

TESTIMONY

OF



JIM VALE, DIRECTOR

**VETERANS BENEFITS PROGRAM
VIETNAM VETERANS OF AMERICA**

FOR

**THE SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES**

REGARDING

**VETERANS DILEMMA: NAVIGATING THE APPEALS
SYSTEM FOR VETERANS CLAIMS**

JANUARY 22, 2015

Vietnam Veterans of America

House Veteran Affairs Committee
Subcommittee on Disability
Assistance/Memorial Affairs
January 22, 2015

Good morning Chairman, Ranking Member and Members of the Subcommittee, Vietnam Veterans of America (VVA) thanks you for the opportunity to present our views regarding, “Veterans Dilemma: Navigating The Appeals System For Veterans Claims.”

STATEMENT

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It is a well established principle that VA’s mission is to provide benefits to veterans and their families is a non-adversarial, pro-claimant system, as desired by Congress. When Congress enacted Judicial Review in 1988, it did so with the clear intent to ensure a beneficial non-adversarial system of veterans benefits. The legislative history specifies:

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95.¹ VVA supports modernizing the VA system so that all veterans receive more timely and accurate adjudications of their claims and appeals, and improving the efficiency of the claims adjudication and appeals process. Nonetheless, these changes cannot come at the expense of due process and

¹ See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating, in the context of statutory interpretation, “interpretive doubt is to be resolved in the veteran’s favor”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that “[t]his court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant” and describing “the historically non-adversarial system of awarding benefits to veterans”); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (describing “the pro-claimant environment created by the general VA statutory scheme”); *Moore v. West*, 13 Vet. App. 69, 74 (1999) (Steinberg, J., concurring) (describing “the pro-claimant nature of the VA adjudication process.”).

abandoning major aspects of the “pro-claimant” system designed by Congress.

The VA’s motto is *“to care for him who shall have borne the battle and for his widow, and his orphan.”* In practice, however, it appears the mission for some VA bureaucrats is to limit the government’s liability to our nation’s veterans by formalizing the claims and appeals processes to the point where benefits are unfairly restricted.

Veterans should not have to give up any of their rights in order for VA to process their claims and appeals more quickly. In the past some VBA executives have gone as far to suggest reducing the Notice of Disagreement (NOD) period from 1 year to just 60 days, change the BVA standard of review from “De novo” to “Appellate” review, close the veteran’s record at the BVA, and eliminate the Decision Review Officer (DRO) program entirely. None of these suggestions actually benefits veterans, but they do help make VA’s job easier.

VVA has a better solution. In order to reduce the size of the appeals backlog and improve the VA appeals process, VVA suggests the following:

- I. Improve the Notice of Disagreement (NOD) Form
- II. Retain 38 C.F.R. § 3.157
- III. Fix the VBA Work Credit System
- IV. Improve Training of VBA Staff
- V. Continue VSO Access to VBA Raters and Coaches
- VI. Implement “Office Hours” at all VA Regional Offices
- VII. Expand the DRO Program (and fence off DROs)
- VIII. Increase the number of VLJs at the Board of Veterans Appeals
- IX. Make BVA Statistics More Transparent
- X. Modification to proposed Fully Developed Appeal (FDA) process
- XI. Appoint a candidate for BVA Board Chairman who can be confirmed by the Senate confirmation process

I. IMPROVE THE NOTICE OF DISAGREEMENT (NOD) FORM

On October 31, 2013 the Veterans Benefits Administration (VBA) Compensation Service published in the Federal Register its proposed rule to RIN 2900-AO81—Standard Claims and Appeals Forms (see: http://www.va.gov/ORPM/docs/20131031_AO81_StandardClaimsandAppealsForms.pdf).

VA received sixty-four comments about this proposed rule change; most were negative (See: <http://www.regulations.gov#!documentDetail;D=VA-2013-VBA-0022-0001>).

Unfortunately, VA ignored most of these comments. VA's final rule was published in the Federal Register on September 25, 2014 (See: http://www.va.gov/ORPM/docs/20140925_AO81_StandardClaimsandAppealsForms.pdf).

