

Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims.

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STATEMENT OF

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FOR THE RECORD

VETERANS' AFFAIRS SUBCOMMITTEE
ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims.

WASHINGTON, D.C.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

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

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Current data shows 250,845 appeals are controlled in the Veterans Appeals and Locator System (VACOLS) which tracks appeals pending in the Department of Veterans Affairs (VA) regional offices, pension centers and the Appeals Management Center. Appeals have been at these levels for at least the last 18 months without significant variation.

It is not just the number of pending appeals which is astounding. In its annual report for FY 2012, released in February, 2013, the Board of Veterans' Appeals (BVA) said that it took, on average, 1,040 days for a veteran to receive a BVA decision after filing a substantive appeal. That is 2.8 years. Even worse, the appeal starts for the claimant/appellant hundreds of days earlier when he/she files a Notice of Disagreement.

Two stage appeals process

The VA runs a two stage appeals process. When VA issues a decision, a claimant generally has one year in which to decide to appeal part or all of the decisions made by VA. The clock for VA starts when a Notice of Disagreement (NOD) is filed. The VA is supposed to place the NOD under control within 7 days of receipt.

The NOD is referred to a VA employee with decision making authority equal to or higher than the individual who made the original decision. Most appeals deal with decisions in disability compensation claims. NOD's in these cases are referred to either a rating specialist or a Decision Review Officer. NOD's filed in non-rating cases are usually assigned to senior Veteran Service Representatives.

Once received, an NOD will pend until a decision maker reviews the original decision and, if they do not change it, issue a Statement of the Case (SOC). An SOC essentially restates the decision with added material outlining the laws and regulations pertinent to the decision. For reasons discussed below, it can take scores of days for a veteran to receive an SOC.

VBA sends a Substantive Appeal, VA Form 9, with the SOC. The claimant has the remainder of the one year appeal period or 60 days, whichever is longer, to return a completed Form 9. Failure to submit the Form 9 within this period ends the appeal. Many claimants decide not to continue their appeal at this point, either because they have a better understanding of why the decision was made in their case, or because they become frustrated with delays and legal sounding boilerplate and decide to give up. However, many tens of thousands decide to continue their appeals and submit the Form 9.

If the Form 9 is received within the required period the appeal continues and is not closed until one of three things happens: the claimant withdraws their appeal; VA grants the maximum benefit allowed by law; or the BVA makes a decision. It is only this period, from submission of the Form 9 to the issuance of a BVA decision, which is covered by the 1,040 day average reported by the BVA.

To look at this differently, VBA reported that in FY 2011 the Houston Regional Office averaged over 1,444 days from receipt of a NOD to the day the appeal is certified to the BVA for their consideration. It is apparent, then, that while the BVA may take over 250 days, on average, to complete its work, most of this extraordinary years-long appeals process is spent in VA regional offices, waiting.

VA regional offices are where appeals go to wait

For much of the last two decades appeals have been the step-child of VA claims processing. These claimants already have a decision from VA. They may not like part or all of what VA decided, but they have a decision. There are currently 1.75 million veterans and other claimants who are waiting for VA to take action on their original disability claim, a reopened claim, a claim for an increase, accrued benefits, burial benefits, a claim to add a dependent...the list goes on. VA's workload is not just the 851,000 disability benefit claims VA routinely talks about. However, these claimants do not have a decision.

Since at least the early 1990's, every time VBA decides it must reduce the backlog, local managers divert most personnel assigned to appeals to assist in the project. Since the focus is on the backlog, Members of Congress and the media fail to notice that appeals are not being worked. The natural consequence of this choice allows the appeals backlog to simultaneously grow, and grow older. Until last year when VBA created Appeal Teams, most regional office appeals operations were understaffed. Even when Decision Review Officers were allowed to work appeals, they had huge caseloads and insufficient support staff to handle the work.

Inattention to appeals, pressure to move other work, and under staffing of appeals operations created inefficiencies which spun out of control. For instance, a high level VBA official involved in appeals recently related that certain work management practices facilitated one segment of the work at the expense of appeals. What he described was this: A veteran submits an NOD on one issue while submitting a supplemental claim on a different issue. Since the NOD and claims material were screened by personnel trained to develop claims, they would initiate development first and not submit the NOD to the appeals team. As a result, months would go by before someone else noticed the NOD and placed it under control.

