

Statement of

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With Respect To

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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 VLJs 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 to 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 looks 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.