

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement of

**Diane Boyd Rauber, Esq.
Executive Director**

Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Concerning

VA Appeals Program: Examining the State of Modernization Efforts

July 13, 2021

Contact Information:
National Organization of Veterans' Advocates, Inc.
1775 Eye Street, NW
Suite 1150
Washington, DC 20006
(202) 587-5708
www.vetadvocates.org

On behalf of the National Organization of Veterans' Advocates (NOVA), I would like to thank Chairman Luria, Ranking Member Nehls, and members of the Subcommittee for the opportunity to offer our views on the VA appeals program and the state of modernization efforts.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 650 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA members represent veterans before all levels of VA's disability claims process, and specifically in a growing number of appeals at the Board of Veterans' Appeals (BVA). For the first time, in FY 2019, attorneys handled more appeals before BVA than any other service organization or listed category, at 22.76 percent. With agent representation included, the number reached 24.24 percent. U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2019* 32 (https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf). In FY 2020, this number expanded again. Attorneys handled 24.4 percent of appeals before BVA, and with agent representation, the number reached 27.1 percent. U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2020* 36 (https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf).

NOVA members also litigate cases before the CAVC and Federal Circuit, frequently resulting in significant precedential decisions. As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review).

Introduction

Congress passed the Veterans Appeals Improvement and Modernization Act (AMA) in 2017 and VA implemented it through regulation in 2019. AMA is intended to simplify the appeals process, provide veterans with more "choice and control," and eliminate effective date traps. Instead of bifurcating the appeals process between the Veterans Benefits Administration (VBA) and BVA, as occurred in the legacy system, the AMA assigned appeals solely to BVA for adjudication. Upon receiving a rating decision, a claimant can

choose to immediately appeal to BVA by filing a *VA Form 10182*. He or she is no longer required to file a notice of disagreement, wait for a VBA employee to issue a Statement of the Case (SOC), and then respond by filing a *VA Form 9* to ensure the appeal continues. NOVA long supported the elimination of this cumbersome two-step process.

Despite eliminating a two-step process and adding options to allow for preservation of an effective date to the date of the original claim, there are still challenges VA must address to truly reform the claims adjudication and appeals process. Some challenges are found within BVA and some within VBA; these two entities do not operate, and cannot be considered, in isolation. Although BVA now has sole responsibility for adjudication of appeals, VBA handles the tasks required by BVA in any remand, e.g., obtaining records or conducting medical examinations. And, while BVA remands in the AMA as compared to the legacy system are lower – for example in 2020, 44.6 percent of legacy appeal issues were remanded versus 31.3 percent of AMA appeal issues – this AMA number still represents a significant volume of remands. Department of Veterans Affairs, *FY 2022 Budget Submission, Volume III* 259 (citing comparison remand numbers) (hereinafter *Budget Volume III*) (<https://www.va.gov/budget/docs/summary/fy2022VAbudgetvolumeIIIbenefitsBurialProgramsAndDepartmentalAdministration.pdf>). Therefore, delays or inefficiencies in one entity affects the work of the other.

Challenges faced by BVA and VBA are discussed in more detail below and are intended to address the Subcommittee’s focus on **workload and performance, human capital, and technology**.

BVA must provide concrete solutions for its hearing backlog.

“The Board’s mission is to conduct hearings and decide appeals properly before the Board in a timely manner.” *Budget Volume III*, at 249. As of mid-June 2021, BVA had 90,983 total hearings pending. See Board of Veterans’ Appeals, Appeals Metrics (https://www.bva.va.gov/Appeals_Metrics.asp). Of the 92,371 pending AMA appeals, 52,650 appellants – or nearly 57 percent – selected the hearing lane in the new system. Clearly, veterans have indicated that, regardless of the system in place, they want to be heard before BVA. While BVA pivoted admirably during the COVID-19 pandemic to launch a virtual hearing platform, that platform alone is insufficient to address the growing number of requested hearings.

We understand BVA is in the process of adding more Veterans Law Judges (VLJs). In the FY 2022 budget request, BVA states it will add 35 VLJs and 100 attorneys through 2021 and 2022. *Id.* at 262. Congress should ensure BVA has the resources it needs to conduct

hearings in a timely fashion, to include funding for adequate staffing, and require BVA to provide a more detailed plan for reducing hearing inventory.

