STATEMENT OF
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OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
FEBRUARY 3, 2009

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to appear before you on behalf of the Disabled American Veterans (DAV), to address problems and suggest solutions to the Department of Veterans Affairs (VA) disability claims process; specifically, the appeals process.

The appeals process is extremely complex and often not understood by many veterans, veterans' service representatives, or even VA employees. Numerous studies have been completed on timeliness of claims and appeals processing, yet the delays continue and the frustrations mount. Therefore, the following suggestions are intended to simplify the process by drastically reducing delays caused by superfluous procedures while simultaneously preserving governmental resources and reducing governmental expenditures.

As VBA renders more disability decisions, a natural outcome of that process is more appellate work from veterans and survivors who disagree with various parts of the decisions made in their case. In recent years, the appeal rate on disability determinations has climbed from an historical rate of approximately seven percent to a current rate that ranges from 11 to 14 percent. The 824,844 disability decisions in 2007 generated approximately 100,000 appeals. The VA estimates that the 942,700 projected completed disability decisions in 2009 will likely generate as much as 132,000 appeals. At the end of 2007, there were over 180,000 appeals pending in regional offices and the Appeals Management Center (AMC).

This increase in appellate workload seriously affects VA's ability to devote resources to initial and reopened claims processing. Appeals are one of the most challenging types of cases to process because of their complexity and the growing body of evidence that must be reviewed in order to process them. Likewise, the number of actions taken in response to VA's appellate workload has increased. In 2001, the VA processed more than 47,600 statements of the case (SOCs) and supplemental statements of the case (SSOCs). In 2007, they processed over 130,000 SOCs and SSOCs.

THE APPEAL PROCESS AND THE BOARD OF VETERANS APPEALS

I. Remove Procedural Roadblocks To Efficiency In The Appeals Process.

To begin the appeal process, an appellant files a written notice of disagreement (NOD) with the VA regional office (RO) that issued the disputed decision. For most cases, the appeal must be filed within one year from the date of the decision. After filing an initial NOD, the VA sends the appellant an appeal election form asking him/her to choose between a traditional appellate-review process by a rating veterans' service representative (RVSR) or a review by a decision review officer (DRO). DROs provide a *de novo* (brand new decision), review of an appellant's entire file, and they can hold a personal hearing with the appellant. DROs are authorized to grant contested benefits based on the same evidence that the initial rating board used. The VA provides the appellant 60 days to respond to the appeal election form. *See* 38 C.F.R. § 3.2600 (2007).

Once the VA receives the appeal election form, the RVSR or DRO (as appropriate) issues an SOC explaining the reasons for continuing to deny the appellant's claim. A VA Form 9, or substantive appeal form, which is used to substantiate an appeal to the Board of Veterans Appeals ("Board" or "BVA") is attached to the SOC. The VA Form 9 must be filed within 60 days of the mailing of the SOC, or within one year from the date VA mailed its decision, whichever is later.

If the appellant submits new evidence or information with, or following, the substantive appeal, (or any time after the initial SOC while the appeal is active) such as records from recent medical treatment or evaluations, the local VA office prepares an SSOC, which is similar to the SOC, but addresses the new information or evidence submitted. The VA must then give the appellant an additional 60 days to respond (with any *additional* evidence, for example) following the issuance of an SSOC. If the appellant submits other evidence, regardless of its content, the VA must issue another SSOC and another 60 days must pass before the VA can send the appeal to the Board. In many cases, this process is repeated multiple times before a case reaches the Board. In many of those cases, the appellants are simply unaware that they are preventing their appeal from reaching the Board.

The VAROs are not supposed to submit a case to the Board before the RO has rendered a decision based on all evidence in the file, to include all new evidence. This restriction stems from 38 U.S.C.A. § 7104, which has been interpreted to mean that the Board is "primarily an appellate tribunal" and that consideration of additional evidence in the *first instance* would violate section 7104 and denies an appellant "one review on appeal to the Secretary," 38 U.S.C.A. § 7104(a) (West 2002 & Supp. 2007); *see Disabled Am. Veterans v. Sec'y of Veterans Affairs,* 327 F.3d 1339, 1346 (Fed. Cir. 2003).

