

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement of**

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**Before the**

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

**Oversight Hearing**

**“Examining the VA Appeals Process: Ensuring High Quality Decision-Making  
for Veterans’ Claims on Appeal”**

**November 29, 2023**

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% of appeals before the Board. By FY 2022, that percentage had grown to 25.7%. 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 determination, 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 decision maker 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](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](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 underperforming 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 veteran, 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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