

**EXAMINING THE VA APPEALS PROCESS:
ENSURING HIGH QUALITY DECISION-MAKING FOR
VETERANS' CLAIMS ON APPEAL**

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY
ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS

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U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL
AFFAIRS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 11 a.m., in room 360, Cannon House Office Building, Hon. Morgan Luttrell (chairman of the subcommittee) presiding.

Present: Representatives Luttrell, Franklin, Ciscomani, Self, Pappas, Deluzio, McGarvey, and Ramirez.

OPENING STATEMENT OF MORGAN LUTTRELL, CHAIRMAN

Mr. LUTTRELL. The subcommittee will come to order. Good morning. Thank you all for being here today.

Today we will be taking a close look at whether VA does enough to ensure that veterans receive high-quality decisions in their claims on appeal. Veterans often wait for years for a final answer on their claims and will owe them an answer that is fair and correct.

The VA Board of Veterans' Appeals (BVA) is primarily responsible for ensuring that veterans receive accurate answers. When the Board decides that the Veterans Benefits Administration, VBA, makes mistakes when initially processing a claim, VBA is responsible for correcting those mistakes. We know that the Board and VBA employees are dedicated to providing veterans with high-quality care decisions.

Board leadership's primary concern is issuing a high number of decisions on veterans' claims on appeal. Board leadership has failed to implement measures to ensure that these decisions are correct and fair for each and every veteran. Training out members is more important to the Board sometimes than ensuring veterans are receiving the right answers on their claims.

We question the accuracy of the over 90 percent quality assurance rates that the Board has reported to Congress. How can the Board's quality rate be that high when the Veterans Court catches the same mistakes being made over and over again, and when the Veterans Court stated that in the Fiscal Year of 2022, only 5 percent board denials on appeal were legally correct?

We are concerned about whether the Board and VBA inform specific employees about their past mistakes so that they can learn from them. We will continue monitoring whether the VA is training employees enough so that they can provide every veteran with legal, accurate answers. It is important for us to ensure that our veterans receive the fair and just outcomes that they deserve.

To provide insights into these quality issues, we will be hearing from VA and the U.S. Government Accountability Office (GAO). We will also hear from Disability American Veterans (DAV); the National Organization of Veterans' Advocates (NOVA); the law firm of Chisholm Chisholm & Kilpatrick; veterans of Foreign Wars (VFW); and the American Federation of Government Employees (AFGE).

I would also like to recognize Ms. Carol Whitmore, the junior vice commander in chief of the Veterans of Foreign Wars of the U.S., who is with us today. Ma'am, thank you so much for joining us today.

I want to thank everyone again for being here today, and I am looking forward to our conversation about what we can do to ensure the VA provides every veteran with a high-quality decision in their claims and appeals.

With that, I yield to the ranking member for his opening statement.

OPENING STATEMENT OF CHRIS PAPPAS, RANKING MEMBER

Mr. PAPPAS. Thank you, Mr. Chairman, for holding this important hearing on the quality of the Board of Veterans' Appeals decision-making in veterans' claims appeals.

As all of my colleagues do, I have got numerous constituents with claims pending at the Board of Veterans' Appeals. The current average time that it takes to have an appeal claim adjudicated by the Board ranges from less than a year to up to 2-1/2 years. I am sure that the panelists here today will all agree that this is totally unacceptable. No one should have to wait that long to find out if their appeal was granted.

Congress tried to address this issue in 2017 with the Appeals Modernization Act (AMA), which redesigned the veterans benefit appeal system and created a new decision review process, allowing veterans to choose from one of three lanes to determine the path their appeal will follow. While the AMA has shown promise, it is not working as fast as we hoped it would. Now, with the implementation of PACT, there is growing concern as to whether the Board will have the capacity to provide timely decisions to veterans.

Today, I am hoping to gain insight into the necessary steps for improvement of the process and how Congress can help or hurt those efforts, because our shared commitment to veterans demands a proactive approach to address these challenges and fortify the effectiveness of the AMA. We must get it right together.

In addition to addressing the speed of appeals under the AMA, it is imperative we also focus on the Board's quality assurance and training programs. Ensuring the accuracy and fairness of appeal decisions is as crucial as expediting the process itself. Robust quality assurance measures must be in place to guarantee that veterans receive correct decisions.

Moreover, investing in comprehensive training programs for Board employees is vital to enhance their expertise and ensure a thorough understanding of veterans' unique circumstances. Accordingly, I would also like to explore strategies for bolstering quality assurance mechanisms and advancing training initiatives, recognizing that the effectiveness of the AMA hinges not only on speed, but also on the precision and fairness of decisions affecting veterans.

I appreciate the efforts VA has made in the past few years to streamline appeals decisions, but clearly more needs to be done. In looking ahead, I see a list of goals to improve the accuracy and timeliness of veterans' claims. I hope BVA will discuss in detail when you plan to achieve these goals and, more importantly, how you plan to achieve them.

This is extremely important to veterans that I serve in New Hampshire and their families, who expect me to not only help them navigate through this red tape, but also to cut it down when necessary.

Thank you, Mr. Chairman. I yield back.

Mr. LUTTRELL. Thank you, Ranking Member Pappas.

Our witnesses today: Mr. Kenneth Arnold, the vice chairman of the VA Board of Appeals. Mr. Arnold is joined by Ms. Mary Ann Flynn of the Office of General Counsel and Mr. Timothy Sirhal of VBA's Office of Administrative Review. Additionally, Ms. Elizabeth Curda will testify on behalf of the U.S. Government Accountability Office.

I ask the witnesses of our first panel to please stand and raise your right hand.

[Witnesses sworn.]

Mr. LUTTRELL. Let the record reflect that the witnesses have answered in the affirmative.

Thank you all for being here today. Mr. Arnold, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF KENNETH ARNOLD

Mr. ARNOLD. Thank you, sir. Good afternoon. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee. Thank you for the opportunity to appear before you today to discuss this important topic. With me today are Timothy Sirhal and Mary Flynn.

I am a VA employee, but my relationship with VA is deeper and more nuanced. As a veteran with 30 years of active-duty service, and as the eldest of seven children in a family that was completely reliant on my father's 100 percent disabled veteran status, I view my role in VA as a sacred duty. The VA medical care my dad received kept him alive until I was 15. That gift was the driving factor in my decision to enlist at the age of 17 and pursue a life of service to this great country.

After retiring from the military and serving for 8 years in the career Senior Executive Service (SES), I was approved by the President nearly 5 years ago to serve in my current role at the VA. It is an incredible honor and a deeply humbling experience. Our sole objective is to swiftly and fully resolve appeals to the fullest extent of the law with fair and final decisions by a judge.

Since 1933, the law has required Board judges to be Presidentially approved for good reason: because they must have the judgment, experience, and authority to act on behalf of the Secretary when applying the law to the facts of each individual case. This has enabled the Board to say yes and grant at least some relief in roughly a third of our annual decisions, even after VA has previously said no. I am not aware of any other Federal appeal system that grants relief as much as the Board does.

VA has decreased wait times thanks to the passage of the Appeals Modernization Act. Last year, the Board decided over 30,000 AMA appeals. Those faster decisions reflect 20 percent fewer remanded cases and 10 percent higher grant rates. VBA implemented over 10,000 full grants of benefits by the board under AMA last year, averaging less than 30 days to do it. On average, AMA appeals at the Board are fully resolved, meaning there are no remands, approximately 4 years faster than it takes to fully resolve legacy system appeals.

However, it takes 6 years to resolve legacy cases and almost 2 years to resolve these AMA cases, far too long for both. Frankly, the legacy system is holding us back from achieving even greater success under the AMA.

Last year, the Board issued 103,245 decisions; 70 percent of those were legacy system appeals; nearly 60 percent had to be remanded. VA still has nearly 60,000 pending legacy system appeals, over 20 percent of which have not been evaluated for the first time by a Board judge because other remanded appeals keep returning to the head of the line.

Roughly 15 percent of the pending legacy appeals are being adjudicated for the fifth time or more. The root cause was identified by Congress in 2017. The legacy system allows for and incentivizes repeated revisions during the appeals process that necessitates successive remands. Some suggest that Court remands mean Board judges are making significant and repeated errors. That is not the whole truth. We make mistakes, but not the type of mistakes that would normally deny veterans extra benefits.

The whole truth is that over 92 percent of the Board's 100,000 decisions each year are not even appealed to the Court. When Court judges do rule on the merits, they overwhelmingly affirm Board decisions, an average of 500 affirmances each year, versus only one to two dozen reversals. Unfortunately, 78 percent of the appeals filed at the Court each year get remanded without ever being seen by a Court judge.

These remands operate like legal settlements between the attorneys and most often require a Board decision to be re-adjudicated with more explanation for why something could not be granted.

The Court's clerk annually approves 6,500 to 7,300 attorney fee requests each year, almost all for remanded cases. This generates 45 to 50 million in attorneys' fees each year, with the majority going to a small number of boutique law firms, but relatively few veterans receiving any increase in their monthly compensation from a new Board decision post remand.

It is time for all stakeholders to come back together for a holistic review of the veterans' disability system. That is why VA has plans

with VBA to host an AMA summit with all stakeholders in early 2024.

This concludes my testimony. My colleagues and I stand ready to respond to any questions you have.

[THE PREPARED STATEMENT OF KENNETH ARNOLD APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Mr. Arnold. Let the record reflect that the witness—excuse me, the written statement of Mr. Arnold will be entered into the hearing record.

Ms. Curda, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF ELIZABETH CURDA

Ms. CURDA. Good morning, Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee. I am pleased to be here to discuss GAO's work regarding the quality assurance, or QA, process at the Board of Veterans' Appeals.

As you know, if VA denies a veteran's claim for benefits or services, the veteran can appeal their case to the Board. If the veteran is dissatisfied with the Board's decision, they may appeal their case to the U.S. Court of Appeals for Veterans Claims (CAVC).

The Board is filled with dedicated individuals who have worked hard to produce record numbers of decisions in recent years. The Board also faces large workloads and time pressures, and these and other factors require a robust QA process to ensure that decision quality does not suffer in favor of speed or production.

Moreover, since 2003, VA's management of disability compensation workloads has remained on GAO's high-risk list, due in part to large appeals backlogs and lengthy wait times. The Board's QA process needs to be understood in this context and the risks that workloads pose to quality.

Compounding the risk is that the Board is not dealing with an appeal once, but often multiple times, due to the practice of remanding appeals that need correction either from the Board to VBA or from the Court back to the Board. This rework is a significant part of the Board's workload. Today, I will discuss, first, how the Board assures and measures quality of its decisions; and second, the extent to which the Board has a process for continuously improving quality.

In terms of how the Board assures and measures the quality of its decisions, the Board has a basic process to detect errors and provide feedback to its judges. An emphasis of the Board's QA process is checking a random sample of its draft decisions to detect errors. Based on this check, it calculates an accuracy rate that represents error-free decisions, meaning that the Board determines that its judges have followed procedure and applied the law correctly. In Fiscal Year 2022, in response to one of our recommendations, the Board established a goal of 92 percent accuracy, which it generally met last year.

However, the Board does not have written policies and procedures for calculating this accuracy rate and managing the data supporting it. Without these policies and procedures, the Board cannot be sure that this publicly reported measure is accurate and verifiable.

Similarly, the Board is not monitoring whether its judges are incorporating the feedback they receive from the QA process. Such monitoring could inform improvements to how this QA activity is designed and implemented.

In terms of the extent to which the Board has a process to continuously improve quality, we found that more could be done. Specifically, certain types of errors, such as improper remands, remained among the most common from Fiscal Year 2020 through Fiscal Year 2022. Also, data show that the Court remands a large majority of appealed Board decisions for full or partial rework, which often is because the Court found the Board's explanation of its findings to be inadequate.

Overall, the Board lacks a process to better understand these issues, which could point to better interventions and solutions.

First, Board officials told GAO it has no comprehensive written plan outlining how it will accomplish the mission of its QA process. Its efforts appear to be ad hoc.

Second, Board officials have not fully analyzed the underlying causes of the most common decision errors or court remands.

Third, the Board has not systematically or comprehensively developed evidence to better understand what effect, if any, its interventions have on quality, such as consistently collecting feedback about training.

Finally, the Board knows little about the consistency of its judges' decisions. Studying consistency could help the Board understand whether there are common misunderstandings of policy, regulation, or law.

The key practices for evidence-based decision-making I highlight in my statement offer the Board a roadmap for developing and implementing a process of continuous improvement. The Board's planned evaluation of its approach to quality assurance could help the Board develop such a process.

Having observed VA over several years, many challenges facing the VA stem from its leaders not fully leveraging leading management practices. Another key to addressing these challenges is fully implementing our recommendations. We have made several recommendations today. By effectively implementing them, the Board would be better positioned to reduce the most common errors and associated rework, thus freeing up resources to decide more timely and accurate appeals.

This concludes my prepared statement, and I am happy to address your questions.

[THE PREPARED STATEMENT OF ELIZABETH CURDA APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, ma'am. The written statement of Ms. Curda will be entered into the hearing record.

We will now move to questioning. I recognize myself for 5 minutes.

Mr. Sirhal, good morning. Can you imagine being a veteran who has waited for years for an answer to your claim and then are told that your case has gotten sent back to the beginning because of a VBA employee did not fulfill their statutory duty to assist?

I understand a VBA employee has a duty to assist in developing a veteran's claim before the claim ever reaches the Board of Ap-

peal. In Fiscal Year 2022, the Board sent back roughly 6,000 cases because a VBA employee failed to properly collect all necessary evidence. We know that the national work queue (NWQ) does not return those cases to the claims processor who initially started the case.

My question is, so how does VBA ensure that individual claims processors receive that feedback?

Mr. SIRHAL. Thank you for the question.

Mr. LUTTRELL. Sir?

Mr. SIRHAL. Am I on the—okay.

Mr. LUTTRELL. You are ready.

Mr. SIRHAL. I thank you for the question.

Mr. LUTTRELL. Go after it.

Mr. SIRHAL. VBA takes remand seriously. Of course, we want the claim moving forward and have a decision issued, not having the claim move backward in the process.

Mr. LUTTRELL. Is your microphone on, sir? I am sorry.

Mr. SIRHAL. Can you hear me?

Mr. LUTTRELL. There you go. Yes, sir.

Mr. SIRHAL. Okay. My apologies, sir. VBA uses remand data on a—we have a programmatic approach, meaning we use it to inform our training programs. We have seen, from a trend perspective, is remands around exam issues. We incorporate exam training in our initial training of new processors in our yearly curriculum.

Mr. LUTTRELL. Yes, sir, I understand that. The issue is, and I am talking with multiple institutes around the country, is that once a case moves forward, i.e., to the Board and back down, it does not go back to the initial processor. That individual is not informed that if they made a mistake, that they made a mistake, so they do not know what to correct. Then the individual that receives the case has to basically start over and the one that suffers is the veteran.

Mr. SIRHAL. Yes, sir. What we found over the years is this—the remand cases from the Board are a nuanced specialized workload. We have consolidated processing at three decision review operations centers with the goal of being more efficient in processing and ensuring that the veteran who is impacted gets the remand resolved as quickly as possible based on the volume of cases that VBA decides each year. Last year we decided 1.9 million. If we were to return the case to individual processors, a single processor may receive one case or less or a year.

Mr. LUTTRELL. The process itself, I understand the infrastructure and it is one of those—this is one of the—if I could put my find on one thing that would help improve and streamline the process, it would be to not only reorganize, restructure, or realign NWQ. Because the three institutions that you are talking about are in place, what are the numbers of success once those cases come back? Do you have that?

Mr. SIRHAL. In the legacy space, it is about 17 percent get granted when they come back, but in AMA, it is more than double that last year. Between 35 and 40 percent get granted when they come back to VBA.

Mr. LUTTRELL. Fairly low.

Mr. SIRHAL. Higher than legacy.

Mr. LUTTRELL. Given the numbers.

Mr. SIRHAL. Higher than legacy, which is a good thing.

Mr. LUTTRELL. Ms. Curda, how many times, your statement that you just read, how many times have you read those same bullet points off in the past few years? I would assume that this just has not been created in 2023 or 22.

Ms. CURDA. Well, back in 2021, I testified before the subcommittee about the Board's QA process having, you know, implemented AMA. The topic at the time was that, you know, under AMA, the Board had not established a QA process that addressed the changes to the system.

Mr. LUTTRELL. The same talking points basically?

Ms. CURDA. Yes.

Mr. LUTTRELL. I will give you a little rope here, but it is basically the same talking points.

Ms. CURDA. Yes.

Mr. LUTTRELL. My question, Mr. Arnold, is, with my 34 seconds, who do these points need to fall in front of? Who is responsible for course correcting these issues? Because if she has been doing this since 2021, we are listening and we are waiting for the VA to respond. Since it is 2023, no one is doing that.

Mr. ARNOLD. Sir, all I can say is, as the essentially chief operating officer for the Board, I accept accountability for anything that we failed on here. I will—as Ms. Curda was saying, the focus was slightly different in 2021. We had not even established a quality assurance program under the new AMA system we have today.

Mr. LUTTRELL. All right. Mr. Arnold, my time is up, and I do not want to hold the rest of the members up, but—and I am going to have to wire brush you on this one, you have to fix this problem.

Mr. ARNOLD. Could not agree more.

Mr. LUTTRELL. I could say this all day long from this chair, and you can receive it and walk out of here. Again, you are the one.

Mr. ARNOLD. Yes, sir.

Mr. LUTTRELL. You have to fix this problem. No more the same reports year after year after year, because as a veteran, you understand it is the veterans that are suffering.

Mr. ARNOLD. I understand, sir.

Mr. LUTTRELL. All right. Thank you.

I now recognize Ranking Member Pappas for 5 minutes.

Mr. PAPPAS. Thank you, Mr. Chairman. I know VA has been highlighting recently the record number of claims that have been processed both through VBA and the Board, but, you know, volume is one metric, and with such a volume of claims, we also know that we are seeing a record number of errors as well in absolute terms. With the PACT Act, there are some concerns about claims that are being granted under the new law still being denied because VBA is not following the guidance. Standard Operating Procedures (SOPs) related to toxic exposure risk activity, it is leading to an increase in higher level reviews, which in turn leads to more appeals at the Board.

Mr. Arnold, could I ask you this question? Has the Board seen a spike in these cases? In general, how have PACT Act claims, which should be relatively straightforward, affected the Board's caseload?

Mr. ARNOLD. Sir, we have seen some, but, honestly, we have not seen a bow wave of new PACT Act claims. I think in part because of the high grant rate at VBA.

I think another thing that is misunderstood is toxic exposure claims. The law has not changed. What PACT Act gave us was more conditions to presume that somebody is eligible. If time, space, and condition are present, we can grant on presumptive basis. It offered more presumptives. The basic evaluation of the case is the same under the Agent Orange Act and all of that, and that is the exposure of the veteran that led to the injury or condition.

I can say we have not seen a bow wave yet. It does not mean it is not coming, but we are prepared for it.

Mr. PAPPAS. Okay. Mr. Sirhal, maybe I can turn to you. I am just curious, you were alluding to this a little bit before, but as we think about communication between VBA and BVA around error trends and what you are seeing, what kind of communication happens there? If you could just give me a better sense of how that information is relayed so that folks at BVA are understanding what these trends are.

Mr. SIRHAL. Thank you for the question, sir. I will break it down into two primary communication loops, one I will call operational. The Office of Administrative Review, where I work, has a feedback loop with the Board of Veterans' Appeals' Chief Counsel's Office. When a remand comes back, if the Decision Review Operations Center employee has a question or needs clarification or something just does not make sense to them, they will submit that to our office through Central Office, and we coordinate with Mr. Arnold's staff to get it clarified with the issuing judge. That is more of an operational case-by-case initiative.

Then the other initiative is more strategic, a remand tiger team that is been established. Me and my staff meet monthly with Mr. Arnold's staff to talk about more trends and strategies we can jointly implement to not only be more efficient in resolving remands, but look for ways to better understand the data, to adjust our behavior, to try to reduce remands in the future. That is focused more on the AMA space legacy as kind of its own issue, but we want to make sure we do not repeat the legacy remand rates in AMA and now is a critical time.

Mr. PAPPAS. Yes, I appreciate that. On quality assurance, I am concerned about these repeated remands, especially those related to reasons and bases, essentially BVA failing to properly explain itself. This speaks to a lack, I think, of internal quality control before a decision goes out the door and prioritization of quantity over quality.

If I could turn back to you, Mr. Arnold. Can you explain for us what sort of review happens before a decision is being issued? Why are veterans' law judges signing off on so many flawed decisions?

Mr. ARNOLD. Thank you for that question, sir. First and foremost, the Board tags a decision—or tags a case for quality review before we know the result. It is randomized so that we are reviewing cases that are granted, cases that are remanded, and cases that are proposed for denial. Oftentimes it is a very—it is a mixed bag in each case. It is a different review standard that we are doing.

The class of cases going up to the Court is a very select class of cases where we just could not get to yes. That is one distinct difference between how we are evaluating cases at our level versus what goes to the Court.

It is interesting, though, that the errors we call in ourselves, which is mostly procedural, is somewhere in the 5 to 6 percent. That is actually come up. It was closer to 8 percent a few years ago. This is the best year we have had from a quality perspective this past year, both under Legacy and under AMA. The appeal rate to the Court is about 8 percent. They do track in terms of percentage there.

The reasons and bases, I do not want to speak for my colleague from General Counsel who agrees to these remands between counsel, her GS-13/14 counsel with the private bar reps, usually. I know in our private conversations, she talks about just how fact-specific they are based on the judge's explanation for why they have to deny. When it comes back, for reasons and bases, it is really hard to have very clear trends on those because it is so fact-specific to the cases. I hope that makes sense.

Mr. PAPPAS. It does, and I appreciate the explanation. I am over on my time, but I just want to underscore, I think, what Ms. Curda was saying before about not leveraging best management practices, not fully implementing GAO recommendations, these are critical steps here. We stand ready to support you and thank you very much for your service. I yield back.

Mr. ARNOLD. Thank you, sir.

Mr. LUTTRELL. Thank you, Mr. Pappas.

Mr. Franklin, you are recognized for 5 minutes, sir.

Mr. FRANKLIN. Thank you, Mr. Chairman, thank you, Ranking Member, for holding this hearing. The oversight that we do here is very critical to what we end up delivering for our veterans. As a veteran, I appreciate all the work that you all do to take care of them, but this is an important part of what we do.

I want to pick up a little bit more on what the chairman was getting into with the lack of quality assurance initiatives. It is a recurring theme. Ms. Curda, actually, I had a hard time figuring out what was current testimony versus what had been done before, because it really seems like a lot of the same drumbeat over and over, and, to me, that is just unacceptable.

When I look back, I think it is important to note some of these. Looking at the GAO testimony that we had here regarding QA processes, specifically, Board officials told GAO it has no comprehensive written plan outlining how it will accomplish the mission and goals of its QA process. Board officials told GAO it had not fully analyzed trends or underlying causes of the most common Board-identified errors or CAVC reprimands. The Board has not systematically or comprehensively built or used evidence—evidence not circumstantial, but evidence—to better understand and improve its interventions, such as collecting feedback about training, which comes up in some of the other testimony. The Board does not assess Volunteer Lawyers for Justice (VLJ) decisions for consistency, such as whether common misunderstandings of VA policy or law exist in decisions.

Ms. Curda, do you still stand by that testimony, that those are shortcomings, deficiencies, you see in the QA process?

Ms. CURDA. Yes.

Mr. FRANKLIN. Okay. I am a firm believer in that what gets measured, gets done. It is important to choose what you are going to measure because any system can be gamed if you are not careful about your metrics. It sounds like even after identifying those back in July 2023, we are still not there. We do not even have the wrong metrics to try to take stock of.

Mr. Arnold, I would understand from—you know, I appreciate you accept responsibility. That is noble of you, but at the end of the day, that is not good enough. You are the person in charge and these quality assurance processes are not in place. I think in reading through all of you all's testimony and then what we are going to get from the next panel, that is the root of a lot of problems. You cannot fix problems that you cannot measure and identify that you have and then figure out how you are going to get out from under them. I want to dive in a little bit on the decision.

You know, after the testimony, 2-1/2 years ago almost, Congress appropriated another \$228 million to hire more people because people were—you know, lack of appropriate manning was part of the issue. We have thrown money at that. We still do not have a QA behind it.

I want to talk a little bit in the couple of minutes we have about the decision to reduce the training requirements, the experience requirements for the veteran law judges. Whose decision was that?

Mr. ARNOLD. Sir, one of the things I want to clarify there is we did not reduce the requirements to become a veterans law judge. The previous chairman of the Board, who retired this past year, was really thoughtful in how we hire veterans law judges. Veterans law judges have the same criteria as—

Mr. FRANKLIN. Yes, okay.

Mr. ARNOLD. I am sorry, sir.

Mr. FRANKLIN. Well, but let us—so that is not a requirement. Was it an unwritten rule before, because this 7 years' of experience comes up in testimony from almost everyone else we are going to hear from later. Was it an unwritten rule before?

Mr. ARNOLD. Sir, it—

Mr. FRANKLIN. That is a pretty specific thing for—

Mr. ARNOLD. Yes, sir, it was an unwritten rule in a couple of recruitments. Yes, sir, over time that—and it actually created some challenges in the prior chairman's mind in terms of the Board having insular thinking. We were not as diverse in experience at the Board as we needed to be.

Mr. FRANKLIN. You think is the Board making—are you getting better decisions from the judges today than you were before that change was made?

Mr. ARNOLD. I believe so, sir. I believe the uptick in our quality assurance rates this year have actually demonstrated that.

Mr. FRANKLIN. Apparently you cannot prove the 92 percent. I mean, you claim 92 percent, but there are no metrics that you can actually stand and show—

Mr. ARNOLD. Yes, sir.

Mr. FRANKLIN [continuing]. according to what GAO said.

Mr. ARNOLD. Yes, sir. We gave—I cannot—I do not know how many questions and datasets we provided to GAO.

Mr. FRANKLIN. Well, but you also say that, you know, most of the times when these are remanded, there is not any change. Well, in fact, 69 percent of the time, there are things that change after those. I would challenge a bit of that.

Mr. ARNOLD. I saw that written testimony, and one of the challenges with that analysis is there was some 2020 cases and they said if anything changed 3 years down the road, that is an entirely different case than the Board evaluated.

Mr. FRANKLIN. All right. We are about out of time. I really would hope that you would stay and listen to the rest of the testimony from the others. Where there are discrepancies, I would hope that as the person in charge, you would pursue those, because, honestly, if we are here 2-1/2 years from now, it should be radically different, or you should not be the one sitting there testifying. Because to me, it is unacceptable that this has not changed in the 2-1/2 years since you did this last time.

Thank you, Mr. Chairman. I yield back.

Mr. LUTTRELL. Thank you, Mr. Franklin.

Mr. Deluzio, you are recognized for 5 minutes, sir.

Mr. DELUZIO. Mr. Chairman, thank you. Good morning, everyone. I want to follow up on a piece of questioning, both Mr. Franklin and Mr. Pappas, about the high remand rate.

Mr. Franklin mentioned some of the commentary in the GAO report about there not being fulsome analysis of underlying causes, though, Mr. Arnold, you were talking with Mr. Pappas and Mr. Franklin a bit about, I think, what some of those causes are. I will give you a chance to clarify. Is there now or are you undertaking a fulsome analysis, a study of what those underlying causes might be or are?

Mr. ARNOLD. Yes, sir, we are. I am going to tell you, even if that includes pulling individual cases. In fact, my colleague, Ms. Flynn, was talking to me about all the remands she pulled, looking for sort of consistency when we were talking the other day.

I will just give one example involving a case that I think points to the issue. We take hearings and decisions really seriously. A judge sitting with a representative and I will pull 2020 case from the same analysis that was afforded to you, we had a representative and veteran sitting before a judge saying, I am at 50 percent for this condition. I would like you to find me eligible for TDIU, total disability for individual unemployability, for this condition.

During the hearing—I hope everybody can come and watch a hearing at some point. The judge is—it is non-adversarial. The judge is trying to get to yes. The judge is like, that dog's not going to hunt. Did not use those words. I cannot get there based on the evidence in the medical records and what you are saying. However, what if the combined total of the things that you are currently rated for, I could get to TDIU for you? Does that satisfy your appeal?

Three times yes for the veteran, yes for the representative. That case was still appealed by private lawyers twice at the Court and remanded twice for further explanations. The veteran is still 100 percent TDIU, and nothing has changed.

Mr. DELUZIO. In the course of doing this analysis or study, will you be generating a report? Well, what will that product look like?

Mr. ARNOLD. Sir, we will probably do something where we will fold it into one of our required annual reports to Congress or, if it is more AMA-specific, with those 180-day reports we provide to Congress every 6 months. I would assume we would fold it into something like that.

Mr. DELUZIO. Okay. Ms. Curda, I will ask you, should there be specific things we are pushing the Board to do in terms of what that report would look at, what would be adequate to answer some of the questions you have or the shortcomings you found?

Ms. CURDA. Sure, yes. I think it would be appropriate to ask for a specific analysis of the root causes of remands from the Court back to the Board. I think you should also be looking at the remands that are going from the Board to VBA, and one of the largest categories of errors that they find in their case review are improper remands. An analysis of the causes of those improper remands would be very informative as well.

Mr. DELUZIO. Mr. Arnold, I see you taking notes. Any objection to either of those or any of those comments from Ms. Curda in terms of what you should be looking into?

Mr. ARNOLD. Not at all, sir. In fact, consistent with that, this is in my written testimony, the feedback system that we established is twofold: to ensure that VBA is appropriately addressing the remands issued by the judges and confirming that the Board's remand return reasons under the AMA relate only to duty to assist errors that occurred prior to the initial claim.

One of the challenges, the biggest error we call in ourselves for cases we pull is what we see as unnecessary remands. Really, it is a legacy mentality that we see where remands were much more prolific under the legacy system, still are. It is one of the challenges we face.

Under AMA, Congress specifically limited what we could remand for, and we see stuff still being shoehorned in that way. It is not bad intent. It is people thinking they are veteran-centric, because I could almost hit a recording every time, we are in a hearing and the hearing ends with, Judge, if you cannot grant this, at least remand it. That is not the right answer, especially under AMA anymore. That is in our backyard. That is something we have to address. Thank you, sir.

Mr. DELUZIO. Yes, sir. A little bit of time left, sir. I want to ask a different question about teleworking. Have you seen negative or positive or neutral impact on productivity, recruitment, VBA, and/or Board, and has there been any change in administration policy in the last few months or so affecting that?

Mr. SIRHAL. Thank you for that question. As far as our field employees, the claims processors, and I will speak about the Office of Administrative Review who handles the remands and the higher-level view process, our retention rate is between 2-1/2 and 4 percent attrition rate, I am sorry, so people are staying.