The foregoing procedures force the ROs to repeatedly issue SSOCs in many cases, which merely lengthens the appeal, frustrates the VA, and confuses the appellant. The problem does not end there. If an appellant submits new evidence once the case is at the Board, or if the RO submits a case to the Board with new evidence attached, the Board is prohibited from rendering a

decision on the case and is forced to remand the appeal (usually to the Appeals Management Center (AMC)), if for no other reason but for VA to issue an SSOC.

Notwithstanding the above, an appellant can choose to waive the RO's jurisdiction of evidence received by VA after a case has been certified to the Board by submitting a written waiver of RO jurisdiction. In the case of an appeal before the VARO, this results in VA not having to issue an SSOC concerning the newly submitted evidence. In the case of an appeal before the Board, it results in not requiring the Board to remand the case solely for issuance of an SSOC.

The Board amended its regulations in 2004 so that it could solicit waivers directly from appellants in those cases where an appellant or representative submits evidence without a waiver. 38 C.F.R. § 20.1304(c); *see* 69 Fed. Reg. 53,807 (Sep. 3, 2004). This has helped to avoid some unnecessary remands. The Board's remand rate decreased from 56.8% in fiscal year (FY) 2004, to 35.4% in FY 2007 due *in part* to these procedures. Nonetheless, the Board still remanded 1,162 cases solely to issue an SSOC. The frustrating reality of this situation is that issuing an SSOC may only consume one work hour from an experienced employee, but the case will nonetheless languish at the AMC for the next two years while the VA completes that one-hour's worth of work.

The statistical data for appeals in the VA represents a significant amount of its workload. Appellants filed 46,100 formal appeals (submission of VA Form 9) in FY 2006 compared with 32,600 formal appeals in FY 2000. The annual number of BVA decisions, however, has not increased. As a result, the number of cases pending at BVA at the end of FY 2006—40,265—was almost double the number at the end of FY 2000. These numbers are exclusive to appeals at the Board and do not include the substantial number of appeals processed by the appeals teams in VAROs and especially the AMC.

In FY 2007, the Board physically received 39,817 cases. Despite this number of cases making it to the Board, the VBA actually issued 51,600 SSOCs, a difference of 11,783.[1] As of May 2008, the VBA has already issued 38,634 SSOCs. Likewise, the Board has remanded an additional 1,162 cases solely for the issuance of an SSOC. This number does not include cases wherein the appellant responded to the Board's initiation of a request for waiver of RO jurisdiction, thereby eliminating the requirement for a remand for VBA to issue an SSOC.

The average number of days it took to resolve appeals, by either the Veterans Benefits Administration (VBA) or the Board, was 657 days in FY 2006.[2] This number, however, is very deceptive, as it represents many appeals resolved at the RO level very early into the process. The actual numbers show a picture much worse. According the FY 2007 *Report of the Chairman*, Board of Veterans' Appeals, a breakdown of processing time between steps in the appellate process is as follows:

[1] The number of SSOCs may exceed 51,600 because VA's appeals tracking system only records up to 5 SSOCs per case.

[2] Note: Appeals resolution time is a joint BVA-VBA measure of time from receipt of notice of disagreement by VBA to final decision by VBA or BVA. Remands are not considered to be final decisions in this measure. Also not included are cases returned as a result of a remand by the U.S. Court of Appeals for Veterans Claims.

- NOD to receipt of SOC – 213 days – VARO;
- SOC issuance to receipt of VA Form 9 – 44 days – appellant;
- receipt of VA Form 9 to certification to the Board – 531 days –VARO;
- receipt of certified appeal to Board decision – 273 days – Board;

Total – 1,061 days from NOD to Board decision—sadly, many are much longer.

The function that should conceivably take the least amount of time actually took the most amount of time—receipt of VA Form 9 to certification to the Board. The reason for this lengthy time VA spends on a relatively simple task is *in part* the result of issuing multiple SSOCs.

Congress has the chance to eliminate tens of thousands, and possibly far more than 100,000 hours annually from VA's workload, including the costs associated therewith. Such changes would also simplify an important part of the appeals process and can be made by *minor* statutory amendments, and potentially only regulatory amendments.

Recommendation

Congress should amend 38 U.S.C. § 5104 (Decisions and Notices of Decisions) subsection (a), to eliminate the need to wait until after an appellant files an NOD in order to issue an appeal election letter. Such an amendment would further eliminate the requirement that VA allow an appellant 60 days to respond to such a letter, thereby shortening every appeal period by 60 days.