One problem appeals processing has in common with claims processing is development. Many claimants either submit additional evidence or identify additional evidence during the appeals process. Additional evidence is rarely sufficient by itself to allow VA to grant the benefit sought on appeal. As a result, VA is required to order a VA examination. If the claimant identifies additional evidence, VA is required to assist the claimant in obtaining it. Identifying exactly the right action to take to properly develop an appeal remains a challenge for VA. In FY 2012, the BVA remanded for additional development 45.8 percent of the appeals it considered. A large portion of these appeals were remanded to correct

development deficiencies that were not addressed prior to shipping the appeal to the BVA.

Discussion

Many organizations and individuals have their own ideas about what is wrong with the appeals process and offer their own ideas for what should be done to fix it. While some would argue that the unique set of veteran friendly laws create obstacles to efficient appeals processing, or the creation of the Veterans Court in 1988 has been an engine of redefinition and change to the regulations and policies enacted by VA in a pre-Court era, or point to the dearth of attorneys representing claimants before the Board, the reality is that VBA has devoted too few resources, created too many process inefficiencies, and failed to timely and properly develop too many cases for the appeal process to be anything but dysfunctional. The VFW believes that if these three things are properly addressed VBA should be able to substantially shorten the time it takes to move an appeal from receipt of an NOD, issuance of an SOC, process a Form 9 and certify a case to the BVA.

VBA recently concluded a one year appeals pilot at the Houston Regional Office where many of these issues appear to have been addressed. While we need to study the process more closely to ensure that veterans were not harmed during this project, we are encouraged by what VA has done. VA reports that during this pilot they were able to shave 1,000 days off the average time it took Houston staff to process appeals from receipt of an NOD to certification to the BVA. While they did not hit their target, they made remarkable strides in improving communication to claimants and expediting appeals.

Unique system of laws

“The veterans’ benefits system has been calibrated with uniquely pro-claimant principles.”

In any discussion concerning the Department of Veterans Affairs, it is critical that all parties understand that Congress created a unique set of pro-veteran policies when establishing programs for veterans and their families. Principles which are common throughout the rest of the law are intentionally absent or relaxed in laws dealing with veterans’ benefits.

While these laws may create challenges for VA, they are not insurmountable challenges. We posit that VBA has yet to put sufficient effort into conducting development efficiently and effectively. Development regimens are too complex, variables too numerous, training too ineffective and oversight is largely absent.

VA has argued that if it could be only allowed to shorten waiting periods from 60 days to 30 days, shorten the appeal period from one year to 6 months, that it would be able to process claims more quickly with higher quality. We believe that two things are wrong with this approach. First, VA seeks to penalize veterans and other claimants for its own inefficiencies and inability to properly develop and control claims and appeals. Second, VA managers

would have you believe that the solution to its problems rests with Congressional mandates and not with its own inability to establish effective procedures, conduct meaningful training, perform adequate and timely quality reviews, and ensure consistent managerial oversight of the appeals process. The VFW strongly urges Congress to compel VA to do its job, and do it correctly, the first time, and not to further restrict “unique set of pro-veteran policies” enacted by you to ensure that veterans receive the benefits they have earned through their service to the American people in both peace and war.

Mr. Chairman, this concludes my testimony.

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

Pursuant to Rule XI2(g)(4) of the House of Representatives, VFW has not received any federal grants in Fiscal Year 2013, nor has it received any federal grants in the two previous Fiscal Years.

Monday Morning Workload Report; June 10, 2013 showing appeals data from May 11, 2013.

<http://www.vba.va.gov/REPORTS/mmwr/index.asp>

Report of the Chairman, Fiscal Year 2012; February 2013, page 19.

http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2012AR.pdf

While VBA requires claims be put under control within 7 days of receipt, the reality is that some offices take much longer to identify and control appeals. Appeals Design Team Briefing, January 2013, page 2

Appeals Design Team Briefing, January 2013, page 2

Monday Morning Workload Report

Report of the Chairman, Fiscal Year 2012; February 2013, page 22

We would be remiss if we did not point out that while attorneys obtained grants in 30.1 percent of the cases decided by the BVA in FY 2012, three veteran service organizations, including the VFW, obtained better results. Report of the Chairman, Fiscal Year 2012; February 2013, page 23.

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