We have also staffed up the last 2 years, so we were bringing people on. In 2022, we had a little bit over 1,100 employees, up to about 1,450 authorized last year, and we achieved 85 percent fill rate; adding 300 more this year. We are retaining people.

Mr. DELUZIO. Okay.

Mr. SIRHAL. We are producing—

Mr. DELUZIO. More to say that. I see my time is out. Mr. Chairman, I will yield back. Thank you.

Mr. LUTTRELL. Thank you, Mr. Deluzio.

Mr. Self, you are recognized for 5 minutes, sir.

Mr. SELF. Thank you, Mr. Chairman.

Ms. Curda, how many GAO recommendations in this process have not been installed?

Ms. CURDA. Well, the report that we are issuing today has four recommendations, and, you know, we would expect to see some progress on those in the next, you know, year or so. On this particular topic, those are the open recommendations.

Mr. SELF. No past or open, so only the four?

Ms. CURDA. Well, we have past open recommendations, but not on the quality assurance process at the Board.

Mr. SELF. Okay. All right. Very good. In your testimony, you hired an additional 50 new veterans law judges. How many total do you have? What percentage is that?

Mr. ARNOLD. Sir, we have 134 line veterans law judges. We also have senior executive Board members, usually deputy vice chairman or myself, who sit above them, who are also holding a veterans law judge status.

Mr. SELF. Okay.

Mr. ARNOLD. In the last 2 years, the plus-up has been 33 percent, I believe. Just during the last year, that portion of that, I think, was a little over 12 percent.

Mr. SELF. Okay. What did you spend the 228 million that Mr. Franklin referenced? How did you spend that in this process?

Mr. ARNOLD. Most of it was—most of our budget is personnel, sir. Almost all of our budget spend has been in hiring personnel. This last year alone, we plussed up decision-writing attorneys by 16 percent.

Mr. SELF. I saw that.

Mr. ARNOLD. We have another ad out right now. Like I said, we plussed up the judges 33 percent. We plussed up other staff, particularly in the hearing's realm, quite a bit as well. I do not have the exact percentage on that, sir.

Mr. SELF. Yes, the reason I ask all of this is because I also filed a bill to add two judges to the senior Court and simply because of the cases that they cannot hear, which this is the process that we have got to fix.

How much of this is transparency? You said you used it on personnel, but how about transparency for the veteran, because everything that I have heard in testimony here has been internal processes, and yet we have a veteran at the end of the day. What has been spent on transparency, Mr. Arnold?

Mr. ARNOLD. Sir, I am really glad you asked that. Around transparency, one, I will point, a lot of people know it is there. In fact, our web traffic has really picked up. A year ago, the number one question for me as a veteran is, why does my appeal take so long? We put explanations out on our website to include data that we update monthly, quarterly, and annually, so they know exactly what is going on, what the challenges are, how things are getting better.

In fact, it is just been recently updated with a lot of the statistics that I provided today.

In terms of spending, we have got several things that are going on. Sir, we have increased our dollars, and, unfortunately, one acquisition vehicle we have has been hung up, which has been specifically related to quality assurance. The Board process around quality assurance for years has been one or two permanent personnel who sit there, and then there is detailed counsel who go in there on 1-to 2-year details that are supporting that. We are looking really hard at how much of that should be permanent. Now there is a judge in charge of that office and there is a judge in charge of the Chief Counsel's Office that sits on top of that.

Mr. SELF. Okay, thank you for that.

Mr. ARNOLD. Yes, sir.

Mr. SELF. Ms. Curda, would you comment on that testimony? How does that fix this problem that you just heard from Mr. Arnold?

Ms. CURDA. Well, just regarding transparency, the Board does have its metrics on its website, so you can see on average how much time it takes. I can tell you that this morning I had six emails in my inbox from veterans who had read my statement, you know, overnight, and they all were talking about how they just did not know where their appeal was. They could not find out that individual level of information, and staff of the Board, you know, could not really give them answers. I think there is an issue with individual veterans being able to see where things are with their claims.

Mr. SELF. Mr. Arnold, I will tell you I met with Veterans Service Organizations (VSOs), this is Wednesday, Monday—

Mr. ARNOLD. Yes, sir.

Mr. SELF [continuing]. before we came back, and they showed me on your website their claims. They pulled up an actual claim and it showed where they had added documents to it. The documents were, one, PDFs. The documents, one, were not hyperlinked, and two, when they copied the address and pasted it somewhere, they could not see the updated documents.

I would ask you to look into that and get back to me, because I have veterans that are very frustrated with not being able to tell not only when their cases are going to be heard, but they do not know what has been added to their records because they cannot read it.

Mr. ARNOLD. I would like to follow up and know the specifics on that so I could follow up. Thank you.

Mr. SELF. Absolutely. Thank you.

Mr. Chairman, I yield back.

Mr. LUTTRELL. Thank you, Mr. Self.

Mrs. Ramirez, you are now recognized for 5 minutes.

Ms. RAMIREZ. Thank you, Chairman. We are discussing quality and in the appeals process. Obviously, I think we can all agree that we have to make some significant improvements. I want to discuss one of the ways we continue to improve the appeals process for our veterans, specifically through the training.

Mr. Arnold, can you walk me through the training that Board attorneys receive to help promulgate the appeals? Specifically, can

you elaborate on how the board trains differently for older legacy claims, newer claims handled under the Appeals Modernization Act, as well as the new claims authorized by the PACT Act?

Mr. ARNOLD. Yes, ma'am. I regret that I do not have the curriculum in front of me, but I can give you the basic outline of it.

When a new attorney is hired at the Board, they go through a 6-month onboarding process that is all training. We have changed that up in recent years to make it more heavily weighted toward mentored writing with these differences that you are talking about. Before it was heavily just the classroom PowerPoint, and now there is more learn by doing. It is front-loaded with about two—I think it is about 2 months of heavy classroom and mentored writing. Then the remaining 4-month period is you have assigned mentor writers—I mean, mentors who are reviewing draft decisions that are going to different judges where you get feedback. That is preparing them for after their 6-month initial onboarding process, when they are full up with the judge's team writing for that judge, that they are just not hitting—they are hitting the ground running rather than just starting to write at that point in a robust way.

I do not know if that answers it fully, but it is split between understanding the distinction between legacy cases and AMA cases. Procedurally, they are just handled differently.

Ms. RAMIREZ. Okay.

Mr. ARNOLD. Yes, yes.

Ms. RAMIREZ. Yes, that was specifically what I was interested in.

Mr. ARNOLD. There is also—I mean, we have, I think, 2 hours of training in that around PACT Act specifically. Somebody asked about that.

Ms. RAMIREZ. Okay, yes.

Mr. ARNOLD. There is a lot of topical things that are in there.

Ms. RAMIREZ. Got it. Just a follow up on that. Is the training that you are offering with that 6-month process, is that only for new attorneys or are senior attorneys also given updated training?

Mr. ARNOLD. Thank you for that, ma'am. Yes, senior attorneys are given more updated training. I know in a letter to the committee, to the chairman, and the ranking member, the chairman just responded to, I think, specific training around PACT Act as an example.

But training offer—we stood up a professional development division under the Office of Chief Counsel, which also oversees the quality assurance process, because in the past, the training was kind of bifurcated between those two because they were in separate parts of the organization. We consolidated them under one umbrella. That training focuses on, topically, so many things. They are offering seminars every week. There are certain portions that are mandatory. There is stuff that we say, you got to give up an hour or two to do this.

Ms. RAMIREZ. Send me the info. I would like to see just some of that updated training.

Mr. ARNOLD. Yes. Yes, ma'am.

Ms. RAMIREZ. I know that we are up in time. I just want to ask you one specific follow-up to that, and then I want to move on to something else.

I am interested in how the Board leadership incorporates some of the observations and feedback that they are getting from the frontline employees on the training. Is there a process in incorporating that feedback into the new training or the ongoing training?

Mr. ARNOLD. There is, ma'am. They are all surveyed by this professional development training staff, the attorneys who are running that. I think at every single block of instruction, I think they may have a survey process that gives them that feedback.

Ms. RAMIREZ. Okay. Thank you. Thank you, Mr. Arnold.

I want to pivot to the findings from the GAO with the time I have left. Ms. Curda, how does the absence of—well, in your testimony, specifically, you mentioned that the Board lacks a comprehensive written plan outlining how it is going to accomplish its mission and its goals of quality assurance. Ms. Curda, how does the absence of such a plan on the Board's ability to set priorities, address common errors, and improve its QA efforts?

Let me ask you a follow up, just so you can answer both, and then we will close there. What are some key elements that you think should be included in the comprehensive plan for a QA process based on your understanding of best practices?

Ms. CURDA. Sure, I can cover those both. I mean, the absence of a plan means that they have a mission, which is a valid mission, but they do not have a specific aspiration or goal for what improvements in the quality process they want to accomplish. It is hard to do that when you do not have any data, specific data, on what you need to tackle and what you need to improve.

I think a good plan would have specific goals for improvement, metrics for what they would expect to see in terms of changes to the goals, and specific actions they plan to take to achieve those goals, and milestones for when those actions will take place, and who is responsible. Those are all good elements of a plan.

Oftentimes these are things that we do not see at the VA. I mean, not just the Board, but across the board at the VA, we see a lack of good planning.

Ms. RAMIREZ. Thank you.

Chairman, I yield back. Thank you.

Mr. LUTTRELL. Thank you, Ms. Ramirez.

Mr. CISCOMANI, you are now recognized for 5 minutes, sir.

Mr. CISCOMANI. Thank you, Mr. Chair. I want to—I have a few questions here and piggyback off some of my colleagues' comments. I cannot find my glasses. Oh, here we go.

There has been progress in the number of claims and appeals being processed, but recent reports have also indicated that this has come with a drop in attention and detail and a high rate of claims wrongly thrown out or continually sent back and forth between VBA and the Board. Today, I hope that we can learn on how we can best streamline VA processes and ensure our veterans and their families are taken care of.

First question, Ms. Flynn. In roughly 80 percent of appeals in the Court in Fiscal Year 2022, the VA Office of General Counsel agreed that the Board made substantial errors in their decision-making and recommended a Veterans Court remand the cases back to the Board. What do you think are some of the primary factors contrib-

uting to the high rate of necessary corrections? What are some of the most common errors your team has encountered? Also, do you think it is important for individual Board employees to learn from their errors so that future veterans are not harmed in the same way?

Ms. FLYNN. Thank you. Yes, my office represents the Secretary before the Court of Appeals, and so we do so keeping in mind that the Secretary is the Nation's advocate for veterans. With that backdrop, plus the fact that this is a uniquely pro-claimant system, the end result is there are often times where we are the ones working with appellant's counsel to identify error and send it back for corrections.

Regarding the typical or the most prevalent errors would be a failure in the duty to assist. Most of those center around inadequate exams, the medical exams, and then inadequate reasons or bases. That centers on the explanation that was given for the reason for the decision. That is a tough—it is tough to quantify, it is tough to describe. It is very fact-specific, and it may hit one judge differently than another, the same way as it does different attorneys.

The joint motions for remand or the joint motions for partial remand are the product of negotiation between the parties, and oftentimes there is a lot of horse trading. The case may have multiple issues when it started at the regional office (RO), some of those were granted or fell apart, fell away as they worked their way. The Board may have granted some of those, still denied others. When it gets to the Court of Appeals, any number of those can be ripe for a decision. They may seek a—

Mr. CISCOMANI. I am going to jump in here because I do not want to run out of time. To finish up here, if you can just briefly tell me how important this is or how are individual employees learning from their mistakes or their errors through the process to make sure it does not happen again?

Ms. FLYNN. Yes, sir. We have several touch points that we have with the Board where we have been working. We provide training on a regular basis. We also are in regular meetings with other components of VA. We have quarterly VLJ training. We participated in the Board's conference in April. We participate in the AMA work group with both VBA and the Board. All of those are opportunities for—

Mr. CISCOMANI. Well, thank you for highlighting that. When we look at over 80 percent, just roughly 80 percent, of appeals having some kind of mistakes, I am hoping that these training or sessions that are happening to make sure it does not happen again, there is a measurable way to prove how productive they are actually being, because with 80 percent does not seem that that is really working. I encourage you to, you know, look into that.

Mr. Arnold, I have good two questions for you real quick. When the VA Office of Administrative Review catches unnecessary remands by the Board, how does the Board's quality assurance and training offices, back on the same topic here, ensure that all Board employees learn from those errors that they made so they can prevent errors from happening again? Same vein of the question, but now to you.

Mr. ARNOLD. Yes, sir. That is an excellent question, actually, because every individual error that is called is transmitted directly to the judge and copying their SES-level judicial supervisor, a deputy vice chairman, and so they are getting that directly. However, in a combined basis, they are publishing monthly for the entire Board a digest of errors. There are Word documents attached to that that highlight the common trends and tips for avoiding for all employees, and that is distributed on a monthly basis.

Mr. CISCOMANI. Appreciate that. I am out of time. Just real quick, I will throw in there was the 228 million that have been mentioned by several of my colleagues already. As an appropriator myself, I am looking at this very carefully and see that the—and your written testimony. The written testimony today mentions nothing about the Board leadership and what it is doing to ensure that every single veteran can accurately get answers on their claims and appeals.

If, you know, throughout the rest of the questions sort of jump in on if there is anything that the Board has done to improve the quality assurance program since July 2021. Two hundred and 20 million is a lot of money. Again, as an appropriator, I am looking at this very carefully.

Mr. ARNOLD. Thank you, sir.

Mr. CISCOMANI. Thank you.

Thank you, Mr. Chair, yield back.

Mr. LUTRELL. Thank you, Mr. Ciscomani.

Mr. McGARVEY, sir, you are recognized for 5 minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman. Thank you all very much for being here.

Mr. Arnold, last time you were before the subcommittee, I raised some concerns about workforce issues at BVA. I just want to continue in that vein today because you have heard a lot this morning and, as you know, our veterans deserve the best care possible. Also, that our public servants at the BVA ensure that our vets get fair and objective decisions. They are the bread and butter of the whole operation. That is why I think it is important to emphasize that BVA needs increased appropriations, resources, and tools to tackle the caseload backlog and hire more staff. We have got to ease the burden on our processing workforce.

We are seeing in real time how successful the PACT Act has been in hiring and beefing up the VA to address the increased caseload. I know it is working in my district in Louisville, Kentucky. I just want to float the idea now of the need for a similar mechanism across other sectors of the VA, specifically with the BVA.

Mr. Arnold, in the last hearing, I highlighted BVA's 7 percent attrition rate in Board attorneys. We talked about that. You stated it has decreased in recent years, which is great, but, as you know, is still above average, and we have got to continue to get that down.

I also asked you about the decision to implement a limited competitive GS-14 career path for new hires instead of the automatic GS-14 career path. I was concerned to read in AFGE's testimony today that Board leadership has not responded to AFGE's request to reconsider this decision.

Mr. Arnold, when do you think you can get them an answer by?

Mr. ARNOLD. Sir, I do not know that I have that. I think it may have gone to one of our other executives, but I will check on that. I imagine it is not long. If it was very recent, then I for sure have not seen it.

I know there was a prior inquiry some months ago while there is something in arbitration. That complicated the response because of the arbitration. I do not know if that is what we are talking about or not. Yes.

Mr. MCGARVEY. Whatever you can do to get that answer to them, obviously, and, like I said, this is to make sure our veterans are getting that top quality care they deserve.

Mr. ARNOLD. Yes, sir.

Mr. MCGARVEY. I do want to turn to one tweak that AFGE recommended in their testimony, and I thought it was compelling. They recommend that the Board create a competitive journeyman, nonsupervisory, GS-15 attorney position. These GS-15 positions would reward hardworking employees for their contributions and incentivize retention. As you know, this model already exists in the VA Office for General Counsel, and I think it would be a really good opportunity to address that attrition rate which we talked about. I just want to flag for you all, for my colleagues, something I would like to explore as a legislative initiative.

Just along those lines, Mr. Arnold, what impact do you think creating 100 to 200 competitive journeyman, nonsupervisory, GS-15 attorney positions would have on recruitment and retention at BVA?

Mr. ARNOLD. It is hard to know for sure what it would have on recruitment and retention, but I cannot imagine it would have a negative impact.

I do—one of the things we look at in our workforce model, we run a very flat organization, and that has been super challenging for us. Around our GS-15 ranks, we have plussed up about 33 percent, at least during my tenure. In the last couple of years, I think we had roughly 20 GS-15 positions that were available at the Board and now it is more like 30, which is good. Those are the positions, quite frankly, that we deplete and move into the judge ranks internally. In fact, we completely emptied our bench recently on that. This is something we are looking at in terms of how we organize to leverage the different grade structures that are available.

I do not have help with me, behind me today back-benching because we put everybody on the line to try to serve as many veterans as we can. One of the things we try to run lean on is not having people who are not directly serving veterans. We are balancing those two things.

Mr. MCGARVEY. Obviously, we want our veterans to get, again—

Mr. ARNOLD. Yes, sir.

Mr. MCGARVEY [continuing]. that is the care they deserve, the care they have earned. I appreciate that.

I yield back.

Mr. LUTTRELL. Thank you, Mr. McGarvey.

I would like to thank the panel for coming today. Ms. Curda, thank you for all of the evidence that you pushed out in front of us.

Mr. Arnold, as a military man, we do not jump out of a helicopter or an airplane. We do not even back up a pickup truck without a plan of attack, from step off to mission complete. We do not do that. I can assure you, sir, I will be waiting for the answers and the processes that you put together from what she put out today. Is that fair?

Mr. ARNOLD. Fair enough, sir. In fact, I could not agree more with some of those recommendations. In fact, one is duh, we should have been done doing that a long time ago.

Mr. LUTTRELL. Yes, sir, I agree. Okay, so panel one is concluded. Thank you very much.

Panel two, please be seated.

[Recess.]

Mr. LUTTRELL. Welcome, everyone, and thank you for coming today. Our second panel of witnesses will include Mr. Shane Liermann of Disabled American Veterans; Ms. Diane Boyd Rauber of the National Organization of Veterans Advocates; Mr. Michael Figlioli of Veterans of Foreign Wars; Mr. Zachary Stoltz of Christian—or excuse me, of Chisholm, Chisholm, & Kirkpatrick; and Mr. Douglas Massey of the American Federation of Government Employees.

I ask the witnesses to please stand and raise your right hand.

[Witnesses sworn.]

Mr. LUTTRELL. Let the record reflect that the witnesses have answered in the affirmative.

Thank you all for being here today. Mr. Liermann, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF SHANE LIERMANN

Mr. LIERMANN. Thank you. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, we are grateful for the opportunity to appear before you.

As you know, DAV is a congressionally chartered and VA-accredited veteran service organization that provides claims and appeals representation to veterans and their families at no cost. In Fiscal Year 2022, DAV represented nearly 20 percent of all appeals decided by the Board of Veterans' Appeals. My remarks today will highlight DAV's concerns and recommendations for the legacy and AMA appeals remands and the Board's intake and docketing of appeals.

Mr. Chairman, in the appeals legacy system, the Board is obligated to remand cases for duty to assist errors that occur at any time while the veteran's appeal was pending. If a veteran's case is remanded, the file will go back to the agency of original jurisdiction (AOJ). In each remand, the Board will lay out specific remand instructions to which the AOJ must adhere to.

In 2020 and 2021, the Board's legacy remand rate was 40 percent. In 22, the remand rate rose to 42 percent. Per the last quarterly report for 23, the legacy remand rate was 44 percent.

Appellants have the ability to submit new evidence throughout a legacy appeal. While we acknowledge that this could be a factor for the increase in remands, there are clear issues regarding the quality of these local decisions, which we believe can be traced back to training.

In 2020 and 2021, the Board's AMA remand rate was 28 percent. In 22, the rate rose to 29 percent. Per the last quarterly report for 23, the AMA remand rate was 32 percent.

One of the original intents of the AMA was to reduce the amount of remands by the Board. However, the increased rate of AMA remands establishes that VBA claims personnel are committing a high volume of duty to assist errors pre-decision.

The Board's legacy and AMA remand decisions both increased during 22 and 23. We recommend the Board to not just determine the root cause of these increased remands, which we believe are mostly development errors caused by the AOJs, but provide specific training on these issues with VBA.

It is imperative that the Veterans Benefits Administration focus the training on the law, not internal manuals which are not legally binding.

Mr. Chairman, we have concerns over the intake and docketing of AMA appeals. Although the clerk of the Board was created in 2020 to correctly docket appeals, DAV continues to discover AMA appeals that are deemed invalid and should not have been docketed.

For example, some veterans who have received a proposed reduction from VBA are filing an appeal directly to the Board. However, since this is a proposed action and not a final decision, the issue is not under the Board's jurisdiction and thus is an invalid appeal. This may not be discovered for months or longer while the veteran is completely unaware. In many instances, this has negatively impacted veterans as they could not take other timely action.

In 2021, the Board learned that a number of veterans may have had their Board appeal forms mistakenly rejected for being untimely. In January 22, the Board sent out another notice that delays to the Board's ability to mail correspondence may have impacted timely submissions.

Mr. Chairman, given the problems with the intake and docketing of AMA appeals, we recommend that a decision by a veterans law judge on the timeliness of the notice of disagreement (NOD) be added to the appeals process.

We believe that most appeals can be tracked back to development errors in the claims process, which really is verified by the increased rates of legacy and AMA remand decisions. Without concentrated training to correct these issues, veterans and their families will continue to experience appeals with extremely long waiting periods just for VA to finally get it right. We urge the Board to take action to improve the docketing of appeals as well, as veterans should not suffer from an inadequate intake process.

This concludes my testimony, and I look forward to any questions you and the subcommittee may have.

[THE PREPARED STATEMENT OF SHANE LIERMANN APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, sir. The written statement of Mr. Liermann, will be entered into the hearing record.

Ms. Rauber, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF DIANE BOYD RAUBER

Ms. RAUBER. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, NOVA thanks you for the opportunity to testify on ensuring high-quality decision-making at the Board of Veterans' Appeals.

NOVA members, who are accredited attorneys and agents, practice all across the country. Nearly all of them represent veterans, family members, survivors, and caregivers before the Board. NOVA participated in the original discussions leading to the passage of the AMA, and we welcome VA's statement today that they are ready to come back and sit down at the table and talk about some of the issues with it.

At a recent legislative hearing, Chairman Luttrell noted that the Board carries a very heavy rucksack. We recognize the ongoing efforts of Board employees to deliver accurate decisions and timely benefits.

We also thank Congress for increasing the Board's budget 63 percent since 2019. These resources, however, must translate into many more decisions in the years ahead.

Unfortunately, stakeholders have minimal insight into the quality assurance program employed by the Board. Today's GAO report details the problems with that program. We urge the subcommittee to continue its oversight to ensure their recommendations are implemented and the results are transparent to the public.

Much of the Board's focus is on court remands. The Board has mischaracterized court remands, stating that remands are done to correct harmless error, and court clerks create remands. A remand is either a negotiated agreement between counsel for the parties or a court order because there is a recognized error in a decision.

There is also the erroneous perception that reasons and bases remands do not result in benefits for veterans. The subcommittee has been provided with statistics that indicate otherwise, and our members can attest to this fact through their experience.

We take issue with the vice chairman's characterization today of our members' efforts. The GAO report provides recommendations on how the Board can analyze court remands to improve decision quality and avoid repeating mistakes that result in remands.

In fact, court remands are not the main problem in this system. Rather, a far more urgent matter is the continuing high rate of remands from the Board to VBA. AMA remands, while somewhat lower, still hover around one-third.

Unfortunately, data on the Board's website does not provide insight as to the causes for remands. NOVA members, however, report AMA remands are often due to the same reasons many remands occur in legacy cases: inadequate or unnecessary VA exams and development.

Of course, one goal of the AMA was to reduce remands. Veterans relinquished the right to retain their docket date on remand in exchange for VA's commitment to issue faster decisions, particularly in the direct review docket. There was an assurance that there would be more up or down, grant or deny decisions. Veterans relied on this commitment when opting into the new system at VA's urging. With a third of decisions being remanded in the AMA, that expectation is not being realized. We urge Congress to allow rep-

resented veterans to waive the duty to assist at the Board to reduce remands.

The continuing cycle of remands is not solely the Board's problem. VBA also plays a role by frequently failing to obtain adequate exams when needed, failing to properly consider private medical evidence and apply the benefit of the doubt, and ordering unnecessary exams.

When you reduce remands, you reduce the backlog. When you reduce the backlog, employees have a more manageable workload. When employees have a more manageable workload, they produce higher quality decisions. Higher quality decisions provide better outcomes for veterans, which is a common goal we all share.

The Board states that it is examining the root causes of continuing remands. We urge the subcommittee to continue its oversight on this issue.

Finally, the subcommittee sought feedback on Board determinations of whether a notice of disagreement has initiated an appeal. The Court of Appeals for Veterans Claims recently issued a decision in the Kernz case. The Court found Mr. Kernz' appeal was moot because the Board corrected its error and docketed the appeal it found untimely. However, that case revealed other veterans who received such letters were not so lucky. Counsel for Mr. Kernz estimated that somewhere between 1,500 and 2,000 other claimants received erroneous letters. The Board was unable to accurately determine how many were issued because of problems with its electronic systems. Although the Board published a notice, without an accurate way to determine exactly how many claimants were impacted, there is no doubt there are veterans who have no idea that their appeal could be reinstated.

We thank Chairman Luttrell for introducing H.R. 5891, which would require the Board to include a written determination of whether the Notice of Disagreement was adequate and timely. It is critical that this basic jurisdictional question be answered by the decisionmaker and not by an administrative employee.

We thank you again for the opportunity to testify today on this important topic and are happy to answer any questions.

[THE PREPARED STATEMENT OF DIANE BOYD RAUBER APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, ma'am. The written statement of Ms. Rauber will be entered into the hearing record.

Mr. Figlioli, you are now recognized for 5 minutes to deliver your opening statement, sir.

STATEMENT OF MICHAEL FIGLIOLI

Mr. FIGLIOLI. Thank you. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars and it is auxiliary, thank you for the opportunity to provide testimony with regard to the BVA and its practices.

The passage of the Appeals Modernization Act was to streamline the appeals process. Under the legacy appeals system, appellants too often had to endure lengthy delays of months, sometimes years, to navigate a confusing and complex structure, and some are still now stuck in that outmoded system.

A Notice of Disagreement is the first step in the appeals process for veterans seeking a review of their disability claim before the VA. While the NOD is a formal expression of disagreement with the decision, historically it does not constitute an appeal to the BVA. The legacy NOD initiated the appeals process, serving as the first official notification to VA that the veteran disagreed with their decision. The veteran would then have to complete Form 9, certifying the appeal to the BVA for docketing and review by a veteran's law judge.

Under the legacy appeal system, this is where the appeals often get stuck in the churn based on docket date, then awaiting assignment and review by their advocate, who would then submit an independent hearing presentation on their behalf. What became clear to VFW was that this process was archaic and generally unnecessary. VFW determined that the Independent Hearing Presentation (IHP) was not based on law or regulation and likely a hold-over from practices years ago. If a quality argument was of record, the appeal could proceed directly to the judge after our staff completed the quality review.

VFW has eliminated its excess workload of legacy appeals. For more than a year, we have been at functional zero, which means that legacy appeals continue to churn through the remand system, reappearing at the BVA at any time.

The Appeals Modernization Act was intended to allow for a review in a timelier fashion. VFW is concerned with the excess workload in the AMA inventory. By focusing mostly on legacy appeals reduction and cases advanced on the docket, the remaining appeals languish, while more appeals continue to be certified to the Board. Hiring more staff is an excellent step and one that we applaud. Delivering more decisions is admirable, but they must be accurate and timely, and not just a number in a performance plan.

The remand process from the BVA to VBA is a crucial aspect of adjudication, and often the most confounding. Workflow may not keep pace with the progression of the appeal. When the BVA identifies deficiencies in the appeals process, it remands the case back to VBA for further action. This acknowledges that some cases may not have been thoroughly examined in the initial stages. It also reflects VA's commitment to ensuring a fair and comprehensive review of veterans claims.

VFW has found if the record was fully associated with all the evidence or a complete review completed prior to a decision, remands are unnecessary. VFW is aware that the remand rate for legacy appeals is over 40 percent. The typical legacy appeal has been remanded at least twice or more. The purpose of AMA was to eliminate remands altogether.

It is the VFW's position that communication between the BVA and VBA is critical during this process. Clear directives that decision-making must comply with will help streamline further development of cases. Effective collaboration between entities is essential to ensure that the remand process serves its purpose without unnecessary complication.

The VBA relies on various sources of data to include data from the BVA. How VBA uses this data is essential in understanding their commitment to continuous improvement.

VFW would like to thank the VA undersecretary for benefits and his staff for showing a willingness to incorporate important changes in law or administrative process into their training. By using remand data and scrutinizing these patterns, VBA can pinpoint areas where its process may need refinement. This will allow VBA to address systemic issues and help guide the development of targeted training programs to improve production.

The BVA has a substantial role in the adjudication of claims. Its decisions are at times subject to review by the CAVC, which provides legal guidance and precedents that may influence how cases are adjudicated. This increases accurate application of the law. If a BVA decision is overturned, it proves that there may be flaws in the initial adjudication. BVA must involve continuous evaluation of its decisions in identifying errors, then implement corrective measures that improve quality and reduce the likelihood of future reversals.

While VFW was pleased with some of the reforms and changes made at the BVA over the last several years, there is work to be done. The AMA is a framework whose intent must continue to be revisited to keep pace with changes in regulation.

Chairman Luttrell, Ranking Member Pappas, this concludes our testimony, and I am happy to answer any questions you may have.

[THE PREPARED STATEMENT OF MICHAEL FIGLIOLI APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, sir. The written statement for Mr. Figlioli will be entered into the hearing record.

Mr. Stoltz, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF ZACHARY STOLZ

Mr. STOLZ. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, thank you and good afternoon. I am Zach Stoltz, a partner with Chisholm Chisholm & Kilpatrick. CCK is a law firm with dozens of VA-accredited attorneys and advocates handling VA benefits claims at all levels of the process. I have personally spent the bulk of my career practicing before the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit. As part of a pro bono program with DAV, my office has handled over 15,000 appeals at the CAVC—as part of a pro bono program with DAV, my office has handled over 15,000 appeals at the CAVC over the past 15 years.

The Board of Veterans' Appeals was given a herculean task with the passage of the Appeals Modernization Act. Already struggling with huge backlogs, it was expected to work down legacy cases while simultaneously adjudicating cases in the brand new AMA system. There is no question the men and women at the Board work hard every day to serve our Nation's veterans and their families. Congress and taxpayers have supported the Board with significant investments, and so far production has not reflected this.

Since Fiscal Year 2020, the Board's budget has surged by approximately 61 percent, escalating from \$174 million in \$2020 to \$285 million in Fiscal Year 2023. Strikingly, the increase in budgetary allocation has not proportionally translated into enhanced

productivity. In comparison, the Board only decided .5 percent more appeals in 2023 than in 2020.

