

**STATEMENT FOR THE RECORD
FROM BERGMANN & MOORE, LLC.
TO THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
ON
"EXAMINING THE VA APPEALS PROCESS; ENSURING HIGH QUALITY DECISION-MAKING FOR
VETERANS' CLAIMS ON APPEAL"**

November 27, 2023

Chairman Luttrell, Ranking Member Pappas, and distinguished members of the Subcommittee, the national law firm of Bergmann & Moore, appreciates the opportunity to offer this statement for the record related to the VA appeals process.

The Veterans' Affairs Board of Veterans Appeals ("Board" or "BVA") has repeatedly claimed that when the U.S. Court of Appeals for Veterans' Claims ("CAVC" or "court") remands a Veteran's case, the Veteran usually receives no additional benefits. The Board has made this claim in statements to the public and to Congress. The Board's narrative is not accurate. Verifiable data in fact shows that Veterans receive additional benefits in nearly 70% of remands following an appeal to court.

1. Background

The Board is the highest appellate body within VA. They review decisions regarding entitlement to benefits for Veterans from all offices within VA.¹ If Veterans are denied by the Board, they may appeal to the CAVC.² If a Veteran wins at the CAVC, their case is usually returned, or remanded, to the Board.³ The Board must "provide for the expeditious treatment" of these cases that have been remanded by the CAVC.⁴

¹ See 38 U.S.C. § 7104.

² See 38 U.S.C. § 7252.

³ The CAVC's Annual Reports indicate that it reversed or vacated and remanded, in whole or in part, approximately 84% of appeals in FY2022, 83% in FY2021, and 81% in FY2020. See CAVC Fiscal Year 2022 Annual Report, at 3, available at <https://www.uscourts.cavc.gov/documents/FY2022AnnualReport.pdf>; CAVC Fiscal Year 2021 Annual Report, at 3, available at <https://www.uscourts.cavc.gov/documents/FY2021AnnualReport.pdf>; CAVC Fiscal Year 2020 Annual Report, at 3, available at <https://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf>.

⁴ See 38 U.S.C. § 7112.

The Board has faced a growing number of appeals in recent years.⁵ While the Board has also grown in size to address these appeals,⁶ the Board has faced concerns from stakeholders about the length of time Veterans must wait to receive a decision.

In addressing these concerns, the Board frequently suggests their workload is adversely impacted by a large number of remands from the Court; remands which the Board asserts do not result in any change in outcome for Veterans. For example, as early as September 2022, the Board added a section to their webpage answering the question “Why does my appeal at the Board take so long, and what is the Board doing about it?”⁷ In a subheading labeled “Requirement to work cases in docket order” the Board specifically addresses remands from the Court by saying, “Thousands of cases previously adjudicated by the Board are remanded and returned to the Board each year by the Court. These returned cases move ahead of other first-time appeals awaiting adjudication even though **these remanded cases usually don’t result in a different outcome upon re-adjudication by the Board.**” (Emphasis added)⁸ The Board made similar statements in their annual report to Congress⁹ for fiscal year 2022, again explaining that cases returned from the CAVC must “**move ahead of other first-time appeals awaiting adjudication even though these remanded cases usually do not result in a different outcome upon re-adjudication by the Board.**” (Emphasis added)¹⁰ The Board did not point to any data on their webpage or in their annual report to support their conclusions that remands from the CAVC “usually don’t result in a different outcome upon re-adjudication.”

As a national law firm that practices before the CAVC, Bergmann & Moore is concerned by the Board’s statements suggesting that remands by the CAVC do not change outcomes for Veterans. For this reason, we initiated research to track the success rates of claimants once their cases were returned to VA. As will be discussed in more detail below, the results show that 69% of claimants were granted benefits that had previously been denied after their cases were remanded by the CAVC. The findings of this research directly contradict the Board’s statements that cases remanded by the CAVC “usually do not result in a different outcome upon re-adjudication.”

2. Research

To conduct this study, the available claims files were reviewed directly in VA’s Veterans Benefits Management System (VBMS) from the date of the CAVC remand to the present. All the selected

⁵ See Board of Veterans’ Appeals, Decision wait times, available at <https://www.bva.va.gov/decision-wait-times.asp> (Reflecting 120,638 pending appeals at the end of FY 2019 with 208,155 pending appeals at the end of FY 2023.) (last visited November 22, 2023).

⁶ See Board of Veterans’ Appeals, About the Board, available at <https://www.bva.va.gov/about/index.asp> (last visited November 22, 2023).

⁷ Board of Veterans’ Appeals, Decision wait times, available at <https://web.archive.org/web/20220929183031/https://www.bva.va.gov/decision-wait-times.asp> (Web archive captured September 29, 2022).

⁸ This language is still available at the Board’s webpage. See <https://www.bva.va.gov/decision-wait-times.asp> (last visited on November 22, 2023).

⁹ See 38 U.S.C. § 7101(d).

¹⁰ Board of Veterans’ Appeals, Annual Report Fiscal Year (FY) 2022, at 13, available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf.

cases reviewed were represented by a Veterans Service Organization (VSO) at the time of the Board decision which was appealed to the CAVC. In certain cases where access to the claims file was not available directly, a search of the Board’s public database¹¹ for subsequent Board decisions for those appellants was conducted, using the Board’s docket number to accurately locate those decisions. Those Board decisions often provide sufficient information to determine whether an additional benefit was granted after the CAVC remand even without direct access to the VBMS claims file.

