

**STATEMENT OF DIANE BOYD RAUBER
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BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
CONCERNING
NAVIGATING THE APPEALS SYSTEM FOR VETERANS CLAIMS**

JANUARY 22, 2015

Chairman Abraham and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our testimony regarding the veterans' dilemma of navigating the appeals system for veterans' claims within the Department of Veterans Affairs (VA). PVA would also like to take this opportunity to congratulate you Mr. Chairman as you assume the leadership of this critical Subcommittee. PVA looks forward to a productive relationship during the 114th Congress.

Paralyzed Veterans of America was founded in 1946 by a small group of returning World War II veterans, all of whom had experienced catastrophic spinal cord injury and who were consigned to various military hospitals throughout the country. Realizing that neither the medical profession nor government had ever confronted the needs of such a population, these returning veterans decided to become their own advocates and to do

so through a national organization. To achieve its goal over the years, PVA has established ongoing programs of research, sports, advocacy, barrier-free design and access, and a program of service representation to secure our members' and other veterans' benefits. In fact, PVA has a highly trained force of over 70 service officers who spend 2 years in specialized training under supervision, to develop veterans' claims both for our own members and non-member clients. In addition, since September 2011, PVA has maintained a national Appeals Office staffed by attorneys and legal interns to address the ongoing, and increasing, appeals challenges faced by veterans seeking to have their claims adjudicated.

There are many problems with the VA appeals process. Some are very straight forward, while others are intransigent and self-defeating. These problems have become even more obvious with VA's singular focus these last few years on reducing the claims backlog. Unfortunately, it is PVA's opinion that the Veterans Benefits Administration (VBA) has simply moved these claims downstream and into the appeals process to manipulate the numbers and feign success on initial claims decisions.

One of the largest issues facing the Board of Veterans' Appeals (Board) is the high volume of remanded appeals. In FY 2014, the Board decided 55,531 appeals. Of those decisions, 25,574 (45.5 percent) had one or more remanded issues. Common reasons for remands include obtaining a new VA examination or opinion and seeking additional service treatment records or updated medical records. One reason so many of these appeals are remanded is due to the Veterans Benefits Administration (VBA) and the Board's predilection for favoring VA examinations over most others. These entities often require a VA examination, often from a Compensation and Pension (C & P) examiner or nurse practitioner, before rendering a decision. This action occurs even when favorable private medical evidence, treatment notes, or opinions from VA treating physicians are in the record. In PVA member cases, the record often includes extensive medical information from a Spinal Cord Injury (SCI) center physician who has specialized expertise and an intimate knowledge of our member client's medical condition. Too often, the opinion of a C & P examiner, who only examines the veteran

once and is also tasked with reviewing a voluminous claims file prior to the examination, will be weighed more heavily than the SCI center experts who regularly treat the veteran.

PVA has testified on this issue on numerous occasions. Not only do additional requests for VA examinations and opinions delay the veteran's individual appeal, it slows down the overall claims process when unnecessary resources are used to seek medical information the VA already has in its possession. *Douglas v. Shinseki*, 23 Vet.App. 19, 26 (2009) ("the duty to gather evidence sufficient to render a decision is not a license to continue gathering evidence in the hopes of finding evidence against the claim"). At times, these requests are also in conflict with the "benefit-of-the-doubt" doctrine. According to *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990) and numerous other cases decided by the U.S. Court of Appeals for Veterans Claims, "the preponderance of evidence must be against the claim for benefits to be denied." Where there is an approximate balance of positive and negative evidence, the benefit of the doubt must be given to the veteran. More cases could be resolved favorably if this doctrine were applied correctly by VA.

In addition, when an appeal is remanded, it typically returns to VBA jurisdiction through the Appeals Management Center (AMC), a separate entity where assigned VBA staff members are tasked to remedy flaws in claims development identified by the Board. It is at this step where many appeals idle on a procedural "hamster wheel" due to a failure to comply with the remand order. In too many cases, the AMC fails to ensure the specific orders defined by the Veterans Law Judge (VLJ) in his or her opinion are followed and completed.