The provisions of the foregoing statute states, *inter alia*, that when VA notifies a claimant of a decision, "[t]he notice shall include an explanation of the procedure for obtaining review of the decision." 38 U.S.C.A. § 5104(a). This section could be amended to read: "The notice shall include an explanation of the procedure for obtaining review of the decision, *to include any associated appeal election forms*." The VA could then modify 38 C.F.R. § 3.2600 accordingly.

Despite this suggested statutory amendment, a solid argument exists that supports a proposition that the VA can incorporate this recommendation by modifying its regulation. As indicated above, the law requires that VA, when issuing a decision, to notify a claimant of the "procedure for obtaining review" of the decision. The right to elect traditional appellate process or a post-decision review from a DRO is certainly part of the "procedure for obtaining review." *See Id.* We nonetheless suggest a statutory amendment to ensure compliance and to shield the Department from possible litigation, however unlikely.

The VA currently receives over 100,000 NODs annually. This minor change would eliminate 60 days of undue delay in every one of those appeals and eliminate VA's requirement to separately mail, in letter format, all 100,000 plus appeal election forms. This recommendation would have a tremendous effect on VA's appeals workload without the need to expend any governmental resources.

Recommendation

Amend 38 U.S.C.A. § 7104 in a manner that would specifically incorporate an automatic waiver of RO jurisdiction for any evidence received by the VA, to include the Board, after an appeal has been certified to the Board following submission of a VA Form 9, *unless* the appellant or his/her representative expressly chooses *not* to waive such jurisdiction. This type of amendment would eliminate the VA's requirement to issue an SSOC (currently well over 50,000 annually) every time an appellant submits additional evidence in the appellate stage. It would also prevent the Board from having to remand an appeal to the AMC solely for the issuance of an SSOC (currently well over 1,100 annually). Further, the substantial amount of time spent by the Board wherein it actively solicits waivers from possibly thousands of appellants each year would be eliminated.

One *possible* way for the VA to administer such a change is by a simple amendment to its VA Form 9. The amendment would merely require the appellant or his/her representative to specify whether additional evidence received at a later point is exempt from the waiver when such evidence is submitted. The notice should be clear that evidence received by VA without an express exemption will be forwarded directly to the Board for review.

Such an amendment should state that the statutory change applies "notwithstanding any other provision of law." This language would prevent any contradiction with other statutes and future confusion caused by any potential judicial review. This type of legislative change would reduce VA and BVA's workload by many thousands of hours while also reducing the appellate period in tens of thousands of cases by 60 days per SSOC. The VA could then utilize the resources freed by these changes to focus on other causes of delay in the claims process.

II. THE TIME HAS COME TO REDUCE THE APPELLATE PERIOD FROM ONE YEAR TO SIX MONTHS.

The DAV believes the time has come to reduce the one-year appellate period currently allowed for filing a timely NOD following the issuance of a rating decision from one year to six months. This subject has been the discussion topic in countless hallway and sidebar conversations for a considerable period of time. It is time these discussions be made public.

President Hoover, under the authority of a July 3, 1930, Act of Congress, consolidated the Veterans' Bureau, the Bureau of Pensions, and the National Home for Disabled Volunteer Soldiers into a single government agency—the Veterans' Administration. This Act created the Board of Veterans' Appeals.

For over 100 years prior to this, disabled veterans seeking pensions had to navigate ever-changing bureaucracies. For years, many had to petition through a mix of Congress and what is now the Court of Federal Claims (*i.e.,* The People's Court) just to be recognized as having veteran status.

From the U.S. Civil War up to 1988, a span of 125 years, there was no judicial recourse for veterans who were denied disability benefits. The Veterans Administration (formerly), was virtually the only administrative agency that operated free of judicial oversight.

Also throughout these years, the Executive could, and did, implement measures to repeal benefits anytime it felt justified. For example, President Franklin D. Roosevelt created “Special Boards of Review” in 1933, staffed by civilians that were not VA employees. These Boards *sua sponte* reviewed over 51,000 cases—only 43 percent of veterans whose cases where reviewed were allowed to keep their benefits.

Veterans stepped up pressure for judicial review after World War II. Those whose claims for benefits were denied by the Veterans Administration were afforded no independent review of decisions, Veterans were denied the right afforded to many other citizens to go to court and challenge similar agency decisions.

