

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

TESTIMONY CONCERNING THE UNDER-PERFORMING
REGIONAL OFFICES OF THE DEPARTMENT OF VETERANS
AFFAIRS

June 2, 2011



STATEMENT OF
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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.
BEFORE THE SUBCOMMITTEE
ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
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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, Inc. ("NOVA") concerning the under-performing Regional Offices ("ROs") of the Department of Veterans Affairs ("VA").

NOVA is a not-for-profit § 501(c)(6) educational membership organization incorporated in 1993. Its primary purpose and mission is dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the VA, the Court of Appeals for Veterans Claims ("CAVC"), and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written amicus briefs on behalf of claimants before the CAVC, the Federal Circuit and the Supreme Court of the United States of America. 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 as well as my own nineteen-year experience representing claimants before the VBA.

THE ROs HAVE A LONG HISTORY OF REFRACTORY PROBLEMS

NOVA's previous testimony, together with the June 2009 "Veterans Benefits Administration Compensation and Pension Claims Development Cycle Study" by Booz Allen Hamilton ("the Booz Allen report") and many reports from the United States Government Accounting Office and by Department of Veterans Affairs Office of Inspector General have detailed the persistent problems of the Veterans Benefits Administration ("VBA"), including:

- an antiquated and insecure paper file;
- inadequately trained employees;
- ineffective supervision;
- inadequate metrics leading to inability to determine whether work is performed correctly;
- a work credit system which induces employees to rate claims which have not been properly developed;
- an institution which is more concerned with finding fraudulent claims than timely granting meritorious claims; and

an institution which is so out of control that it takes years to promulgate needed regulations and which is incapable of effectively communicating policy to its employees.

Indeed, in a recent decision, the United States Court of Appeals for the 9th Circuit found that the VA's dilatory adjudications of veterans' claims denied veterans due process and that time limits for adjudicating claims must be imposed by the courts. *Veterans for Common Sense v. Shinseki*, ___F.3d___ (9th Cir. 2011) (No. 08-16728).

Because the ROs are laboring under an avalanche of claims and employees are judged by a work credit system which rewards paper pushing over efficient, effective and accurate claims adjudication (see, Booz Allen report, p.16) the number of pending appeals continues to increase, thus adding to the frustrations of veterans and other claimants. During the past year, from May 22, 2010 to May 31, 2011, the VBA's Monday Morning Workload Reports show a 23% increase in pending appeals from 193,134 to 236,141. Equally startling is the fact that pending claims have increased by 54% and those claims pending over 125 days have increased by 126%.
<http://www.vba.va.gov/REPORTS/mmwr/historical/2010/index.asp>;
<http://www.vba.va.gov/REPORTS/mmwr/index.asp>.

There is no one legislative, nor one administrative, initiative which can rearrange and reconstitute the VA into an efficient and effective claims processing organization, however, NOVA has some suggestions which might yield positive results.

ALTHOUGH THE PRIOR ATTEMPT BY CONGRESS TO IMPROVE THE WORK CREDIT SYSTEM AND VA TRAINING AND SUPERVISION HAS NOT YIELDED RESULTS, IT SHOULD NOT BE ABANDONED

During October 2008, Congress passed P.L. 110-389, which required, among other things, that the VA implement an employee certification exam, that the Comptroller General of the United States evaluate the VA's employee training program and that the VA study the effectiveness of the current employee work credit system and work management system, consider methods for improvement, and report back to Congress.

It is apparent that these tasks have not been accomplished in over 2½ years and they will not be completed without firm direction from Congress. By way of example, the VA had not issued proposed substitution regulations, which were also required by P.L. 110-389, until February 2011. This followed, and was the result of, a lawsuit which NOVA filed in the United States Court of Appeals for the Federal Circuit, to compel compliance with the Congressional directive.

Congress was wise to pass this legislation, and enforcement should be pursued.