Although VVA is not opposed to the VA using standardized forms to obtain efficiency gains in claims and appeals processing, we are opposed to VA abridging veterans' rights in the name of efficiency.

VA's final rule to RIN 2900-AO81 mandates the use of the Notice of Disagreement (NOD) form (VA Form 21-0958). VVA is not opposed to the use of this form, but we object to some of the questions on it.

a) Box 13

In box 13 the VA asks the veteran:

“Would you like to receive a telephone call or email from a representative at your local regional office regarding your NOD?”

There is space to check “Yes” or “No.” **Yet NOWHERE on the form or in the form instructions does the VA direct the veteran to contact his or her appointed VSO or attorney representative for help.**

Last year a veteran didn't talk to his VVA Service Officer and checked “Yes” to box 13 on the NOD form. Later, he received a phone call from his VA Regional Office. The VA employee provided incorrect information on what could be appealed, and convinced the veteran to drop his appeal.

Just last month there was a newspaper article about Vietnam Veterans being called by VA employees from the Houston VA Regional Office and pressured to drop their claims. See:

Jeremy Schwartz, Austin American-Statesman, *Statesman Investigates: Veterans Affairs Backlog- VA employee: Vets pressured to drop claims to improve giant backlog*, Dec. 13, 2014 (Available: http://www.mystatesman.com/news/news/local-military/va-employee-vets-pressured-to-drop-claims-to-impro/njRyM/?icid=statesman_internallink_mystatesmaninvitationbox_feb2014_99cday_pass_post-purchase#95e4ad29.3918432.735618).

Field Code Changed

This is unethical. ***The VA should not be calling veterans to talk them out filing their appeals.*** Instead, the VA should be directing veterans to contact their appointed representative for help and not interfere with the VSO-client or attorney-client relationship. Veterans should be advised to find an accredited representative.

Congress intended this to be a non-adversarial process. VVA now advises veterans to check “NO” to box 13, and contact their accredited service officer for assistance with filing their appeal, and in the event they receive a call from the VA about their appeal, they should *immediately* tell the VA employee they are represented and direct the caller to contact their appointed representative.

b) Box 15(c)

VVA is opposed to box 15(c), which asks the veteran what the percent of disability should be, “Percentage (%) evaluation sought (if known).” *This is a trap.* Most veterans are not medical or legal experts, and they do not understand the VA Rating Schedule.

Legally, it doesn’t matter what the veteran thinks the percentage should be. What matters is what the evidence in the record supports.

For example, a veteran files a service-connected claim for PTSD and is awarded a 30% service-connection by the Regional Office (when in fact the

evidence in the record supports a 70% rating), and the veteran writes 50% in box 15(c) in the NOD form. Later, the VA awards 50% on appeal. Will this be considered a full grant of benefits for this claim? If the answer is yes, then the veteran is being shortchanged by VA.

VVA believes the better way to reduce the appeals backlog is to follow the current law and rate a veteran based on the evidence of record, and not shortchange or bargain with the veteran. Even though VA officials state box 15 (c) is optional, VVA urges that it be removed from the NOD form. Until that happens, VVA recommends veterans write “MAX” rather than a numerical percentage.

c) Missed Opportunity- De Novo Election

The VBA missed an opportunity to shave two months off the processing time for veterans’ appeals when the NOD form was developed. Currently, when a veteran submits an NOD, the VA regional office must respond by mailing a De novo review election letter, which asks the veteran if he or she wants the case reviewed by a Decision Review Officer (DRO). If that option had been added to the NOD form, election letters would no longer be necessary. VVA strongly urges the VA to add the De novo election to the NOD form.

Removal of block 15 (c) would provide the additional space needed to add the De novo review election to the NOD form.

II. RETAIN 38 C.F.R. § 3.157

Although the title of RIN 2900--AO81 is “Standard Claims,” the scope of this regulation change goes well beyond just forms. It is an attempt to limit large retroactive awards in the guise of “efficiency.”

