

House Committee on Veterans' Affairs

Subcommittee on Disability Assistance and Memorial Affairs
February 3, 2010

Statement of Richard Paul Cohen

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National Organization of Veterans' Advocates, Inc.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc ("NOVA") concerning the implementation and effectiveness of the Veterans' Benefits Improvement Act of 2008, P.L.110-389.

NOVA is a not-for-profit § 501(c)(6) educational organization incorporated in 1993. Its primary purpose and mission is dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Department of Veterans Affairs ("VA"), the Court of Appeals for Veterans Claims ("CAVC"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and on remand before the VA.

NOVA has written many amicus briefs on behalf of claimants before the CAVC and the Federal Circuit. The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's members as well as my own seventeen-year experience representing claimants at all stages of the veteran's benefits system from the VA Regional Offices to the Board of Veterans Appeals to the CAVC as well as before the Federal Circuit.

P.L. 110-389

In October 2008 Congress passed S. 3023, enacted as P.L. 110-389, and titled the "Veterans' Benefits Improvement Act of 2008" ("the VBIA 2008" or "Act").

The Department of Veterans Affairs ("the VA") was directed by the Act to issue regulations prescribing the content of notices to be provided to claimants in conformity with the Veterans Claims Assistance Act of 2000 ("VCAA"), 38 U.S.C. § 5103(a), Act, section 101, and to issue regulations regarding substitution in case of death of the claimant, Act section 212.

Among the reports which the Act required the VA to submit to Congress, before the end of 2009, are the following six reports:

1. The VA's progress in addressing variances in compensation payments by improving coordination between the Veterans Benefits Administration and the Veterans Health Administration regarding examinations of veterans. Act, section 104;
2. The assessment of personnel requirements of the VBA. Act, section 104;
3. On descriptions of patterns of claims submitted to the VA and the effort undertaken to reduce such differences. Act, section 104;

4. On the appropriate levels of disability compensation to compensate for loss of earning capacity and quality of life and on the feasibility and appropriate level of long term transition payments during rehabilitation for veterans separated from the Armed Forces due to disability. Act, section 213;
5. On a one year pilot program, at ten regional offices, to assess the feasibility and advisability of expeditiously deciding "fully developed" claims. Act, section 221; and
6. On a study conducted on the effectiveness of the current VBA employee work credit and work management systems. Act, section 226.

The following four studies, by the VA, were required by the Act:

1. Assessment of the quality assurance program, including retaining, monitoring, and storing designated data on each claim. Act, section 224;
2. Development of an updated certification examination for appropriate employees and managers. Act, section 225;
3. Review of VBA's use of information technology to process claims and develop a plan for the use of such technology. Act, section 227; and
4. Assessment of the feasibility and advisability of mechanisms to provide VBA employees with medical advice from the VHA, when needed. Act, section 228.

Additionally, the VBIA 2008 required the United States Court of Appeals for Veterans Claims to submit to Congress an annual report containing detailed information summarizing the Court's workload during the preceding year.

VA COMPLIANCE

Proposed VCAA Regulations

The VA's notice of proposed regulations regarding VCAA notices to be provided to claimants was published, on December 11, 2009, in 74 FR 65702, as RIN 2900-AN 46, Notice of Information and Evidence Necessary To Substantiate Claim.

NOVA has commented on the proposed regulations, observing that the VA has not implemented regulations which would assist claimants by providing specific and helpful information and guidance and by explaining what is necessary to support the claim at issue. Rather, the VA has opted to provide claimants with the minimum possible information and explanation, that is, generic "general information and evidence to substantiate entitlement for the type of claim filed and benefit sought."

There has been no action on a substitution regulation

The VA has not issued any regulations, nor published any intent to do so, regarding substitution in the case of death of the claimant. Accordingly, the VA is obstinately trying to administer a regulation, 38 C.F.R. 20.1302, which requires an appeal to be dismissed upon the death of the claimant in violation of 38 U.S.C. § 5121A which allows the appeal to continue with the substitution of an eligible person.