BVA needs to set timeliness goals for its hearing and evidence lanes.

From the time of the original AMA negotiations to the present, the need for timeliness goals in the hearing and evidence lanes has been discussed by VA, GAO, and stakeholders. However, to date, no such goals have been set. In the FY 2022 budget submission, BVA states: “The Board has only recently outlined strategic goals for the Evidence and Hearing Dockets in response to GAO recommendations.” *Budget Volume III*, at 259.

GAO recently highlighted the importance of such goals:

Until VA sets timeliness goals for each appeals option, the Board cannot fully assess the impact of veterans using the tele-hearing option, or the risk associated with veterans not sufficiently doing so. For example, the Board has not yet identified the number of veterans needed to use tele-hearings to sufficiently mitigate this risk and address legacy and AMA hearings workloads. In addition, VA has yet to articulate other key goals and measures, such as accuracy of decisions or veteran’s satisfaction, to create a balanced set of measures that would more fully inform VA’s assessment of risk. These elements are largely missing from VA’s October 2020 high-risk action plan provided to GAO and February 2021 report to Congress. The Board’s ability to effectively manage appeals lies, in part, in planning ahead and in proactively identifying and addressing risks that may impact the Board’s timeliness and quality of decisions and serving veterans.

Government Accountability Office (GAO), *VA Disability Benefits: Improving Planning Practices Would Better Ensure Successful Appeals Reform* (GAO 18-352) (updates to recommendations online at <https://www.gao.gov/products/gao-18-352>).

Congress should provide oversight of BVA’s timeliness goals for the evidence and hearing lanes, particularly given the large volume of hearing requests, as well as monitor the direct review lane goal of 365 days.

Despite implementation of centralized mailing, VA’s historical failure to consistently notify appointed representatives of decisions continues, clogging the system with unnecessary claims and appeals.

NOVA’s testimony regarding VA’s failure to properly mail decisions is not new. See National Organization of Veterans Advocates, Inc., *Statement Before the House Committee on Veterans’ Affairs Concerning “Appeals Reform: Will VA’s Implementation*

Effectively Serve Veterans?” 4-5 (January 30, 2018). NOVA continues to receive regular complaints from its members regarding non-receipt of decisions and other correspondence, indicating VA and BVA’s noncompliance with relevant statutes, regulations, and policy. *See, e.g.*, 38 U.S.C. § 5104 (VA is required to provide notice to representative of any decision affecting provision of benefits); 38 U.S.C. § 7104 (“Board shall promptly mail a copy of its written decision to the authorized representative at the last known address of the authorized representative”); 38 C.F.R. § 3.103 (representatives are entitled to “notice of any decision made by VA affecting the payment of benefits or the granting of relief”); M21-1, I.3.B.1 (requiring VA to mail a paper copy of correspondence to attorney or agent and to include the representative’s mailing address in the cc line). While VA launched a centralized outgoing mail system in response to a 2017 GAO report and subsequent Congressional hearing,¹ it simply has not solved the problem.

VA’s failure to address this problem was detailed in the CAVC’s recent decision in *Romero v. Tran*, 33 Vet.App. 252 (2021). Before BVA, the attorney representing Mrs. Romero indicated he was aware of at least 863 instances between July 2015 and May 2018 where VA failed to mail required copies to his office. In addition, NOVA filed an affidavit in support of the appeal indicating examples of 272 other mailing failures. BVA, in fact, made a finding in Mrs. Romero’s case acknowledging widespread mailing problems at VA. *Romero*, 33 Vet.App. at 257.

These mailing problems continue. Here are just two recent examples of VA’s failure to mail or receipt of significantly delayed mailing:

- “A client informed me of a Board decision sent to her at the beginning of June. I never received a copy and my name isn’t even cc’d on the Board letter. I’ve been informed that, for some reason, I was not listed as the POA in Caseflow – even though I am listed as the POA in VBMS – and have been since 2018.”
- On June 25, 2021, a member emailed NOVA to inform us that her office had just received a letter dated **July 27, 2018**, informing her of the certification of a client’s appeal to BVA. That notice is nearly three years late.