THE VA MUST BE REQUIRED TO MEASURE AND TO REPORT OBJECTIVE ACCURACY

Reports from the United States Court of Appeals for Veterans Claims show that over 70% of the appeals which are decided on the merits result in the determination that the VA's actions were

not substantially justified. This results in punishment to the VA by an award of Equal Access to Justice Act fees to the veteran. http://www.uscourts.cavc.gov/annual_report/. Similarly, in the Board of Veterans Appeals, almost 70% of the appeals are allowed or remanded, and when the veteran is represented by an attorney, the positive outcome goes up to 75%. http://www.bva.va.gov/Chairman_Annual_Rpts.asp.

In the face of this clear showing of RO and BVA accuracy of only 30%, the VA continues to rely upon internal estimates showing accuracy of 80% or more.

Congress should require the VA to include remand and reversal rates by the CAVC and by the BVA in the Monday Morning Workload reports and should further require that tracking of claims through the appeal process be part of the VA's employee training program. This would allow a true picture of accuracy and provide relevant on-the-job training.

PRE-ADJUDICATION REVIEW AND CONFERENCES CAN IMPROVE THE VA'S ACCURACY

Apparently, as a result of the VA's awareness that improperly developed claims lead to erroneous decisions and that, in the rating process, the most time is consumed by claim development, the VA continues to try different plans to generate "fully developed claims" prior to rating. Remarkably, the VA has never advocated for veterans to have the right to hire a lawyer, for pay, during the time that the claim is initially filed and developed, to assist in the claim development. It is equally remarkable, that the VA appears to be opposed to working cooperatively with the veteran and his or her representative to obtain the most complete claim development prior to adjudication.

Therefore, 38 U.S.C. § 5103(a) should be amended to require the VA to prepare a claim-specific pre-adjudication review of the claim which should state precisely what additional evidence is necessary to substantiate the claim. That written information should also be communicated, if possible, by phone, to the veteran and to the veteran's representative, during a pre-rating decision conference. The result of providing for a meaningful Veterans Claims Assistance Act notice conference, rather than a useless generic notice, and of working cooperatively with the veteran and with the veteran's representative will be to eliminate avoidable remands and avoidable reversals resulting from inadequate or hasty VA claims development. It will also result in some unjustifiable claims being withdrawn.

ELIMINATION OF THE SUBSTANTIVE APPEAL CAN SAVE TIME AND SIMPLIFY THE PROCESS

Presently, in order to place an unfavorable rating decision into appellate status, a veteran must file a Notice of Disagreement ("NOD"), with the RO, showing an intent to appeal and, after receiving a Statement of the Case from the RO, which in many cases merely restates the information contained in Rating Decision, the veteran must file a second document to perfect the appeal.

It would be quicker, and in most situations would eliminate the possibility of the veteran becoming enmeshed in a procedural trap, to eliminate the second step. Thus 38 U.S.C. §§ 7105 (a) and 7105A should be amended to eliminate the need for a veteran to submit a “substantive appeal” or a “formal appeal” as is presently required after the NOD is filed. Instead, once a veteran submits an NOD, 60 days would be provided to allow for the submission of additional evidence, and, so long as no additional evidence is submitted, the appeal would be directed to the BVA for *de novo* review. However, in cases where the claimant requests a hearing or submits additional evidence, then the appeal will remain at the RO for a new decision, which addresses the additional evidence and/or argument, and either confirms the prior denial or grants in whole or in part the relief requested.

CONSIDERABLE TIME AND MONEY COULD BE SAVED BY THE VA BY ELIMINATING UNNECESSARY EXAMS

Presently, the VA will delay rating a claim until after reviewing a VA generated Compensation and Pension (“C&P”) exam even if there is a suitable private exam report in the file. Even if a veteran submits a complete and well-reasoned supporting medical opinion from a treating or examining physician, the VA’s general procedure is to request yet another medical examination, referred to as a C&P examination. The VA physicians who provide these medical examinations are employed by VBA, which is separate and distinct from the VA physicians who provide medical care to veterans and are employed by the Veterans Health Administration (VHA). Last year, a report by the VA’s Inspector General revealed that, although C&P exam reports are required to be returned to the RO within 30 days, there are times when it takes over 180 days for the RO to receive the exam report. “Audit of VA’s Efforts to Provide Timely Compensation and Pension Medical Examinations”, March 17, 2010, 09-02135-107, p.5.
www.va.gov/oig/52/reports/2010/VAOIG-09-02135-107.pdf