The status quo of no judicial review of veterans claims persisted until an influx of post-Vietnam claims in the 1970s and 80's directed the spotlight on an adjudication process in obvious need of reform. The House Committee on Veterans' Affairs consistently resisted efforts to alter the VA's unique status and noted that the Veterans Administration stood in “splendid isolation” as the single federal administrative agency whose major functions were explicitly insulated from judicial review. (The Supreme Court was sure to remind all of the coldness of that term in a landmark decision[3]) By now, history had proven that without proper oversight, those wishing to cut veterans' benefits, whether couched in government reform or expressly decided by an Agency Board, while ignoring the suffering caused by their service-connected disabilities would do so without hesitation.

The Veterans' Judicial Review Act finally created a veterans' court under Article I of the Constitution on November 18, 1988. This Act of Congress, along with a multitude of other favorable pieces of legislation throughout the years, has solidified the VA into its current non-adversarial, veteran-friendly, pro-claimant system. Veterans and their dependents also have more avenues than ever before to choose from when seeking representation in the claims and appeal process. Veterans' organizations are also stronger than ever and stand ready to fight against any power that might try to reduce benefits.

It is for all of these reasons and many more, however, that reducing the appellate period from one year to 6 months would not reduce veterans' benefits. Such a time would also be consistent with other appellate periods. For example, an appellant currently has 60 days in which to file an appeal to the Court of Appeals for the Federal Circuit from the Court of Appeals for Veterans Claims, and 120 days to file an appeal to the Court of Appeals for Veterans Claims

[3] *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) (holding that statutory interpretation, or “interpretative doubt” be resolved in a veteran's favor and further stating: “But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation . . ., the Government's position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's ‘splendid isolation.’ (citation omitted). As the Court of Appeals for the Federal Circuit aptly stated: ‘Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence’ could not alone, therefore, enhance any claim to deference.”

from the Board. It necessarily follows then that a fair period to file an NOD, which is the first step in initiating an appeal to the Board would be an additional 60 days, totaling 180 days, which is still an extremely long period by any appellate standards.

Recommendation:

Congress should decrease the period in which a VA claimant may submit a timely notice of disagreement to the VA following the issuance of a VA rating decision from one year to six months.

III. THE APPEALS MANAGEMENT CENTER PROMOTES AN ATMOSPHERE LOW IN ACCOUNTABILITY, HAS A POOR RECORD OF SUCCESS, AND SHOULD BE DISSOLVED.

Accountability is one key to quality, and therefore to timeliness as well. As it currently stands, almost everything in VBA is production driven. VA's quality assurance tool for compensation and pension claims is the Systematic Technical Accuracy Review (STAR) program. Under the STAR program, VA reviews a sampling of decisions from regional offices and bases its national accuracy measures on the percentage with errors that effect entitlement, benefit amount, and effective date.

According to VA's 2007 performance and accountability report, the STAR program reviewed 11,056 compensation and pension (C&P) cases in 2006 for improper payments. While this number appears significant, the total number of C&P cases available for review was 1,540,211. Therefore, the percentage of cases reviewed was approximately seven tenths of one percent, or 0.72 percent.

Another method of measuring error rates and assessing the need for more accountability is an analysis of the Board's Summary of Remands. Of importance is that its summary represents a statistically large and reliable sample of certain measurable trends. Review these examples in the context of the VA (1) deciding 700,000 to 800,000 cases per year; (2) receiving over 100,000 local appeals; and (3) submitting 40,000 appeals to the Board. The examples below are from FY 2007.

Remands resulted in 998 cases because no "notice" under 38 U.S.C.A. § 5103 was ever provided to the claimant. The remand rate was much higher for inadequate or incorrect notice; however, considering the confusing (and evolving) nature of the law concerning "notice," we can only fault the VA when it fails to provide *any* notice. This is literally one of the first steps in the claims process.

VA failed to make *initial* requests for SMRs in 667 cases and failed to make *initial* requests for personnel records in 578 cases. The number was higher for *additional* follow-up records requests following the first request. This number is disturbing because initially requesting a veteran's service records are the foundation to *every* compensation claim. It is claims development 101.

The Board remanded 2,594 cases for *initial* requests for VA medical records and 3,393 cases for *additional* requests for VA medical records. The disturbing factor here is that a VA employee can usually obtain VA medical records without ever leaving the confines of one's computer screen.