¹ In July 2017, the Government Accountability Office (GAO) completed a report addressing VA’s outgoing mail deficiencies. United States Government Accountability Office, Report to the Chairman, Committee on Veterans’ Affairs, House of Representatives, *Veterans Affairs: Actions Needed to More Effectively Manage Outgoing Mail*, GAO-17-581 (July 2017). The Subcommittee on Oversight and Investigations subsequently held a hearing on this report. House Committee on Veterans’ Affairs, Subcommittee on Oversight and Investigations, *VA Mail Management: The Case of the \$11,257 Package* (September 12, 2017). In addition to finding VA had an outdated mail management policy directive and handbook, GAO noted that “VA cannot ensure consistent mailing practices in its administrations and facilities because it has not provided mail managers with appropriate authority and responsibilities to oversee mail operations across the agency.” GAO Report at 7; *see also* GAO Report at 15.

Related to this issue, VA frequently fails to properly change addresses when a representative moves his or her office, resulting in mail being sent to wrong addresses **for years**. NOVA members have been instructed to inform VA's Office of General Counsel (OGC) of new addresses and inform a VA contact for updating of a "corporate database." VA representatives attended two prior NOVA conferences to provide technical assistance for attendees experiencing this problem. The M21-1 manual also provides guidance for when a VA employee finds a discrepancy between the private attorney/agent mailing address "applied by a VA system (VBMS or otherwise)" and the OGC accreditation database. M21-1, III.ii.3.C.6.c. Yet, items are still frequently mailed to addresses that have not be used for years. In addition, NOVA recently had two members – one a veteran and one a dependent of a veteran – inform us they sometimes **receive mail for a client at their home address**.

When BVA and VBA fail to properly notify or significantly delay notification, deadlines are missed. The result: additional claims and appeals are pursued through VA, BVA, and the CAVC to address these failures, resulting in yet more delay in the process at every level. Congress should renew its oversight of VA's mailing practices.

VA unnecessarily rejects, denies, or delays claims and appeals due to an overly rigid position on forms, and fails to provide claimants with useful information on how to correct filing errors.

In 2015, VA implemented a regulation requiring use of standardized forms for claims and appeals "for the purpose of improving the quality and timeliness of the processing of veterans' claims for benefits and appeals." Department of Veterans Affairs, *Standard Claims and Appeals Forms*, 79 FR 57660 (September 25, 2014). With the adoption of the AMA, several new forms were introduced and some forms were eliminated. VA employees are still struggling with which form is required in many situations. For example, NOVA members report ongoing confusion regarding whether a *VA Form 0995, Supplemental Claim*, or *VA Form 526 EZ, Application for Disability Compensation*, is required when disputing a rating or filing a new claim for an increased rating. VA continues to erroneously require a *VA Form 21-8940, Application for Increased Compensation Based on Unemployability*, even when TDIU is "part and parcel" of the claim or appeal, in violation of *Rice v. Shinseki*, 22 Vet.App. 447 (2009).

When a claimant files the wrong form or VA improperly determines a form is erroneous, the content of the notification sent to the claimant and representative is inadequate. Frequently, these letters do not even identify the action the veteran took in furtherance of a claim or appeal. Rather, the letters are generic and **typically convey that VA will take no further action**. As one advocate described: "This clearly leaves veterans and their representatives in a quandary on how to proceed. . . . In our experience – this may or may not be the second or third time a 'VA Form' has been submitted in response to VA's

correspondence.”

As with improper notification, the frequent confusion regarding form usage and erroneous rejection of forms does not improve VA efficiency, is not veteran friendly, and results in unnecessary adjudications, particularly higher-level reviews (HLRs). VA should work to ensure there is proper training on form usage and develop improved notification to veterans and their representatives when a wrong form is submitted.

VA must provide ongoing, improved training to employees to ensure better comprehension and execution of AMA procedures.

