

STATEMENT OF
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NATIONAL ORGANIZATION OF VETERANS ADVOCATES
BEFORE THE
SUBCOMMITTEE ON
DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
VETERANS' AFFAIRS COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
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MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates ("NOVA") on the operations of both the Board of Veterans' Appeals and the Appeals Management Center. NOVA is a not-for-profit educational organization created under 26 U.S.C. § 501(c)(3) for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents, before the Court of Appeals for Veterans Claims ("CAVC") and on remand before Department of Veterans Affairs ("VA"). NOVA has written many *amicus* briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's board of directors and represent the shared experiences of NOVA's members.

For the past fourteen years I have been representing claimants at all stages of the veteran's benefits system from the VA regional office to the Board of Veterans' Appeals to the CAVC as well as before the Federal Circuit.

A claimant who files a new claim for benefits that is denied by the VA usually faces a three to five year horizon before he or she receives a final decision from the Board of Veterans' Appeals. If that same claimant then appeals the case to the Court of Appeals for Veterans Claims, it may take another twelve to eighteen months for the Court to render a final decision. When the Court acts in the claimant's favor, it will most likely result in a remand back to the Board of Veterans' Appeals. See *Swiney v. Gober*, 14 Vet. App. 65 (2000) (wherein the CAVC acknowledged "outright reversal on the merits has been very rare" and remands are the norm). The remand from the CAVC provides the claimant with the opportunity to submit additional evidence and arguments in favor of the claim at issue, and it preserves the claimant's favorable effective date if there is an award of benefits. The problem, however, is that many claimants do not survive the protracted adjudicatory process. Those claimants who do survive are subjected to interminable delays before the VA.

Remanded claims and Board Docketing of Appeals.

I would first like to direct my testimony to the issue of claims remanded from the Court to the Board of Veterans' Appeals. A "remand" is simply an order sending the case back down the ladder to be done over again. It is upon return from the Court to the Board of Veterans' Appeals that delays in adjudication are exacerbated.

In 1994, Congress enacted the Veterans Benefits Improvement Act. Section 302 of the Act, Pub.L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994), which provided for expeditious treatment of veterans claims that were remanded from the Court of Appeals for Veterans Claims back to the Board of Veterans' Appeals. In addition, the Act

requires claims remanded from the Board to the VA regional offices to receive expeditious treatment. The statute specifically mandates that “[t]he Secretary of Veterans Affairs shall take such actions as may be necessary to provide for the expeditious treatment, by the Board of Veterans’ Appeals and by the VA regional offices of the Veterans Benefits Administration, of any claim that has been remanded by the Board of Veterans’ Appeals or by the United States Court of Veterans Appeals for additional development or other appropriate action.” This act was codified in 2003 by Pub. L. 108-183, Title VII, § 707(a)(1), 117 Stat. 2672.) at 38 U.S.C. § 5109B. It provides that “[t]he Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the appropriate VA regional office of the Veterans Benefits Administration of any claim that is remanded to a regional office of the Veterans Benefits Administration by the Board of Veterans’ Appeals.” In addition, Pub. L. 108-183, Title VII, § 707(a)(1), 117 Stat. 2672) codified the VBIA at 38 U.S.C. § 7112 which provides that the Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims.

The intent behind the VBIA 1994 and the subsequent statutory codification is clear: Congress wants those claimants who have been unable to get a final decision from the Board to thereafter receive expeditious treatment whether on remand from the CAVC or on remand from the Board to the VA regional offices. The problem, however, is the Board has failed to execute the will of Congress.

Docketing of Cases by the Board of Veterans' Appeals

The Board's failure to implement the intent of Congress regarding expeditious treatment of remanded cases is exemplified in the Board's docketing procedure for remanded claims. The Secretary has promulgated certain regulations to govern the order in which appeals to the Board are decided. Generally speaking, the Board decides appeals in the order in which they are received from the VA regional offices. 38 C.F.R. § 20.900(a). Therefore, if a claim has a 2003 docket number it is supposed to be decided before a case with a 2004 docket number and so on. Remanded claims that are returned to the Board assume their original place on the docket. 38 C.F.R. § 20.900(a). If a case with a 1999 Board docket number is remanded to the VA regional office and then returns to the Board in March 2005, it should retain the 1999 docket number, not a new 2005 Board docket number.