This research involved the review of 338 appeals, which constitutes the cases from one VSO that were remanded by the CAVC in June, July, and August 2020 following representation by our firm.¹² This sample size produces a margin of error of 4.8% with a confidence level of 95% for all cases remanded by the CAVC in FY2020. We selected cases which were remanded at least 3 years prior to ensure that VA would have had adequate time to reach a final result in the vast majority of appeals.

To determine whether claimants had received an additional grant of benefits following a CAVC remand, we looked for whether VA had subsequently granted at least one benefit which had been explicitly or implicitly denied by the Board in the decision which was appealed to the CAVC. When at least one previously-denied benefit was granted by VA following the CAVC remand, we coded the appellant as having received a grant. This is the same methodology used by the Board to report when it has granted benefits in a decision.¹³

The results of our research are as follows:

Outcome¹⁴	#	%
Granted	232	69%
Denied	47	14%
Other	14	4%
Pending	26	8%
Unknown	19	6%

¹¹ See <https://search.usa.gov/search?affiliate=bvadections>. These decisions are also available through Lexis and Westlaw.

¹² Cases were selected based on the date that the Memorandum Decision, Joint Motion for Remand, or Joint Motion for Partial Remand, was filed on the CAVC’s docket.

¹³ See Board of Veterans’ Appeals, Annual Report Fiscal Year (FY) 2022, at 43, 51-52, 56 https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf.

¹⁴ “Granted” means at least one previously-denied benefit was granted by VA following the CAVC remand. “Denied” means no previously-denied benefit was granted by VA following the CAVC remand and all previous-denied issues have been finally adjudicated. “Other” means no previously-denied benefit was granted by VA following the CAVC remand and the appellant died or withdrew the case before all previously-denied benefits were finally adjudicated. “Pending” means no previously-denied benefit has yet been granted by VA following the CAVC remand but at least one previously-denied benefit is still pending a final decision from VA. “Unknown” means we could not determine the result because we do not have access to the appellant’s VA claims file and could not locate a public Board decision which contained the necessary information.

Accordingly, the research shows that 69% of CAVC remands result in at least one previously-denied benefit being granted by VA.¹⁵

The research result also shows that there is significant delay in VA's grants of additional benefits following a CAVC remand. The median time to receive a new Board decision directly following CAVC remand is 199 days from the date mandate issues. If the Board then remands the case, the median time to receive a grant from the Veterans Benefits Administration (VBA) following that remand is 339 days from the date mandate issues on the CAVC remand. If the case then needs to return to the Board following VBA's adjudication, the median time to receive a grant from the Board is 554 days from the date mandate issues on the CAVC remand. Overall, the median time to receive a grant from VA following a CAVC remand is 352 days.

3. Conclusions

The research result strongly suggests the Board is incorrect in asserting that cases remanded from the CAVC "usually do not result in a different outcome upon re-adjudication." The research indicates that remands from the CAVC result in additional benefits to Veterans in a large majority of cases. This objectively demonstrates that the CAVC is serving a valuable oversight role in ensuring all Veterans receive equal access to the benefits they have earned.

Bergmann & Moore is not able to determine the basis the Board has for asserting otherwise, as it has provided no data, and cited no source, for its comments. The Board has repeatedly stated that there is no change in outcome "upon re-adjudication by the Board."¹⁶ This suggests that the Board may only be looking at what happens in Board decisions immediately following a remand from the CAVC. However, the data shows that approximately three-quarters of the grants claimants received after a CAVC remand were made after at least one remand from Board to the Veterans Benefits Administration (VBA).¹⁷ Due to limitations of VA's internal computer systems, the Board may be unable to identify cases in which VA grants benefits after at least one Board remand. We respectfully encourage the Board, and other VA stakeholders, to conduct similar research into the ultimate outcome of cases remanded by the CAVC to verify our results.

We respectfully submit that the CAVC needs adequate resources to continue to maintain its crucial role in ensuring all benefits receive access to the benefits they have earned. The CAVC is serving a critically important role overseeing the quality of VA's benefits system, and its actions

¹⁵ We have calculated this grant rate in the most restrictive way possible, by reporting a percentage of all cases remanded by the CAVC. However, we believe that it is very likely that a significant number of "Unknown" cases also received grants which we were not able to locate and that some of the "Pending" cases will receive grants in the future. Accordingly, the actual grant rate is likely notably higher than the 69% we report here. For example, excluding all "Pending" and "Unknown" cases from the calculation results in a grant rate of 79%.

¹⁶ Board of Veterans' Appeals, Annual Report Fiscal Year (FY) 2022, at 13, available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf; Board of Veterans' Appeals, Decision wait times, available at <https://www.bva.va.gov/decision-wait-times.asp> (last visited November 22, 2023).

¹⁷ Specifically, of the 232 cases that were granted, only 57 (25%) of those grants were made by the Board on immediate remand from the CAVC, with 119 (51%) granted by VBA after at least one Board remand, and a further 54 (23%) granted by the Board after the appeal was returned from VBA. The remaining 2 cases were granted directly at the CAVC through settlement agreements.

are resulting in awards of benefits for large numbers of veterans. Likewise, the Board also needs adequate resources to readjudicate the cases remanded by the CAVC to allow Board attorneys and Veterans Law Judges to fully address all the shortcomings identified by the CAVC and ensure that veterans are properly awarded the benefits they have earned.

Bergmann & Moore thanks the distinguished members of the Subcommittee on Disability Assistance and Memorial Affairs for allowing us the opportunity to share the objective results of our research on this issue.

About Bergmann & Moore -- Bergmann & Moore, LLC is a national law firm managed by former VA attorneys based in Rockville, Maryland. Since 2004, the firm has successfully represented over 12,000 Veterans and their family members in VA disability compensation claims in federal court.