VA Reports

Submitted Reports

According to a presentation by VBA, in November 2009, the following reports, which NOVA has not seen, have been submitted to Congress:

1. A July 2009 report on EconSys;
2. An interim report in October 2009 on the pilot study on expediting fully developed claims;
3. An interim report in October 2009 on the pilot study on providing checklists to claimants; and,
4. An April 2009 report on improving medical advice to rating specialists.

Booz Allen Cycle Study

The June 5, 2009, report prepared by Booz Allen Hamilton (“Booz Allen”) and entitled “Compensation and Pension Claims Development Cycle Study” (“the report”) offers recommendations to improve the cycle time of the claim development and rating process.

Findings

According to the report, the present Claims Processing Improvement (“CPI”) model divides claims processing into six functional teams, (triage, pre-determination, rating, post-determination, appeals and public contact) in each of the 57 Regional Offices. This has resulted in an average claim rating processing time, a/k/a average days to complete (“ADTC”), of 163 days with some Regional Offices having an ADTC of 238 days, or close thereto.

In site visits to eight of the 57 ROs, Booz Allen observed great variability, from 99-193 days, in the average time it takes for a claim to go through the development process, but very little variability, from 5 to 6 hours, in the average time a claim is worked on during the entire development process.

Because of the division of labor resulting from use of the CPI model, claim folders spend time waiting in queues between process operations. Segregation of work “creates overlapping, redundant, and sometimes unnecessary work activities”, and work typically backs up at each step. To make matters worse, work is, typically, unevenly assigned to VSRs according to the last two digits of the veteran’s claim number which causes further backups and delays.

Booz Allen found that policy documents provided by VBACO are difficult to access during the processing of a claim, which causes Veterans Service Representatives (“VSRs”), who are responsible for all activities in the pre-determination and post-determination functioning of claims processing, to use self-generated and non-standardized tools. In addition to tools which are hard to access, fast letters communicating policy changes “do not specify the required procedural changes in a step-by-step format that would allow VSRs to rapidly enact the changes.” As a result of lack of guidance, the policies for scheduling compensation and pension exams vary considerably across VAROs “resulting in the inconsistent collection of evidence, rework, and increased cycle times.”

Separation of the physical locations of the functional teams in the VAROs leads to “functional stovepipes” characterized by frontline employees, such as file clerks and claims assistants, being “unaware of what happens to a claim once they have finished their steps in the process, or how their work contributes to the quality of the final product.”

Not only are employees unaware of their contribution, but the employee performance data base, ASPEN, is misaligned with the goal of increasing the number of claims ready to rate. Instead of tracking production goals and progress toward the goals, ASPEN tracks self-reported work activities without regard to the overall production goals. Quality control is similarly inadequate, lacking timely feedback. It can take as long as 6 weeks between the time that five of a VSR’s claim folders are pulled for the monthly review and the time that feedback is provided by the “Super Senior VSR”.

Also detracting from production and accuracy goals is the mandatory training which is inappropriately focused on functional position regardless of the knowledge or skill level of the

VSRs. Because all employees must attend the same training sessions, some employees are bored by the training while other are confused.

Recommendations

Primarily, Booz Allen recommends initiating a pilot project based upon a “pod team structure” with changes in physical layout and responsibilities that create self contained teams. Each team would perform triage, pre-determination, rating and post determination functions as a team, thus reducing cycle times by facilitating claims flow and reducing inventories. It is anticipated that the team members would “have a greater appreciation for how their work quality impacts downstream processes” thus eliminating the functional stovepipe effect and increasing work quality.

To further gauge claim progress and to supervise performance, Booz Allen suggests visual management displays with charts of daily production goals and progress toward those goals. Linking processing activities to “Veteran customer demand” by “Takt Time” calculations, management would generate information on the required pace for production to allow the RO to better balance workload and assess the ability to meet demand on a daily basis. To control quality it is suggested, rather than increasing the number or frequency of inspections, that quality be embedded into the claims resolution process by encouraging the uncovering of errors thus allowing for quality to be controlled by root cause analysis.

To solve the problem of inconsistent procedures utilized by the VSRs, Booz Allen recommends development of standardized claims development processes and the use of Job Instruction Sheets containing action steps and times to completion. Additionally, faster resolution of claims could be realized by improved clarity and consistency of communications with Veterans.