The chairman's latest report lays some of the blame for the Board's inefficiency on the Court of Appeals for Veterans Claims. In my nearly 20 years of practice, I have noticed it is not uncommon for some at the Board to complain about the Court's oversight, like the way District Courts complain about Appellate Courts and Appellate Courts complain about the Supreme Court.

Putting aside for the moment the mistaken notion that many remands are simply for the Board to explain itself better, the CAVC remanding 6-to 7,000 cases a year cannot explain why the Board is not deciding more than an average of 95,000 cases over the past 4 years. The Board simply must adjudicate more cases. It is the inescapable bottom line.

There is a role for advocates to play in this process. In our written testimony, CCK proposed that the Board more routinely accept waiver of director of compensation consideration of 4.16(b) claims and the duty to assist. Waiver is not to be taken lightly. The duty to assist is a vital part of VA's nonadversarial adjudicatory system. With the growing sophistication of advocates, both in the VSO and private bar communities, there is a place for knowing waiver. As many of the witnesses here today noted, the remand rate from the Board to the regional offices is very high, allowing for advocates and the veterans they represent to waive certain procedures when a record is fully developed will move cases along faster.

This also makes more sense as we see the promises of the AMA come more into focus, but also some of the pitfalls. Remands are far more devastating in the AMA because veterans lose their place in line at the Board when their cases are sent back to the regional offices.

Everyone in this room today works to make the VA adjudicatory process better for our Nation's veterans. The Board is a linchpin and, frankly, the place where tens of thousands of veterans can receive justice. This hearing and hearings like it are vital to ensuring clear-eyed oversight of the Board's results.

I appreciate being here today, and I look forward to your questions.

[THE PREPARED STATEMENT OF ZACHARY STOLZ APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, sir. Mr. Stoltz will be entered into the hearing—the written statement of Mr. Stoltz will be entered into the hearing record.

Mr. Massey, you are now recognized for 5 minutes, sir, to deliver your opening statement.

STATEMENT OF DOUGLAS MASSEY

Mr. MASSEY. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, thank you for inviting the American Federation of Government Employees to participate in today's hearing. My name is Douglas Massey, and for the past 7 years, I have had the honor of serving as President of AFGE Local 17, representing approximately 1,000 attorneys and support staff at the Board of Veterans' Appeals. It is a privilege to offer insights to this

subcommittee on ways to enhance the Board's appeals process for our Nation's veterans.

The foundation of well-informed decisions lies in the perspectives of those directly engaged in the work. This is where AFGÉ plays a crucial role. My testimony today aims to highlight areas where both Board leadership and this subcommittee can support dedicated Board attorneys, focusing on recruitment and retention, training, and workload and performance.

The first issue I will address is a career path for Board attorneys, which Board leadership downgraded from a GS-14 to a GS-13. This undermines the VA's and this subcommittee's goal of recruitment and retention of talent. Board management has effectively limited the career path for Board attorneys, widening the competitive pay gap among attorneys in the public and private sectors. We firmly believe that this committee shares our commitment to ensuring that veterans claims receive the highest level of attention.

Beyond restoring the GS-14 career path, we further propose that the Board create a nonsupervisory GS-15 attorney position. Establishing this possibility for attorneys would significantly contribute to the long-term recruitment and retention. It is noteworthy that nonsupervisory GS-15 attorneys exist within VA's Office of General Counsel, setting a precedent. We ask the committee to take legislative action.

Second, the Board's decision to hire Board judges without any veterans law experience is equally disruptive and detrimental to the Board's mission. Historically, Board judges were required to possess a minimum of 7 years of experience in veterans law, acknowledging the intricate nature of the work. Several years ago, the longstanding 7-year requirement was abruptly eliminated from the Board judge hiring criteria. The result of this decision has been disastrous. Experienced judges are signing or finalizing three times as many decisions per week compared to their inexperienced counterparts.

In addition to fewer decisions, attorneys complained that the inexperienced Board judges struggle with approving quality decisions, requiring that attorneys train the Board judges for whom they work. Similarly, many of the Board's experienced Board judges are now tasked with training their new, inexperienced colleagues, which detracts from time they could devote to signing decisions. Board judges are already under immense pressure to review and sign at least 20 decisions a week, conduct numerous hearings, and mentor attorneys.

Furthermore, the hiring of inexperienced Board judges has demoralized attorneys because it has foreclosed promotion opportunities to these coveted positions. Many surveyed attorneys have indicated they plan on retiring earlier than expected. AFGÉ requests that the committee take action and propose codifying the 7-year experience requirement for entry-level Board judges into law.

Third, the Board's recent failure to prioritize quality through effective training has left attorneys frustrated and demoralized. AFGÉ, recognizing this gap, initiated its own successful training program. Despite the program's success, upper management has yet to implement a similar initiative. An alarming example of the

training gap is the Board's offering of only 2 hours of mandatory training on the PACT Act in the past year compared to VBA's 15 hours. This inadequacy leaves attorneys unprepared to navigate the nuances of the PACT Act, risking errors and inadequate decisions for veterans. Insufficiently trained attorneys contribute to delays, a backlog of cases, and ultimately hinder veterans access to benefits.

Last, while the Board's output is a priority, an exclusive focus on quantity over quality harms veterans and disrupts the entire appeals process. AFGE strongly urges the Board to lower the quota, allowing sufficient time for the required de novo review of claims files and the issuance of high-quality decisions. AFGE members believe that making straightforward changes to Board attorneys' compensation, promotion opportunities, training, and performance measures, together with setting minimum experience levels for Board judges, will greatly benefit the productivity and effectiveness of the Board.

We look forward to working together collaboratively to make the changes we can. Thank you, and I look forward to answering your questions.

[THE PREPARED STATEMENT OF DOUGLAS MASSEY APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, sir. The written statement of Mr. Massey will be entered into the hearing record.

We will now move to questioning. I recognize myself for 5 minutes.

The remaining World War II vets into Korea, into Vietnam, into the Gulf War, and into the two wars we previously fought that just recently ended, all of those servicemembers or veterans are moving into the Veterans Affairs organization. The amount of weight that that Department has to shoulder now that our generation, my generation, are moving out, they are doing everything they cannot to scuttle. We are asking them to do everything in the right for us, and they are trying to shoulder that. I want that to be said right now, and I want them to hear me say that.

Each one of you listed off multiple issues that need to be addressed. Absolutely. Mr. Stoltz, you listed off—the weight of your statement holds a lot to me.

Mr. Massey, your discussion is about us downgrading the GS levels and the caliber of attorneys that we are going to get inside the VA system, correct?

Mr. MASSEY. Could you please repeat the question?

Mr. LUTTRELL. Your statement revolved around the type of attorneys that the VA will be receiving because we lowered the GS levels, correct?

Mr. MASSEY. Correct.

Mr. LUTTRELL. All right. Here is my issue. We are putting all of these issues out in the open that need to be addressed, and we are asking the VA to address them in its entirety. Here is 500 issues that you guys are absolutely failing on. That big machine cannot work like that as hard as it tries.

From the GAO statement over the past years, I keep hearing the exact same thing, that we are asking to accomplish these many things. I am going to ask this question, and I want each of you to

answer it. If you had to pick one issue that I could hand to Mr. Arnold and say, you have got 2 weeks to give me an answer and 6 weeks to fix it, and we take smaller bites of this grand apple that we are trying to swallow instead of sitting in these hearings over and over and over, what does that look like?

Mr. Liermann, if you had one thing you could say, Mr. Arnold, this is absolutely what I need to be done for our veterans that I think would move the needle in the right direction? Do not give me the legislation that we are pushing already. I need concrete facts. What is that one thing?

Mr. LIERMANN. Training.

Mr. LUTTRELL. Training. I hear training all the time. Okay? VA employees, from what I understand, only have to come into the VA brick-and-mortar twice a month. What does training mean?

Mr. LIERMANN. I think training in this instance means looking at why these remand decisions or these errors are being made and sitting down and explaining it to the attorneys at the Board and, additionally, explaining this to the employees at VBA.

Mr. LUTTRELL. Is that written out somewhere? Somewhere in their organization or your organization, is it, because if we go into a meeting and we just talk to each other, you are going to retain about 2 minutes of the information that I am saying. Is what we are asking for from our organizations written down somewhere? I can hand that to him and say, push this down inside your organization so we can change this. That is what we need. If that does not exist, sir, let us get that done.

Mr. LIERMANN. Roger.

Mr. LUTTRELL. Okay.

Ms. Rauber.

Ms. RAUBER. Well, Vice Chairman Arnold said a little earlier that Board attorneys and judges are too often going back to the legacy system style of doing things and continuing to remand when they should not be. That is something that was promised under the AMA, so I think you have to be looking at why you are remanding cases that should not be remanded. You cannot solve this problem if you cannot figure out why you keep remanding cases.

Mr. LUTTRELL. Mr. Figlioli.

Mr. FIGLIOLI. Yes, thank you. It goes hand-in-hand with training and what Diane just said, quality review. If you are putting out a product that does not meet the standard, then how do you know to fix those issues? We have to train them better. We have to agree on what that is going to look like. They have to know what the process is, understand the law, and apply it properly, so we do not end up in the constant remand cycle. We do not end up with things going back and forth between the BVA and the VBA. That lawyer, that law judge, that staff attorney needs to know what quality product they need to produce for a veteran in order for that appeal to be heard, but then also for them to be successful as well.

Mr. LUTTRELL. Mr. Stoltz.

Mr. STOLZ. More decisions from the Board. The process has to keep moving. The only way that veterans are going to be served is if the line keeps moving, and there have to be more decisions.

Mr. LUTTRELL. More decisions by the Board.

Mr. STOLZ. It is not going to—

Mr. LUTTRELL. See me after class. Sorry.

Mr. Massey.

Mr. MASSEY. Yes. Veterans are not widgets. They are warriors. I think we need a different culture at the Board, a learning culture, a growth culture. I think we are kind of all saying the same things.

Last night, briefly, I talked to an attorney. He said he wanted to be switched to a different veterans law judge, and I asked why. He said he is a new judge, does not understand the law. I said, what are the conflicts? He says, I would like to grant a lot of these decisions. He wants to remand them or deny them.

That is only one issue I brought up, is the inexperienced veterans law judges, but proper training, proper compensation, treating the workforce with respect. You know, any organization, any enterprise, I mean, everybody talks about employee engagement, you cannot have a service organization if you are going to treat the workforce the way, you know, we are treated at the Board of Veterans' Appeals.

Mr. LUTTRELL. Thank you, sir.

Mr. Pappas, you are recognized for 5 minutes, sir.

Mr. PAPPAS. Thank you, Mr. Chairman. Obviously at BVA, we are grateful for the attorneys, the judges that are so essential in that system to ensure that it operates efficiently, but also, most importantly, effectively and accurately for the veterans that are, you know, working toward achieving what they deserve.

As such, issues pertaining to training, I think, are central, and several of you have mentioned that. Mr. Massey, you were talking earlier about the need for training the way AFGE has, I guess, put together a training program in absence of something that you thought would be more effective coming from the Board. Can you discuss a little bit about what that AFGE training program looks like and what recommendations you would have for a more permanent solution?

Mr. MASSEY. Yes. Management identified, 1 year, 40 attorneys who were struggling and failing, and they were supposed to provide the training and assistance under our Collective Bargaining Agreement. One of our stewards, Dr. Benton Komins, put together a group of three other union stewards, and he worked with these people every week on efficiency training, on understanding the law. Dr. Komins has continued doing this by himself. He has recruited other attorneys to help and it is kind of an informal training program.

I have urged Board leadership to have a similar group where you take five or six attorneys off production, have a group where they can help anybody out. It can be anonymous. The problem is that the Board is pennywise and a pound foolish. They do not want to take three, four, or five attorneys off production to do this. This is an investment.

The 7 percent attrition rate, that is not accurate. We have hired probably 4-or 500 brand new attorneys since 2017. They are on a 2-year probationary period. They are not considered employees. They are considered applicants. Out of those 4-or 500 people, we have probably lost well over 50 percent. The attrition rate, their training has been—the attorneys doing the training are very com-

mitted. We have a very flawed system, and I think we need management to address it.

Mr. PAPPAS. Well, I agree that the training issues pertaining to morale and retention are just as important as some of the technical tweaks that we have been exploring this morning.

Can you talk a little bit more about the quotas and performance metrics that have been an issue and how these changing standards affected the well-being of attorneys? In your opinion, what reasonable workload would balance productivity with maintaining high-quality decision-making for veterans?

Mr. MASSEY. Well, right now we have an annual quota of 156 decisions or 491 issues. We believe it should be lower, around 125, 130. We know that you cannot dictate a quota for the Board of Veterans' Appeals. However, Congress has—what is a requirement is that each decision be done de novo review, meaning looking at the whole record fresh and reviewing it. That is actually impossible with this quota.

Everything is online, but we used to have paper files and some of these came in boxes. It would be like, here is a box of medical records. You need to read this. You need to write a decision. We need three of these a week.

It is very demoralizing because the attorneys know that they are required to do de novo review. You cannot do that in this system, and people struggle. It is almost as though there is not a thought from management about what the finished product is. Everything is a number.

I think it needs to be said. This management team, there is about seven senior executives running the Board of Veterans' Appeals, they are all new except for one. They have never written a decision. They have never signed a decision. I think they are struggling because I do not think they know what they are doing.

Mr. PAPPAS. Thanks for those comments.

Ms. Boyd Rauber, if I could turn to you. You mentioned a comment in your testimony that we heard during the first panel about the supposed way that accredited attorneys drag out the appeals process as a way to drive up fees. Is there a moral hazard in terms of the work that gets done in practice for these accredited attorneys?

Ms. RAUBER. Well, I am really glad, I hope I will get the chance to put that urban legend to rest here today once and for all. Attorneys and accredited agents do not drag out cases. VA rules and regulations are very clear. There are standards of conduct that require them both to work diligently and promptly on their cases. Affirmatively, if you are dragging out any case you are prohibited from doing that, that would not only get you in trouble with VA accreditation, it would also get you in trouble with your State bar.

Veterans talk to each other. VA practitioners talk to each other. It would be a terrible business model for you to be doing that.

I would actually argue that accredited attorneys and agents, and as well as VSOs with us today, are the people who are actually going to VA advocating for those cases to be done faster, going to the Court, filing writs, filing motions to advance on the docket. They are working diligently every day to get these cases resolved.

Mr. PAPPAS. Thank you. I yield back.

Mr. LUTTRELL. Thank you. Mr. Self, you are recognized for 5 minutes, sir.

Mr. SELF. Thank you, Mr. Chairman. I have heard one of you—and I apologize for stepping out, but the Red Cross is having members write letters to our overseas servicemembers. Having received many times those, I know how important it is, so I missed some of your testimony. I do want to ask, I did hear about judges that have no knowledge, no experience. Please give me examples of how that harms veterans.

I believe that was you, Mr. Stoltz. No? Mr. Massey?

Mr. MASSEY. I believe it was me, yes.

Mr. SELF. Okay. Mr. Massey.

Mr. MASSEY. The story I just related, an attorney called me, he wanted to be moved from the current judge he works for, and I asked him why. He said, this guy is new. We are clashing. He is doing things incorrectly. He wants me to remand things or deny claims, and I think they should be granted. It is a very difficult job. There was a 7-year requirement every time it was posted on USAJobs until 2019, and there was a reason for that.

I worked with a veterans law judge who is now retired, John Ormond. He worked for the Internal Revenue Service (IRS) for a long time, and he said that veterans law is far more complicated than the tax code, and we know how complicated the tax code can be.

Part of the job of a veterans law judge is to train and mentor attorneys. How do you do that? I mean, I started this job in 1997, and I always knew if I had a decision I had to write, if I had a question, I would go to the judge. I was going to decide the decision and say, hey, what do you think about this or what do you think about that? I always felt confident they would give me correct answers. I do not know how attorneys are doing that these days, writing for inexperienced veterans law judges.

Mr. SELF. Give me examples of how they are harmed. Is it just the delay? How are they harmed?

Mr. MASSEY. I do not think they know how to adjudicate the appeals properly. We get stories of attorneys that they believe it should be done a certain way. The inexperienced veteran—I mean, this could be an attorney with 25 years of experience that is an expert in veterans law, and there could be somebody brand new with 6 months, just had no prior experience, and the veterans law judge is going to tell this very experienced person how to adjudicate a claim. If the attorney knows that it is incorrect and maybe the claim should be granted, maybe it should not be remanded, that person has to do what the judge says.

Mr. SELF. Well, what is the recourse? Do you have a whistleblower option? What is the recourse, because there must be a recourse for someone whose superior is not trained well, whatever. What is the recourse?

Mr. MASSEY. There really is not a recourse. I mean, we do what the judge says. I have been in that situation. I have kind of fought back a little bit, and it usually does not work out so well. That is why—

Mr. SELF. Does anyone else know of a recourse, any of our other panel members?

Mr. MASSEY. As a solution, we could have it legislatively put in there. This was a policy, the 7-year requirement. If that could be in legislation, I think that would be very beneficial to veterans.

Mr. SELF. I see Mr. Arnold behind you. I would like to follow up on the recourse, Mr. Arnold. I think that is an important question. If this system is as broken as we have been hearing this morning, what is the recourse for subordinates in this situation?

I would also like to follow up on the fact that if the veterans law is more complex than the tax code, that is something that ought to raise everyone's eyebrow if that is, in fact, true. If that is it, we have got a bigger problem than what we are discussing here this morning.

With that, Mr. Chairman, I yield back.

Mr. LUTTRELL. Thank you, Mr. Self.

Ms. Ramirez, you are recognized for 5 minutes.

Ms. RAMIREZ. Thank you again, Mr. Chairman. I want to get into the questions, and perhaps some of this is also follow up from my colleagues.

Mr. Massey, in your testimony, you discussed a lack of training. I think this also goes back to a little bit of what you just mentioned a moment ago. In the panel before, I asked about training both for new Board attorneys as well as continued training for those that have already been there.

I want to ask you a little bit more about the initiatives to train employees. Can you elaborate a little bit more about the specifics that you want to see in training? What are the ways that you want it to be improved? I want to get that on the record.

Mr. MASSEY. Are you talking about new attorneys being hired or ongoing training?

Ms. RAMIREZ. I think both.

Mr. MASSEY. Okay. I do have some ideas.

The new attorneys, they have a 6-month program. It is the Professional Development Division. The people running that very good, very qualified. They do not have a productivity standard during those first 6 months. They are just being trained.

Now, right after that 6 months, they are given the same productivity standard as everybody else, the same quota. I do not think that is a very wise decision. I know that one of my colleagues worked for Social Security. They did not have the same quota the first year that everybody else had.

Here is another thing, this obsession with numbers and not looking at, you know—there was one—one of our members, she—you know, it was a 24-week training program. She took 10 weeks off for maternity leave during that 24-week period. You know, she missed a good portion of the training. Instead of giving her the 10 weeks of additional training, when the 6 months was over for her class, they said, no, you are going on productivity, you are on production.

Another person who had quit recently or a year ago, she did not have a computer or something for a good portion, like the first month. Instead of giving her that time back, they said, sorry, you can catch up with everybody else.

Nobody really looks at these people like they are people. Everybody is a widget. Veterans seem like widgets in some respects; the employees do.

I do know that I have been at the Board for a long time. The people there are very dedicated, very committed. When I wrote—you know, writing decisions for me was—I really enjoyed it. You get a sense of satisfaction, especially when you grant somebody 100 percent disability benefits. You know it is going to change their life.

I think instead of just the number 103,000 this year and 111,000 next year, what is the product we are putting out there? I think that needs to be a focus.

Ms. RAMIREZ. Yes. No, thank you for that, Mr. Massey. I appreciate it.

I want to shift gears a bit now, and I want to talk about the AMA appeals and how they are being handled. My questions are directed to Mr. Liermann.

During your oral statement, you mentioned increase in remands for legacy and Appeals Modernization Act appeals. What do you feel is the primary reason for the increase in both types of appeals and what do you think can be done to correct the problem?

Mr. LIERMANN. Thank you. I think it really comes down to is training and understanding on development errors. As was already said, when they are being—cases are being remanded back for an exam or clarification of a medical opinion or one that was not requested, if there is adequate training to understand and explain that remand and that reason to the VBA employee, then we have that same training as well with the judges. We are going to help eliminate the most common reason these cases are being remanded.

I have been doing this for about 25 years with DAV, and I was at our office in Nashville, Tennessee, for a few years. Back when the Board of Veterans' Appeals was conducting Travel Board hearings, several of the judges would offer training to that appeals coach when they were there conducting hearings for that week. They would bring in that entire appeals team. They would bring in some of the attorneys that even invite us VSOs. They would sit down and talk about some of the common mistakes and errors that are found. I think that type of training to that level involving everybody is what is really needed to help avert these problems going forward.

Ms. RAMIREZ. Got it.

I just have one last question before my time is up. In your written statement, you noted that the Board conducted 11,000 fewer hearings in Fiscal Year 2023 than they did in Fiscal Year 2022. Do you have an idea why this happened?

Mr. LIERMANN. Not really, to be quite honest. I mean, I do not really understand how you go from conducting 11,000 less hearings. There are 72,000 hearings pending right now, and if we continue to do less, we are not going to get to the end result that veterans are waiting for.

Ms. RAMIREZ. Thank you for that.

Chairman, I yield back.

Mr. LUTRELL. Thank you, ma'am.

Mr. McGarvey, sir, you are recognized for 5 minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman. Thank you all very much for being here.

I wanted to start off by highlighting a quote from your testimony, Mr. Massey. You wrote that, "AFGE members and Board attorneys are not afraid of the hard work necessary to satisfy the mission of serving veterans." Thank you. Thank you for that.

We know what an incredibly valuable resource we have, both in our veterans and in the people who are working to serve them and get them the care they need. What you see from this committee, if you sense any frustration at all, it is that we want to make sure they get the care they need.

I was going to ask a little bit about the training that Ms. Ramirez discussed, and so since she kind of got a good answer from you guys on that, I want to shift a little bit more to what you were just talking about and follow up on her last questions.

Mr. Massey, you mentioned a legislative fix earlier that you would like us to look at. Now we are hearing there are 72,000 claims pending, 11,000 fewer claims adjudicated Fiscal Year 2023 than in Fiscal Year 2022. What can we do, Mr. Massey? How can we help you guys? If you could snap your fingers and ask for something from us, what can we do to help our veterans get these claims adjudicated, get the care they need, they have earned, they deserve?

Mr. MASSEY. That is a tough question to answer. The comment was made if this is more complicated than the tax code, we got some serious problems, I mean, the whole system needs to be redesigned. For purposes of this hearing, I think the Board of Veterans' Appeals, I think it needs to focus on training.

I think they need to—I mean, when they downgraded the position from the GS-14 to the 13, it did not impact any of our members. This was new people being hired, but everybody was upset. I was wondering why from a union advocate standpoint. It was kind of a message to them that they are not valued, and it does not seem like they are being valued. You cannot have any kind of customer service.

The first thing, if you treat the employees well, they are going to treat their customers well, their clients. The Board attorneys, they do a phenomenal job, but they need more time to do the job. They need a quota that is lower.

By the way, this whole tension between quality and quantity, it is been going on since I started 25 years ago. This is not new. It is a very difficult job. I do not envy the managers in charge of the Board of Veterans' Appeals. It is very tough.

I think compensation, definitely, if you create 100-to 200 GS-15 positions for people that want to stay—I know a guy, he does not mind me using his name, Thomas Douglas left. He was one of the Board's most valuable attorneys as far as quality and productivity. He left after 26 years. He did not stay his 30 years. I asked him why. He said, I am never going to be a veterans law judge, and look at all these people. I am going to go train somebody? You know, we need to take a look at how we are running the Board of Veterans Appeals.

We did a survey; I think you guys got it. Ten staffers came to the Board about 2 months ago. In June, I asked a question in a

survey, what would you tell a member of the House Committee on Veterans' Affairs about the Board of Veterans' Appeals? Not knowing we were going to have this hearing. I gave that to the staffers. There is a common theme if you read that, and I encourage everybody to read or to have your staffers read it. It is all about productivity. They do not care about us. They do not care about the quality of what we are doing. That was the common theme.

Some positive notes with the surveys we have done, they do like their immediate supervisors, the veterans law judges. They like their senior counsel, the supervisors. Their direct supervisors they view very favorably. There seems to be a disconnect between upper management and what everybody is doing.

Mr. MCGARVEY. You hit on this briefly. We do have an incredible workforce, an amazing workforce. People coming in day-in, day-out, working really hard to ensure that our vets get the decisions they deserve. We want to make sure you guys have the tools and the support you all need as well.

Throughout your testimony, you did highlight several ways the VA could improve recruitment and retention, including metric reforms, promotion opportunities, training, compensation that you just hit on. I just want to elevate those ideas, and I do hope that BVA leadership and this committee can take action on some of these items.

Just, you know, appreciate the work you all do. I do know that there are big positives and highlights of working at the BVA, and we are here to support. Thank you.

Mr. LUTTRELL. Thank you. Thank you, sir.

Thank you all to our witnesses for testifying before us today about the important issues of ensuring that veterans receive high quality decisions on their appeals.

With that, I will yield to the ranking member for his closing remarks.

Mr. PAPPAS. Well, thank you very much to everyone on our second panel for your discussion here today and what you all do and represent. I did hear during the first panel that there is going to be an AMA Summit coming up in early 2024, and I do hope that your organizations will somehow be involved in that and that an invitation is coming your way. We will see. Thank you to everyone who participated in today's event.

This is, obviously, a very crucial conversation about the Board of Veterans' Appeals, and it is evident that BVA has got some work to do to address these issues with the appeals process, including retention and hiring concerns, training deficiencies, lapses in quality assurance, and the impact of increased workloads on morale.

Let us not forget that behind every claim is a veteran. Behind every claim decision is an employee tasked with writing it. As such, a singular focus on increasing productivity will only lead to greater employee burnout, attrition, and ultimately worse outcomes for the veterans that we all want to serve better.

I know that with the implementation of PACT, VA is delivering more benefits to more veterans than ever before. The Board must continue to focus on workforce development and quality assurance as we find ways to decrease the appeals backlog.

Further, the Board should continue to aggressively hire new employees to balance out the workload. I would say also that VBA must continue to address, at the same time, the upstream issues with claim accuracy that lead to additional downstream work by the Board.

Ensuring veterans receive a decision on their appeals promptly, along with an accurate and comprehensive decision, remains a top priority. It is imperative that these individuals obtain the benefits rightly due to them, and we should all be committed to nothing less and I know that we are.

I anticipate a continued collaboration, Mr. Chairman, with you, with our VSOs, with all those who have been a part of this hearing today. I yield back and thank everyone for a productive session.

Mr. LUTTRELL. Thank you, Mr. Pappas.

Mr. Massey, my colleague, Mr. McGarvey, asked one of the most profound questions, and your response was, that is an extremely difficult question, but those are the answers that we need. We need to know exactly the answers to those hard questions so we can take that information directly to the VA and make movement on it.

You heard me say earlier, having these hearings where we are engaging back and forth, but we have no profound this is the way forward. This is from step off to mission success is what we need to implement. We have to refine that in a way where it is just not Sunday lunch and you are emptying the refrigerator. Okay? I do not have any other better way to put it.

Again, thank you so much for coming today.

I ask unanimous consent that all members have 5 legislative days to revise and extend their remarks and include extraneous material. Without objections, so ordered.

This hearing is adjourned.

[Whereupon, at 12:53 p.m., the subcommittee was adjourned.]

A P P E N D I X

PREPARED STATEMENTS OF WITNESSES

Prepared Statement of Kenneth Arnold

Good afternoon, Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee. I appreciate the invitation to appear before you today on behalf of the Department of Veterans Affairs (VA) to discuss how VA strives to achieve final resolution of Veteran appeals regarding claims and eligibility for service-connected disability compensation ratings and benefits, VA health care access or services and VA cemetery or burial benefits. Accompanying me today is Timothy Sirhal, Executive Director, Office of Administrative Review, Veterans Benefits Administration (VBA) and Mary Flynn from the Office of General Counsel (OGC).

We have made incredible strides within VA to execute the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which was implemented on February 19, 2019. Increased choice for Veterans and setting reasonable time constraints on adding additional evidence under each choice during the appeals process under AMA has led to much faster resolution of appeals, with higher grant rates and significantly lower remand rates between the Board and VBA.

Providing Veterans with the opportunity to “appeal first” to VBA after an initial denial of claims under AMA has been a game-changer, resulting in ever-increasing numbers of Veterans choosing that option each year to have their denials turned into grants without the need to seek an appeal from the Board of Veterans’ Appeals (Board). Under the AMA, Veterans can choose to have initial claims decisions reviewed within VBA by a more experienced claims adjudicator through the higher-level review process (i.e., a review of the same evidence presented to the prior decision-maker) or Veterans can file a supplemental claim with VBA if there is new and relevant evidence to support the claim. These new choices available to Veterans to “appeal first” to VBA has reduced the number of appeals to the Board. In fiscal year (FY) 2021, only 17 percent of Veterans who received an initial “no” from VBA under AMA chose to challenge the decision by appealing to the Board. In FY 2023, merely 2 years later, that rate dropped to single digits—just below 10 percent.

Even though we know we still have a long way to go to achieve the full impact of those historic changes in law, and improvements can be made, I am pleased to report to you that the most notable improvement in AMA appeals processing is the significant reduction in the time it takes to fully resolve Veteran appeals, both at VBA and at the Board. Since implementation of the AMA, VBA has consistently met its timeliness (125-day average days to complete) and quality (93 percent) goals under the AMA decision review program. In FY 2023, under the AMA system, VBA completed over 429,000 supplemental claims in an average of 122 days and decided over 140,000 higher-level reviews in an average of 77 days.

Last year, the Board decided over 30,000 AMA appeals. On average, AMA appeals at the Board are fully resolved (meaning no remaining remands) approximately 4 years faster than it takes to fully resolve Legacy system appeals, i.e., those appeals remaining in the appellate system that the AMA replaced. At the same time, those faster AMA decisions reflect 20 percent fewer remanded cases and 10 percent higher grant rates when compared to the Legacy system remand and grant rates. These are consistent trends over the past 4 years. In FY 2023 alone, VBA implemented over 10,000 full grants of benefits awarded by the Board...averaging less than 30 days to process those granted benefits. In short, Veterans are using the different options available to them under the AMA and this increased Veteran choice is also enabling Veterans to get full and final answers from VA much faster than under the Legacy system of appeals.