In this regulation change VA is deleting 38 C.F.R. § 3.157, which provides that reports of examination or hospitalization can constitute informal claims to increase or reopen. VA’s justification: *“The idea that certain records or statements themselves constitute constructive claims is inconsistent with the standardization and efficiency VA intends to accomplish with this final rule.”*

In practice, this will prevent veterans from being able to receive retroactive awards over a year where medical evidence is identified in the record that was missed as informal claims by prior VA adjudications. This change has absolutely nothing to do with standardized forms; it's all about VA limiting the government's liability to veterans by eliminating large retroactive awards won on appeal from informal claims.

If VA succeeds in eliminating 38 C.F.R. § 3.157 through its agency rule making process, then Congress should act immediately through legislation to require VA to accept reports of examination or hospitalization as informal claims.

III. FIX THE VBA WORK CREDIT SYSTEM

The manner in which VBA managers "grade" their raters still needs to be re-examined, inasmuch as the current work credit system puts a premium on volume and on an increase in speed, at the cost of not doing it right the first time. The result? An unacceptably high number of appeals due to adjudication mistakes caused by shortcuts and gaming of the VBA Work Credit System.

It shouldn't be easier and quicker to deny a claim than to grant a claim. VA still has to fulfill its statutory Duty To Assist (DTA).

What's the answer? VBA employees should not get work credit for taking shortcuts. For example, there should be no work credit granted for denying a claim without first getting the evidence needed to comply with the DTA (which will reduce the number of denials and therefore the number of appeals in the system).

VBA needs to include a quality component to the work credit system, and for each RVS (rater), track the number of rating decisions that are successfully appealed. Raters who have a high rate of decisions overturned on appeal need to be retrained, reassigned, or terminated. VBA needs a revised standard for adjudication of claims that does not credit employees for speed and volume but rather on the efficiency and accuracy of the results of their adjudication.

IV. IMPROVE TRAINING OF VBA STAFF

Improved training will help reduce the number of appeals in the VA claims system. VBA's "one-sized fits all" training is not working. Although VBA has made great progress with the implementation of CHALLENGE training for new VSR and RVSR staff, it needs to continue to use and expand quality reviews in the field to identify and track training needs so mistakes can be used to create customized and personalized training for each employee involved in the adjudication process.

VVA supports and commends VBA's efforts to improve its training program. However, training is not only for new raters – and accredited veterans' representatives – it should also be required for all VBA employees and management involved on the benefits side of the administration. Just as VSRs, RVSRs, DROs, accredited service officers, and accredited attorneys must all undergo initial and recurring training and recertification, so should all VBA RO employees, including all supervisors, managers, and directors.

V. CONTINUE VSO ACCESS TO RATERS AND COACHES

VBA is in the process of developing a new "workflow" system called the **National Work Queue (NWQ)** to help even the workload across 58 Regional Offices as rating and appeals capacity is not uniform across the country- there are peaks and valleys in supply and demand. The NWQ will electronically redistribute claims to reach wherever the rating capacity is across all 58 ROs. VSOs have been advised by VA management that the NWQ will be expanded to include appeals later this year.

The problem with redistribution is that it divorces Veterans from their VSO. For example, not every VSO has staff at every RO, and VSOs could find themselves unable to dispute bad rating decisions for claims submitted at their local RO that are adjudicated at other ROs through the NWQ. If VBA does not provide sufficient functionality for VSOs to informally dispute bad rating decisions adjudicated at ROs where the VSO does not have staff, then the NWQ will result in *more* appeals being filed. NWQ should not be permitted to redistribute to an office not represented by the VSO.

Furthermore, if VSO physical access to raters and coaches is restricted or removed then bad rating decisions that would normally be resolved informally at the lowest level—with the rater or coach—will now have to be formally appealed. Simple adjudication mistakes that take just a few minutes for a rater or coach to correct will now take months or even years to overturn as the VSO will have no choice but to file an appeal.

VI. IMPLEMENT “OFFICE HOURS” AT EVERY RO

VBA should implement “office hours” at every RO so VSOs have a set time each day to informally meet with raters and coaches to raise their concerns and resolve their differences when there is a problem with a rating decision. For the raters, this would help reduce the amount of interruptions throughout the day from VSOs, and for the VSOs, time would be saved by not having to search for raters or coaches. This would be a win/win/win for the VA, VSO, and most importantly, the veteran.