Booz Allen recommends streamlining file and records retrieval through collaboration and electronic records sharing among the VBA and the Records Management Center, the National Personnel Records Center, the Federal Archives and Records Center and the Department of Defense. An additional recommendation is development of manual procedures to minimize the delay caused by unavailability of claim folders because of pending appeals.

NOVA’s Observations

Booz Allen’s Cycle Study highlights systemic problems of delays, inefficiencies and inaccuracies present in and created by the VBA’s claims adjudication process which are well known to those who practice in this field and are consistent with findings contained in reports of other recent investigations by the VA Office of Inspector General.¹

NOVA supports the recommendation to explore the pod team approach. We had advocated employing a similar team approach in a letter sent to the Senate Veterans Affairs Committee in March 2009, as part of a comprehensive plan to remake the VBA. See attached letter. NOVA is pleased to learn that a pilot project utilizing the pod team approach is already in place in the North Little Rock Arkansas RO, and we await the upcoming progress reports.

Although the use of an electronic file is only mentioned in passing in the Booz Allen report, as part of the recommendation to streamline file and records retrieval, section 227 of the Act requires the use of information technology to be utilized by the VBA to, among other things, access information which has been submitted; to permit veterans to view applications for benefits submitted online; and through a secure portal, to allow a claimant to check the status of any claim submitted by that claimant. NOVA views the VA’s use of a secure, readily searchable, and adequately indexed, electronic file as essential to Congress’s goal of correcting the delays in the VBA claims adjudication process.

Moreover, having such an electronic file which is accessible by claimants and their representatives, online, will eliminate the need for many of those VA employees in the public contact team, who are tasked with answering inquiries regarding the status and contents of claims folders. It will also solve the problem, identified by Booz Allen, which was created by trying to develop one claim submitted by a veteran while the claim file containing a different claim also submitted by the veteran is at a different location for review by an appellate adjudication team. To eliminate confusion and mis-mailed submissions by claimants, NOVA recommends modifying the RO structure suggested by Booz Allen which utilizes a VARO based mail intake facility. Instead, NOVA suggests utilizing one address for all correspondence and documents sent to the VA housed in a central processing facility and tasked with scanning documents into the file. This central scanning and filing system should automatically send an electronic notice to the submitter of the document acknowledging receipt, which is what happens with the CAVC's E-Filing system, and it should also send notice to the appropriate RO, to the BVA, to the appropriate VAMC, or to the General Counsel, as necessary.

Two crucial matters not addressed by the Cycle Study are continued unreliability of statistics published by the VA and the continued anti-veteran institutional bias in the VA. Both of these problems negatively impact the VA's ability to monitor performance and to provide accurate decisions. NOVA has previously called this committee's attention to the fact that both the VBA and the BVA claim decision accuracy rates of 90 percent although the rates of appeals and the rates of affirmances by the CAVC reveal an accuracy rate of below 20 percent. More recently the VBA has altered the Monday Morning Workload Reports so as to under report backlog and to make comparisons with reports published in 2009 and preceding years impossible.

As discussed above, the VA has also inexplicably issued regulations proposing to provide to claimants generic and meaningless statutorily required notices, called Veterans Claims Assistance Act notices. Such general notices are of no value to claimants, waste precious VA resources and are contrary to the recommendations in the Cycle Study to "improve the clarity and consistency of communications with Veterans." Another indication of the VA's indifference to veterans is shown by the reaction of the C&P Service after being told by NOVA that erroneous notices had been sent to claimants informing them, contrary to section 101 of P.L. 109-461, that claimants are not permitted to hire a representative, for a fee, until after the BVA decides their appeal. Ignoring the assertion of NOVA that due process rights of claimants who received erroneous letters require that corrected letters be sent, the C&P Service, in the December 2009 Bulletin, declined to correct the erroneous notices and opted instead to attempt to send correct notices some time in the future.

NOVA continues to learn of VSRs who refuse to apply statutorily mandated presumptions, incorrectly apply the benefit of the doubt and refuse to acknowledge diagnoses of PTSD in combat veterans as service connected. Obviously, the VA requires more than a structural overhaul to achieve the stated goal of being "strongly and uniquely pro-claimant."