Honestly, the older Legacy system of appeals has been holding us back from achieving even greater success under AMA. Veterans Service Organizations (VSO) and other accredited representatives have expressed frustration on behalf of the Veterans they represent, noting that the promises of faster resolution under AMA is not happening with so many Legacy system appeals still pending. When Congress passed AMA in 2017, a widely held assumption was VA could successfully operate both systems at the same time, even though the House Report noted it would take

an average of 10 years for a final appeals decision under the Legacy system. It was expected that the older Legacy appeals system cases would decrease to the point that the system would effectively sunset and almost all appeals would be processed more swiftly and effectively under the newer AMA system.

VA still has nearly 60,000 pending Legacy system appeal cases, and over 20 percent of those Legacy system appeals have not had an initial review or adjudication by a Board judge because so many remanded cases keep returning to the head of the line, essentially cutting in front of those Veterans. While we have made great strides reducing the pending Legacy system appeals from nearly 475,000 pending cases in 2017 to the current 60,000 pending cases, we are seeing a very high percentage of these remaining appeals being remanded over and over. When we look at those pending Legacy system appeals in the Board inventory on any given month, we have seen half of them previously, as VBA is recertifying Legacy remands back to the Board upon completing the directed case development. In fact, 15 percent of the Board's pending Legacy appeals are being adjudicated for the 5th time or more. The root cause is what Congress previously found in 2017 – the Legacy system allowed for and incentivized “repeated revisions” to add new evidence in the claims file during the appeals process that necessitated successive remands.

Reports accompanying the 2017 AMA legislation estimated the average time to fully resolve Legacy system appeals through both VBA and the Board to be 5 years, not counting additional time for Court-appeal cases. Legacy system appeals are now taking approximately 6 years for final resolution by the Board, and that does not count the time the case was at VBA or the fact that over 60 percent of Legacy system adjudications by the Board continue to be remanded. It also does not account for the extra time to re-adjudicate the 6,800–7,700 appeals remanded by the Court every year. Projections show that by the end of FY 2025, the remaining Legacy appeals inventory will be approximately 10,000 cases in the Department overall, split evenly between the Board and VBA.

As noted earlier, the rate of cases remanded from the Board has been substantially lower under the new AMA appeals system compared to the Legacy appeals system. To build on this progress, partnership between VBA and the Board offers an opportunity to enhance the quality and effectiveness of VBA training programs for the dedicated VBA claims processors who serve the Nation's Veterans. Ultimately, VBA seeks to ensure that Veterans and claimants receive the benefits they have earned at the earliest point possible during the claims process and to minimize avoidable delays—while also guarding against the overdevelopment of cases. Remand data from the Board are used to both validate VBA's current areas of training focus and potentially present new opportunities to refine training as data analytics capabilities in this area evolve.

While full resolution of the vast majority of the 30,000 AMA appeals decided by the Board last year took an average of less than 2 years, that is still too long for Veterans to wait. A major cause is the fact that the Legacy system cases consistently move to the head of the line because they have been waiting longer, and the number of those cases pending is far higher than anyone anticipated when AMA was passed. Those remaining Legacy system appeals are being repeatedly remanded without a final resolution and closure for Veterans because the underlying system still suffers the same flaws that led to passage of the AMA over 6 years ago. We must do better. The Courts, VSOs, private attorneys and other accredited representatives, VBA, the Office of General Counsel and the Board must come together, again, to solve this challenge together through a holistic review of the Veteran's disability system.

To know there are still over 200,000 pending appeals, with most filed under the newer AMA system that promised faster resolutions, this is difficult to accept as a Veteran myself. We have been making aggressive changes to address that challenge, while increasing our staffing so as to not burn out those we rely on to serve Veterans at the Board.

First, thanks to continued support from Congress, we added additional budgetary resources that allowed us to hire and retain more talent. The Board hired 50 new Veterans Law Judges (VLJ) during the past 2 years. This is the largest and most diverse increase in judges in the Board's 90-year history. However, because the VLJs can only be as productive as the attorneys who prepare draft decisions, the Board focused on attorney hiring last year, which resulted in a 16 percent increase in FY 2023, with the addition of over 200 new attorneys and law clerks. The Board is currently prioritizing two rounds of attorney hiring during FY 2024 (fall 2023 and Spring 2024) to fully staff the current VLJ teams and maximize the number of decisions that can be issued. Board culture for how we operate also has changed, and we are retaining talent as a result. Attorney attrition is down from 13.9 percent in FY 2018 to 7.4 percent in FY 2023.

Second, the Board is adjudicating exponentially more AMA appeals, even though older Legacy system appeals continued to dominate the Board's docket in recent years since the passage of AMA. The distribution of appeals cases in October 2022 at the start of FY 2023 was 25 percent AMA to 75 percent Legacy. By the end of the FY, 42 percent of our decision output was under the AMA. This year, we anticipate more than 50 percent of all output will be under the AMA rather than the Legacy system.

There are bright spots and cause for hope that AMA will live up to original expectations of faster and full resolution for awaiting Veterans. They deserve final answers, to include rational explanations for any claim or appeal that cannot be granted for some reason. This past year, the Board set a 90-year record, adjudicating 103,245 appeals. For the first time in 4 years, we ended the FY with a shorter line of pending appeals than where we started at the beginning of the fiscal year. The number of pending hearings at the end of FY 2023 was 72,465, and this is the second year in a row the Board has reduced the hearing inventory. The number of pending Legacy hearings was reduced by over 85 percent, down to just 1,054 remaining at the end of FY 2023.

The increased partnership in sharing remand information is a testament to the joint commitment of both VBA and the Board to continuously improve the services and support we provide to Veterans. VBA acknowledges that there are opportunities to improve data collection in this area and is collaborating with the Board to obtain more granular information that will better inform training needs and opportunities. Specifically, remand data from the Board validate VBA's significant investment in training around medical exam requests and medical opinions, and its robust catalogue of courses for claims processors. Following passage of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, VBA created additional courses that include information specific to exams and medical opinions related to that legislation.

In addition, VBA and the Board collaboratively exchange information through an agreed upon Board Feedback Loop process, identifying trends for AMA and Legacy Board remands. This feedback system was established to 1) ensure VBA is appropriately addressing remands issued by VLJs and 2) confirm that Board remand return reasons under the AMA system relate only to duty to assist errors that occurred prior to an initial decision on a claim, as prescribed by the AMA.

Further, VBA is actively exploring innovative training delivery methods. VBA is considering options such as microlessons, videos and other modernized training techniques to ensure that claims processors are well-equipped to address the challenges presented by cases that often involve complex legal and medical questions.

In FY 2023, VBA made over 36,000 Legacy appeals decisions and implemented over 12,500 Legacy full grants of benefits received from the Board. Further, VBA remains on pace to have fewer than 5,000 remaining Legacy appeals by the end of FY 2025. Sunsetting the Legacy appeals system will allow VBA to focus additional resources on improving the AMA decision review process.

Our mission success is ultimately defined by what Veterans experience during the lifecycle of their cases on appeal, from the initial filing all the way until they receive a final written decision from a Board VLJ. Since 1933, the Board has been charged to apply the "benefit of the doubt" and "duty to assist" doctrines that are now enshrined by Congress in statute. In large part, it is those two factors that enable the Board to say "yes" and grant at least some relief in roughly a third of its decisions even after VA has previously said "no," sometimes on multiple occasions. Survey results show that Veterans leave the Board with higher trust levels than they had when they first filed their appeals—10–11 percent higher. Data show a significant percentage of Veterans report "trust" even after getting no relief from the Board. Over 50 percent of Veterans report they trust the Board after getting their final decisions, which is remarkable when the Board is only able to grant relief on about 25 percent of the issues appealed to the Board.

The new AMA system that was designed and developed through the full partnership between VA, the VSOs, private bar representatives and Congressional staff is proving that comprehensive, Veteran-centric solutions are possible when people with different perspectives work together toward a common goal. We should maintain focus on our shared goal to reduce the overall time Veterans spend patiently waiting for final VA resolution of their claims and appeals. That is why VA is planning to host an AMA Summit with all stakeholders in early 2024.

VA understands that the claims appeals process can be long and frustrating for many Veterans, but I hope that our answers to your questions today will help explain why it takes so long to process your appeal and efforts VA has taken to improve the process. We must recognize that processing these appeals will take time because each and every case represents a Veteran with a unique set of facts and

circumstances that must be carefully evaluated and appropriately resolved according to governing laws and regulations.

Conclusion

VA shares Congress' goal of continuous improvements to both our program and our customer service to Veterans, their families, caregivers and survivors. We want to express our appreciation for your continued support and look forward to continued collaboration. Chairman Luttrell and Ranking Member Pappas, this concludes my testimony. My colleagues and I are happy to respond to any questions you or the Subcommittee may have.

Prepared Statement of Elizabeth Curda



United States Government Accountability Office

Testimony

Before the Subcommittee on Disability Assistance and Memorial Affairs,
Committee on Veterans' Affairs,
House of Representatives

For Release on Delivery
Expected at 10:30 a.m. ET
Wednesday, November 29, 2023

**VA DISABILITY
BENEFITS**

**Board of Veterans'
Appeals Should Address
Gaps in Its Quality
Assurance Process**

Statement of Elizabeth H. Curda, Director,
Education, Workforce, and Income Security

GAO Highlights

Highlights of [GAO-24-106156](#), a testimony before the Subcommittee on Disability Assistance and Memorial Affairs, Committee on Veterans' Affairs, House of Representatives

Why GAO Did This Study

Each year, the Board adjudicates thousands of cases in which a veteran was dissatisfied with the Department of Veterans Affairs' (VA) initial decision on their claim for benefits. However, researchers and Congress have raised questions about how the Board ensures the quality of its adjudications.

GAO was asked to review the Board's QA process. This testimony examines (1) how the Board assures and measures the quality of its adjudicative decisions, and (2) the extent to which the Board builds and uses evidence to assess its QA process.

GAO reviewed relevant federal laws and Board documents. GAO analyzed QA data provided by the Board for fiscal years 2019 through 2022 and assessed its reliability. GAO also reviewed relevant quality assurance literature and interviewed VA officials, attorneys, VLJs, and subject matter experts, including researchers and veterans service organizations. GAO also conducted group discussions with randomly selected Board decision-writing attorneys and VLJs.

What GAO Recommends

GAO is making four recommendations, including that the Board develop policies for calculating its accuracy rate; develop and implement an evidence-based decision-making process for its QA efforts; and study decision-making consistency. The Board generally agreed with three recommendations and disagreed with the fourth about consistency. GAO continues to believe that the recommendation is valid as discussed in the report.

View [GAO-24-106156](#). For more information, contact Elizabeth H. Curda at (202) 512-7215 or ehcurda@gao.gov.

November 29, 2023

VA DISABILITY BENEFITS

Board of Veterans' Appeals Should Address Gaps in Its Quality Assurance Process

What GAO Found

The Board of Veterans' Appeals (Board) has a quality assurance (QA) process and a related accuracy measure for its decisions. Specifically, its QA process involves: 1) checking a random sample of draft decisions for certain types of Board-defined errors each month through its case review process; and 2) monitoring outcomes of Board decisions that were further appealed to the U.S. Court of Appeals for Veterans Claims (CAVC). The Board uses results from these activities to provide various interventions, such as individual feedback to veteran law judges (VLJs) or training. The Board also calculates and publishes an accuracy rate that represents error-free adjudications. However, GAO found shortfalls in the Board's process for calculating this measure. Contrary to federal internal control standards, GAO found that the Board did not have:

- (1) written policies or procedures for calculating its accuracy rate or managing case review error data, or
- (2) checks on its accuracy rate calculation.

As a result, the Board lost data and GAO could not verify accuracy rates provided by the Board in 2 of 4 fiscal years. Until the Board develops written policies and procedures, the Board will likely continue to have difficulty supporting the accuracy of its publicly reported measure.

GAO found gaps in the Board's efforts to build and use evidence—such as a lack of data and analysis—to assess its QA process and related activities. GAO analyses of CAVC and Board data show that over the past 3 fiscal years, CAVC remanded (sent back) about 80 percent of appealed Board decisions, often because CAVC found the Board's explanation of its findings to be inadequate. However, GAO found that the Board lacked evidence to better understand and address these and other issues and set priorities to help improve its QA process. Specifically:

- Board officials told GAO it has no comprehensive, written plan outlining how it will accomplish the mission and goals of its QA process.
- Board officials told GAO they had not fully analyzed trends or underlying causes of the most common Board-identified errors or CAVC remands.
- The Board has not systematically or comprehensively built or used evidence to better understand and improve its interventions, such as collecting feedback about training.
- The Board does not assess VLJ decisions for consistency, such as whether common misunderstandings of policy or law exist in decisions.

GAO's prior work has identified key practices for evidence-based decision-making. These practices involve building and assessing evidence and using it to foster a culture of continuous improvement. Absent such a process and a plan to guide it, the Board is not positioned to fully understand and address underlying causes of the most common errors and remands or understand consistency—evidence which is needed to target and implement effective interventions and foster continuous improvement of its QA efforts.

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee:

I am pleased to be here today to discuss our review of the Department of Veterans Affairs' (VA) Board of Veterans' Appeals' (Board) quality assurance (QA) process. As you know, the Board adjudicates appealed cases in which a veteran is dissatisfied with the Veterans Benefits Administration's (VBA) initial decision on their claim.¹ In turn, if the veteran is dissatisfied with the Board's decision, they may appeal their case to the U.S. Court of Appeals for Veterans Claims (CAVC).

Veterans often wait years for a final VA decision for their claims for disability compensation and other benefits. To make changes to the appeals process, the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) was enacted, which VA implemented in February 2019.² The Board continues managing appeals that were in process before the AMA took effect, called legacy appeals.

The Board conducts QA activities through its Office of Assessment and Improvement (OAI). However, researchers and Congress have raised questions about the quality of the Board's decisions on appealed claims, particularly given the pace needed to expeditiously process the large volume of appeals now before the Board.³ We were asked to examine the Board's QA process.

My statement today focuses on (1) how the Board assures and measures the quality of its adjudicative decisions, and (2) the extent to which the Board builds and uses evidence to assess its QA process and related activities.

For both objectives, we reviewed relevant federal laws and documents from VA and the Board, including reports, guidance, and training

¹In addition to disability compensation appeals, the Board decides appeals from all three VA Administrations—VBA, the Veterans Health Administration (VHA), the National Cemetery Administration (NCA)—and the Office of General Counsel (OGC).

²Pub. L. No. 115-55, 131 Stat. 1105.

³See David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, "Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003–16," *The Journal of Law, Economics, and Organization*, Vol. 35, no. 2 (2019): 239-288.

materials related to its QA process. We also interviewed Board officials about their QA process.

To address the first objective, we analyzed Board data produced by OAI's case review process for legacy and AMA appeals, and OAI's monitoring of CAVC remands from fiscal year 2019 through fiscal year 2022.⁴ We compared the Board's data management and accuracy rate calculation process against standards for internal controls in the federal government.⁵ We also assessed the reliability of these data by conducting electronic testing, examining documentation, and interviewing Board staff knowledgeable about the data. We found that some of the data elements are sufficiently reliable for our purposes of describing overarching trends and how the Board measures quality. However, the Board's data management practices limit the usefulness of these data.⁶ We describe these limitations in detail later in this statement.

To address the second objective, we also reviewed relevant literature and interviewed VA officials and subject matter experts. We selected subject matter experts from veterans service organizations (VSO), research organizations, and private law firms that studied or worked with veterans appealing VBA's initial decision on their claim. We also conducted two group discussions with Board decision-writing attorneys and two with veteran law judges (VLJs). Each group consisted of eight to 10 participants randomly selected from lists of attorneys and VLJs provided to us by the Board. Information obtained from these group discussions cannot be generalized to all VLJs and attorneys. We compared the Board's QA process to the Board's guidance, and performance plans; the Administrative Conference of the United States key practices for QA

⁴A CAVC remand is an appellate decision by CAVC that does not resolve the merits of the issues, but that returns matters to the Board for further factual development and, in some cases, readjudication. If additional development is required, the Board remands the case to VBA, usually to the Decision Review Operations Center.

⁵GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: Sept. 10, 2014), principles 3, 10, 13 and 16.

⁶We found that case review data on errors, data on reasons for remand from CAVC, and the fiscal year accuracy rates provided by OAI are sufficiently reliable for the purposes of describing trends for this engagement. However, the Board could not provide the original raw data on the number of cases with errors for fiscal years 2019-2020, which would support the accuracy rate information they provided to us. Instead, they reconstructed the data using other internal documents. We concluded that these reconstructed data are not sufficiently reliable for our purposes.

systems;⁷ and, the four interrelated topic areas containing key practices for evidence-based decision making from our prior work.⁸

We conducted this performance audit from July 2022 to November 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

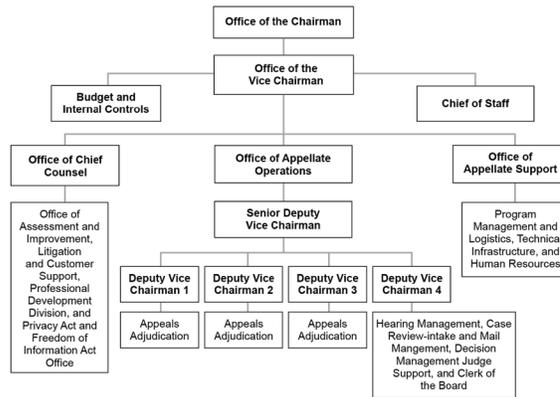
Board Organizational Structure and Roles

The Board is responsible for deciding appeals for veterans benefits and services on behalf of the Secretary of Veterans Affairs. Board documents state that its mission is to conduct hearings and dispose of appeals properly before the Board in a timely manner. See figure 1 for an overview of the Board's organizational structure.

⁷Administrative Conference of the United States, *Administrative Conference Recommendation 2021-10: Quality Assurance Systems in Agency Adjudication*, (Washington, D.C.: adopted Dec. 16, 2021). The Administrative Conference of the United States is an independent federal agency within the executive branch whose statutory mission is to identify ways to improve the procedures by which federal agencies protect the public interest and determine the rights, privileges, and obligations of private persons.

⁸GAO, *Evidence-Based Policymaking: Practices to Help Manage and Assess the Results of Federal Efforts*, GAO-23-105460 (Washington, D.C.: July 12, 2023).

Figure 1: Board's Organizational Structure



Source: Board of Veterans' Appeals (Board) Fiscal Year 2022 Annual Report. | GAO-24-106156

VA's Legacy and AMA Processes

Under AMA, veterans have more options to appeal VA's claims decisions than in the legacy process. For example, under the legacy process, veterans who were dissatisfied with VBA's decision on their initial claim needed VBA to re-examine the case and issue a decision before a veteran could appeal to the Board. Under AMA, VA offers five appeal options. Two of those options afford veterans opportunities to have their VBA claims decision undergo an additional review within VBA. Veterans also may choose one of three options when appealing to the Board: (1) a hearing before the Board, which can include providing new evidence; (2) review by the Board, where there is no hearing or new evidence; or (3) review by the Board without a hearing, but where the veteran can submit new evidence.

Process at the U.S. Court of Appeals for Veterans Claims

If a veteran is dissatisfied with the outcome of their appeal at the Board, they may appeal to CAVC by filing a Notice of Appeal. According to CAVC officials, almost all appealed cases receive mediation conferencing, also called a Rule 33 conference. They also said that the goal of mediation conferencing is to determine whether the parties can resolve the case without a full briefing and without the case going before

a judge. Mediation may serve to narrow the issues on appeal. It may also result in agreement between the veteran's representative and VA's Office of General Counsel that, due to a Board factual or legal error, the case will be returned to the Board for readjudication, according to CAVC officials.

If the parties agree that the case must be returned to the Board, the parties file with CAVC a joint motion for remand (JMR) or partial remand (JMPR), identifying the Board errors.⁹ The Clerk of the Court grants the motion and returns the case to the Board for any necessary development and readjudication. If after mediation the parties are not able to resolve the appeal as described, briefs are filed and the case is decided by a single CAVC judge or a panel of judges. A panel of judges is generally required if the outcome of the case is reasonably debatable or would establish or alter existing law. In its decisions, CAVC may affirm, modify, remand, or reverse a Board decision, as appropriate.

Trends in Pending Workloads and Decisions at the Board

In our prior work, we noted that developing and implementing a comprehensive QA program is important as the Board contends with large workloads, which potentially create pressure to sacrifice the quality of work activities to meet timeliness goals.¹⁰ Moreover, since 2003, VA's management of disability compensation workloads has remained on GAO's High-Risk List.¹¹

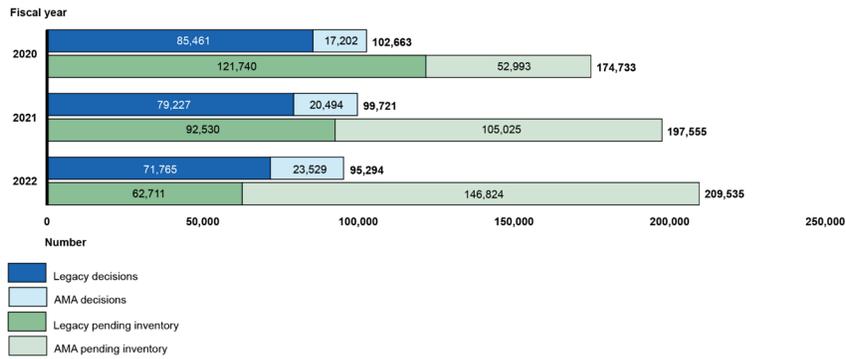
Currently, the Board is adjudicating appealed cases through its legacy and AMA processes and facing a growing inventory of cases. During fiscal year 2020—the first full fiscal year of AMA—through fiscal year 2022, the combined number of cases pending at the Board has increased by approximately 20 percent (see fig. 2).

⁹As we describe later in the statement, these remands are often related to reasons or bases, where the Board did not provide an adequate explanation for its findings or conclusions, according to Board data we analyzed.

¹⁰GAO, *VA Disability Benefits: Actions Needed to Better Manage Appeals Workload Risks, Performance, and Information Technology*, GAO-21-105305 (Washington, D.C.: July 13, 2021).

¹¹GAO's High-Risk List focuses attention on government operations that are vulnerable to fraud, waste, abuse, or mismanagement, or in need of transformation to address economy, efficiency, or effectiveness challenges. Our 2023 High-Risk Report provides VA a road map for better managing its disability workloads. See GAO, High-Risk Series: *Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas*, GAO-23-106203 (Washington, D.C.: April 20, 2023).

Figure 2: Number of Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Decisions and Appeals Pending at the Board, Fiscal Years 2020-2022



Source: Board of Veterans' Appeals (Board) Annual Reports. | GAO-24-106156

Note: The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) required VA to change its appeals process. VA is currently managing two sets of workloads related to appeals: appeals under AMA and legacy appeals that were in process before AMA took effect. As of November 2023, the Board had not released its fiscal year 2023 annual report. However, according to the Board's website, the Board further reduced the pending inventory of legacy cases to 23,146 as of September 2023.

From fiscal years 2020 through 2022, the Board has decided around 100,000 appeals annually, most of which were decisions on legacy cases, as shown in figure 2. In that time, the Board decreased its legacy cases inventory by about 48 percent. Meanwhile, the number of pending AMA appeals has almost tripled. According to Board data, during fiscal year 2023, the Board issued 103,245 decisions and the pending inventory was slightly reduced from 209,535 pending appeals at the end of fiscal year 2022 to 208,155.

The Board's Quality Assurance Process Lacks Written Policies to Support Its Accuracy Calculations and the Board Does Not Monitor whether Errors Are Corrected

The Board's Quality Assurance Process Involves Reviews of Draft Board Decisions and CAVC Decisions

The Board's OAI manages the QA process. The QA process involves two primary activities: (1) case review, which is a review of randomly selected draft Board decisions each month; and (2) monitoring of CAVC decisions. For each activity, the Board conducts interventions intended to inform VLJs and attorneys about errors and CAVC trends. These interventions include notices, training, and guidance.

Case Review. During case review, OAI attorneys follow a series of checklists to help them identify Board-defined errors in randomly selected draft decisions.¹² Board officials told us that OAI attorneys must respect judicial discretion and therefore look for errors that the Board describes as "undebatable." If an OAI attorney identifies a potential error, they add it to an agenda for discussion at OAI's twice weekly meetings. Board officials said that the majority of the OAI attorneys and the Chief of OAI must agree that the situation fits the description of an error, as defined in the Board's internal documentation of error standards, before OAI can provide feedback to a VLJ, as discussed below.

¹²According to Board documents, OAI's sampling methodology yields a monthly estimated accuracy rate with a five percent margin of error at the 95 percent level of confidence. On a yearly basis, the aggregate results are likely to produce an estimated accuracy rate with an approximate 1.5 percent margin of error at the 95 percent level of confidence. According to Board documents, the sample size calculation assumes a population accuracy rate of 90 percent and an estimated Board production of 6,000 cases per month. Currently, the Board samples about 137 legacy cases and 164 AMA cases per month. According to Board documents, the higher number of AMA cases being reviewed is based on the estimated AMA accuracy rate of 87.5 percent in fiscal year 2021. Beginning in June 2022, the Board began reviewing over 160 AMA cases each month. Cases are randomly selected for review on a rolling basis until the appropriate number of cases are pulled for that month.

The error standards describe categories of errors as: (a) customer service errors, which occur when an undebatable mistake is made that could significantly impact the appellant's experience interacting with the Board, but they may or may not affect the outcome of the decision; (b) procedural errors, which are undebatable errors that occur when the proper adjudicative process is not followed, but they may or may not affect the outcome of the decision; and, (c) clear and unmistakable errors, which occur when a VLJ gets the facts or law wrong in a way that, but for the error, the decision outcome would have been manifestly different.¹³

According to Board officials and our analysis of Board documents, OAI provides interventions based on the case review results. For example:

- **Feedback memorandum.** Board officials said that when the OAI team agrees that an error exists, a feedback memorandum is sent to the VLJ that signed the draft decision. The memo explains the error(s) that OAI found and recommends solutions. Board officials said that VLJs have the discretion to address the error(s) however they choose. Some VLJs may follow OAI's recommended correction, while others may choose to not address the error or to formally request reconsideration of the error.¹⁴
- **Error Digest.** OAI creates an "error digest" each month, which describes all errors found that month and recommended solutions. The Office of the Chief Counsel sends this digest to VLJs and attorneys.
- **Training.** OAI develops and administers trainings to attorneys and VLJs multiple times per year, based on themes identified during case review. These trainings have included, for example, guidance on aspects of new AMA requirements. OAI coordinates with the Board's

¹³In addition to customer service errors, procedural errors, and clear and unmistakable errors, OAI attorneys look for opportunities to make "preauthorized corrections," which involve correcting minor mistakes, such as incorrect dates or incorrect veteran biographical information. These mistakes are not classified as errors.

¹⁴According to the Board's Operations Handbook, if the VLJ disagrees with OAI about the validity of an error, the VLJ may request reconsideration through a written request outlining the reasons they disagree, within 5 business days from the date on the feedback memo. OAI then reviews the feedback memo and the request for reconsideration and makes a recommendation to the Chief Counsel regarding whether the error should be upheld or withdrawn. The Chief Counsel, whose office is above OAI in the chain of command (see figure 1), will provide the final decision to the VLJ. Board officials told us that after the Chief Counsel makes the decision, the VLJ has final discretion to address the error.

Professional Development Division, the main training office, to avoid duplicating trainings, according to Board officials.

Monitoring CAVC Outcomes. As part of the QA process, OAI monitors the outcomes of Board decisions that were appealed to CAVC. In particular, OAI attorneys read CAVC decisions and use Board-defined categories to identify the reason, or reasons, why a case was remanded. According to Board documents, reasons for remand may include duty to assist errors that CAVC identified, which are instances when VA failed to help the veteran collect necessary evidence to decide a disability claim,¹⁵ among other types of errors. The Board defined other categories of remands as a result of various reasons or bases issues, where CAVC decided that the Board's explanation or discussion of its findings and conclusions is inadequate. According to Board documents, OAI staff use their judgement to identify which reason, or reasons, best represent CAVC's decision to remand a case to the Board.

OAI's interventions related to these monitoring efforts include guidance and training. These are intended to address issues identified in CAVC decisions, common reasons for remands, or other notable information. For example, Board officials provided documentation of a May 2022 training session that covered ten examples of cases that OAI found CAVC had frequently cited in its remand decisions in fiscal year 2021.

The Board Tracks the Accuracy of Its Decisions, but Lacks Written Policies and Procedures to Support Its Calculations and Data Management

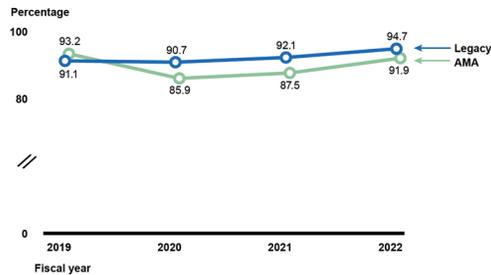
The Board uses the results of its case review process to calculate accuracy rates for legacy and AMA cases each fiscal year (see fig. 3). The accuracy rates represent the percentage of cases reviewed by OAI that did not contain any Board-defined errors during that year. The fiscal year accuracy rates for legacy and AMA cases are published in the Board's annual report.¹⁶ In addition, Board officials told us they calculate and monitor accuracy rates each month for legacy and AMA cases and discuss trends at internal meetings. In fiscal year 2022, the Board established an annual accuracy rate goal of 92 percent accuracy for AMA and legacy cases. Although the accuracy rate for AMA cases was 91.9 percent in fiscal year 2022, the Board is still producing some AMA decisions with errors. Based upon our analysis of the sampled case review results for AMA appeals in fiscal year 2022, we estimate that up to

¹⁵VA has a legal duty, known as the duty to assist, to make reasonable efforts to assist a claimant in obtaining the necessary evidence, such as medical records, to support a veteran's disability claim.

¹⁶The Board began publishing its AMA fiscal year accuracy rate in annual reports in fiscal year 2021.

2,220 decisions on AMA cases may have been sent to veterans with one or more errors in them, at the 95 percent level of confidence.¹⁷

Figure 3: Board Reported Annual Accuracy Rates for Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Appeals, Fiscal Years 2019-2022



Source: Board of Veterans' Appeals (Board) data. | GAO-24-106156

Figure Note: VA is currently managing two sets of workloads related to appeals: appeals under AMA and legacy appeals that were in process before AMA took effect. Because the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) was fully implemented at the Board in February 2019, the fiscal year 2019 AMA accuracy rate represents a partial year and nongeneralizable sample of cases, from February to September 2019.