VII. EXPAND THE DRO PROGRAM (AND FENCE OFF DROs)

VBA needs to expand its Decision Review Officer (DRO) program. VSOs have a lot of success getting appeals resolved at the DRO level in the appeals process. The case load for DROs is excessive, and is a significant contributing factor for some ROs taking up to 2 years to certify veterans’ appeals to the Board of Veterans Appeals (BVA). Currently, the national average for certification of appeals to the BVA is 629 days.

For example, the 16 DROs assigned to work appeals at the VA St. Petersburg office have a total backlog of 25,276 appeals, which is approximately 1,600 appeals per DRO. Veterans under VVA Power of Attorney (POA) in St. Petersburg are waiting 18 to 24 months on average for their appeals to be certified to the BVA. This is unconscionable. The ROs need to be staffed with sufficient DRO FTE to handle the size of their appeals backlog.

The form the veteran submits to appeal to the BVA is VA Form 9, but the certification process requires the DRO to sign VA Form 8 (see: <http://www.va.gov/vaforms/va/pdf/VA8.pdf>). The VA Form 8 is a checklist for the DRO to ensure all the steps have been followed. Many of these steps

could be tracked in VACOLS (BVA's appeals tracking database), and an automated Form 8 could then be generated at a push of a button and electronically signed by the DRO. Then the electronic claims folder in VBMS could be reassigned to the BVA in a matter of seconds. VVA urges VBA to automate the Form 8 process. Veterans should not have to wait 2 years for their appeal to be certified.

Additionally, too many DRO personnel are reassigned by RO management to non-appeals team functions- e.g., quality reviews, training, and rating work. DROs who adjudicate initial claims are disqualified from being the DRO for these same claims if they later are appealed. This only exacerbates the excessive DRO case loads by reducing the number of eligible DROs who can work appeals. DROs need to be fenced off so they cannot be reassigned to non-DRO functions. Congressional action may be needed if VBA leadership refuses to take appropriate steps to fence off DROs.

Congress should legislatively mandate that VA retain the DRO program, and provide through appropriations additional funding to ensure VBA has the correct number of DRO FTE it needs at each RO to adequately process veterans' appeals.

VIII. INCREASE THE NUMBER OF VETERAN LAW JUDGES (VLJs) AT THE BOARD OF VETERANS APPEALS

Currently there are approximately 67 VLJs at the BVA. In comparison, the Social Security Administration has over 500 VLJs. Given the growing veterans appeals backlog, the current number of VLJs is inadequate. This is hurting veterans. For example, the Regional Office in San Juan, Puerto Rico has a BVA appeals backlog of approximately 2,700 appeals. Yet, BVA only sends a single VLJ for one week annually to San Juan to conduct about 30 travel board hearings. At this rate, it will take 90 years to clear out this backlog. Sadly, most of these veterans will die before they see a BVA Travel Board hearing.

More VLJs are needed at the BVA to provide for more Travel Board and Video Conference hearings. VVA urges Congress provide additional funding for more VLJs at the BVA.

IX. MAKE BVA STATISTICS MORE TRANSPARENT

In the BVA Board Chairman's Annual Report to Congress, the BVA reports only the most favorable outcomes of final BVA decisions. For example, a multi-issue appeal that has 1 issue granted, 1 issue remanded, and 1 issue denied is reported as a granted claim. The remanded and the denied issues do not get reported. Consequently, the data reported to Congress by BVA is skewed.

VA must be more transparent in its data reporting to all stakeholders. VBA quality statistics are reported as claim-based and issue based. VVA urges BVA do the same by reporting its appeals outcomes by claim and by issue.

In addition, the time an appeal is with a BVA Veteran Law Judge (VLJ) should be tracked and made available to VSOs, veterans, and to this committee, so VLJs can be held accountable in the event cases are held in chambers too long.