On July 7, 2021, GAO publicly released a report entitled, *VA Disability Benefits: Veterans Benefits Administration Could Enhance Management of Claims Processor Training*. GAO-21-348 (June 2021) (<https://www.gao.gov/assets/gao-21-348.pdf>). GAO made several major findings in this report, to include the following: (1) VBA has not established performance goals or fully applied other leading practices to guide its training efforts; (2) VBA has not established links to goals or documented criteria to select training delivery mechanisms; (3) Efforts to set minimum training requirements for instructors and monitor completion of all required training are incomplete; and (4) VBA has not comprehensively or systematically evaluated training effectiveness.

NOVA members report inconsistent adjudication on both a procedural and substantive basis, which reflects the training deficiencies cited by GAO, particularly as related to AMA procedures. These include, but are not limited to (1) denying supplemental claims due to a lack of “new and relevant” evidence when such evidence clearly has been submitted; (2) continuing confusion regarding AMA opt-ins from Supplemental Statements of the Case (SSOCs), with cases then being erroneously certified to BVA as legacy appeals; (3) failing to understand the claims stream, particularly when a case came through the Rapid Appeals Modernization Program (RAMP) pilot or was an AMA opt-in from an SOC or SSOC; (4) a failure to properly preserve the correct and earliest effective date; and (5) unreliable communication regarding scheduling of informal conferences.

Inconsistent results, however, are not limited to AMA-specific issues. NOVA members report frequent legal errors that apply in either system, e.g., relying on the absence of evidence as negative evidence, failing to critically assess functional loss in increased rating orthopedic cases, and not properly identifying “inextricably intertwined” issues.

Given this most recent GAO report, Congress should provide continued oversight of VA’s training programs.

VA IT systems, such as VBMS and Caseflow, must be improved and attorneys and agents need the same level of access as VSOs.

When advocates request IT enhancements to make VA systems more user friendly and efficient for representatives, VA frequently responds that it must prioritize enhancements to favor delivery of benefits, payments, and services to veterans. The two are not mutually exclusive. Practically speaking, advocates need access to VBMS and other systems, such as Caseflow, to follow the adjudication process; therefore, robust systems are necessary to ensure veterans receive competent representation and obtain all earned benefits. Competent representation, in turn, promotes efficiency within VA.

VBMS was designed as a tool primarily for VA employees to adjudicate claims; it is not an adequate case tracking tool for advocates. Likewise, in its FY 2022 budget submission, BVA noted that its case review software, Caseflow, is limited: “While great strides have been made, Caseflow provides minimum functionality to support the enterprise needs of appeals processing.” *Budget Volume III*, at 252. For example, some advocates report deficiencies in Caseflow that resulted in docketing deficiencies for appeals remanded to BVA from the CAVC.

VA should collaborate with representatives to make its systems more functional for advocates, as well as for VA employees. NOVA continues to work with VA to ensure that attorneys and agents have access that is equal to that of VSOs. Congress should support VA’s budgetary requests for updated technology to facilitate the improvement of VBMS and Caseflow, as well as other relevant databases, for all users.

Conclusion

NOVA is committed to working with this Subcommittee, VA, and fellow stakeholders to improve the appeals process. Thank you again for allowing NOVA to provide our views today, and I would be happy to answer any questions the Subcommittee members might have.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA's office at (202) 587-5708 or by emailing Diane directly at drauber@vetadvocates.org.

Diane Boyd Rauber, Esq.
Executive Director
National Organization of Veterans' Advocates, Inc. (NOVA)
1775 Eye Street, NW
Suite 1150
Washington, DC 20006
(202) 587-5708

Diane Boyd Rauber is the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA) in Washington, DC. NOVA is a not-for-profit 501(c)(6) educational membership organization, representing more than 650 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families who are seeking to obtain earned benefits from the Department of Veterans Affairs.

Prior to joining NOVA in September 2015, Ms. Rauber worked as the Associate General Counsel for Appeals with Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (Board), provided support and training to PVA's service officers, and analyzed cases for potential appeal to the United States Court of Appeals for Veterans Claims (CAVC).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before the Board and the CAVC. 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 Communication Disorders from the Pennsylvania State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, the CAVC Bar Association, and the Maryland Bar Association Veterans Affairs and Military Law Section, as well as a trustee for the CAVC Historical Society.