However, we found that the Board does not have written policies or procedures for calculating its accuracy rates or managing case review error data. Instead, Board officials could only describe their accuracy rate calculation and data management practices to us, and we identified potential risks in their efforts to measure accuracy. Specifically, we found that:

¹⁷In fiscal year 2022, OAI identified 144 draft AMA decisions containing error(s) out of the 1,779 sampled draft decisions that were reviewed, resulting in an estimated accuracy rate of 91.9 percent—which indicates an estimated error rate of 8.1 percent. According to Board documents, the aggregate fiscal year accuracy rate is calculated from 12 monthly simple random samples of draft decisions. We applied this estimated error rate to total AMA decisions made in fiscal year 2022—23,529 decisions, see figure 2—to estimate the range of AMA decisions sent to veterans that may have contained one or more errors as defined by the Board's error standards. We estimate that the range of AMA decisions that may have contained errors is between 1,620 and 2,220 at the 95 percent level of confidence. Note that the error(s) identified by OAI may have been corrected before being sent to veterans.

-
- The Board does not have any checks on its calculation of legacy and AMA accuracy rates. One official in OAI is solely responsible for identifying the relevant data and calculating the percentage of cases without errors. Officials said that while OAI makes a good faith effort to prepare the calculations correctly, no process exists to check that official's work.
 - The Board faces challenges with managing data related to the AMA accuracy rate calculations. While the process for calculating the legacy accuracy rate is mostly automated,¹⁸ the AMA accuracy rate is calculated manually, using data from two sources. The Board does not store or maintain documentation of these sources or the actual accuracy rate calculations in a centralized location.

We found that these challenges with data management led to two specific shortfalls. First, the Board could not provide the original, raw data on the number of cases containing errors in 2 of 4 fiscal years. Without these data, we could not verify the accuracy rates the Board provided to us for those 2 years.¹⁹ Second, the Board provided us with two different versions of raw data on errors from fiscal year 2020 through fiscal year 2022 that contained differences that officials could not explain.²⁰ Board officials said that automating the calculations for AMA would help reduce the vulnerabilities that exist in their current methods. They also said that the Board requested that VA's Office of Information and Technology develop a feature in Caseflow—the AMA case management system—to automatically track the number of cases with error(s) and calculate the accuracy rate. However, as of November 2023, Board officials said there

¹⁸The legacy case management system, Veterans Appeals Control and Locator System (VACOLS), automatically tracks the number of legacy cases with error(s) and the number of cases reviewed by OAI and displays the percentage of cases with error(s). One official in OAI subtracts this error rate from 100 to calculate the accuracy rate.

¹⁹The Board misplaced the raw data on the number of cases containing one or more errors for fiscal year 2019 and 2020. We attempted to replicate the accuracy rates for those two years using data that the Board reconstructed by reviewing past error feedback memos and internal email communications. However, we found that the resulting accuracy rates did not align with the accuracy rates the Board provided to us. We determined the reconstructed data to be unreliable for our purposes.

²⁰Error data tracks all individual errors that OAI finds regardless of whether they occurred in the same case. The Board provided us with two versions of this AMA error data. The first version of the AMA error data contained 208 individual errors in fiscal year 2020 and 232 in fiscal year 2021; while a second version contained 199 and 234, respectively. Officials could not reconcile the trackers in those years. We used the first version of AMA error data for our analyses, according to the Board's recommendation not to use the second version. The error data in fiscal year 2022 was consistent in both versions, with 168 errors.

is no timeline for completion, as VA's Office of Information and Technology must balance the needs and priorities of the entire department.

According to federal standards for internal control, agencies should segregate key duties and responsibilities among multiple people to reduce the risk of error, misuse, or fraud.²¹ In addition, agencies should maintain effective documentation that enables them to retain organizational knowledge and communicate knowledge as needed to external parties.

Board officials acknowledged that their current methods of measuring accuracy have vulnerabilities, and that policies or procedures are needed to ensure data is properly managed. Until the Board develops written policies and procedures, it is likely that the Board will continue to have difficulty supporting and checking the accuracy of its accuracy rate measure, which the Board communicates internally and to the public. Further, without written policies and procedures, the Board could face further challenges such as additional data loss, improperly storing data, or using inconsistent methodologies.

The Board Does Not Monitor How Feedback from Its Case Review Process Is Incorporated or whether Errors Are Corrected

As mentioned above, VLJs decide whether or how to address error(s) that OAI finds during the case review process, and whether they will incorporate OAI's recommended corrections. However, we found that the Board does not monitor whether or how case review feedback is incorporated or if errors are corrected before decisions are sent to veterans. Board officials said that OAI receives about one request to reconsider an error per month, and occasionally, OAI withdraws the error. Board officials said that because VLJs have the ultimate discretion to determine what benefits a veteran will receive, they were unsure whether it would be useful to monitor how case review feedback is used.

However, according to federal standards for internal control, management should use quality information to achieve their objectives, and establish and operate activities to monitor internal control systems.²² In this case, OAI's objectives are to assess accuracy and identify opportunities for improvement. Until the Board begins monitoring how case review feedback is incorporated—or if errors are corrected before decisions are sent out—it will continue to invest resources in the case review process

²¹GAO-14-704G, principle 3 and 10.

²²GAO-14-704G, principle 13 and 16.

without understanding how it impacts decisions for veterans and without identifying opportunities to improve the process. Monitoring this information could also help management identify case review design or implementation challenges and inform their decision-making related to what the Board considers an important aspect of its QA process. For example, once the Board gains an understanding of how VLJs incorporate feedback from case review, or whether specific types of errors frequently remain unaddressed, it can use this evidence to consider whether changes to the case review process or error standards may be appropriate.

Gaps Exist in the Board's Efforts to Build and Use Evidence to Assess its Quality Assurance Process

GAO found that the Board lacked evidence to better understand and address the most common errors and reasons for remands and set priorities to help improve its QA process. Specifically, we found that the Board has no comprehensive plan outlining how it will accomplish the mission of its QA process. In addition, it has not fully assessed the underlying causes of the most common errors in its decisions or the reasons for CAVC remands. The Board also has not systematically or comprehensively built evidence to assess, better understand, and improve its interventions. In addition, we found that the Board is not positioned to fully understand systemic inconsistencies across VLJ adjudicative decision-making.

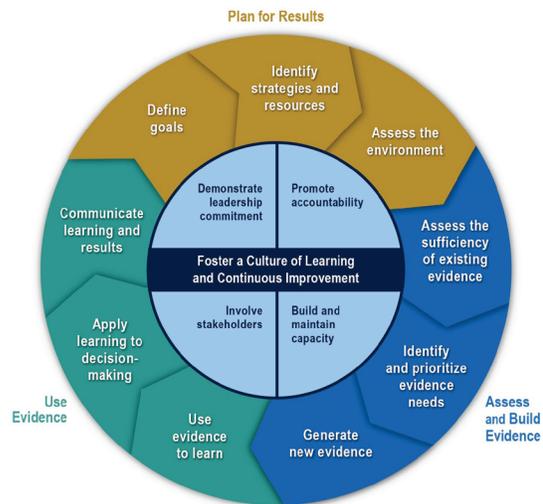
Our prior work has identified 13 key practices that can help federal agency leaders and employees develop and use evidence to effectively manage federal performance and guide decision-making at different organizational levels, including for individual projects or programs.²³ Evidence can include performance information, program evaluations, statistical data, and other research and analysis.

These practices can be viewed as four interrelated topic areas: (1) planning for results, (2) assessing and building evidence, (3) using evidence, and (4) fostering a culture of learning and continuous improvement. For example, our prior work has found that successful organizations monitor their internal and external environments continually and systematically, which allows them to anticipate opportunities and challenges and to plan accordingly. Planning helps a federal organization provide a clear picture of what it is trying to achieve, how it will achieve it, and any obstacles that may affect its ability to do so. In addition, these practices can help agency leaders foster a culture of learning and

²³GAO-23-105460.

continuous improvement. As illustrated in figure 4, the first three topic areas and their practices can be viewed as an iterative cycle, with the fourth area and its practices central to effectively implementing that cycle.

Figure 4: Topic Areas and Key Practices for Evidence-Based Decision-making



Source: GAO-23-105460. | GAO-24-106156

The Board Lacks a Comprehensive Plan Outlining How It Will Accomplish the Mission of the Quality Assurance Process

Board officials told us they have no comprehensive, written plan outlining the mission and goals of the Board’s QA process and how the related interventions will achieve those goals. The Board’s stated mission for its QA process includes (1) reviewing Board decisions for legal errors to assess accuracy before sending them to veterans; and (2) developing resources based on identified opportunities for improvement to support the Board’s mission of delivering legally correct decisions to veterans and other appellants. As previously described, the Board has a 92 percent accuracy rate goal. Beyond that goal, Board officials told us the purpose

of OAI is to improve decision quality through a greater understanding of the applicable law. Moreover, they said that the Board's Operation Handbook and OAI Case Review Guide outline processes to achieve that goal.

However, these documents provided by the Board mainly outline the case review process, which focuses on OAI's stated mission to assess accuracy but not its mission for identifying opportunities for improvement. Moreover, contrary to key practices for evidence-based decision-making, these documents do not identify the key questions it will address to improve quality and the ways in which the Board will collect and use evidence to answer them.

In addition, we learned that the Board has begun planning an evaluation of its QA process. According to the Board's January 2023 draft statement of work (the latest available at the time of our review), a contractor will evaluate the Board's QA process against best practices for internal quality review procedures and standards, and methods used by other federal entities, and will advise on new processes. While the planned evaluation is a good step, we found that these separate documents—Operation Handbook, Case Review Guide, and draft statement of work—do not constitute a strategy or plan for systematically and comprehensively assessing, building, and using evidence to improve its QA process.

The Board Is Not Fully Assessing, Building, and Using Evidence to Foster Continuous Improvement

Board's Evidence and Assessment of the Most Common Errors. We found that the Board is not fully using existing or newly identified sources of information to determine whether its QA process and interventions are working as intended—that is, whether they are improving the accuracy of Board decisions. Specifically, Board officials told us they discuss short-term trends in errors at weekly meetings. However, they said they have not conducted systematic analyses of errors identified by OAI in recent years.

Our analysis of Board data revealed that from fiscal year 2020 through fiscal year 2022, three of the four most prevalent errors in AMA cases remained consistent. Those three errors were: (1) improper remands to VBA, where a case is unnecessarily sent back to VBA for rework; (2) failure to address an issue that was properly before the Board; and (3) failure to address a theory or contention, which is a statement about why a claim should be granted. These errors represented 31 percent, 14

percent, and 12 percent of all errors, respectively, during this period.²⁴ A fourth error, jurisdiction errors—which can happen when the Board decides an issue that it did not have jurisdiction over—were the second most common error in fiscal years 2020 and 2021 at about 20 percent of errors. However, this type of error only comprised 4 percent of errors in fiscal year 2022. Board officials were not aware of what factors may have contributed to this decrease.

Board officials told us that they have some ideas about the underlying causes of the most common error identified in AMA cases—improper remands to VBA—but they have not formally studied them. For example, Board officials told us that VLJs might be attempting to apply remand rules for legacy appeals to AMA appeals with the well-intentioned, but legally improper belief that doing so would help the veteran. These improper remands are a source of rework for VBA and the Board.

To learn more about improper remands, Board and VBA officials told us they had assembled a “tiger team” in 2023 to evaluate the root causes and ways to reduce improper remands, consistent with leading practices for evidence-based decision-making. However, VA officials told us there is no charter for the team that might include the initiative’s scope, strategic framework, and success measures. An effective plan can help ensure that the evidence the tiger team assesses and builds will meet relevant quality standards.²⁵

Board’s Evidence and Assessment of CAVC Remands. According to our analysis of data published in CAVC annual reports, remands are a

²⁴The percentages presented are the percentage of each error type out of the sum of all errors from each fiscal year in 2020-2022. Analysis is based on data available at the time the Board prepared their responses to us. We excluded fiscal year 2019 error data from this analysis because AMA was implemented part way through fiscal year 2019 and thus that data did not represent a full year.

²⁵GAO-23-105460. In addition, our past work has identified leading practices for effective reforms, such as establishing outcome-oriented goals and implementation plans. See GAO, *Government Reorganization: Key Questions to Assess Agency Reform Efforts*, GAO-18-427 (Washington, D.C.: June 13, 2018). Moreover, in July 2022, we reported that VA undertook 23 initiatives in recent years to improve its disability compensation program, including a team that examined duty to assist errors. However, we found that VA did not consistently follow leading management practices, such as establishing goals for the reforms and involving key stakeholders, to achieve intended results. We made eight recommendations (and VA generally concurred), but VA has not yet implemented six of them as of November 2023. See GAO, *VA Disability Benefits: Compensation Program Could Be Strengthened by Consistently Following Leading Reform Practices*, GAO-22-104488 (Washington, D.C.: July 18, 2022).

common outcome at CAVC. In fiscal year 2019 through 2022, over 80 percent of cases appealed to CAVC were partially or fully remanded. In addition, the Board must expedite adjudicating cases that are remanded by CAVC, which accounted for almost 14 percent of its workload in fiscal year 2022.²⁶

While OAI tracks the reasons for remands from CAVC, Board officials told us they have not analyzed the underlying causes of CAVC remands. According to our analysis of available Board data,²⁷ about three quarters of remand reasons are related to reasons or bases, where CAVC determined that the Board did not provide an adequate explanation for its findings or conclusions.²⁸

The Board's 2022 annual report states that CAVC remands or decisions rarely result in a reversal of the Board's decision. However, errors are known to exist independent of a CAVC reversal. In instances where VA and the claimant agree to a JMR, it generally involves acknowledgement that VA made a factual or legal error in its decision or that additional information is needed before making a final decision, according to CAVC officials.

While Board officials have not studied the underlying causes of CAVC remands, they acknowledged that some remands are a result of flaws in Board decisions. However, they stated that the main cause of remands was related to reason or bases, and that the term is not defined in statute. They said the subjectivity of the term gives CAVC broad license to remand cases. In many instances, this decision is made through Rule 33 mediation conferencing without a CAVC judge or panel of judges examining the case. However, the documents and explanations the Board provided to us do not reflect a systematic or comprehensive analysis of

²⁶See 38 U.S.C. § 7112. The Board prioritizes cases with certain circumstances over original appeals. For example, in addition to cases that are remanded by CAVC, the Board prioritizes adjudicating cases based on a veteran's age, or where a veteran is facing serious health conditions, or financial hardship (called "advance on docket"). Since fiscal year 2020, the majority of Board decisions are on appeals with one of these circumstances.

²⁷Board officials tracked remand reason data in fiscal year 2019, 2021, and 6 months of fiscal year 2022. Board officials said they did not track remand reasons in fiscal year 2020 nor half of fiscal year 2022 due to staffing challenges.

²⁸See 38 U.S.C. § 7104(d).

whether there are any factors within their control contributing to the underlying causes of CAVC remands.

Congress has expressed concern about recurring issues that continue to surface on appeals to CAVC.²⁹ In addition, two experts we interviewed told us the Board could do more to understand the underlying causes of CAVC remands and develop approaches, tools, or other interventions to reduce the likelihood that a case will be remanded by CAVC. While Board officials told us it is not their goal to reduce the number of CAVC remands, in the past the Board has analyzed CAVC remands for specific types of cases. For example, in 2017, the Board analyzed CAVC remands of cases involving extra-schedular ratings.³⁰ Board documents show that this effort resulted in training that advised VLJs to change their behavior in this area of law.

Board's Approach to Assessing Interventions. Board officials told us they have not systematically or comprehensively built evidence to assess the results of its interventions. For example, the Board lacks information on how interventions affect errors found during case review. Board officials said OAI reviews evidence on an informal basis, such as anecdotal evidence that suggests a particular training has either been effective or ineffective. Board officials said they welcome feedback from any source that would improve the effectiveness of their trainings and guidance, and they told us they use such feedback to improve interventions. For example, they have sometimes used post-event

²⁹168 Cong. Rec. S9236 (Dec. 20, 2022). In the Explanatory Statement accompanying the Consolidated Appropriations Act, 2023, CAVC was directed to provide a report on recurring issues that CAVC addresses in VA decisions, and the impact it has on the quality or timeliness of a veteran's claim. In its report, CAVC wrote that recurring issues are duty to assist errors and reasons or bases. CAVC stated that, because it is an independent Court, it is unable to comment on the impact that these recurring issues have on quality or timeliness at the Board. CAVC wrote that it "can only note that claims remanded by our Court are entitled to expeditious treatment by the Board."

³⁰In some cases, a veteran can be given a higher disability rating than one based on the general schedule used for evaluating the degree of disability. These are called "extra-schedular" ratings. See 38 C.F.R. § 3.321(b).

participant surveys to learn whether the material presented was relevant and whether the method used to deliver the training was effective.³¹

Most Board attorneys and VLJs we spoke with during discussion groups found the interventions—such as individualized feedback memos, monthly error digests, and training—to be generally helpful. However, some told us that the interventions could be improved or that other tools are more useful in helping them improve their accuracy. For example, some attorneys and VLJs said OAI's targeted trainings are inconsistently offered and often not as informative as they hoped. Some told us that they develop ad hoc trainings, which can be timelier and more helpful than OAI targeted training. While most of the attorneys and VLJs said that OAI's monitoring of CAVC decisions and related notices from the Office of Chief Counsel were generally helpful, some told us that they find a staff-initiated, unofficial case law blog more helpful because it can be timelier and provide more detail. A few attorneys and VLJs said that daily emails from one VLJ who takes the initiative to summarize CAVC decisions have also been helpful.

Overall, we found that the Board lacks a systematic and comprehensive process for evidence-based decision-making to inform and assess their interventions. Board officials acknowledged that such a process could be helpful, but they have been focused on higher priority tasks. However, until the Board develops and implements an evidence-based decision-making process and a plan to guide it, the Board is not positioned to fully understand and address underlying causes of errors and remands. Specifically, this process and related planning could define strategies to address or mitigate relevant factors within its control leading to rework. Moreover, without systematically and comprehensively collecting information about these and other interventions, Board management has little insight into whether its QA process is improving the quality of its adjudicative decisions.

Such an evidenced-based decision-making process is a critical element to help reduce Board rework. This process could also point to new strategies to address areas outside of the Board's control, such as

³¹Our previous work has identified leading practices to help federal agencies improve their strategic training efforts that could be helpful to the Board. For example, leading practices for evaluating training include collecting feedback from a variety of stakeholders and incorporating it into the training program. See GAO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, GAO-04-546G (Washington, D.C.: Mar. 2004).

partnering with CAVC on ways to reduce remands or helping to inform potential reforms to the overall appeals system for veterans. Through its planned evaluation of its QA process, the Board has an opportunity to take a first step towards developing an evidence-based decision-making process.

Consistency of Decisions. Currently, the Board does not systemically assess VLJ adjudicative decisions for consistency, such as whether there are common misunderstandings of policy, regulation, or the law. However, several stakeholders we interviewed told us inconsistency among VLJ decisions is a challenge at the Board. Specifically, two experts we interviewed who are familiar with the Board's QA process and Board decisions told us that a lack of consistency across VLJs is a problem at the Board. They said that while some VLJs write very reasoned, legally-based decisions that are difficult to appeal, others do not. An official at a VSO said he notices inconsistency in the quality of decisions among VLJs and that the record will contain evidence for the VLJ to consider, but that certain VLJs do not consider that evidence in their decisions. In addition, researchers who published a study in 2019 on the Board's QA process said inconsistency among VLJs is a recurring problem.³²

Several subject matter experts we interviewed stressed the importance of consistency across VLJs when considering adjudications of the same type. For example, attorneys at a veteran law firm told us that studying decision-making among VLJs would be useful to identify those who make an inordinate number of errors, or errors of a certain type, and address the underlying issues leading to repeated mistakes. Another expert told us the Board should aim for a system that treats similar applicants the same way.

Board officials told us that a systematic study has not been done because an independent VLJ is necessary to ensure the rule of law is respected. Moreover, they said that judicial independence means that VLJs are not subject to pressure and influence and are free to make impartial decisions based solely on facts and law.

We recognize the importance of judicial independence and that variation is not necessarily an indicator of poor quality decision-making. While some degree of variance is expected given VLJs' decisional

³²Ames et al.

independence and the complex nature of cases, consistency studies could alert Board management to any large differences that could indicate a misunderstanding of policy regulation, or law, or other areas needing attention. The results of such analysis could provide a basis for targeting interventions, such as training and guidance, to assist VLJs.

Noting the importance of consistency among adjudications, the Administrative Conference of the United States recommended that a good practice for QA systems of adjudicative agencies is to assess whether decisions and decision-making processes are consistent across all adjudications of the same type.³³ In addition, the Social Security Administration (SSA) uses consistency studies for assessing decision-making consistency. For example, according to a study published by the Administrative Conference of the United States, SSA examined decisional consistency across administrative law judges by using collected evidence to develop a series of “heat maps”. These heat maps allowed SSA to determine whether inconsistencies result from adjudicator idiosyncrasy or something more systematic.³⁴ The co-author, who spearheaded the studies, told us that by using the heat maps he could see how common a specific type of error was across all administrative law judges, or if a particular judge was continually making the same error, which then led to direct feedback to that judge.

Beginning in 2011, SSA also established an electronic tool called “How MI Doing?”. This tool allows administrative law judges to compare their productivity and timeliness metrics to hearing office, regional, or national metrics. The tool also provides data on the agree rate for each judge as well as the hearing office, regional, and national agree rates. Using this tool, judges can also learn the reasons any prior decisions have been remanded, and access on-demand training pertaining to that reason.³⁵ Another study offered examples of how using analysis of adjudications of

³³Administrative Conference of the United States, *Administrative Conference Recommendation 2021-10: Quality Assurance Systems in Agency Adjudication*, (Washington, D.C.: adopted Dec. 16, 2021).

³⁴Daniel E. Ho, David Marcus, & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication* (Nov. 30, 2021) (report to the Administrative Conference of the United States).

³⁵See GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, GAO-18-37 (Washington, D.C.: Dec. 7, 2017).

the same type might benefit VLJs.³⁶ For instance, if a VLJ misinterprets a CAVC precedent about a certain disease category, and as a result has an allowance rate that is higher than other VLJs, the feedback might help the VLJ understand the reason their allowance rate differs from their colleagues. Without systemically assessing VLJ adjudicative decisions for consistency, the Board is not positioned to fully understand and address systemic inconsistencies in decision making, if any, to target interventions, as appropriate.

Conclusions

The Board helps assure and measure the quality of its adjudicative decisions through its QA process. As part of this effort, the Board invests time and resources in the case review process and on generating its monthly accuracy rate. However, without written policies and procedures to guide the calculation of its accuracy rate and managing related data, the Board will continue to risk communicating unsupportable information internally and externally, losing underlying data, or using inconsistent methodologies. Furthermore, until the Board begins monitoring how VLJs incorporate feedback from the case review process and whether errors are corrected, it will continue to invest resources without understanding the usefulness of this QA activity.

The Board has taken a good step in planning an evaluation. However, as the Board contends with large workloads and expectations for timely decisions, planning, developing, and implementing a more systematic and comprehensive process for evidence-based decision making is important. Such a process will better position the Board to fully understand and address underlying causes of the most common errors and remands—a process needed to effectively target and implement interventions and assess the results. In addition, the Board has not systemically assessed VLJ adjudicative decisions for consistency, such as whether there are common misunderstandings of policy, regulation, or the law in their adjudicative decisions. The results of such analysis could provide a basis for targeting interventions, such as training and guidance, to assist VLJs.

Ultimately, the Board's ability to effectively manage workloads lies, in part, in developing and using evidence to effectively manage and assess its QA process and reduce the most common errors, identify the most common reasons for CAVC remands, or reduce other forms of rework.

³⁶Ames et al.

Recommendations for Executive Action

We are making the following four recommendations to the Chairman of the Board of Veterans' Appeals:

The Chairman of the Board of Veterans' Appeals should develop written policies and procedures related to its accuracy rate measure, to require that OAI (1) involves more than one official in the calculation process; (2) documents its calculation of monthly and fiscal year accuracy rates; and (3) manages related error data. (Recommendation 1)

The Chairman of the Board of Veterans' Appeals should monitor how veteran law judges choose to incorporate the feedback they receive from the case review process—including whether errors are corrected—and use this data to inform decision making related to the case review process. (Recommendation 2)

The Chairman of the Board of Veterans' Appeals should develop and implement an evidence-based decision-making process that includes a plan outlining how it will build evidence to assess the underlying causes for the most common errors identified by the case review process and the most common reasons for CAVC remands. The Board should use this evidence to better target its interventions and assess their results. One option is to fold the development of this process into the Board's planned evaluation. (Recommendation 3)

The Chairman of the Board of Veterans' Appeals should study how to evaluate VLJ adjudicative decisional consistency. One option is to fold the development of this study into the Board's planned evaluation. (Recommendation 4)

Agency Comments and Our Evaluation

We requested comments on the contents of this statement, including our recommendations, from the Board. The Board provided technical comments, which we incorporated as appropriate. See appendix I for the Board's comments. The Board agreed with recommendation 2 and agreed in principle with recommendations 1 and 3. The Board disagreed with recommendation 4.

Regarding recommendation 1, Board officials stated in their emailed comments to us that we should clarify the recommendation about the Board needing a policy and procedure for managing data. They indicated that the loss of data was specific to fiscal years 2019 and 2020. However, the loss of data stemmed from not having policies and procedures. And without them, these types of data management issues could occur again in the future. We continue to believe that having policies and procedures

are an important part of internal control. Without written policies and procedures, the Board could face further challenges such as additional data loss, improperly storing data, or using inconsistent methodologies.

Regarding recommendation 4, Board officials stated in their emailed comments to us that it would be inappropriate to force consistency in VLJ decisions in a way that is inconsistent with codes of judicial conduct and other standards applicable to VLJs. They stated that there will and should be variance in how legal authority is applied to the individual facts and circumstances of each case appealed to the Board. Board officials further stated that VLJs should be independent and not subject to pressure and influence. They also stated that, as part of evaluating individual VLJs' adherence to performance standards, the Board evaluates the total number of decisions each VLJ has adjudicated and the manner in which they have adjudicated them, among other things. In addition, Board officials noted that the number of decisions remanded does not demonstrate whether such remands were warranted, and that the number of CAVC remands or reversals does not necessarily correlate with productivity, legal acumen, or even with performance. Finally, they said that the concept of "consistency" of decision-making among individual judges evaluating sets of facts and circumstances of each individual case is a difficult one to address at all levels of adjudication, not only at the Board, but also at CAVC.

Our statement acknowledges the importance of judicial independence, that some degree of variance is expected given that independence, and that variation is not necessarily an indicator of poor quality decision-making. In addition, the Board's emailed comments acknowledge that consistency among VLJs in the use of appropriate legal authority is appropriate. However, without studying consistency, the Board will remain unaware of whether systemic inconsistencies in VLJ decision-making exist, and the Board will be unable to target interventions, as appropriate. We continue to believe that the results of systematic study of VLJ adjudicative decisions for consistency could provide a basis for targeting interventions, such as training, to assist VLJs. As such, this recommendation is not intended to "force" consistency in any VLJ decisions, but rather is meant to help the Board assist VLJs. We intentionally worded our recommendation to allow the Board the necessary latitude to implement it in a way that allows for the retention of judicial independence while meeting other goals it deems appropriate.

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

**GAO Contact and
Staff
Acknowledgments**

If you or your staff have any questions about this testimony, please contact Elizabeth Curda, Director, Education, Workforce, and Income Security, at (202) 512-7215 or curdae@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

GAO staff who made key contributions to this testimony are James Whitcomb (Assistant Director), David Perkins (Analyst-in-Charge), and Kayla Good. Also contributing to this testimony were Carl Barden, John Bornmann, Rachael Chamberlin, Alex Galuten, Erin Godtland, Dana Hopings, Cheryl Jones, Terrell Lasane, Benjamin T. Licht, Mimi Nguyen, Jessica Orr, Walter Vance, Margaret Weber, and Adam Wendel.

Appendix I: Comments from the Board of Veterans' Appeals

The Board of Veterans' Appeals disagrees with the very broad language used in Recommendation 4, especially when considering some of the subjective language and inputs used in the GAO report to support its recommendation for greater "consistency" in Veterans Law Judge (VLJ) adjudicative decisions. The recommendation fails to note that most remanded cases from the Clerk of the United States Court of Appeals for Veterans Claims are premised on the subjective opinions of party litigants that a decision did not provide adequate "reasons or bases" to support the findings of fact and conclusions of law in a Board judge decision. It would be inappropriate to force consistency in single judge VLJ decisions in a way that is inconsistent with codes/cannons of judicial conduct and the longstanding statutory, jurisdictional and performance standards applicable to VLJs. Consistency in citation/use of appropriate legal authority is appropriate, however, there will be and should be variance in how that legal authority is applied to the individual facts and circumstances of each case appealed to the Board.

First and foremost, we should note that the Judicial Cannons in the Code of Conduct for United States Judges applies to VLJs. In upholding their integrity and independence under Canon 1, the commentary notes, "The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions" and it notes this is important to public confidence. The comment also states, "The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law."

Evaluation of individual judge performance and adherence to the VLJ performance standards is something the Board takes very seriously, pursuant to 38 U.S.C. §7101A. For example, the need to avoid unwarranted delays in the adjudication process, to include the total number of decisions each judge has adjudicated and the manner in which they have adjudicated them, is generally evaluated under the VLJ performance standard elements relating to legal acumen (which includes quality), and docket/case management (including productivity and timeliness). It is important to note, the total number of decisions remanded does not demonstrate whether such remands were warranted because the record is not ready for appellate review or because referral to the agency of original jurisdiction is necessary and proper. Similarly, while the decisions of the U.S. Court of Appeals for Veterans Claims (CAVC) are a factor to be considered in performance evaluation, the number of remands and/or reversals does not necessarily correlate with productivity, legal acumen, or even with performance. It should be

remembered that cases returned to the Board from the CAVC are predominantly Clerk "dispositions", rather than judge "decisions," and CAVC annual reports make this careful distinction. Of the remaining "decisions" by CAVC judges, very few are precedential panel decisions, with almost all of them constituting non-precedential, single judge memorandum decisions. Each year, CAVC only reverses an average of 1-2 dozen appeals out of the 7,000-9,000 appeals filed with CAVC for each of the past 5 years. The standard for reversal is whether the Board judge's findings are "clearly erroneous," and that is why there are so few reversals of Board decisions by CAVC judges.

Also, the following considerations are important to keep in mind: CAVC decisions on the merits are subject to reversal/remand by superior federal courts; a Board decision may have been in compliance with the law or the interpretation of the law that was in effect when the decision was made; and remands by the Court most often result from joint motions by the parties, which often have no bearing on the quality of the Board decision at issue nor express legitimate differences in judgment. While CAVC judicial decisions and Clerk dispositions concerning remanded issues for further adjudication must be considered, affirmances or other favorable comment by the Court should also be taken into consideration in order to achieve a balanced perspective on an individual VLJ's performance. We also know the number of Notices of Appeal filed with the Court does not appear to have any clear relationship to productivity in particular or performance, in general.