Finally, the Board has a specific regulation issued in response to the requirement to provide expeditious treatment to remanded claims from the Court. That regulation provides: "A case remanded by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket." 38 C.F.R. § 20.900(d).

Delay— Not Expeditious Treatment— Is the Norm

Typically, veterans face years of delay instead of receiving the expeditious treatment required by Congress. Delay occurs at two critical junctures:

- (1) When a case is remanded from the Court to the Board, and
- (2) When the Board remands a case back to the VA regional office and the

denial is sustained by the VA regional office.

In this latter situation, the matter is supposed to retain its earlier Board docket number but most cases are assigned new docket numbers.

As noted above, the first significant time delay occurs when the cases are remanded from the CAVC to the Board of Veterans' Appeals. When a case is remanded from the Court to the Board, the Board is required to send a letter to the claimant and the representative of record to provide them with 90 days to submit additional evidence. Once that letter is responded to by the claimant or the representative, the Board is required to render a new decision. In my experience, claimants are waiting up to a year for a new decision.

The second situation, when the Board remands a case back to the VA regional office, causes far more grievous delay, especially where the VA regional office grants a part of the claim, but then commits error by denying less than the full relief required by law. In that situation, Congress requires that the Board expeditiously review the regional office decision, but often it does not.

For example, assume that in 1996, a Persian Gulf War veteran filed a claim for service connection of post traumatic stress disorder (PTSD), which the VA regional office finally denied in 1999. The veteran appeals to the Board of Veterans' Appeals where the case is given a 1999 docket number. The Board issues a remand decision in 2004 because the VA regional office failed to obtain a medical opinion on issues necessary to decide the veteran's claim. Based on the newly obtained medical opinion, the VA regional office finally decides that the Gulf War veteran is entitled to disability

compensation for his PTSD, but the VA regional office assigns a rating of only 50%, and awards benefits as of the date the VA obtained the medical opinion— even though the veteran's PTSD has prevented him from working since his claim was filed in 1996. Under those circumstances, the law requires the VA to rate the veteran as 100% disabled and to pay him benefits at the 100% rate, starting in 1996 when he filed his claim.

Unfortunately, the VA regional office grants some relief, but less than what the law requires, and less than what the veteran is entitled to and needs because of his disability. The veteran's only remedy is to appeal, again, to the Board of Veterans' Appeals, and ask the Board, again, to correct the VA regional office's mistake and assign a higher rating and an earlier effective date.

Here lies the problem: Getting the case back before the Board can take another three to five years, because the Board has no protocol to require docketing personnel to retain the earlier and clearly more advantageous docket number. Instead, the docketing personnel usually assign a new docket number. In the case of our hypothetical Gulf War veteran, then, his 2005 appeal to the Board would be assigned a 2005 docket number, rather than retaining his original 1999 docket number. This means that instead of having his case set for immediate Board review, he is sent to the back of the line for another three to five year wait, on a claim that was first filed in 1996 - nine years ago already. The additional delay of three to five years is caused by the Board assigning a new docket number to the veteran's claim, instead of retaining the earlier, original docket number.

If the claimant is not helped by a sophisticated representative, the claimant will not even know that he was entitled to faster consideration. In order to assure that the Board is complying with its own docketing procedures for remanded claims, I as well as other attorneys, have found it a necessary practice to file petitions for writs of mandamus with the Court of Appeals for Veterans Claims. *E.g., Dailey v. Principi*, 17 Vet. App. 61 (2003); *Vargas-Gonzalez v. Principi*, 15 Vet. App. 222 (2001). In over 75% of my cases that are returned to the Board of Veterans' Appeals after remand, I must send a letter to the Board because the case was assigned a new Board docket number instead of the original one. The process should be automatic, but it is not. Once again, a claimant who does not have the help of a sophisticated representative will never know what happened.