Some specific examples of defective remands which frequently are not corrected by the AMC prior to the return of the appeal to the Board include the following:

- The VLJ specifies the new examination be conducted by a medical specialist, such as a neurological or orthopedist. This order instead is fulfilled by a nurse practitioner or general practitioner.
- The VLJ specifies certain questions be answered by the examiner, which are not satisfactorily completed.
- The AMC/VA fails to follow Veterans Health Administration (VHA) procedure for scheduling a VA examination, which includes the obligation to contact the veteran by phone.
- The AMC/VA fails to complete all necessary actions to ensure all relevant service treatment and VA medical records are associated with the file.

This failure to ensure compliance results in a premature return of the appeal to the Board, and an automatic request by the representative for another remand under U.S. Court of Appeals for Veterans Claims precedent. A remand confers on a veteran, “as a matter of law, a right to compliance with the remand orders.” *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Furthermore, the Secretary has a “concomitant duty to ensure compliance with the terms of the remand” and “the Board itself errs in failing to ensure compliance.” As a result, it is not uncommon for remanded appeals to be remanded more than one time, in some instances multiple times, adding significant delay before the veteran receives a final decision from the Board.

Remanded appeals often take a year or more to process through the system and return to the Board. If 45 of every 100 decisions are remanded each year for one or more issues to be further developed and readjudicated, it stands to reason that the number of appeals will only increase, as each of those 45 appeals must return to the Board at a later date for further review and adjudication while original appeals are continuing to be certified to the Board. Those original appeals linger while the older remanded appeals with earlier docket dates must be decided.

There are some solutions to these challenges. As PVA has testified, a greater reliance on private medical evidence or VA treating medical professional evidence and more

consistent application of benefit-of-the-doubt doctrine could greatly reduce remands. A review of examination scheduling procedures to reduce the numbers of remands related to inadequate notice would also be helpful, as would a review of AMC training, procedures, quality review, and accountability to ensure a consistent and proper handling of appeals. When the Board determines a veteran is entitled to advancement on the docket due to age, financial hardship, or serious illness, that designation should be honored and enforced on remand. PVA has participated with its VSO partners, as well as VBA and Board administration, in a working group on how an expedited appeals pilot program might allow certain appeals to be decided in a more timely fashion. It is the intent of PVA and our VSO partners to support the introduction of bipartisan legislation to expedite appeals, which will subsequently free up resources to avoid the coming increased appeals backlog.

Another problem for VA appeals has been the improper utilization of Decision Review Officers (DRO). For multiple reasons, VA is using DROs to handle initial claims adjudication instead of *de novo* review of appeals. Since it is always preferable to have a claim resolved at the local level, PVA has consistently supported the strengthening of the DRO program and requiring DROs to work on appeals where their expertise can be of the best use. The DRO program allows for another *de novo* review of a veteran's claim. The veteran can also have an informal hearing at this level, which may allow for resolution of the appeal before it is certified to the Board. It is critical that the DRO program be continued and expanded if possible, and that DROs, as the more experienced VA personnel, only work on appeals and not initial claims adjudication.

Another source of delay for veterans, and one that could be easily corrected, is that there is no direct avenue for substitution when a case is already pending at the Board. In 2008, Congress passed legislation that allows a person eligible to receive accrued benefits due to a claimant at the time of his or her death to file to substitute in the appeal within a year of death. Regulations implemented by the Secretary require the eligible person to file to substitute at the agency of original jurisdiction. If the appeal is already at the Board for any step in the process when the veteran dies, it will be

dismissed by the VLJ for lack of jurisdiction. The appeal virtually stops in its tracks until the eligible individual files to substitute, at which time the appeal must come back to the Board to complete the process. This should be a simple fix by implementing procedures so an eligible party can substitute when the case is at the Board to save time and continue the appeal in a timely fashion. This would not only speed up this appeal, but would help reduce the appeals backlog with a common sense change.