X. MODIFICATION TO PROPOSED FULLY DEVELOPED APPEAL (FDA) PROCESS

The proposed FDA process promises to deliver a quicker BVA decision to the veteran, but at the cost of waiving the De novo review, waiving the BVA hearing, and closing the record at the BVA. Veterans should not be required to waive due process rights in order to get a quicker decision. Here again, VA is attempting to implement change to make its job easier all at the expense of Veterans. If a veteran, after submitting a FDA, submits any evidence, he or she will be kicked out of the FDA program, and will go to the back of the line and start all over at the beginning of the traditional appeals process, and wait 3 years or longer for a BVA decision. Consequently, VVA is opposed to the FDA process in its current form.

FDA is claim-based, not issue-based. Veterans cannot split their appeal by issue. Modifications to the FDA, such as allowing veterans to participate in the FDA, by issue, rather than by claim, would make the FDA beneficial to

Vietnam Veterans of America

House Veteran Affairs Committee
Subcommittee on Disability
Assistance/Memorial Affairs
January 22, 2015

more veterans since not every issue in every appeal is suitable for FDA placement.

Once the NWQ is developed, VBA and BVA should have the capability to divide up appeals by issue. VVA suggests the FDA process can be enhanced by making it issue-based rather than claim-based.

XI. APPOINT A CANDIDATE FOR BVA CHAIRMAN WHO CAN BE CONFIRMED BY THE SENATE CONFIRMATION PROCESS

The BVA has been without a permanent Board Chairman now for the past 4 years. Veterans need a permanent Chairman who has the organization skills, leadership, and temperament to successfully lead the BVA for the next 6 years.

CONCLUSION

In closing, on behalf of VVA National President John Rowan and our National Officers and Board, I thank you for your leadership in holding this important hearing on this topic that is literally of vital interest to so many veterans, and should be of keen interest to all who care about our nation's veterans.

VVA supports modernizing the VA claims system and the use of standardized forms, but not to the point where VA benefits are unfairly restricted. Property rights are at stake here. VA officials continue to suggest "improvements" to the appeals process that only helps make VA's job easier, at the expense of harming veterans. Veterans' rights in the VA claims and appeals processes should not be abridged, curtailed or eliminated under the guise of "administrative efficiency."

We agree with General Omar Bradley, VA Administrator (1946), "*We are dealing with veterans, not procedures; with their problems, not ours.*"

Vietnam Veterans of America

House Veteran Affairs Committee
Subcommittee on Disability
Assistance/Memorial Affairs
January 22, 2015

I also thank you for the opportunity to speak to this issue on behalf of America's veterans and I will be happy to answer any questions you may have.

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James R. Vale, Esq.

Mr. Jim Vale is the Director of Veterans Benefits Programs for Vietnam Veterans of America. He is a licensed attorney (State of Washington) and he won his first civil appeal case just one month after graduating law school. Today, he oversees VVA's network of over 900 service officers and six appellate attorneys- over the past four years veterans and dependents under the VVA POA have received over \$1.5 Billion in VA benefits.

Mr. Vale is a past-presenter at the National Organization of Veterans Advocates (NOVA), has written an article in the National Veterans Legal Services Program (NVLSP), *The Veterans Advocate*, and has a column in VVA's Magazine, *The Veteran*.

He is a former David Isbell Summer Law Clerk with the Veteran Pro Bono Consortium. He has been an accredited service officer since 2004 and has represented veterans for VA claims at the VA Seattle Regional Office and the Board of Veterans Appeals.

Mr. Vale is a disabled Navy Gulf War-era Veteran. After his military service he was employed as a Logistics Analyst on the engineering team that developed the maintenance and logistic programs for Air Force Two (C-32A), and the Navy C-40A Clipper. He earned his Bachelor of Science in Professional Aeronautics (BSPA), Master of Business Administration in Aviation (MBA) and Master of Aeronautical Science (MAS) from Embry-Riddle Aeronautical University, Master of Public Administration (MPA) and Education Specialist Degree (Ed. S.) from the University of Arizona, and Juris Doctorate (JD) from Seattle University School of Law. He is also a graduate of the VA Vocational Rehabilitation & Employment (VR & E) Program.

Vietnam Veterans of America

House Veteran Affairs Committee
Subcommittee on Disability
Assistance/Memorial Affairs
January 22, 2015

Vietnam Veterans of America
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January 22, 2015

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans' membership organization registered as a 501(c) (19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:

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