Finally, the concept of "consistency" of decision-making among individual judges evaluating the individual sets of facts and circumstances of each individual case is a difficult one to address at all levels of adjudication, not only at the Board, but also at CAVC. See Ridgway, James D. and Stichman, Barton and Riley, Rory E., 'Not Reasonably Debatable': The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims 27 Stan. L. & Pol'y Rev. 1 (2016). That article by prominent Veterans Law experts concluded outcome variance in single-judge decisions is a serious problem at the CAVC that can and does result in conflicting guidance to VA. However, Congress explicitly addressed and authorized single judge Board decisions in the 1990s as a way to help manage the ever-increasing caseload of appeals, so awaiting Veterans receive more timely "final" decisions on their pending appeals. This process, and Congress' subsequent passage of the Appeals Modernization Act (AMA) have served Veterans well, with full and final resolution of Veteran appeals being decided on average 4 years faster

Appendix I: Comments from the Board of
Veterans' Appeals

than under the older legacy system of appeals and over 92% of Board
judge decisions not being appealed to CAVC.

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Prepared Statement of Shane Liermann

Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee: Thank you for inviting DAV (Disabled American Veterans) to testify at today's oversight hearing titled, "Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal."

DAV is a congressionally chartered, VA-accredited, non-profit veterans service organization (VSO) comprised of more than one million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. To fulfill our service mission, DAV directly employs a corps of benefits advisors, national service officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every Department of Veterans Affairs (VA) regional office (VARO) as well as other VA facilities throughout the Nation, including the Board of Veterans' Appeals (Board).

More than 12.1 million claims for benefits have been submitted by DAV since the organization was chartered by Congress in 1932. In VA Fiscal Year (FY) 2022, DAV represented veterans and families in more than 13,500 decided appeals by the Board, which represented nearly 20 percent of all Board decisions, the largest amount of any accredited VSO.

Based on our experience, our testimony will focus on the quality of appeals decisions by examining the Board and its remand decisions, the performance of the Board in FY 2022, the Court of Appeals for Veterans Claims (Court) and its FY 2022 report, and our concerns and recommendations.

THE BOARD OF VETERANS' APPEALS

Established in 1933, the Board is an agency within the VA, which is responsible for making final decisions on behalf of the Secretary regarding appeals for veterans' benefits and services from all three administrations, the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA), as well as the Office of General Counsel (OGC) that are presented to the Board for appellate review.

The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairman, members, and professional, administrative, clerical personnel. The principle functions of the Board of Veterans' Appeals are:

- Make determinations of appellate jurisdiction.
- Consider all applications of appeal properly before it.
- Conduct hearings on appeal.
- Evaluate the evidence of record.
- Enter decisions in writing on the questions presented on appeal.

All questions of law and fact necessary to a decision under a law that affects the provision of benefits to veterans or their dependents or survivors are subject to review on appeal by the Board. Additionally, the Board shall decide all questions pertaining to its jurisdictional authority to review a particular case.

The Appeals Improvement and Modernization Act

Starting in 2015, DAV collaborated with the VBA, the Board, and other stakeholders to improve and streamline the appeals process. The Appeals Improvement and Modernization Act (AMA), a veteran-centric appeals process, was the result of those combined efforts and was implemented in February 2019.

In the legacy appeals process, appeals could languish for several years within each VARO before being certified to the Board and then, potentially spend several more years there before a final decision.

AMA created three options, referred to as lanes, for claimants dissatisfied with the initial decisions on their claim. Claimants may seek a higher-level review of the decision based on the same evidence presented to the initial claims processors; file a supplemental claim that includes the opportunity to submit additional evidence; or appeal directly to the Board.

Claimants appealing to the Board may elect one of three appeal options: 1) a direct review of the evidence that the Agency of Original Jurisdiction (AOJ) considered; 2) an opportunity to submit additional evidence without a hearing; or 3) a hearing before a veterans' law judge (VLJ), which includes the opportunity to submit additional evidence.

The Board noted in its final FY 2023 quarterly report, published on its website, that 103,245 appeals were decided while receiving over 101,000 new appeals. There were 24,145 legacy appeals pending and over 180,000 pending AMA cases totaling 208,155 appeals pending on October 1, 2023. Of the appeals pending, it noted that

AMA appeals on a direct route were pending an average of 577 days, AMA appeals with evidence were pending an average of 682 days and AMA appeals requesting a hearing were pending an average of 700 days.

Additionally, in FY 2023, the Board conducted 19,434 hearings, which is approximately 11,000 less than those held in FY 2022. At the end of the FY 2023, there were 1,054 legacy hearings and 71,411 AMA hearings pending for a total of 72,465 appeals awaiting hearings.

Legacy Remand Decisions

In the legacy appeals system, when a veteran files a VA Form 9 in response to a Statement of the Case issued by the VARO, their claim will go to the Board to be reviewed by a VLJ. The Board will then look through the veteran's file, consider all of the evidence submitted, and issue a decision. There are several situations in which the Board will decide to remand a claim, including:

- If the Board believes it needs additional information or evidence in order to come to a final determination;
- If the Board does not believe that the VARO evaluated the veteran's claim appropriately; and
- If additional evidence was submitted that the VARO did not review.

Importantly, in the legacy appeals system, the Board is obligated to remand for duty to assist errors that occurred at any time while the veteran's appeal was pending. If a veteran's case is remanded, the file will go back to the VARO, the agency of original jurisdiction (AOJ). In each remand, the Board will lay out specific remand instructions to which the VARO must adhere. For example, the Board can instruct the VARO to obtain a compensation and pension examination, medical records, service records, or other types of additional evidence. Once the VARO completes the Board's remand instructions, it will issue a decision on the veteran's claim. It can either issue a rating decision if it determines the veteran is entitled to the benefits sought on appeal, or a Supplemental Statement of the Case (SSOC), if it is unable to grant benefits. The issuance of an SSOC will automatically send the veteran's claim back to the Board so a final decision can be made.

In FY 2020 and FY 2021, the legacy remand rate was 40 percent. In FY 2022, the legacy remand rate was 42 percent and the Board stated in the report, that nearly 60 percent of the returned legacy remands pending at the Board have been remanded by the Board to the agency of original jurisdiction two or more times. In the last FY 2023 quarterly report, the legacy remand rate was 44 percent, which is an increase over the past three years.

AMA Remand Decisions

Under AMA, the Board is no longer obligated to remand for duty to assist errors. However, if the duty to assist error is pre-decisional, meaning it occurred prior to the VARO adjudication on appeal, the Board can remand the appeal back to the VARO with instructions to correct the error. For example, the Board may request the VARO to obtain an advisory medical opinion if it should have done so prior to the initial decision.

Additionally, under AMA, remanded appeals are not automatically returned to the Board following development and correction. Instead, the AOJ will readjudicate the appeal by re-reviewing the record, conducting the development necessary to correct the pre-decisional duty to assist error, and issue a new rating decision. A veteran's appeal will only return to the Board if the claimant files another Notice of Disagreement within one year of the VARO's readjudication.

If there is no pre-decisional duty to assist error, the Board is instructed to grant or deny the appeal for benefits based on the evidence considered by the VARO, and any evidence submitted during or within 90 days after the NOD or Board hearing.

In FY 2020 and FY 2021 the AMA remand rate was essentially 28 percent. In FY 2022, the AMA remand rate was 29 percent. In the FY 2023 last quarterly report, the AMA remand rate increased to 32 percent.

CONCERNS AND RECOMMENDATIONS

We are greatly concerned about the increased rates of legacy remand rates. In the last FY 2023 quarterly report, 70,584 legacy appeals were decided in FY 2023, with a grant rate of 34 percent, a remand rate of 44 percent and a denial rate of 17 percent. Appellants have the ability to submit new evidence throughout a legacy appeal. While we acknowledge this could be a factor for the increase in the remand rate, we ask why only 17 percent of the legacy appeals were denied. There is clearly

some issue regarding the quality of the these AOJ decisions, which we believe can be traced to training issues.

When the Board previously conducted hearings at the VAROs, often called travel board hearings, many of the VLJs traveling to the VAROs would conduct training with the local appeals teams. While these were conducted with the permission of the VARO Director and if the VLJs had time, DAV even participated in these training sessions. It is evident by the 17 percent denial rate at the Board, that training is desperately needed in VBA and at the VARO level.

One of the original intents of AMA was to reduce the amount of remands by the Board of Veterans' Appeals; however, the increased rate of AMA remands establishes that VBA claims personnel are committing a high volume of duty to assist errors pre-decision. We believe this high percentage of errors is, in part, due to training issues.

We believe these high duty to assist errors are verified by the June 2021 Government Accountability Office (GAO) report, "Veterans Benefits Administration Could Enhance Management of Claims Processor Training," which made ten recommendations for VBA to implement. Additionally, the report noted, "fully applying leading practices for training would provide VBA greater assurance that its workforce is sufficiently skilled to efficiently and effectively process disability claims and provide high-quality service to veterans." The report clearly identifies training issues within VBA.

Additionally, we believe VBA places an overemphasis on their own training manuals, adjudication manuals and training memos which are not binding on the Board. As noted in title 38, Code of Federal Regulations, section 20.105, "In the consideration of appeals and in its decisions, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues."

Further, in December 2020, the Court held in *Kennedy v Wilkie* that a VA Fast Letter does not constitute "law." It is clear that VBA focuses training of their claims processors to their own manuals and not specific to statutes, regulations and precedent decisions.

In the FY 2022 report, the Board states, "While the overwhelming majority of remands from the Court have instructions for the Board to provide additional "reasons and bases" for its denial decision, the Board and VBA are assembling a tiger team to evaluate root causes and ways to reduce remands from the Board to VBA. While doing this, the Board is exploring options to enable it to better address original Legacy system appeals still pending that have never been seen by a Board judge because of these remands that continue to have priority."

We recommend that the Board institute this tiger team not only to determine the root cause of remands, which we believe is partly development errors, but also to provide training on these specific issues. Additionally, the training needs to impress upon VBA it needs to focus training on the law, not internal manuals.

The Board's legacy and AMA remand decisions both increased during FY 2022 and FY 2023, which speaks directly to the quality of the decisions being made by AOJs and inversely speaks to the quality of decisions made by the Board.

QUALITY OF BOARD DECISIONS

In order to effectively discuss the quality of Board decisions, we must take a look at several factors, including the intake and docketing of AMA appeals, the GAO testimony of July 13, 2021, the Board's FY 2022 annual report, as well as the Court and its FY 2022 annual report.

Intake and Docketing of AMA Appeals

In January 2020, the Board established the Office of the Clerk of the Board, an internal Board resource formed to ensure the proper docketing of AMA appeals. The Clerk's Office also works to identify and correct AMA docketing errors, improve Board training around AMA issues and assists VA IT professionals in refining the technological tools used by Board staff to process AMA appeals.

Although the Clerk of the Board was created, DAV continues to discover AMA appeals that are deemed invalid and should not have been docketed. For example, veterans who have received a proposed reduction from VBA are filing an appeal, VAF 10182, directly to the Board. However, since this is a proposed action and not a final action, the issue is not under the Board's jurisdiction and thus is an invalid appeal. This invalid appeal may not be discovered for months or longer while the veteran is completely unaware. In many instances, this has negatively impacted veterans as they could not take other timely actions.

In our July 2021 testimony to this Subcommittee, we reported that DAV's National Appeals Office located at the Board estimated that 1 in 25 cases reviewed for an informal hearing presentation and 1 in 100 cases reviewed for a hearing were invalid appeals that should not have been docketed.

Then in 2021, the Board learned that a number of veterans may have had their Board Appeal forms mistakenly rejected for being untimely. The Board sent out notifications that VA Forms 10182 submitted to the Board between February 19, 2019, and March 23, 2021, may have been improperly rejected as untimely. Impacted veterans were invited to resubmit the Notice of Disagreement (NOD).

In January 2022, the Board sent out another notice that delays to the Board's ability to mail correspondence between July 13, 2021, through December 31, 2021, may have impacted timely submissions and invited veterans to request that the Board consider a previous submission that was not addressed or reconsider a prior determination that a submission was untimely.

CONCERN AND RECOMMENDATION

It is important to note that the decisions on the timeliness of the NOD is currently not a written decision made by a VLJ, but an intake clerk. This means the timeliness of the NOD determination by the Board is not appealable.

Given the problems with the intake and docketing of AMA appeals, we recommend that a decision by a VLJ on the timeliness of the NOD be added to the appeals process. To accomplish this goal, DAV supports H.R. 5891, the Veteran Appeals Decision Clarity Act as it would require a written determination on the timeliness of the NOD.

The problems identified with intaking and docketing cases, speaks to the quality of the decisions made by the Board and a need for improving the quality of decisions and a thorough quality assurance program.

GAO Testimony of July 31, 2021 before the Subcommittee

The testimony specifically notes, "Board officials recently told us that while they have conducted some analysis to ensure that decisions are accurate and consistent, they are developing a quality assurance program that measures and reports the accuracy of its decisions on AMA appeals. Developing this program, according to Board officials, involves efforts such as determining the appropriate criteria and statistical practices to assess decision quality, collecting baseline data, and specifying an AMA quality goal. Board officials told us they plan to set and use an AMA quality goal in Fiscal Year 2022."

Additionally, GAO noted, "Developing and implementing a comprehensive quality assurance program is important as the Board contends with its large workloads, which potentially create pressure to sacrifice the quality of work activities to meet timeliness goals. This scenario could result in incorrect decisions, or rework to correct errors or issue new decisions, thus affecting timeliness from the veteran's perspective."

In the Board's most recent annual report, they refer to a Quality Assurance (QA) program, the Office of Assessment and Improvement (OAI) and the Board's independent review process. However, none of this is well-defined or explained in any great detail.

The Board of Veterans' Appeals Annual Report Fiscal Year 2022.

The report states the Board adjudicated 95,294 decisions, which is 4,000 fewer cases than adjudicated in FY 2021. Specific to the issue of quality, of the more than 3,400 cases sampled during FY 2022, statistical analysis revealed a quality assurance rate of approximately 94.66 percent for legacy appeals decisions, which improved over FY 2021 from 92.06 percent. For AMA appeals decisions, the quality assurance rate for FY 2022 was 91.91 percent compared to the FY 2021 quality assurance rate of 87.48 percent.

The Board noted in its FY 2022 report, "The Board has been collaborating closely with GAO to evaluate areas for continued improvement in the Board's Quality Assurance program. This includes evaluating potential root causes for declining, but continuing, trends related to unnecessary or improper remands under the AMA. The Board is monitoring the outcomes in cases appealed to CAVC and the United States Court of Appeals for the Federal Circuit to identify trends that may help enhance the Board's Quality Assurance program. The Board will continue its collaboration with VA's OGC to provide targeted trainings to VLJs based on trends seen in these court cases."

We are encouraged by the increase in the quality assurance of the decisions for the legacy and AMA appeals and an improved quality assurance program. However,

the Board is quick to point out that the mere discovery of an “error” in a decision does not mean that the Board’s decision was “wrong.”

In FY 2022, of the total 261 errors called, only 4 errors were deemed clearly and unmistakably erroneous, where the decision erroneously states the facts or the law and, but for the error, the decision result would have been manifestly different. The report further states there are many other quality “error” categories that do not necessarily involve a procedural defect or incorrect outcome.

Additionally, they report “approximately 7.28 percent of errors identified in the Board’s Quality Assurance process were based on a need for the Board to fully address all raised contentions and theories of entitlement. Again, please note that fully addressing each contention or theory of entitlement does not necessarily result in a different outcome.” Through the lens of quality and accurate decisions, we view this as a very troubling statement from the Board. Their focus should be on the requirements of law, which requires it to consider all theories or avenues of entitlement, because in many cases that can result in a grant of the benefits being sought.

The report also states that, “OAI reviews Board decisions to ensure compliance with the duty to assist and evidentiary rules under the AMA, even if such an “error” is not adverse to the appellant.” This is a stunning statement considering the Board has vastly increased remand decisions based on duty to assist errors as previously noted.

The FY 2022 report does show improvement in the quality of the Board’s decisions, yet the Board downplays the significance of certain errors that are discovered in its decisions, which fall under the jurisdiction of the Court of Veterans Appeals. Let’s review the Court and its FY 2022 Annual Report.

The Court of Appeals for Veterans Claims

Until the Court was established in 1988, veterans had no court of law where they might appeal the decisions on veterans’ benefits. A veteran whose claim VA denied was therefore afforded no independent review of VA decisions; that veteran was therefore denied the right to go to court to challenge the decision of an administrative agency. Prior to the establishment of the Court, the last line of appeal for veterans and their families was the Board of Veterans’ Appeals.

In order to obtain review by the Court of a final decision of the Board of Veterans’ Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date of the decision.

The Court has exclusive jurisdiction to review decisions of the Board and has the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate. The Court must confine its review to the Board decision and may not consider any evidence which was not of record before the Board. In other words, an appeal to the Court cannot contain new evidence.

Court of Appeals for Veterans Claims FY 2022 Annual Report

According to its annual report, in FY 2022, the Court received 7,344 appeals along with 280 petitions and 6,530 Equal Access to Justice Act (EAJA) applications. During FY 2022, the Court issued 15,136 decisions addressing 8,164 appeals, 260 petitions, and 6,534 EAJA applications.

The number of new cases filed at the Court in FY 2022 decreased by 8 percent. This decrease correlates to a reduction of final decisions issued by the Board. The report states, “In FY 2022, the Board decreased production of final decisions from 99,721 in FY 2021 to 95,294. Over the course of FY 2022, the Court averaged 612 appeals filed per month, and reached a high of 717 appeals filed in March 2022.”

Out of the 8,164 decisions decided, the Court affirmed the Board’s decision in 411 appeals, affirmed or dismissed in part, reversed or vacated and remanded in part 3,245 appeals, reversed or remanded 3,629 appeals, and dismissed 879 appeals.

CONCERNS AND RECOMMENDATIONS

Based on the GAO report of July 2021, the Board has implemented and improved its quality. It reported an increase in the quality of decisions for legacy appeals at 94.66 percent and AMA appeals at 91.91 percent; however, the Court only affirmed the Board’s decision in 5 percent of appeals. This, coupled with the Court reversing or remanding 44 percent of the Board’s decisions, acknowledges an issue with the quality of decisions.

The Board has indicated it needs to train VBA on remand issues and it is clear training from the Court is needed due to the large number of remanded cases. We recommend a renewed focus on quality by establishing a training program for VLJs. This should include feedback and input from attorneys and judges at the Court.

For many veterans and appellants, while appeals are streamlined by the AMA it can still take years to get a decision from the Board and the Court. With the Court reversing or remanding 44 percent of the Board's decisions, this can lead to more years of waiting for a remand decision to be finally decided. The Board has shown improvement in quality; however, with the amount of remanded cases and the low percentage of affirmed cases, quality is still a major issue and concern for DAV.

Mr. Chairman, this concludes my testimony on behalf of DAV. I am happy to answer any questions you or members of the Subcommittee may have.

Prepared Statement of Diane Boyd Rauber

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to testify today on the VA appeals process and the quality of actions taken by the Board of Veterans' Appeals (Board) for veterans, their families, survivors, and caregivers.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents approximately 850 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans, families, survivors, and caregivers seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits.

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC), U.S. Court of Appeals for the Federal Circuit, and the Supreme Court of the United States. Accredited attorneys and agents handle a growing volume of appeals at the Board. In FY 2015, attorneys and agents represented 14.9 percent of appeals before the Board. By FY 2022, that percentage had grown to 25.7 percent. Compare U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2015 27*, with U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2022 49* (hereinafter Board FY 2022 Report).

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); *Van Dermark v. McDonough*, No. 23-178 (September 25, 2023) (amicus in support of petition for writ of certiorari before U.S. Supreme Court). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA also advocates for laws to improve the VA disability claims and appeals process. NOVA participated in the stakeholder meetings that resulted in the development and passage of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, 131 Stat. 1105 (August 23, 2017) (AMA). As VA has implemented the new system over the last several years, NOVA has provided extensive training to our members on the statute, regulations, and practice under the AMA. We also gather information from our members across the country on their experiences advocating in both the legacy and AMA systems.

Introduction

Per the Subcommittee's invitation, we address below the quality of Board actions to include (1) Board determinations on whether a Notice of Disagreement (NOD) has initiated an appeal; (2) Board remands of cases to the Veterans Benefits Administration (VBA) for further action or development; (3) the Board's quality assurance and training program; and (4) additional issues that hinder timely, quality decisions and result in long wait times in the AMA system for veterans, family members, survivors, and caregivers.

I. Board Determinations on Whether an NOD Has Initiated an Appeal

In its recent decision in *Kernz v. McDonough*, the CAVC found the veteran's appeal to be moot and therefore did not determine if the Board's letter finding his NOD to be untimely was a final decision the veteran could appeal. No. 20-2365 (October 4, 2023). We endorse Judge Jaquith's characterization of such letters in his dissent: "A letter advising the veteran that his appeal was untimely and the Board would not consider it, without any mention of an opportunity to challenge that de-

termination, screams final decision, not ‘prudent and informative notice’ – especially when the letter comes from the Vice-Chairman of the Board.” Slip op. at 25 fn 136. Mr. Kernz has since appealed the CAVC’s decision to the U.S. Court of Appeals for the Federal Circuit.

In the interim, this Subcommittee introduced H.R. 5891, the Veterans Appeals Decision Clarity Act. This bill would require one element of the Board’s decision to be “a written determination of . . . whether the notice of disagreement was adequate and filed timely under section 7105 of this title.” Such a requirement would provide a definitive legal finding made by a Veterans Law Judge in a decision that is unquestionably appealable. It is critical that this basic jurisdictional question be answered by the decisionmaker to ensure there is no confusion about the appellant’s ability to challenge it. NOVA supports H.R. 5891. See National Organization of Veterans’ Advocates, Inc., *Statement for the Record Before the House Committee on Veterans’ Affairs, Subcommittee on Disability Assistance and Memorial Affairs, Concerning Pending Legislation 4* (October 24, 2023).

II. Board remands of cases to the Veterans Benefits Administration

Board remands continue to be ordered at a high rate. Legacy remands in FY 2023 were close to 50 percent. While somewhat lower in the AMA, remands in the new system still hover at the rate of one-third. See Dispositions by issue, https://www.bva.va.gov/quarterly_reports.asp.

High rates of legacy remands historically have been linked to a lack of nexus opinions, incomplete and inadequate findings, and lack of adequate examinations. See, e.g., *Department of Veterans Affairs (VA) Appeals Data Requested by the House Committee on Veterans’ Affairs Subcommittee on Disability Assistance and Memorial Affairs* (January 2015). Unfortunately, the data shared on the Board’s website is not transparent as to the causes of ongoing high remand rates.

NOVA members, however, continue to report extensive AMA remands for the same reasons as in the legacy system, as well as due to “overdevelopment,” i.e., remanding when there is sufficient evidence of record that puts the appeal in relative equipoise. For example, one NOVA member recently represented a veteran with metastatic prostate cancer. The veteran opted into the Rapid Appeals Modernization Program (RAMP) in 2019. The record contained a negative opinion from a VA examiner and a positive opinion from a private oncologist, who had reviewed the veteran’s service treatment records, genetic testing, and current diagnosis, as well as relevant medical literature and environmental impact studies. In 2020, the veteran filed a motion to advance on the docket (AOD) due to his age and terminal illness. Two years later, despite the evidence being in relative equipoise, the Board remanded the appeal for an addendum opinion from an “appropriate clinician,” who ultimately agreed with the private oncologist. Seven months later, this AOD veteran finally received a notification letter from the Regional Office that his claim was granted. Unnecessary remands such as these waste resources and time.

In the FY 2022 annual report, the Board noted that it is “assembling a tiger team” with VBA “to evaluate root causes and ways to reduce remands from the Board to VBA.” Board FY 2022 Report at 36–37. **Congress should seek a status update on the results of these efforts and those results should be transparent to the public.**

III. Board’s quality assurance and training programs

Stakeholders generally have minimal insight into the quality assurance and training programs and procedures employed by the Board. In its most recent annual report, the Board described those programs. See Board FY 2022 Report at 33 (training); 15, 37 (quality assurance).

Regarding quality assurance, the Board described the following ongoing efforts:

The Board has been collaborating closely with GAO to evaluate areas for continued improvement in the Board’s Quality Assurance program. **This includes evaluating root causes for declining, but continuing, trends related to unnecessary or improper remands under the AMA.** The Board is monitoring the outcomes in cases appealed to CAVC and the United States Court of Appeals for the Federal Circuit to identify trends that may help enhance the Board’s Quality Assurance program. The Board will continue its collaboration with VA’s OGC to provide targeted trainings to VLJs based on trends seen in these court cases.

Board FY 2022 Report at 37 (emphasis added). **Congress should seek a status update on the results of these efforts, particularly as related to remands, and those results should be transparent to the public.**

Below, we describe other issues that, if resolved, could serve to reduce the backlog and ultimately result in more timely decisions of higher quality.

IV. Additional Issues – Board of Veterans’ Appeals

A. Board decisions lag the level of resources provided in the past several years, causing increased and unacceptable wait times.

NOVA has supported, and continues to support, funding levels necessary for the Board to implement the AMA and reduce wait times for veterans, family members, survivors, and caregivers. Congress appropriated \$174,748,000 to the Board for FY 2019; by FY 2023, that amount grew 63 percent to \$285,000,000. Compare *Energy and Water, legislative branch, and Military Construction and Veterans Affairs Appropriations Act, 2019*, Pub. L. No. 115–244, 132 Stat. 2897 (2018), with *Consolidated Appropriations Act, 2023*, Pub. L. No. 117–328, 136 Stat. 4953 (2022). By contrast, the Board issued 95,089 decisions in FY 2019 and 103,245 in FY 2023, representing a much smaller increase at approximately 8.5 percent. We understand that not every dollar of increased appropriations can translate to an identical increase in decisions since funds are allocated for supporting functions as well. The Board, however, has only two functions: holding hearings and issuing decisions. Considering the tremendous resources provided by Congress, decisions should and must increase significantly in the years ahead as appellants continue to experience longer wait times in all three lanes, as well as in the legacy system. The Board stated that “the FY 2024 budget request notes the Board expects to decide at least 115,000 decisions,” an approximately 21 percent increase. Board FY 2022 Report at 37. That is not enough.

The impact of wait times on veterans, family members, survivors, and caregivers cannot be overstated. A review of “average days pending” (ADP), which is a more accurate assessment of wait times for most AMA appellants who are not entitled to expedited treatment, shows ever-increasing wait times in all AMA dockets. In the first quarter of FY 2023, the ADP was 440 days in the direct review docket, 575 days in the evidence docket, and 638 days in the hearing docket. By the fourth quarter of FY 2023, those times had increased to 577, 682, and 700 respectively. See AMA average days pending, https://www.bva.va.gov/quarterly_reports.asp.

These wait times, particularly in the direct review docket, are unacceptable. In stakeholder discussions leading to the passage of the AMA, veterans relinquished an important benefit of the legacy system: the right to retain their docket date on remand. This right was conceded in reliance on a commitment from VA that Board decisions in the direct review lane would consistently be issued within 365 days. Nearly five years after AMA’s implementation, that commitment has not been kept. According to NOVA members, many appellants now waiting to get a decision in the direct review docket were already waiting in the legacy system and opted into the AMA at VA’s urging to get a faster decision. Now, those who receive a remand in the AMA and do not receive the requested relief or suffer another inadequate exam are forced to start the process all over again at the back of the line. This result is not the reform expected by veterans and their advocates or promised by VA.

In 2017, the U.S. Government Accountability Office (GAO) warned Congress, VA, and stakeholders that VA was not adequately prepared to implement a new system while resolving legacy appeals. U.S. Government Accountability Office, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions* (GAO–17–234) (March 2017). Unfortunately, the goal of finishing legacy appeals has not been realized and continues to impact wait times in the AMA. In fact, there is still one open recommendation pending related to that report: “As of August 2022, VBA and the Board are establishing a working group to develop approaches for comparing the new and legacy appeals processes, including by conducting surveys and listening groups with VA employees, veteran service organizations, and other advocates. However, VA plans do not fully articulate what aspects of the legacy and new processes it will evaluate through its efforts or how it will analyze and use the information it collects. We will consider closing this recommendation when VA identifies how it will use the information it is collecting to determine whether the new process is an improvement.” Recommendations for Executive Action, <https://www.gao.gov/products/gao-17-234>.

A year later, GAO issued another report. U.S. Government Accountability Office, *VA Disability Benefits: Improved Planning Practices Would Better Ensure Successful Appeals Reform* (GAO–18–352) (March 2018). Two priority items remain open on that report. One states a need for the Board “to develop a methodology, similar to VBA’s plan, for how it will assess the new appeals process compared to the legacy process. Until the Board takes such action, it will lack information about how well the new process is performing relative to the legacy process and possible underper-

forming areas for improvement.” Recommendations for Executive Action, <https://www.gao.gov/products/gao-18-352>.

While the Board notes repeatedly throughout its FY 2022 annual report that it has taken longer than expected to resolve legacy appeals, that is of little comfort to veterans, family members, survivors, and caregivers who have been waiting for years for resolution and have relied on the commitments made by VA. **Congress must continue to oversee the implementation of the AMA at the Board and hold the Board accountable to the commitments made to veterans under the AMA. Until the Board’s delays are sufficiently resolved (or at least fully understood), Congress should restore the claimant’s right to the same docket number on remand if the Board’s remand does not result in a full grant by the agency.**

B. The Board needs to promptly grant motions to withdraw hearing requests.

The Board takes issue with the large volume of hearing requests, yet NOVA members frequently report that motions to withdraw those requests far in advance of a scheduled hearing date are not timely ruled upon. Months may elapse and undesired hearings are still scheduled. Advocates do not wish to see Board resources wasted; hearings that are no longer desired for whatever reason should be removed as promptly as possible from the docket to ensure resources are not expended needlessly. The Board should institute a standard administrative process by which these motions are promptly granted and hearings removed from the docket.

C. Congress should allow represented veterans to waive the duty to assist.

The AMA system was designed to allow for claimants to avail themselves of new options to develop the record before proceeding to the Board. NOVA members frequently use the higher-level review and supplemental claim lanes and view these options as important pathways to obtain benefits and avoid long waits at the Board. When a veteran who is represented takes a claim to the Board, there should be an opportunity for them to waive further development under the duty to assist. NOVA sees this option as a way to reduce unnecessary remands for tiebreaker examinations and other superfluous development, and make the “up or down” decision that was supposed to be the hallmark of a Board appeal under the AMA. **Congress should consider legislation that would allow for represented veterans to waive this duty upon appeal to the Board.**

V. Additional Issues – Veterans Benefits Administration

Problems hindering issuance of timely, quality decisions are not solely due to challenges within the Board of Veterans’ Appeals. Improvements within VBA are also necessary to ensure all veterans, family members, survivors, and caregivers receive timely, quality decisions so fewer claimants must seek relief at the Board and remands are reduced.