An additional matter covered by the VBIA 2008 is reporting by the CAVC. The Court's FY 2009 annual report lacks the information required by VBIA 2008, Section 604, items 4 through 15 which includes information such as the number of dispositions by the Court, by the clerk, by a single judge, by a panel and by the full Court; the time from filing the brief to disposition; and an assessment of the workload of each judge. All of this required information is necessary to determine the Court's need for increased resources.

National Organization of Veterans' Advocates, Inc. (Nova)
Washington, DC.
March 16, 2009

By Email and U.S. Mail

Senator Daniel Akaka, Chairman
Senate Veterans Affairs Committee
141 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Akaka:

Attached are NOVA's answers to your additional questions following the hearing on February 11, 2009.

Sincerely,

Richard Paul Cohen
Executive Director

RPC/smp

Attachment

RECOMMENDATIONS FOR REMAKING THE VBA

Summary

NOVA's recommendations include utilizing secure, electronic files; decentralizing rating and appellate functions; and implementing a user-friendly, simplified system which puts the veteran first.

Specific recommendations

NOVA's plan to remake the Veterans' Benefits Administration contemplates an organization dedicated to being user-friendly, considerate of the needs and limitations of veterans when adjudicating claims, and believing that veterans generally file meritorious claims for VA benefits. Fundamental to creating a system which truly does put veterans first is ensuring that veterans and their families receive actual assistance in the development of their claims and that fully-developed claims are properly paid regardless of whether the veteran is represented or proceeding *pro se*.

First and foremost, there must be a system which allows disabled veterans and their families to file simplified claim forms, participate in hearings and review claim files without having to travel four or more hours to participate in the adjudication of their claims. Under the present system, 57 Regional Offices (RO) handle all of these functions, forcing many veterans to travel long distances to their "local" RO. A veteran-friendly system would disperse most of the functions of the present ROs closer to VA Hospitals, VA outpatient clinics, and/or Vet Centers. This way, the processes of meeting the veteran, completing forms, developing evidence, and attending hearings would take place closer to the claimant's home, while centralized state offices would house the rating boards. With computerized files, the file could be accessed in all locations. A system like this has been utilized by the Social Security Administration, which has multiple local offices dispersed throughout each state for these precise processes.

Such a system would begin to process the simplified application by requesting specific documentation from the claimant, such as a necessary DD214 or current medical records. Then, rather than continuing with the obsolete system of separating work functions at the ROs into six teams, there should be one decision unit which handles everything from reviewing the application for completeness in predetermination through gathering the evidence and producing rating decisions. This

reworked adjudication unit would be charged with the responsibility of partnering with the claimant and the claimant's representative, if the claimant is represented, to fully understand and develop the claim. It would then issue an understandable and case specific VCAA notice, prior to any rating decision, assist with any additional development, and then, after case-development was completed, issue the rating decision.

Because the present rating system is obviously difficult for veterans to understand and for rating boards to apply, it often results in erroneous decisions. What is needed is an overhaul of the entire Schedule for Rating Disabilities contained in 38 C.F.R. Part 4 to simplify and update the schedules.

There should be increased use of presumptions to eliminate the need for development of evidence regarding the incidents of military service for all those who were deployed to a war zone regardless of their military occupational specialty or place of assignment within the war zone. For example, any veteran who was deployed to a war zone, whether during WWII, Korea, Vietnam, the Gulf War or the GWOT and who is subsequently diagnosed with PTSD, the sole inquiry during the rating stage of their claim should concentrate on the severity of their symptoms without requiring development of the nature of their in-service stressor(s) or the connection between their stressor(s) and their present diagnosis of PTSD. Any veteran who is diagnosed with a medical condition while on active duty and who is presently being treated for that same condition should not need to prove a medical nexus between the in-service condition and the current condition. Also veterans who are receiving Social Security Disability or Supplemental Security Income benefits based on medical conditions and/or disabilities which are related to service should be presumed to be unemployable.

PTSD, TBI, and their underlying symptoms and residuals are leaving increasing numbers of veterans' lives in shambles. It is only right, therefore, that any rewrite of the Schedule for Rating Disabilities include consideration and compensation for a veteran's loss of quality of life as well as for his/her loss of earning capacity as related to these medical conditions.

