 125 days at the start of the year. By January 2013 that number had tripled to over 630,000.

The story told by this data is not new. In the last few years the volume of outrage from veterans, veterans' advocates and members of Congress has increased substantially. What was once an infrequent chant of disenchanted veterans of "deny, deny until I die" has been joined by many other voices demanding answers as to why VA cannot process claims more quickly than it currently does.

During the last five years VA Secretary Eric Shinseki and VBA leaders, most recently Under Secretary for Benefits Allison Hickey, were able to identify many of the systemic problems which slow claims processing and put into motion historic changes in IT modernization which they believe will, over time, enable VA to process claims more quickly and with better quality. Unlike their predecessors they have a single vision and are dragging the second largest bureaucracy in the Federal government into the 21st Century. These are good things.

However, while this long overdue transformation takes place, more and more veterans wait longer and longer for decisions from VA. Although VA made decisions in more than 1 million claims last year it was not enough to reverse the tsunami of claims it received. Inexorably, pending claims grew older and older, one day at a time. The media has been filled with story after story of veterans who had waited seemingly forever, frequently longer than a year. The number of veterans waiting two years or more seemed to explode overnight.

With this as background, what was VBA to do? It did what it has always done; it decided to play a game of Whack-a-Mole. VA decided to shift its claims processing attention from methodically working all of its claims to concentrating on processing claims pending for more than two years. This reordering of priorities is not new, nor is it necessarily unreasonable in light of shifting workloads.

For instance, in August 2010 VA recognized three new conditions presumptively related to exposure to herbicides in Vietnam. VA leadership knew that they were faced with reviewing tens of thousands of claims previously filed by Vietnam veterans to see if they were entitled to benefits for one or more of the new presumptive conditions. This review was required in

order to comply with *Nehmer v. United States Department of Veterans Affairs*. VA could also reasonably anticipate receiving many more thousands of claims from Vietnam veterans. Faced with this certain dramatic spike in its workload and the relative simplicity of many of these claims, VA decided to shift its priorities to work Agent Orange claims ahead of pending claims.

In the end, VA processed 260,000 Agent Orange claims ahead of other pending claims. The very nature of this priority caused hundreds of thousands of other claims to grow months, perhaps years, older. VBA leaders are convinced that it was the right decision. Two-hundred-sixty thousand Vietnam veterans are receiving benefits today for conditions stemming from their war which ended 38 years ago. We can assume that most are satisfied with the actions taken by VA. This is what happens when priorities shift; a new set of claimants “win” while others wait longer.

The review of claims more than two years old is a change in priorities. It places virtually the entire claims backlog on hold until VBA finishes a review of more than 50,000 claims pending for more than two years. During this review, we are told, another 5,000 claims per month will turn more than two years old. After an interminable wait these veterans will receive decisions.

VA states that about 30 percent of the 50,000 claims were “ready to rate.” That is, someone had indicated that all necessary development had been completed. These cases could have been worked at any time. Had regional office management paid attention to the workload reports, it should have assigned sufficient staff to process at least that segment of old claims. Judging from the fact that some regional offices had few claims subject to this review, it appears that some regional office managers managed their workload better than others.

The remaining 70 percent of pending claims would fall into the following categories: Claims which should have been marked “ready to rate” but were not; claims which were awaiting records from Federal government agencies; claims waiting for a required VA medical examination; and claims waiting for records from private or non-Federal government sources. It is this last group of claims which, we believe, make up the largest segment of these old claims. Often, development is incomplete because of mistakes made by VA early in the processing of the claim.

This project concerns us deeply. When the project was first proposed the VFW and other service organizations sought to create a dialog with VBA. VA adjusted the letter to address some of our concerns. However, the basic problem with this review is the creation of a new type of rating: A provisional rating. While VA has had great latitude in issuing interim ratings when it finds that evidence is sufficient to grant service connection or a higher evaluation even though additional development is required to fully adjudicate other issues, the idea of rating on the evidence of record before development is completed on that issue is

new. It is also a disturbing departure from the law and past practice.

For the record, the VFW welcomed the changes made by VBA in modifying this project. We told VBA leaders that we would not oppose this project as we consider it a one-of-a-kind event; that these veterans had waited too long to have their claims decided. VBA indicated that it wanted to expand this project to claims pending more than one year once the initial review was done.

Given that VBA wanted to expand the review, we asked that it pause after this project to assess it to determine what problems were noted during the review; what action, if any, was taken to address those problems; what changes, if any, are necessary if the project was to be expanded to claims more than one year old; and what additional problems might develop by expanding this project.