A. Ongoing problems with VA examinations hinder quality, timely decisions.

NOVA has long detailed deficiencies in the disability examination process, which result in poor quality of exams, inferior service to veterans, and ongoing delays across the entire VA disability adjudication system. *See, e.g.,* National Organization of Veterans’ Advocates, *Statement for the Record Before the House Committee on Veterans’ Affairs Subcommittee on Disability Assistance and Memorial Affairs Concerning “VA Disability Exams: Are Veterans Receiving Quality Services?”* (July 27, 2023); National Organization of Veterans’ Advocates, *Statement for the Record Before the Senate Veterans’ Affairs Committee Concerning Pending Legislation to Include Discussion Draft, S. , No Bonuses for Bad Exams Act of 2022 (July 13, 2022)*; National Organization of Veterans’ Advocates, *Statement for the Record Before the House Committee on Veterans’ Affairs Concerning Fulfilling Our Pact: Ensuring Effective Implementation of Toxic Exposure Legislation* (Dec. 7, 2022); *see also* Department of Veterans Affairs, Office of Inspector General, *Veterans Benefits Administration: Veterans Are Still Being Required to Attend Unwarranted Medical Reexaminations for Disability Benefits* (March 16, 2023), <https://www.va.gov/oig/pubs/VAOIG-22-01503-65.pdf>.

1. Inadequate examinations

The CAVC has repeatedly emphasized VA’s role in obtaining examinations and ensuring those examinations are adequate. *See, e.g., McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (outlining when VA must obtain an examination); *Barr v.*

Nicholson, 21 Vet.App. 120, 123 (2007) (when VA seeks an opinion, the Secretary must ensure it is adequate); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (adequate medical report must be based on correct facts and reasoned medical judgment).

Despite this clear precedent, VA frequently failed to ensure veterans received timely, adequate VA disability examinations when the Veterans Health Administration conducted nearly all examinations. See, e.g., *Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs* (January 2015) (reasons for remands between FY 2009 and 2014 centered on issues with medical examinations and opinions). This problem has not been solved with the shift to contract examinations.

Frequently, BVA orders a particular type of examination, but it is conducted by an inappropriate provider, e.g., an OB/GYN nurse practitioner handling a neck and back exam. Or BVA provides specific instructions that are ignored by the examiner. Example: The veteran's claims for bilateral knee conditions were remanded back to BVA from the CAVC in 2020. BVA remanded in May 2021 and February 2022 for new medical opinions. In February 2022, BVA specifically ordered the VA examiner to address the veteran's competent lay statements regarding the history and chronicity of his knee symptoms. Because the VA examiner failed to comply with these instructions, BVA yet again remanded these claims for the examiner to comply with the order, adding untold months of waiting before the veteran receives resolution.

In addition, NOVA members report that confusing examination requests contribute to inadequate exams and deficient reports. Many times, the request does not match the veteran's claims or incorporate the remand instructions articulated by BVA or the CAVC. Sometimes, the request is not clear as to whether the veteran must appear for an exam or the examiner can write the report based on a record review. Without clear guidance, examiners burdened with large workloads are bound to conduct inadequate exams and write incomplete reports.

In June 2022, the VA Office of Inspector General acknowledged that "[r]esults of medical exams are critical pieces of evidence in supporting veterans' claims for benefits, and the exams represent a significant investment by VBA." Department of Veterans Affairs, Office of Inspector General, *Veterans Benefits Administration: Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions* i, June 8, 2022 (<https://www.va.gov/oig/pubs/VAOIG-21-01237-127.pdf>). The report also found, among other things, that "[a]ll three vendors failed to consistently provide VBA with the accurate exams required by the contracts" and "vendor exam accuracy has not improved and exam errors have not been resolved." *Id.* at 8; 10. Contract examiners must comply with the terms of their contracts and be held accountable when they fail to do so. Furthermore, contractors must correct errors and provide adequate examinations to reduce repeated remands, which result in continuing delay and backlogs.

2. Overdevelopment

NOVA members also report that VA frequently orders additional examinations even when adequate medical evidence of record exists and a favorable opinion has been rendered. Unnecessary examinations are particularly troublesome considering the statutory requirement for VA to consider private medical evidence. See 38 U.S.C. § 5125 ("a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim").

Furthermore, VA may not undertake "additional development if a purpose [is] to obtain evidence against an appellant's claim." *Mariano v. Principi*, 17 Vet.App. 305, 312 (2003). In some instances, NOVA members report the ordering of additional examinations that appear to be "tie breakers," e.g., when there is one negative and one favorable opinion. Such exams are in contravention of VA law and policy requiring adjudicators to grant the claim when the evidence is in relative equipoise.

Example 1: In February 2022, a VA contract examiner provided a favorable opinion on the veteran's claim for service connection for an arthritic condition. Despite this favorable opinion, VA obtained a second set of exams, which were unfavorable, and VA's denial made no mention of the first favorable exam. After a higher-level review, the claim was sent back for more development due to the "difference of opinion." This time, the original examiner ultimately concluded the condition was "more likely than not" service connected. Nonetheless, VA denied the claim.

Example 2: In July 2023, VA sent a claim out for an additional medical opinion where the VA examiner already provided a nexus opinion advising that the veteran's depression was secondary to his service-connected hypothyroidism. The vet-

eran, as a result of his Agent Orange exposure, is also service connected for Parkinson's disease.

VA also routinely rejects favorable, well-rationalized, private medical opinions for improper/unlawful reasons, such as the examiner's "failure to review the veteran's claims file" or because the examiner's opinion "was based on the history reported by the veteran." The CAVC has repeatedly admonished BVA for rejecting favorable evidence for these reasons, yet these types of rejections continue to occur on a regular basis. *See, e.g., Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (Board may not reject a private medical opinion in favor of a VA opinion solely because the VA examiner reviewed the claims file); *Kowalski v. Nicholson*, 19 Vet.App. 171, 179–80 (2005) (Board may not disregard a medical opinion solely because the opinion was based on a history provided by the veteran); *see also Coburn v. Nicholson*, 19 Vet.App. 427, 432 (2006) ("[R]eliance on a veteran's statement renders a medical report incredible only if the Board rejects the statements of the veteran.").

Solving these problems are key to reducing VBA's backlog, the Board's backlog, and allowing for more quality decisions to be issued throughout the system.

B. Additional training is necessary so VA employees do not deny claims on the basis that only the Board may grant a certain claim.

NOVA members frequently report that VA adjudicators, particularly Decision Review Officers (DROs) that handle higher-level reviews, state they cannot grant a benefit at their level and only the Board may do so. For example, a DRO recently informed one NOVA member that the Board has more leniency in interpreting the law than DROs. Another VA employee informed a NOVA member that they would need to check with "quality review" to determine if a claim could be granted, and if it could not be granted (it was denied), the attorney should appeal to the Board so they could grant it.

Statutes, regulations, and case law apply equally to VA and Board adjudicators. VBA needs to conduct additional training with its employees to emphasize that fact so unnecessary appeals are not filed to the Board.

CONCLUSION

NOVA remains committed to working with Congress, VA, and fellow stakeholders to improve the VA disability claims and appeals process. Thank you again for allowing us to present our views on this important topic. If you have questions or would like to request additional information, please feel contact:

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Prepared Statement of Michael Figlioli

Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide testimony with regard to the Board of Veterans Appeals and its practices.

Since its establishment in 1933, the Board of Veterans Appeals (BVA) has a rich history with its primary purpose being to provide veterans with an avenue for appealing decisions made by the VA regarding claims for benefits. The BVA was created as part of a broader effort to streamline the appeals process and ensure that veterans receive fair and just consideration of their claims for benefits.

Over the years the BVA has undergone several changes and reforms to enhance its efficiency and responsiveness to the needs of veterans. One significant milestone was the Veterans Judicial Review Act of 1988 allowing veterans to appeal BVA decisions directly to the Court of Appeals for Veterans Claims (CAVC) marking a significant shift in the appeals process and providing veterans and appellants with an additional layer of judicial review.

Perhaps the most substantial change to affect veterans, family members and survivors wishing to appeal their decisions on benefits claims to a higher authority was the enactment of the Appeals Modernization Act (AMA), in 2019. The primary goal

was to modernize and streamline the appeals process but under the “Legacy” appeals system, too often appellants had to endure lengthy delays of months, sometimes years to navigate a confusing and complex structure and some are still stuck in that now outmoded system. The AMA aimed to address these issues by providing veterans with more options and a faster, more transparent process to appeal VA decisions.

One of the key features of the AMA was the introduction of three new lanes for appellants to choose from when appealing a decision: Supplemental Claims, Higher Level Review and Direct Docket to the Board. The AMA emphasizes increased transparency and more effective communication throughout the appeals process. Veterans are provided with better information about the status of their claims with this streamlined system intending to reduce the backlog of cases in the AMA inventory.

NOD vs BVA Appeal

A Notice of Disagreement (NOD) is a crucial first step in the appeals process for veterans seeking a review of their disability compensation claims with the Department of Veterans Affairs (VA). While the NOD is a formal expression of disagreement with a VA decision, historically it has not, in itself, constituted an appeal to the Board of Veterans Appeals (BVA). The “Legacy” NOD initiated the appeal process. It served as the first official notification to VA that the veteran disagreed with a particular decision. VBA would then draft a detailed Statement of the Case designed to explain the initial VA decision. The veteran would then have to complete an additional form, the Form 9, certifying the appeal to the BVA for docketing and review by a Veterans law Judge (VLJ).

Under the Legacy Appeals system, this is where appeals often got stuck in the churn based on docket date, then awaiting assignment and review by their advocate who would then submit an Independent Hearing Presentation (IHP) on their behalf.

Often, Legacy cases were remanded for common due process errors or for development of additional evidence. What became clear to the VFW was that this process was archaic and generally unnecessary in many appeals. Upon review, we determined that the IHP was not based in law or regulation. It was likely a holdover from practices many years ago and therefore, if a quality argument was presented on the Form 9, the appeal could proceed directly to the VLJ after our staff conducted a quality review. This process was highly successful, and VFW was able to eliminate its excess workload of Legacy appeals. Today, we are at functional zero and have been for more than a year thanks to the efforts of our BVA appeals team and their leadership. However, functional zero means that Legacy appeals continue to churn through the remand system, reappearing at the BVA at any time, creating the backlog of appeals that the BVA now faces under the modern appeal structure.

The advent of the Appeals Modernization Act (AMA), to which VFW was a major contributor, was intended to alleviate the cycle of Legacy appeals and allow a VLJ to review them in a timelier fashion. Quicker decisions mean faster awards for claimants and quality of life improvements. Under AMA, when a veteran submits the new NOD on the required form, the appeal proceeds directly to the BVA through the veteran’s selected docket: Direct review, evidence-only, or hearing. The BVA then has the opportunity to conduct a review of the claim based on the unique criteria of each lane.

VFW is concerned with the continued excess workload in the AMA inventory. While the intent continues to be faster and more accurate decisions, there is work to be done. While VFW wants every veteran to have their chance to present their case before a VLJ it needs to be managed properly. By focusing mostly on Legacy appeals to reduce that inventory or cases requiring to be advanced on the docket (AOD), the remaining appeals languish. All the while, appeals continue to be certified to the board. Once a hearing is conducted and completed, VFW has seen delays in bad transcriptions and long wait times and even completed AMA files sitting in docket order at the conclusion awaiting the VLJ’s decision. If completed, they need to be moved out of the queue as expeditiously as possible.

Hiring more staff attorneys and VLJs is an excellent step and one that we applaud. The BVA must have the resources to deliver on their responsibility to those who serve their country and want their day in court. Delivering more appeals decisions is admirable but those decisions must be accurate and timely and not just a number in a performance plan. The BVA made great strides during the challenges of COVID to provide veterans with the opportunity to have their hearing virtually. This was an immense innovation in the way the BVA does business and was well received by VSOs and veterans alike. Then came the challenges of staffing and maintaining consistency in the hearing branch. It seemed that every time someone was assigned to one of our staff and a positive relationship was being developed,

they were moved to another team or position. We had to start over again, possibly with an inexperienced coordinator and this contributed to delays, reschedules or misreported no-show because the information didn't get to the VLJ. We are happy to see this has improved.

We continue to hear from our BVA staff that there are problems with electronic management systems intended to manage the workflow. CASEFLOW needs to be improved or another system that meets the needs of advocates developed. For years now, we have heard that it is not accurately updated, it fails to give a defined picture as to where in the appeals process a case is and it needs to be updated. One of the greatest limitations is information that is accessible to a veteran's representative and what issues are on appeal. The issues are the basis of what the veteran is seeking and impossible to address if they are inaccurate or inaccessible.

BVA Remands for development

The remand process from the Board of Veterans Appeals (BVA) to the Veterans Benefits Administration (VBA) is a crucial aspect of the veterans' benefits adjudication system and often the most confounding as the workflow may not keep pace with the progression of the appeal. When the BVA identifies deficiencies or gaps in the evidence presented during the appeals process, or in providing the appellant due process, it has the authority to remand the case back to the VBA for further action or development. This step is intended to reflect VA's commitment to ensuring a fair and comprehensive review of veterans' claims.

VFW has found that despite the intention of this step in the process, often, if the record was fully associated with all the evidence or a complete and thorough review had been completed prior to a decision being rendered, a remand can be duplicative or completely unnecessary. The BVA may identify specific areas where more information is needed to make a well-informed decision which is a positive for the veteran in achieving the benefits sought on appeal but only if timely and more importantly accurate to reduce the possibility of continued remands. VFW is aware that the remand rate for Legacy appeals is 40 percent, and the typical Legacy appeal has been remanded at least twice. We have also seen some cases remanded as many as seven times.

Under the Legacy system, VBA would receive a remand, complete its required development, and return the appeal to the BVA for readjudication. Under AMA, remands are returned to VBA for rework and VBA issues a new decision without further Board review, restarting the veteran's review rights, which include not only the NOD, but also Supplemental Claim and Higher Level Review.

The purpose of AMA was to eliminate remands altogether. The BVA needs to work more collaboratively with the veteran's accredited representative to let the veteran know exactly what they need to provide to succeed. That said, perhaps we must revisit the AMA and begin discussions as to further enhancements and improvements to the remand and readjudication processes.

The remand process serves as a means of enhancing due process for veterans. By allowing for further development, when necessary, it acknowledges that some cases may not have been thoroughly examined in the initial stages. This iterative approach ensures that veterans have ample opportunity to present their cases and that decision-makers have access to all relevant information before reaching a final decision.

It is the VFW's position that communication and coordination between the BVA, VBA and accredited representatives are critical during the remand process. Clear and concise directives that the decision-maker must comply with from the BVA to the VBA help streamline the further development of cases. Effective collaboration between these entities is essential to ensure that the remand process serves its intended purpose without unnecessary complications and needless delays.

VBA data usage BVA Remands

The Veterans Benefits Administration (VBA) plays a crucial role in ensuring that veterans receive the benefits and support they deserve. To achieve this goal, the VBA relies on various sources of data, including information from the Board of Veterans Appeals (BVA) remand orders. Remands occur when a case is sent back to the BVA from higher courts for further review or action. Analyzing the extent to which the VBA utilizes data from BVA remands is essential in understanding the agency's commitment to continuous improvement in quality assurance and training programs and VFW would like to thank the VA Undersecretary for Benefits and his staff for their commitment to ensuring that lessons learned are applied not only to future cases and have shown the willingness to incorporate important changes in law or administrative process into their training courses.

One key aspect of the VBA's use of BVA remand data is in identifying trends and patterns related to denied claims. By scrutinizing the reasons behind remands and denials, the VBA can pinpoint areas where its decision-making processes may need refinement. This information becomes invaluable for quality assurance efforts, allowing the VBA to address systemic issues and enhance the accuracy of claims processing. Additionally, understanding common reasons for remands can guide the development of targeted training programs to improve the skills and knowledge of VBA personnel.

Another dimension of the VBA's reliance on BVA remand data lies in its ability to adapt to changes in laws or regulations affecting veterans' benefits. As legal interpretations evolve, remands may highlight areas where the VBA needs to align its practices with updated requirements. This responsiveness is crucial for maintaining compliance and ensuring that veterans receive the benefits to which they are entitled. By incorporating insights from BVA remands into its training programs, the VBA can keep its workforce informed and equipped to navigate the complex and evolving landscape of veterans' benefits law.

The extent to which the VBA uses data from BVA remands is critical for shaping its quality assurance and training programs. The constant analysis of BVA ordered remands provides valuable insights into areas for improvement in decision-making processes, compliance with all legal requirements, internal communication, and documentation practices. By actively incorporating these insights into its operations, the VBA can enhance the accuracy and efficiency of veterans' benefits claims processing, ultimately fulfilling its mission to serve those who have served our nation.

BVA usage of CAVC data

The Board of Veterans Appeals (BVA) has a highly significant role in the adjudication of veterans' claims for benefits, and its decisions are at times subject to review by the U.S. Court of Appeals for Veterans Claims (CAVC). The CAVC, through its orders, provides legal guidance and sets precedents that may influence how the BVA adjudicates cases. While the BVA is not directly bound by the CAVC's decisions, we know that it often considers them in shaping its own rulings. The extent to which the BVA uses data from CAVC orders to inform its quality assurance and training programs is as important an aspect as that of VBA using and interpreting data to develop its policies and proposing future legislation. It is also a key to ensuring consistency and fairness in the adjudication process.

By BVA using data from CAVC orders through case analysis it can guarantee the accurate application of the law as intended by VA or Congress. By examining the reasoning and outcomes of cases reviewed by the CAVC, the BVA can identify patterns, common legal issues, and areas where its decisions may be prone to challenge. This data-driven approach allows the BVA to pinpoint specific areas for improvement in its decision-making process and tailor its training programs accordingly.

Quality assurance within the BVA must involve continuous evaluation of its decisions to identify errors or inconsistencies. The analysis of CAVC orders can serve as a valuable resource in this regard. If the CAVC overturns a BVA decision, it provides a clear signal that there may be flaws in the initial adjudication. BVA can then implement corrective measures to enhance the quality of its decisions and reduce the likelihood of future reversals.

However, it's essential to recognize that the BVA operates within a broader legal framework, and CAVC decisions are just one of many factors influencing its practices. While CAVC orders can provide valuable guidance, the BVA must also consider other legal authorities, statutes, and regulations. Striking the right balance between adapting to legal developments and maintaining consistency in training and proper adjudication is a complex challenge that the BVA faces.

Overall, VFW is pleased with the reforms and changes made at the Board of Veterans Appeals over the last several years. We must all keep in mind that the AMA is a framework whose intended passage must continue to be revisited and adjusted to keep pace with changes in regulation. BVA must maintain a fully staffed and well-trained workforce. VFW encourages the Chairman to continue to reach out in collaboration with the VSO and accredited representative community to advance its agenda. By the same token BVA must also be responsive to suggestion and constructive criticism. Communication and interaction from all levels of the BVA are crucial to the positive outcomes we all strive for in representing appellants before the Board. VFW encourages the BVA leadership to fill vital open senior management positions as quickly as possible to provide continued continuity and direction the BVA staff. This will enable the BVA, its organization and mission to be refined to deliver on its promise of faster, clearer, more transparent operations and appeals decisions. Our organization look forward to contributing to this effort, recognizes the

value of our partnership and will continue to make positive changes in our business processes that serve veterans, their families, and survivors.

Chairman Luttrell, Ranking member Pappas this concludes our testimony. I am happy to answer any questions you may have.

Prepared Statement of Zachary Stolz

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee: Thank you for inviting Chisholm Chisholm & Kilpatrick LTD (CCK) to testify at today's legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs.

CCK is a public interest law firm, with offices in Providence, Rhode Island and Houston, Texas. We serve clients across the nation focusing on veterans disability compensation, bequest management, and long-term disability insurance claims. Since 1999, CCK has represented thousands of veterans and their family members before VA and the U.S. Court of Appeals for Veterans Claims. CCK has the most VA-accredited attorneys, practitioners, and claims agents of any law firm in the United States. The firm has been involved in legislative processes and landmark, precedent-setting cases that have benefited the entire veterans' community.

We are pleased to offer our views on these issues impacting veterans and their families.

Introduction

Congress passed the Veterans Appeals Improvement and Modernization Act of 2017 "to expedite VA's appeals process," as a response to VA's ever-growing backlog of appeals and increasing wait times throughout the claims process. H.R. Rep. No. 115-135, at 2 (2017). As we approach the fifth year in the AMA, wait times at the Board of Veterans' Appeals are as long as ever: the Board is failing to meet its 365-day stated goal for issuing direct docket decisions, and it is taking *years* to adjudicate evidence and hearing docket appeals. This is despite a historic budget for Fiscal Year (FY) 2024 and the availability of increased resources. Congress must act to ensure that the promises made to our nation's veterans are promises kept.

At the Subcommittee's invitation, I will address the following:

1. The Board's failure to issue timely AMA Decisions.
2. The Board's high remand rate, a problem the AMA is supposed to fix.
3. The use of waiver as an effective tool for veterans and their advocates to secure timely resolution of their Board appeals.
4. The Board's rising expenditure per case and contrasting production stagnation.
5. The experience level and quality of new Board members.
6. The most recent Chairman's Report.

1. The Board of Veterans' Appeals is not Issuing AMA Decisions Swiftly.

In the Legacy appeals system, VA delays were prolonging appeals over three years, on average. Government Accountability Office, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions* (GAO-17-234) (Mar. 2017). With an appeal rate increasing by 20 percent every year, the average wait time in the Legacy system was projected to rise to eight-and-a-half years. *Id.* Support for appeals reform legislation highlighted how it would not only "efficiently and effectively resolve backlogged claims" but also "prevent this kind of backlog from happening in the future." 163 Cong. Rec. H4417-03 (daily ed. May 22, 2017).

To address these concerns, the Board committed to issuing decisions in the direct docket within 365 days and decisions in the evidence docket in approximately 18 months. See *Decision Wait Times, Board of Veterans' Appeals*, available at <https://www.bva.va.gov/decision-wait-times.asp> (last accessed Nov. 22, 2023). Veterans whose appeals had been sitting for years in the Legacy system were enticed with these clear timeframes to move their cases out of Legacy and into the AMA. Options to move cases from Legacy to AMA were many, including via VA's pilot program, the Rapid Appeals Modernization Program (RAMP), or by opting a Legacy Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC) into the AMA.

The Board has failed to achieve its stated AMA decision timeliness goals. At the AMA's outset, the Board was initially issuing timely decisions in the direct docket. But that changed once more veterans had opted into the AMA and as the Board

changed the formula for how it was deciding AMA versus Legacy cases. The Board prioritized Legacy cases to the detriment of AMA appeals. The Board did this without regard to the fact that many veterans opted their Legacy cases into AMA in response to VA's pleas and promises to decide cases faster in the AMA. A population of these veteran claimants had earlier docket numbers than those who did not opt their appeals into AMA, meaning that veterans who opted in lost an earlier place in line at the Board for a decision. As a result, veterans who declined to opt into AMA, and who remained in Legacy, found themselves further ahead in line than their counterparts who had been waiting longer for a decision. This result ran counter to VA's promise to eligible veterans that opting into an AMA appeal lane "may lead to an earlier resolution of your claim." *RAMP Opt-In Letter*, available at <https://benefits.va.gov/BENEFITS/docs/appeals-RAMP-Opt-in-letter.pdf> (last accessed Nov. 22, 2023).

According to VA's AMA Metrics report, current through October 2023, the Board's average days to a decision in the direct docket are 592 and 692 in the evidence docket. See *AMA Metrics Reports*, October 2023, Tab "Part 1—AMA (E, G, J)," available at <https://www.benefits.va.gov/REPORTS/ama/> (last accessed Nov. 22, 2023). These numbers reflect a mean, not a median, average. Because some appeals are advanced on the Board's dockets due to advanced age, serious illness, or financial hardship, those appeals are prioritized, regardless of docket order. They are decided within a few months, skewing the data as to how long the average person whose case is not advanced at the Board is waiting. The reports therefore do not account for the experience of a veteran at either end of the spectrum: they overshoot the waiting period for an advanced-on-docket claimant by years, and yet they still underestimate the waiting period for a veteran whose case is not advanced.

The Board's shift to focus primarily on Legacy appeals has created a massive AMA backlog. At the end of October 2023, there were 186,543 AMA appeals pending at the Board. See *AMA Metrics Reports*, October 2023, Tab "Part 1 AMA (A-D)," available at <https://www.benefits.va.gov/REPORTS/ama/> (last accessed Nov. 22, 2023). By contrast, the Board had only decided 32,661 AMA appeals in FY 2023. See *Decision Wait Times, Board of Veterans' Appeals*, available at <https://www.bva.va.gov/images/appeals/ama-appeals-decided-past-five-years-large.jpg> (last accessed Nov. 22, 2023).

These delays, along with the growing volume of AMA backlogged appeals at the Board, confirm that VA has not only failed to "efficiently and effectively resolve backlogged claims" but has also failed to "prevent this kind of backlog from happening in the future." 163 Cong. Rec. H4417-03 (daily ed. May 22, 2017). The Board's failure to keep its commitment to veterans in AMA has caused the Board's AMA dockets to suffer from the same serious deficiencies (like a massive backlog and egregious wait times) that plagued the Legacy system Congress attempted to fix. The Board's inability to manage its AMA dockets has effectively resulted in untenable wait times for many deserving veterans.

2. The Board Remands at an Alarming High Rate, a Problem the AMA Set Out to Fix.

In the VA system, a veteran's appeal is remanded back to a VA regional office if the record is not complete for the Board to make a fully informed or favorable decision. Of the 70,584 decisions issued on Legacy appeals in FY 2023, approximately 44 percent of those decisions were remands. In the AMA system, the Board decided over 32,000 AMA appeals and remanded approximately 28 percent of them. See "Dispositions by hierarchy," *Quarterly Reports for FY 2023, Board of Veterans' Appeals*, available at https://www.bva.va.gov/Quarterly_Reports.asp (last accessed Nov. 24, 2023). In other words, close to half of all Legacy appeals, and more than a quarter of all AMA appeals, were returned to VA's regional offices for further development in FY 2023.

Each remand means that veterans must wait even longer for a final decision to be made on their claim. It also means that the Board is expending resources to work on a case, issue a remand, and send it back to a regional office for further development. Many of these remanded cases ultimately return to the Board if a decision from the regional office is not favorable to the claimant.

VA's remand rate has remained high over the past three years, with the Legacy remand rate increasing year over year. A high remand rate is particularly damaging to veterans in the AMA, as these veterans lose their place in line on the Board's AMA dockets after a remand. This results in veterans waiting years longer for a final decision on their claim.

3. Waiver is an Important Tool for Veterans and their Advocates to Secure Timely Resolution of their Board Appeals.

Accepting a knowing waiver of certain rights from veterans will help the Board make faster decisions on claims, such as requests for a total disability rating based on individual unemployability (TDIU). This is a benefit reserved for veterans whose service-connected disabilities prevent them from securing and following substantially gainful employment. Veterans can be awarded schedular TDIU if they meet certain rating criteria and may still qualify for what is called “extraschedular” TDIU if they do not.

Section 4.16(b) states that veterans’ cases should be referred to the Director of the Compensation Service for extraschedular consideration of TDIU when their service-connected disability limitations render them unable to work but do not meet the percentage requirements for schedular TDIU. 38 C.F.R. § 4.16 (2023).

Many veterans seeking extraschedular TDIU at the Board find that the Board refuses to issue a final decision on entitlement to extraschedular TDIU. Instead, the Board remands to a regional office for extraschedular consideration by the Director of the Compensation Service, who often rubber-stamp denies TDIU, leaving the veteran with no choice but to file another appeal (and wait for it to be decided) to continue seeking the benefit.

Veterans should be able to waive their right to review by the Director of Compensation in favor of receiving a decision from the Board, which is qualified to make a TDIU determination. This is especially true since the Veterans Court has made clear that the Director’s opinion is not evidence in a case. *See Wages v. McDonald*, 27 Vet.App. 233, 236 (2015). The opportunity for waiver can be a tool of efficiency that costs VA and the Board nothing.

The same type of waiver should be available for VA’s duty to assist. The phrase “duty to assist” describes VA’s obligation to help veterans develop their claims by gathering potentially supportive evidence, such as service records, medical records, and more.

If the Board finds that a regional office made a duty to assist error, it usually remands the case and instructs the RO to fix that error. While the Board is not obligated to remand cases for additional development, it often does, leading to one cause of the alarming remand rates at the Board. To help minimize unnecessary wait times for veterans, veterans should have the right to waive the duty to assist in some cases.

If an appeal is at the Board, and if the record is fully developed—meaning that the file contains enough favorable evidence warranting a grant of benefits—then a veteran should have the right to waive any additional development under VA’s duty to assist.

In CCK’s experience, and in so many cases, the Board’s duty to assist remands unfortunately do not yield a positive result for the veteran in the long run. Remands for more information—that is not even necessarily favorable to the claimant or may not exist—simply hold up the process for veterans who have already been waiting oftentimes years for a decision. The Office of the Inspector General confirmed that the duty to assist process is not always fruitful or necessary, discovering that 37 percent of cases reviewed during a portion of FY 2017 included unwarranted reexamination requests. *Department of VA, Office of the Inspector General (OIG), Unwarranted Medical Reexaminations for Disability Benefits*, Report #17-04966-201, available at <https://www.va.gov/oig/pubs/VAOIG-17-04966-201.pdf> (last accessed Nov. 23, 2023).

The duty to assist is an important right for veterans and an essential part of the VA benefits process, but once all development is complete, veterans should be able to tell the Board that there is no reason for further development. The Board would then be able to quickly render a decision on the case and move on to the next one. If the purpose of the duty to assist is truly pro-claimant, and if it is meant to be a benefit to a veteran to assist with claim development, then veterans should be able to waive the benefit that is statutorily provided for them.

4. The Board of Veterans’ Appeals Cost Per Case is Rising while Production Stagnates.

The Board of Veterans’ Appeals budget for Fiscal Year (FY) 2023 was \$285 million, a 20 percent increase from the previous fiscal year. The cost for the Board to work each case in FY 2023 was approximately \$2,760, a 63 percent increase since 2020 and almost \$500 more per case than just last year.

The Board’s production has not risen in step with these increases. In FY 2022, the Board made 95,294 decisions. In FY 2023, with a 20 percent larger budget, it made 103,245 decisions. Since FY 2020, the Board’s budget has surged by approximately 61 percent, escalating from \$174 million in 2020 to \$285 million in FY 2023. Strikingly, the increase in budgetary allocation has not proportionally translated

into enhanced productivity. In comparison, the Board only decided 0.5 percent more appeals in 2023 than in 2020.

5. There are Concerns about the Experience Level and Quality of New Board Members.

One contributing factor to the rising cost per case is the inexperience of Veterans Law Judges (VLJs) the Board is hiring. Traditionally, VLJ applicants were required to possess a minimum of seven years' experience in veterans law. This prerequisite ensured a comprehensive understanding of VA regulations, the dynamic landscape of caselaw from the courts, and other essential nuances critical to delivering high-quality decisions.