Obviously, NOVA's recommendation to decentralize the VA will not work without a 21st century VA claims system, i.e., one that is paperless and secure. Also, the VA will never secure the confidence of our country and our veterans until there are secure claims files.

Together with a modern claims file system, veterans must be granted the same rights granted to all other classes of citizens--the right to choose to hire a lawyer for assistance, if desired, from the very beginning of the claim adjudication process. Presently, veterans are the only class of citizens who do not have the right to hire an attorney to assist with a claim from the claim's inception. For example, veterans who are notified of the possibility that their rating will be reduced are not permitted to hire an attorney for a fee to represent them even after objecting to the notice of reduction. They must wait until after their rating has been reduced to hire a lawyer. Moreover, once a lawyer or other representative is hired, neither the first-line decision makers, the appellate teams nor the BVA should view the veteran's representative as having interests opposed to the VA's central mission of providing proper benefits to veterans and their families. It follows that the VA should partner with the claimant's representative and use informal conferences to speed claim-development and narrow the issues to be decided.

Following an unfavorable rating decision, the claimant should only need to file one request for an appeal instead of the present requirement to file both a notice of disagreement and a substantive appeal to the BVA. Thereafter, the claimant and his representative should have the right to submit further evidence and/or argument, have a *de novo* review on the record, and/or a personal hearing before a Board Member (in person at the "local" RO, via video-conference, or in person in Washington, DC).

Fundamental to remaking the VBA is adequate training, supervision and accountability. This will require a revamping of the VA's organizational chart so as to provide reporting and direct accountability from the Regional Offices to the Secretary. Presently, there are an excessive number of layers of executives in the system which impedes the flow of knowledge and communication to the Secretary, thereby impeding accountability. With direct accountability comes less likelihood of lost, shredded or compromised evidence and/or claims files. Direct accountability also brings about better-trained staff who are properly motivated to perform functions essential to the mission. Finally, in a system with adequate training and accountability, VLJs are less likely to write decisions which are affirmed only 20 percent of the time when appealed to the Veterans Court.

To ensure efficient, convenient, timely and proper appellate review at the administrative level, the Board of Veterans Appeals should be made independent of the VBA and should be decentralized and dispersed within reasonable distances from the many Regional Offices. Not only should the BVA Veterans Law Judges be moved out of their fortress in Washington, D.C., but the BVA's VLJs should be reconfigured into a corps of truly independent and well-trained Federal Administrative Law Judges.

It is fundamental that the pressures placed on raters and VLJs to turn out decisions must be replaced with a system which expects the right decision to be made at all levels of the process. Veterans require a system which does not provide a decision until the claim is fully developed, which involves a true partnership between the claimant and the VA, and which rewards prompt and correct decision making. NOVA's experience confirms the findings in the 2005 report of the Office of Inspector General that the present work credit system is providing a disincentive to properly deciding claims. It should be replaced. To complement new expectations of increased accuracy and accountability, it is essential that VA employees be repeatedly and adequately trained and supervised. Additionally, the high rate of VLJ decisions which are returned to the BVA because of inadequate reasons and bases is unacceptable and contributes to the backlog and to the reputation of "hamster wheel" adjudications.

Appeal from a VLJ's decision should go to the CAVC and then to the Federal Circuit. Two changes to the operation of the court would make a big change. First, the CAVC should be granted class action jurisdiction to remedy situations which affect a broad class of veterans. Second, the CAVC should be required to resolve all issues reasonably raised, except for constitutional claims, if the appeals can be resolved without reaching the constitutional claim.

¹ 09-01995-63, 20100114, VARO Roanoke; 09-00213-125, 20090512, VARO Pittsburgh; 09-01996-41, 20091204, VARO San Juan; 09-00189-81, 20090227 VARO C&P Benefit Claim Receipt Dates; 08-02073-96, 20090312, VBA Compensation Rating Accuracy and Consistency Reviews; 09-01993-29, 20091119, VARO Baltimore; 09-01193-228, 20090928, VBA's Control of Veterans' Claims Folders; 08-01759-234, 20090930, VARO Claim-Related Mail Processing; 08-03156-227, 20090923 VARO Rating Claims Processing Exceeding 365 Days.