NOVA recommends amending 38 U.S.C. § 5125 to eliminate waiting for those unnecessary medical exams. The title of Section 5125 should be amended to read “Acceptance of Reports of VHA and Private Physician Examinations.” The body of the statute should be amended to read as follows: “For purposes of establishing any claim for benefits under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.], a report of a medical examination administered by a VHA treating physician or a private treating or examining physician that is provided by a claimant in support of a claim for benefits, including a claim for increased benefits, under that chapter, if requested by the claimant, shall be accepted without a requirement for confirmation by an examination by a VBA physician, so long as the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.” By doing this, the VA would be able to diminish delays and save money by eliminating unnecessary medical exams and the subsequent C&P exam reports.

DRASTIC MEASURES IN THE NATURE OF A PARADIGM SHIFT ARE REQUIRED TO SOLVE THE VA’S BACKLOG

In addition to the suggestions provided to eliminate unnecessary delays and to improve the

decision making procedure, nothing short of a major change will enable the VA to get control over its burgeoning backlog which is now over one million claims.

The VA must change its culture to operate under the assumption that veterans, especially combat veterans, file meritorious claims which should be fully and quickly granted. Such a change in outlook would naturally lead to a triage system for claims management which would dramatically cut backlogs of initial claims and appeals.

The creation and utilization of new presumptions of entitlement to benefits would eliminate the need for unnecessary and time consuming development of evidence regarding the incidents of military service for all those who were deployed to a war zone regardless of their military occupational specialty or place of assignment within the war zone. Thus, for example, anyone who was deployed to a war zone, whether during WWII, Korea, Vietnam, the Gulf War or the GWOT who is subsequently diagnosed with PTSD should have the sole inquiry, during the rating stage of their claim, concentrate on the severity of their symptoms. Anyone who is diagnosed with a medical condition while on active duty and who is presently being treated for that condition should not need to prove a medical nexus between the conditions. Also, veterans who are receiving Social Security Disability or Supplemental Security Income benefits based on conditions which are related to service should be presumed to be unemployable.

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Since 1992, Mr. Cohen has been representing veterans before the United States Court of Appeals for Veterans Claims ("CAVC") and the Department of Veterans Affairs (VA). In that time, he has successfully represented veterans in Court and before the Department of Veterans Affairs. In addition, Mr. Cohen has represented veterans before the United States Court of Appeals for the Federal Circuit. In November 2006, Mr. Cohen was elected to serve as the President of the National Organization of Veterans' Advocates, Inc. ("NOVA") and he continued to serve in that capacity until December 2007. On January 1, 2008 he began serving as NOVA's Executive Director. Mr. Cohen has presented at Judicial Conferences of the CAVC and the Federal Circuit. He is a member of the CAVC Bar Association and of the Federal Bar Association, and has been accredited to represent veterans by the VA.

Education: B.M.E., June 1968, the City University of New York, School of Engineering;
J.D. June 1973, Fordham University School of Law

Court Admissions

NY 1974
WV 1979
Supreme Court of United States of America 1977
United States Court of Appeals for the Federal Circuit 1994
United States Court of Appeals for Veterans Claims 1993
United States Court of Appeals for the 2nd Circuit 1974
United States Court of Appeals for the 4th Circuit 1985
United States District Court for the Southern District of New York 1974
United States District Court for the Southern District of West Virginia 1979
United States District Court for the Northern District of West Virginia 1979

Associations and Organizations

American Bar Association
CAVC Bar Association
Federal Bar Association
West Virginia State Bar
National Organization of Social Security Claimants Representatives
National Organization of Veterans' Advocates, Inc.

Neither Mr. Cohen nor NOVA have received any federal grant money or contract work in the last two years related to this testimony.