

CHISHOLM CHISHOLM & KILPATRICK LTD.



Statement of

**Zachary Stolz, Esq.
Partner**

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:

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% 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% of those decisions were remands. In the AMA system, the Board decided over 32,000 AMA appeals and remanded approximately 28% 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% 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 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% increase from the previous fiscal year. The cost for the Board to work each case in FY 2023 was approximately \$2,760, a 63% 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% larger budget, it made 103,245 decisions. Since FY 2020, the Board's budget has surged by approximately 61%, 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% 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% 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% 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% affirmed to less than 5% 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%—far less than the 95% 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:

Zachary M. Stolz, Esq.
Partner
Chisholm Chisholm & Kilpatrick LTD
321 S Main St #200
Providence, RI 02903
zstolz@cck-law.com
401-331-6300