The Board's Statistical Tabulations.

I would also like to comment on NOVA's concern about the methodology used by the Board to generate its statistics for its annual reports. In order for Congress to understand the operations of the Board and the Appeals Management Center, an accurate representation of what happens at the Board is necessary.

Every year the Board of Veterans Appeals in its annual report provides the following information: (1) the total number of decisions made; (2) the number of allowed claims; (3) the number of remanded claims and (4) the number of denied claims. The following data is from the Board annual report:

Fiscal Year	Number of Board Decisions	Allowed	Remanded	Denied
2004	38,371	17.1%	56.8%	24.2%
2003	31,397	22.1%	42.6%	32.6%

The data in the Board's Annual Report is misleading in the following way. Many claimants' claims have multiple issues. By way of example, a single claimant could have claims for PTSD, hearing loss, tinnitus and Agent Orange-related illnesses. If the Board grants the claimant a 10% rating for hearing loss and denies the claims for PTSD, tinnitus and Agent Orange, the Board considers that an "allowed" claim for the purposes of its annual report. The Board simply fails to report in its annual report that it has denied the remaining three issues, each of which is an appealable claim to Court. Thus, the Board fails to report the total number of actual claims denied.

Quality of Decision Making at the Board

In order to truly assess the quality of Board decision making, one needs to examine what is happening to the cases appealed from the Board to the Court. The CAVC in its annual report provides data regarding the total number of cases filed and the dispositions of those cases.

Fiscal Year	Merits Decisions	Percentage Remanded
2000	1619	63%
2001	2853	96%
2002	972	72%
2003	2152	91%
2004	1337	83%

The data is from the following website address:

<http://www.vetapp.gov/AboutCourt/Annual%20Reports.pdf> .

This evidence is indicative of a lack of quality decision making at the Board. A claimant who is denied benefits has a much better than even chance of getting a remand from the Court due to errors committed by the Board.

The Need for Legal Representation Before the Board

A final thought regarding the operation of the Board specifically and the adjudication of claims generally. Presently, claimants do not have the choice to hire and compensate an attorney until after the Board issues the first final decision on the case. 38 U.S.C. §§ 5904 and 5905. As my testimony demonstrates, obtaining a “first final decision” from the Board is a lengthy and unnecessarily protracted process. Consequently, under the current statutory scheme, a claimant’s first opportunity to compensated counsel occurs only after the first final decision of the Board. As a result, a claimant’s right to the compensated assistance of counsel occurs after the evidentiary record is closed.

The right of a claimant to hire counsel is further limited by the requirement that the claimants retain the attorney within one year of the final Board decision. 38 U.S.C. § 5904(c)(1). As a practical matter, however, if the attorney is not hired within 120 days of the final Board decision, the right to appeal the Board decision to the CAVC is extinguished. In order to preserve the claimant’s right to judicial review, the claimant must appeal the Board decision within 120 days of the Board decision. 38 U.S.C § 7266(a). Further, if a claimant does not hire counsel within one year, then any further

efforts involving the same claim or claims prohibit the compensation of an attorney until after another final decision of the Board of Veterans' Appeals. As noted above, the Board routinely commits errors in its decisions and if the claimant does not appeal that case to Court, the matter ends.

On behalf of NOVA, I would like to thank the subcommittee for the opportunity to present this testimony. Oversight of the VA adjudication process is critical and necessary to ensure that the intent of Congress to compensate veterans and their families for all benefits which can be supported in law is not thwarted. NOVA believes that the most effective means of ensuring that the VA provides all benefits which can be supported in law, is to permit all claimants the right to hire an attorney at the initial claims process. The current system merely reinforces the adjudicatory errors of the VA and compounds needless delay of these claims. NOVA submits that an amendment to 38 U.S.C. §§ 5904 and 5905 to permit legal representation at the initial claim level is necessary.