In our view, issuance of a provisional rating is an admission of failure; failure on the part of VA to accurately and completely develop an issue at the start of the claim. Examination of these cases will almost always show that VA performed incomplete development at the start, and failed to fully correct its mistakes and obtain required evidence in a timely manner. Most of these cases show signs of neglect. They sat for many months without any review by progressively more responsible and experienced VA employees.

This project does more than simply bring these cases to the light of day to complete development and decide the issue at hand. With every provisional rating VA tells the veteran that VA failed to complete its job and now the burden of completing development is shifted to the veteran.

In the end, VA will resolve nearly all of the 50,000 two-year-old claims it had pending at the start of this project. The average age of claims pending (ADP) will drop precipitously. VA will take a one-time hit in average days to complete (ADC) but this portion of the workload will no longer be a drag on the rest of the data. For a time VA will have significantly fewer cases pending over the artificial goal of 125 days. However, without fixing its underlying problems of accurate, complete and timely development with rigorous attention to subsequent reviews and correction of any problems noted, timeliness will degrade and VA will slide backwards again.

VBA leadership proposes to expand the more than two year review to claims more than one year old. There are several problems with this expansion. Any expansion beyond the current project institutionalizes the provisional rating. Further, it encourages some VA employees to accept, rather than correct, poor development. It encourages some managers to forego routine reviews to catch and correct mistakes in development because they will know that if a case ages past a certain point they can simply issue a provisional rating and shift remaining development to the veteran.

Finally, the simple logistics of an expanded review become problematic. Consider that if it takes 60 days to review and decide 50,000 claims, it would take another 8 months of concentrated, exclusive effort to review and process the estimated 200,000 claims pending for a year or more. In the meantime, virtually all of the existing work now less than one year old will age by another year. In the end, this project will not solve the backlog problem, it will only deprive thousands of veterans the assistance of VA mandated by law and regulation.

Congress, through the Veterans Claims Assistance Act and other legislation, has instructed VA on the minimum it must do to assist veterans in the development and completion of their claims. We recognize that the legal burden for submitting evidence not in the control of the Federal government ultimately rests with the veteran. However, Congress decided that the burden does not shift until VA has completed certain actions. This project abrogates VA's responsibility to do the job Congress gave it.

This project is a very public admission that VA has failed to create a viable, effective and efficient system for developing and managing claims. Instead of fixing its problems, VA is demanding that veterans once again suck it up and shoulder the burden of completing the job that VA botched.

We ask Congress to require VA to step up and perform the tasks it is required to do. We ask that Congress end the use of a provisional rating as it prematurely shifts the evidentiary development burden to veterans in contravention of existing law and regulations.

Mr. Chairman, this concludes my testimony.

Monday Morning Workload Report, January 2003-January 2013; <http://www.vba.va.gov/reports/mmwr/>

Whack-a-Mole is one of those carnival games which can never be won, only played. It is usually a table with five or six holes. The head of a plastic mole protrudes from one hole. If you push down the head another pops up from different hole. The object of the game is to see how many moles you can whack with a mallet in a given time frame. The person who hits the highest number of moles wins the game.

Nehmer v. United States Department of Veterans Affairs, No. CV-86-6160 TEH (N.D. Cal.).

"Balancing the Record on the Claims Backlog"; <http://www.blogs.va.gov/VAntage/8995/balancing-the-record-on-the-claims-backlog/>

VBA Letter 20-13-05 mandates a review of all claims received prior to July 1, 2011. Except for certain excluded pending claims, VA personnel are directed to rate all claims in this group based on the evidence of record. If development was complete at the time of review VA will make a decision using existing criteria and guidelines and provide appeal rights to the claimant. If development was not complete, but was not excluded from the project, VA will issue a "provisional"

decision based on the evidence of record. This provisional decision does not become final for 1 year. During this period a claimant can submit additional evidence and receive a new decision based on the evidence of record. VA will notify the claimant that the decision is now final and provide appeal rights if no evidence is received within 1 year of the issuance of a provisional rating.

It is important to note that a small segment of claims grow old because of the difficulty in obtaining Federal government records in spite of timely efforts to obtain them. Claims from veterans who participated in nuclear bomb tests in the 1940-60's, for instance, are notorious for taking a long time to develop dosimetry readings from DOD, adjusted exposures and medical opinions.

38 CFR 3.159(e)(iv)