In February 2020, the longstanding seven-year experience requirement was eliminated from the VLJ hiring criteria. This policy shift opened the door for the recruitment of VLJs with no prior experience in veterans law. Since the summer of 2021, more than 50 percent of VLJs hired at the Board lacked any prior background in veterans law.

The impact of this change is evident in the data: inexperienced VLJs have issued significantly fewer decisions compared to their more seasoned counterparts. In 2021, thirteen inexperienced VLJs averaged 1 to 6 decisions per week, while more experienced VLJs consistently issued between 13 and 26 decisions per week. Based on these figures, it is projected that inexperienced VLJs will issue approximately 3,432 decisions in a year, while their experienced counterparts will contribute approximately 14,872 decisions. This stark contrast represents a difference of over 11,000 decisions, exceeding 10 percent of the Board's annual output.

These concerns prompted a group of experienced VLJs to write a letter to my firm, highlighting the adverse effects of these practices. The letter underscores that experienced VLJs are now burdened with training their inexperienced colleagues, in addition to managing their existing responsibilities. This extends even to Board attorneys, who are now tasked with training their own supervisors, creating conflicts with the Board's longstanding policy that VLJs are entrusted with the training and mentoring of attorneys.

Regrettably, these changes have a direct and detrimental impact on veterans, their dependents, and their survivors. Inexperienced judges without proper training are likely to issue fewer decisions, resulting in prolonged wait times for the hard-earned VA benefits upon which veterans and their families depend. It is imperative to reevaluate the recent changes in VLJ hiring practices and consider their implications on the Board's ability to fulfill its mission effectively.

6. The Chairman's Report Needs Proper Context.

According to the Board Chairman, Veterans Court "judge dispositions on the merits overwhelmingly uphold Board decisions at a rate of at least 95 percent affirmed to less than 5 percent reversed." *Chairman's Annual Report*, FY 2022, at 14, available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf (last accessed Nov. 24, 2023). While outright reversal of Board decisions is relatively rare, this statement is misleading. The Court's annual report shows that in appeals decided on the merits by at least one judge, the Court affirmed only 411 appeals. *U.S. Court of Appeals for Veterans Claims, Annual Report*, FY 2022, at 3, available at <https://www.uscourts.cavc.gov/documents/FY2022AnnualReport.pdf> (last accessed Nov. 24, 2023). In contrast, the Court at least partially vacated about 1,120 cases decided on the merits by at least one judge. *Id.* So, when accounting for remands based on Board error, the actual rate of affirmance in appeals decided on the merits by at least one judge is approximately 27 percent—far less than the 95 percent rate cited in the Chairman's Report.

Furthermore, the remaining 1,120 appeals that are remanded by a judge reflect only a fraction of all the appeals that the Court remands to the Board. As the Chairman's Report recognizes, the vast majority of the 6,000-plus appeals that the Court remanded in FY 2022 were based on a joint motion in which the claimant's attorney and VA's attorney agreed that the Board erred in some way. Those errors include the failure to apply a relevant statute or regulation, the failure to ensure compliance with the duty to assist, improper application of the rules for assessing the credibility of lay evidence, or the complete omission of favorable evidence in the Board's analysis, among many others.

According to the Chairman's report, however, these joint motions are merely agreements between "Court clerks and VA Office of General Counsel attorneys [] to jointly remand select issues from appealed cases back to the Board so the judge can further explain the reasons and bases supporting the judge's denial." *Chairman's Annual Report*, FY 2022, at 17. Court clerks are not parties to joint motions for remand, contrary to the Chairman's characterization of the motions. And joint motions

are rarely—if ever—for the Board to simply provide further explanation for its *denial*. Decades of case law has made clear that “remand is not required in those situations where doing so would result in the imposition of unnecessary burdens on the [Board] without the possibility of any benefits flowing to the appellant.” *Winters v. West*, 12 Vet.App. 203, 208 (1999) (*en banc*) (bracketing in the original).

Though some joint motions for remand are based on the Board’s failure to provide an adequate statement of reasons or bases for its denial, the Chairman’s Report is incorrect that these remands are not based on legal error. See *Chairman’s Annual Report*, FY 2022, at 17. The Board is statutorily required to provide an explanation for its decision that is sufficient to allow judicial review of its findings. When it fails to do so, its decision is not in accordance with law (*i.e.*, 38 U.S.C. § 7104(d)(1)). Remands on this basis are not for the Board to simply “further explain the reasons and bases supporting the [Board]’s denial.” *Chairman’s Annual Report*, FY 2022, at 17. They are for the Board to reexamine the record and issue a new, complete decision that the Court can review, if necessary. The Court must also “take due account of the rule of prejudicial error.” *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). This means that the Court is not sending cases back to the Board unless the veteran has shown that they have suffered harm because of the Board’s error.

The report’s significant misrepresentations about the process at the Veterans Court are concerning. The overall tone of the report borders on hostility to the Court’s role in this process. This hostility is entirely misplaced. It is also concerning that the Board foists blame on the Court and on veterans’ advocates for Board delays. Any cursory review of the actual data demonstrates that this is not the case.

Conclusion

The Board is faced with a difficult and vital task. Its members and staff work hard and with the best interests of veterans in mind, but the Board can and must be improved. Thank you for inviting CCK to give some of its thoughts on these issues. If you have questions or would like to request additional information, please feel free to contact:

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Prepared Statement of Douglas Massey

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee: Thank you for inviting the American Federation of Government Employees (AFGE) to participate in today’s Subcommittee Hearing entitled, “Examining the VA Appeals Process: Ensuring High-Quality Decision-Making for Veterans’ Claims on Appeal.” My name is Douglas Massey, and for the past seven years, I have had the honor of serving as President of AFGE Local 17, representing approximately 900 attorneys and additional support staff at the Board of Veterans’ Appeals (“the Board”). On behalf of AFGE, its National Veterans Affairs Council, and AFGE Local 17, it is a privilege to offer insights to the Disability Assistance and Memorial Affairs (DAMA) Subcommittee on ways to enhance the Board’s appeals process for the benefit of our nation’s veterans.

The foundation of well-informed decisions, whether in the public or private sector, lies in the unique perspectives of those directly engaged in the work. This is where unions such as ours play a crucial role. As frontline employees responsible for adjudicating veterans’ claims, we possess a distinct perspective on both the strengths and shortcomings of current Board procedures. My testimony today aims to highlight areas where both Board leadership and this Subcommittee can support the dedicated workforce, focusing on recruitment and retention, training, as well as workload and performance. Addressing these aspects will empower the Board’s personnel to fulfill their mission of providing timely resolutions to the claims of our nation’s veterans, many of whom have endured lengthy waits for final decisions.

Regrettably, recent leadership changes at the Board have introduced challenges within the organization, contributing to demoralization among our dedicated employees, with some considering leaving. The turmoil arises from decisions made by a relatively new leadership team lacking veterans law experience. These decisions

include downgrading the career path for attorneys, appointing Veterans Law Judges (VLJs) lacking any experience in veterans law, providing deficient training and support for our professional staff, and imposing unrealistic quotas hindering thorough evidence examination. This confluence of factors has created a chaotic work environment, negatively impacting the effectiveness of the Board's operations, to the detriment of the veterans we serve.

Downgrade of the Attorney Career Path to GS-13

For many decades, the Board has had a GS-14 career path for attorneys. Some two years ago, however, Board leadership downgraded the career path to GS-13, which is counterintuitive from a management perspective and does not help the VA's and this subcommittee's goal of recruitment and retention of talent. Any competent executive understands the importance of competitively remunerating the highest qualified candidates for any job based on their work and abilities. Eliminating this level of growth and compensation for attorneys dissuades qualified applicants from joining the Board or choosing to stay long-term. Instead of aligning with the standards of colleagues in private practice, Board management has effectively lowered the salary cap for attorneys, widening the competitive pay gap among attorneys in the public and private sectors. We firmly believe that this Committee shares our commitment to ensuring that disability claims for veterans and their families receive the highest level of attention. We have requested Board leadership and Secretary McDonough to reconsider this shortsighted policy to attract and retain the best candidates to the Board's ranks. Neither responded. Furthermore, while this shortsighted decision only impacts new hires, it sent a strong message to the entire attorney-workforce that they are not valued.

We further propose that the Board take a more comprehensive step by creating a competitive journeyman non-supervisory GS-15 attorney position. Currently, Board attorney grades range from GS-11 to GS-14, with nearly half of decision-writing attorneys at the GS-14 level. While not all attorneys would qualify or choose to advance to a GS-15 position, establishing the possibility for 100 to 200 GS-15 attorneys would significantly contribute to long-term recruitment and retention. It is noteworthy that non-supervisory journeyman GS-15 attorneys exist within the VA Office of General Counsel, setting a precedent. Given that Board attorneys are in the Excepted Service, it is within the Secretary's discretion to create and fill these new positions. We ask the committee to take legislative action.

Inexperienced Veterans Law Judges

The decision to hire VLJs without any veterans law experience is equally disruptive and detrimental to the Board's mission. Historically, VLJs were required to possess a minimum of seven years of experience in veterans law, acknowledging the intricate nature of the work involving complex legal statutes, evolving caselaw, and nuanced medical terminology in VA disability claims. To our dismay, in February 2020, the longstanding seven-year requirement was abruptly eliminated from the VLJ hiring criteria, opening the door for appointments for those without any veterans law experience. Shockingly, over 85 percent of VLJs hired since the summer of 2021 arrived without this essential expertise, a shift that we believe is detrimental to veterans and taxpayers alike.

The data reveals a stark contrast in decision output between inexperienced VLJs and their seasoned counterparts. From **October 2021 to June 2022**, inexperienced VLJs issued an average of one to six decisions per week, while VLJs with seven or more years of experience issued between 13 and 26 decisions weekly. Extrapolating these data suggests a significant difference in outcomes, with inexperienced VLJs likely issuing approximately 3,432 decisions compared to the 14,872 decisions projected from experienced counterparts, a difference of over 11,000 decisions or more than 10 percent of the Board's annual output.

In addition to fewer decisions, attorneys complain that the inexperienced VLJs struggle with approving quality decisions, requiring that attorneys train the VLJs for whom they work. Similarly, many of the Board's experienced VLJs are now tasked with training their new inexperienced colleagues, which detracts from time they could devote to signing decisions. A VLJ's job is extremely difficult. They are already under immense pressure to review and sign at least 20 decisions per week, conduct numerous hearings, and mentor attorneys. The practice of attorneys training these inexperienced VLJs to whom they report conflicts with the Board's longstanding policy that VLJs are charged with training and mentoring attorneys. When VLJs lack the knowledge and experience to train their attorney-subordinates, a knowledge gap results in the more junior attorney ranks. This knowledge gap will ultimately reduce the quality of Board decisions and harm veterans. As things stand, a junior attorney cannot rely on the inexperienced VLJ supervisor to answer

any questions of law, and more experienced attorneys cannot engage in productive dialog regarding complex or novel legal issues.

Furthermore, the hiring of inexperienced VLJs has demoralized attorneys because it has foreclosed promotion opportunities to these coveted positions. Some attorneys have indicated they plan on retiring earlier than expected. These complaints are also reflected in an August 2021 survey of over 200 Board attorneys in which 74 percent of respondents agreed with the statement: “The hiring of Veterans Law Judges from outside the Board has discouraged my hope of being promoted to that position.” Only 5.5 percent disagreed. This should cause alarm because more than 400 attorneys and VLJs, including probationary employees, have left the Board in just the past five years. Clearly, the Board’s new hiring practice undermines the goal that the federal government be a model employer by attracting and retaining talent.

Experienced VLJs also feel disheartened, witnessing the erosion of promotion opportunities for highly qualified attorneys they’ve mentored. A group of experienced VLJs felt compelled to raise awareness about these practices, advising an external law firm specializing in veterans’ benefits litigation, a move that has received coverage in Spectrum News on September 22, 2022.¹ The VA’s press team declined to comment on the story. Perhaps VA leadership can comment on this issue at today’s hearing. AFGE respectfully requests your assistance in resolving this important matter through your oversight and legislative abilities. Indeed, we ask that the seven-year experience requirement for entry-level VLJs be codified into law.

Training

The Board has also failed to provide sufficient training and support to new and experienced attorneys because of management’s singular focus on the Board’s overall output while failing to prioritize work product quality. The lack of training at the Board has been so severe that VLJs have reached out to me and my union colleagues for assistance. I can proudly say that for the benefit of veterans in our care, **Local 17 has tried to fill the training gap left by management.**

In response to a plethora of complaints and inaction by management, Local 17 initiated a special program led by Dr. Benton Komins, a steward aimed at providing tools, support, and efficiency strategies to ensure the success of decision-writing attorneys. Collectively, Dr. Komins and his team of volunteer Local 17 bargaining unit attorneys have offered individualized assistance and training to an average of 50 attorneys per year. While upper management has taken notice of Dr. Komins’ successful initiative, there has been no effort whatsoever to institute an analogous program on their part. In contrast to the successful Local 17-initiated assistance project, management offered a total of two hours’ mandatory training in the past year regarding the PACT Act. Notably, VBA provided its employees 15 hours of mandatory, time prorated training. The minimal PACT Act training provided by the Board stands in stark contrast to the complexity and breadth of the Act. Unfortunately, and predictably, the impacts of minimal training include decreased quality of decisions. As this subcommittee is well aware, the PACT Act introduced substantial changes to veterans law. With only two hours of training, Board attorneys and VLJs are ill-equipped to understand the nuances of this statute, significantly increasing the risk of errors and inadequate decisions for veterans seeking their rightfully earned benefits. The lack of PACT Act expertise at the Board not only denies justice to our veterans but also burdens the adjudication system with avoidable appeals and re-examinations. It further harms VA’s mission by eroding the trust veterans place in VA to adjudicate their claims fairly and capably.

Insufficiently trained attorneys are more likely to require additional time to research and understand the new law, leading to delays in claim processing and a backlog of cases. This inefficiency further delays veterans’ access to benefits. Faced with the challenge of applying complex legal changes with minimal training, attorneys may experience moral and professional dilemmas, contributing to the already noted issues of low morale, burnout, and high attrition at the Board.

It is imperative that the Board revises its training protocols either on its own or through a statutory mandate, ensuring that our attorneys are not only well-versed in the intricacies of new legislation but are also fully prepared to uphold the rights and entitlements of our veteran population. When doing so, the Board should also solicit the opinions of Local 17 attorneys who have already showcased an effective training program. Our veterans deserve no less than our best and most informed efforts.

¹ See <https://ny1.com/nyc/all-boroughs/politics/2022/09/22/veteran-affairs-comes-under-fire-after-massive-backlog->.

Workload and Performance

In examining the workload and performance of Board attorneys, it is critical to understand the continually evolving quotas and performance metrics Board attorneys face, the obstacles outside of attorneys' control and the differences between "Legacy Claims" and Appeals Modernization Act (AMA) claims, including new PACT Act claims.

The Board has made significant changes over the past several years regarding the number of cases and issues a Board attorney must complete annually. Prior to the implementation of the AMA, Board attorneys were expected to complete 125 cases a year, a pace that averaged 2.4 cases per week. Each case, regardless of the number of issues decided, carried the same weight toward an attorney's production quota. In FY 2018, the Board increased its production standards from 125 to 169 cases per annum, (or 3.25 cases per week), a 35 percent increase in production requirements which was overwhelming for Board attorneys. In FY 2019, the Board created an alternative measure or track of production for Board attorneys which evaluated the total number of issues decided by an attorney, regardless of the number of cases completed, setting that number at 510 issues decided. AFGE supports the creation of this alternative metric, as it better accounts for the amount of work required to complete each case. However, we caution that measuring the number of issues can also be manipulated to create unfair metrics. Unfortunately, this manipulation appeared in FY 2020, the first full year the AMA was fully implemented, because while the case quota remained at 169, the issue quota was raised to 566. In FY 2021, the quota was changed to a more manageable but still very difficult 156 cases or 491 issues. This has remained the same through FY 2024, though upper management has actively discouraged attorneys from taking the "issues track" toward completion of the annual quota.

AFGE members and Board attorneys are not afraid of the hard work necessary to satisfy the mission of serving veterans. However, extraordinarily challenging metrics make it more difficult to meet standards, setting attorneys up for failure or forcing them to cut corners in order to meet their production goals. Chairman Jaime Areizaga-Soto recently announced that the Board-wide quota would be increasing from 103,000 appeals annually to 111,000. AFGE strongly urges the Board to lower the quota to allow sufficient time for required *de novo* review of claims files and issuance of quality decisions. The Board should in parallel continue to hire more attorneys to meet the increased production goal. AFGE truly fears that if the current quota remains, many hardworking and successful attorneys will continue to leave the Board either from overwork, inability to meet the quota, or discomfort with being forced to cut corners. Because of this, AFGE also urges this committee to request a Government Accountability Office study on the production standards of Board attorneys to determine what is feasible while retaining high quality standards.

Last, beyond the issues surrounding production quotas there are other concerns that should be examined by the DAMA Subcommittee. The first is the requirement that an attorney may only receive credit for a case once a VLJ signs off on the work. While in theory this may sound like a plausible requirement, considering the amount of work and burden already placed upon VLJs, this can severely hinder an attorney's ability to timely reach his or her quota. These delays are entirely out of the attorney's control but can prevent an attorney from meeting his/her quota, qualifying for within grade increases, or meeting requirements for overtime eligibility. Holding attorneys accountable for VLJ-caused delays violates Article 27, Section 8, Subsection E of AFGE's collective bargaining agreement with the VA, which states "When evaluating performance, the Department shall not hold employees accountable for factors which affect performance that are beyond the control of the employee." This requirement that credit can be assigned only after VLJ signature is arbitrary and should be adjusted.

In summary, AFGE members believe that making straightforward changes to Board attorneys' compensation, promotion opportunities, training, and performance measures – together with setting minimum experience levels for VLJs – will greatly benefit the productivity and effectiveness of the Board of Veterans' Appeals. Thank you for giving me the opportunity to testify at today's hearing. I look forward to answering any questions you may have.

STATEMENTS FOR THE RECORD

Prepared Statement of Bergmann & Moore, LLC

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 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:

Outcome ¹⁴	#	%
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.

Prepared Statement of U.S. Court of Appeals for Veterans Claims

**STATEMENT FOR THE RECORD OF
THE HONORABLE MARGARET BARTLEY, CHIEF JUDGE
U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

**FOR SUBMISSION TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS**

NOVEMBER 29, 2023

CHAIRMAN LUTTRELL, RANKING MEMBER PAPPAS, AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for the invitation to submit a statement on behalf of the U.S. Court of Appeals for Veterans Claims (Court) with respect to the oversight hearing entitled: "Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal." The hearing appears focused primarily on the Board of Veterans' Appeals (Board) training and quality assurance operations, and the Board's remands of veterans benefits cases to the Veterans Benefits Administration. As the only independent federal court tasked with reviewing Board decisions, the Court is happy to share factual information concerning our judicial review of those decisions, and we hope that this statement will be helpful in examining and understanding Board decision quality. The Court is not privy to what occurs once the Court remands a case due to error in the Board's decision-making and, thus, some matters that are the focus of this hearing are not within the Court's sphere of knowledge.

By way of background, the Court was created in 1988 as an independent judicial body with exclusive jurisdiction to review appeals of Board decisions. With the creation of the Court, veterans became entitled, for the first time, to contest in a court of law adverse final VA decisions on their benefits claims. Our caseload over the years shows that approximately eight percent of Board decisions are appealed to the Court. Pursuant to 38 U.S.C. § 7252(a), the Court has the power to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." The scope of our review is statutorily limited to the record that was before the Board. Further, except in isolated instances, we may not find facts. Instead, we are tasked with deciding all relevant questions of law and holding unlawful and setting aside Board decisions and findings that are, among other things, arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. The Court's interpretations of law by panels of Judges are precedential, and binding in all cases subsequently decided by the Secretary and the Board.

It is notable that although an ultimate grant of benefits is paramount for veterans, VA's procedural compliance with adjudication requirements is equally important and statutorily safeguarded. Congress created the Court to ensure full and fair process for claimants, to make certain that they understand not only the outcome of the Board's decision but also the basis for that decision. *See* S. Rep. No. 418, 100th Cong., 2nd Sess. 38 (1988) (legislative history of 38 U.S.C. § 7104(d)) (underscoring the importance of the Court's function in this regard). Thus, by statute, every decision of the Board must include "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d). This statutory "reasons or bases" requirement not only is meant to ensure that the veteran understands the reason for the Board's benefits decision, but also to permit the Court to understand the precise basis for the decision so that its accuracy may be reviewed. If the Board decision is not clear to permit the Court to determine whether the decision is legally justified, or if the Court can't discern the basis of the Board's rationale, the decision does not comply with section 7104(d) and remand may be required when the outcome could potentially change. As noted, the Court is charged with reviewing decisions of the Board and may not find facts in the first instance.

It may be helpful to provide a short overview of how a case proceeds through the Court. Before briefs are filed and the case goes before a Judge, a Court staff attorney convenes a mediation conference with the veteran's lawyer and an attorney from VA's Office of General Counsel, who represents the VA Secretary in every appeal. The goal of mediation conferencing is to facilitate narrowing or resolution of the issues on appeal. Full or partial resolution of the appeal often occurs at this point, when the parties together agree that the Board made an error of fact or law requiring reversal or remand. In those instances, the parties file with the Court a joint motion for full or partial remand, called a "joint motion," identifying the Board errors that the parties agree were made. The joint motion guides the Board as to how to remedy the identified errors. Joint motions reflect agreement by both parties, the VA and the veteran, that the Board erred and that the matter must be returned to the Board for error correction. Such appeals do not require a written decision by a Judge because there is no controversy. The Court's Executive Officer/Clerk is authorized to grant such uncontested motions, allowing Judges to concentrate on appeals where the

parties do not reach an agreement, such as when the VA Secretary defends the Board decision and does not concede Board error. A joint motion that is granted results in termination of the appeal and return of the matter to the Board. The Board must then ensure any necessary development and readjudicate the case in accordance with the terms of the remand and applicable law. If the veteran's representative and the VA Secretary do not reach agreement during mediation conferencing, the appeal is then decided by a Judge or Judges of the Court, in which case a written decision is issued that affirms, modifies, or reverses the Board decision, or remands the matter for readjudication based on Board error.

The percentage of Court appeals resolved by joint motion of the parties due to Board error has historically been high. For several years after mediation conferencing began in 2008, the percentage of appeals resolved via joint motion between the parties was approximately 50%, but it has since risen to 75% and even higher. Those statistics are remarkable because they reflect a significant number of appeals in which the VA Secretary concedes that the Board decision contained consequential error, requiring remand of the case. As to the Court's remand rate overall, combined joint motion and Judge decision remand rates due to Board error are likewise high. In fiscal year 2020, 81% of the Court's appeals were remanded due to Board error. The number of the Court's appeals that were remanded due to Board error rose to 83% in fiscal year 2021 and 84% in fiscal year 2022.

As to the types of Board errors in cases that come before the Court, most fall into two broad categories: the failure to assist veterans as required by statute and caselaw, and the failure to provide a discernable reason for the VA benefit decision as required by statute and caselaw. The duty to assist directs the VA Secretary to make reasonable efforts to assist a VA claimant in obtaining evidence necessary to substantiate a claim. This requires, among other things, that VA obtain relevant records in deciding a claim, provide an adequate medical examination and/or medical opinion in certain cases, and base medical opinions on accurate facts. Court decisions and joint motions demonstrate considerable errors in Board decision-making in this area. *See* Court's June 9, 2023, Report to Congress (Attached). Additionally, as noted earlier, statutorily the Board must provide a written statement of findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. This is meant to enable both the veteran and the Court to understand why a benefit was denied. The Board violates the statutory "reasons or bases" requirement when, among other things, it fails to consider favorable evidence, fails to address issues or arguments raised by the veteran or the record, or

improperly finds the veteran not credible. *Id.* These legal errors may require correction and a new Board decision.

The Court is honored to afford veterans and their families and survivors full, fair, and prompt judicial review of Board decisions pertaining to VA benefits claims. Thank you for the opportunity to submit this statement.

ATTACHMENT

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
625 INDIANA AVENUE, NW
SUITE 900
WASHINGTON, DC 20004
202-501-5835

CHAMBERS OF
CHIEF JUDGE MARGARET BARTLEY

June 9, 2023

[Transmitted via email to the Chairmen and Ranking Members of the U.S. Senate and U.S. House of Representatives Committees on Appropriations; the Senate Subcommittee on Military Construction, Veterans' Affairs, and Related Agencies; and the House Subcommittee on Military Construction, Veterans Affairs, and Related Agencies]

Dear [Chairman/Ranking Member]:

In the Joint Explanatory Statement accompanying the 2023 Consolidated Appropriations Act (PL 117-328), the United States Court of Appeals for Veterans Claims (Court) was directed to provide to the Committees a report on "recurring issues that the Court addresses" in its review of appeals from decisions of the Board of Veterans' Appeals (Board), as well as "the impact it has on the quality or timeliness of a veteran's claim." The following examples of recurring issues are based on Court decisions, which are available on Westlaw or Lexis, as well as issues frequently cited by the parties when they jointly move to vacate a Board decision and remand the matter(s).

I. Recurring Issues

A. Duty to Assist

The duty to assist directs the Secretary to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate a claim. 38 U.S.C. § 5103A(a)(1). This duty requires, among other things, that VA obtain relevant records in deciding a claim, provide a medical examination and/or medical opinion in certain cases, and base medical opinions on accurate facts. Recurring issues at the Court that relate to the duty to assist include:

Obtaining records:

Lurati v. McDonough, No. 22-0658, 2023 WL 2384735 (Vet. App. Mar. 7, 2023) (Board did not obtain veteran's SSA records or find that they were unavailable); *Reaves v. McDonough*, No. 21-8209, 2023 WL 2327198 (Vet. App. Mar. 2, 2023) (VA failed to obtain veteran's private medical records).

Providing examination or medical opinion:

Everett v. McDonough, No. 19-9118, 2022 WL 593753 (Vet. App. Feb. 28, 2022) (Board did not provide a medical opinion as required by statute); *Dobbs v. McDonough*, No. 21-0031, 2022 WL 3009595 (Vet. App. Jul. 29, 2022) (Board did not provide a medical opinion as required by statute).

Providing adequate medical examination or opinion:

Celaya v. McDonough, No. 21-7189, 2023 WL 2733332 (Vet. App. Mar. 31, 2023) (examiner provided no rationale to inform as to why disability was unrelated to service).

Factual premise for medical opinion:

Tucker v. McDonough, No. 22-2639, 2023 WL 3735103 (Vet. App. May 31, 2023) (examiner erroneously opined there was no record of treatment for approximately 30 years after service, despite evidence reflecting such treatment 10 years after service); *Walters v. McDonough*, No. 20-8402, 2021 WL 6133769 (Vet. App. Dec. 29, 2021) (examiner stated both that the condition first manifested prior to service and that it did not manifest until after service).

Opinion must be complete, not speculative, and address all theories of entitlement:

Wright v. McDonough, No. 20-2147, 2022 WL 17828848 (Vet. App. Dec. 21, 2022) (examiner used speculative language, opining that claimed disability "does not seem to be associated" with a service-connected disability); *Fagerstrom v. McDonough*, No. 20-1322, 2021 WL 1555305 (Vet. App. Apr. 21, 2021) (examiner did not address whether hearing loss is related to in-service ear drum injury).

Credible lay statements:

Blair v. McDonough, No. 22-3244, 2023 WL 3735139 (Vet. App. May 31, 2023) (examiner ignored veteran's lay statements regarding post-service symptoms); *Wooden v. McDonough*, No. 21-7406, 2023 WL 2424983 (Vet. App. Mar. 9, 2023) (examiner did not acknowledge favorable lay testimony).

Substantial compliance with a prior remand:

Sorrell v. McDonough, No. 22-0853, 2023 WL 3735765 (Vet. App. May 21, 2023) (prior remand ordered medical opinion to address aggregate impact of veteran's service-related disabilities but resulting opinion focused on only one disability); *Biernatt v. McDonough*, No. 21-7138, 2023 WL 2534110 (Vet. App. Mar. 16, 2023) (examiner failed to comply with prior remand instruction to specifically consider veteran's lay statements when rendering a medical opinion).

B. Reasons for Decision

In its decision, the Board must provide a written statement of findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1). This enables both the claimant and the Court to understand why a benefit was denied. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). If the Board decision is not clear to permit the Court to determine whether the decision is legally justified, or when the Court can't understand the basis of the Board's rationale, remand may be required since the Court may not find facts in the first instance. See *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Recurring issues at the Court that relate to § 7104(d)(1) include:

Consideration of favorable evidence:

Warren v. McDonough, No. 22-1593, 2023 WL 3735878 (Vet. App. May 31, 2023) (Board did not consider veteran's statements made while seeking medical treatment); *Horne v. McDonough*, No. 21-4685, 2022 WL 4591821 (Vet. App. Sept. 30, 2022) (when determining effective date for increased disability rating, Board failed to consider evidence of worsening).

Issues or arguments expressly raised by the veteran or reasonably raised by the record:

Marshall v. McDonough, No. 21-4937, 2023 WL 2547984 (Vet. App. Mar. 17, 2023) (Board did not address explicitly raised theory of service connection); *Saunders v. McDonough*, No. 22-4145, 2023 WL 3719238 (Vet. App. May 30, 2023) (Board did not address earlier effective date argument specifically raised by veteran).

Evaluating credibility:

Davis v. McDonough, No. 21-4349, 2022 WL 17828856 (Vet. App. Dec. 21, 2022) (Board found the veteran not credible without laying a proper foundation for that finding).

II. Impact of Recurring Issues on Quality or Timeliness of a Veteran's Claim

The Joint Explanatory Statement directed the Court to report on the impact of recurring issues on the quality or timeliness of a veteran's claim. However, as an independent federal Court that reviews VA's Board decisions, the Court is not privy to what happens to a veteran's benefits appeal once the Court remands to VA due to Board error. Therefore, the Court is unable to provide the Committees with information as to the impact that recurring issues in Board decisions have on the quality or timeliness of a veteran's claim. The Court can only note that claims remanded by our Court are entitled to expeditious treatment by the Board. *See* 38 U.S.C. § 7112.

Congress created the Court to ensure full and fair process for claimants, to make certain that they understand not only the outcome of the Board's decision in their case, but the precise basis for that decision. *See* S. Rep. No. 418, 100th Cong., 2nd Sess. 38 (1988) (legislative history of 38 U.S.C. § 7104(d)). We undertake this mission with the utmost seriousness and, as always, we appreciate your ongoing support of the Court. Please let me know if I may be of further assistance.

Sincerely,



Margaret Bartley
Chief Judge