An unexpected challenge has occurred in the area of technological improvement. PVA was very supportive of VA's adoption of the Veterans Benefits Management System (VBMS). This system has been helpful in allowing VA to act quickly on less complicated claims. While these are not claims normally filed by those with catastrophic disabilities, PVA has always supported timely resolution of less complicated cases to free up adjudicators to handle more complex claims. Unfortunately, in the appeals arena, VBMS lacks "appeals-friendly" features to allow it to be efficient. As more and more appeals at the Board are being worked in a "virtual" or paperless format, representatives must use the VBMS system to review and file their briefs on behalf of clients. The system lacks features that allow for easy review of the file, adding to the time needed to properly present a veteran's appeal. The Board's administration has included VSOs co-located at the Board in meetings to provide input on ideas to improve the system specifically for appeals work. We anticipate VSO suggestions will be included in future upgrades to improve VBMS for appeals work. But this will only occur if the Board is provided with adequate funds early enough in the development process to accelerate VBMS improvements and continues to engage VSOs in that process. If not, as the backlog of initial claims is reduced, the backlog will simply move into the appeals realm. This will lead to continued accusations of VA's inability to provide benefits in a timely manner and questions of why VA did not see the appeals backlog coming and work to improve its processes before it became a crisis.

Finally Mr. Chairman, it is not all a VA problem. As stated earlier, PVA has many service representatives and spends a great deal of time, funds, and effort on ensuring they accomplish their duties at a high level of effectiveness. However, it is important

that veterans and their representatives also share responsibility when appeals arrive at the Board without merit. A disability claim that is denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf, or compels an accredited representative to do so with no legal basis for appealing, that appeal clogs the system and draws resources away from legitimate appeals. The Board is bound by the law and is without authority to grant benefits on an equitable basis. *Harvey v. Brown*, 6 Vet.App. 416, 425 (1994); *see also* 38 U.S.C. § 503. Since 2012, PVA has taken steps to reduce frivolous appeals by having claimants sign a "Notice Concerning Limits on PVA Representation Before the Board of Veterans' Appeals" at the time they execute the Form 21-22 Power of Attorney (POA) form. PVA clients are notified at the time we accept POA that we do not guarantee we will appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal, in keeping with VA regulations. Furthermore, improved, case-specific notice of the initial decision should be provided to the veteran, so he or she can make a more informed decision regarding the merits of an appeal. PVA also takes issue with several provisions adopted by the VA in its new regulations governing standard claims and appeals forms. In particular, some of the new procedures appear to make it more difficult for the veteran's representative to obtain information regarding the claim and confer with the client to ensure effective representation.

Mr. Chairman, we would like to thank you once again for allowing us to address this truly important issue. The challenges faced by veterans who file claims for benefits from VA are often enormous. Over the last several years as so much attention has been paid to the backlog in claims, veterans appeals have grown significantly. Just moving the claims downstream, while patting themselves on the back for success in reducing the backlog, is a meaningless gesture by VA and a disservice to those who sacrificed so much for this nation. This is particularly true when considering those with catastrophic disabilities and complex claims.

I would be pleased to take any questions.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2014

No federal grants or contracts received.

Fiscal Year 2013

National Council on Disability — Contract for Services — \$35,000.

Disclosure of Foreign Payments

“Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies.”

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She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney at the National Veterans Legal Services Project, representing veterans and their families before the Board and Court. She has presented at numerous veterans' law conferences, on topics including successful advocacy and military history research.

She also served as a consultant to the American Bar Association (ABA) Center on Children and the Law. In this capacity, she wrote and edited numerous ABA publications on an array of child welfare issues, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communications Disorders from Penn State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America. She is a member of the Maryland and District of Columbia Bar Associations, as well as a member of the National Organization of Veterans Advocates.