Another 2,461 cases were remanded because the claimant had requested a travel board hearing or video-conference hearing. Again, there is a disturbing factor here. A checklist is utilized prior to sending an appeal to the Board that contains a section that specifically asked whether the claimant has asked for such a hearing.

The examples above totaled 7,298 cases, or nearly 20 percent of appeals reaching the Board, all of which cleared the local rating board *and* the local appeals board with errors that are *elementary* in nature. Yet, they were either not detected or they were ignored. Many more cases were returned for more complex errors. Nevertheless, for nearly a 20-percent error rate on such basic elements in the claims process passing through VBA's most senior of rating specialist and Decision Review Officers is simply unacceptable.

The problem with the VA's current system of accountability is that it does not matter if VBA employees ignored these errors because those that commit such errors are usually not held responsible. One may ask, "how does this apply to the appeals process?" Simple, with the advent of the AMC, local employees handling appealed cases have little incentive to concern themselves with issues relating to accountability because if the Board remands a case, then in all likelihood, the appeal will be sent to the AMC, not back to the local employee. Therefore, local employees realize they will most likely never see the case again.

Further, the AMC is essentially considered a failure throughout the veteran community, including VSOs and VA employees. Part of this failure is displayed in how and when appeals are resolved throughout the appellate process. As of the end of FY 2007, the Board had disposed of 24.5 percent of all appeals with an initial decision—21.7 percent were resolved at local offices prior to submission of a form 9, which usually means the appeal was granted—another 11.8 percent were resolved at local offices after receipt of a Form 9, which also usually means the appeal was granted. Approximately 35.5 percent of all Board decisions were remands; however, only 2.8 percent were resolved *after* a BVA remand.

As it pertains to the AMC, the 2.8 percent must shrink even further when realizing that some appeals are returned to the Agency of Original Jurisdiction, such as egregious errors and those represented by attorneys. Therefore, the AMC is succeeding in resolving less than 2.8 percent of VA's appellate workload. This begs the question of what exactly is the AMC doing?

The AMC received nearly 20,000 remands from the Board in FY 2008. By the end of FY 2008, the AMC had slightly over 21,000 remands on station. By the end of January 2009, they had approximately 22,600 remands on station. The AMC completed nearly 11,700 appeals, out of which 9,811 were returned to the Board, 89 were withdrawn, and only 1,789 were granted. In fact, 2,500 appeals were returned to the AMC at least a second time because of further errors in carrying out the Board's instructions. This means the AMC's error rate was higher than its grant rate. This record is not indicative of success.

If remands were returned to ROs rather than the AMC, local employees would inherently be held to higher accountability standards. Additionally, a large amount of resources, such as that utilized by the AMC, would no longer be wasted on such little output, such as the number of cased disposed after remand. Congress has already laid the path for this action—VA must now capitalize on the opportunity.

Congress recently enacted Public Law 110-389, the "Veterans' Benefits Improvement Act of 2008" (S. 3023). Section 226 of S. 3023 requires VA to conduct a study on the effectiveness of the current employee work-credit system and work-management system. In carrying out the study, VA is required to consider, amongst other things: (1) measures to improve the accountability, quality, and accuracy for processing claims for compensation and pension benefits; (2) accountability for claims adjudication outcomes; and (3) the quality of claims adjudicated.

The legislation requires the VA submit the report to Congress no later than October 31, 2009, which must include the components required to implement the updated system for evaluating employees of the Veterans Benefits Administration. No later than 210 days after the date on which the Secretary of Veterans Affairs (Secretary) must submit the report to Congress, the Secretary must establish an updated system for evaluating the performance and accountability of employees who are responsible for processing claims for compensation or pension benefits.

Congress and the Administration must not conduct the foregoing actions without including the appeals process—it is inextricably intertwined with the entire claims processing system. Section 226 of Pub. L. 110-389 may provide the perfect opportunity to dismantle the dysfunctional AMC, return appeals to local offices, and include the appellate process when enhancing VA's accountability as required by the Veterans' Benefits Improvement Act of 2008.

Further, this is an historic opportunity for the VA to implement a new methodology—a new philosophy—by developing a new system with a primary focus of quality through accountability, which must include the appellate process. Properly undertaken, the broad outcome would result in a new institutional mindset across the VBA—one that focuses on the achievement of excellence—one that changes a mindset focused mostly on quantity-for-quantities-sake, to a focus of quality and excellence. Those who produce quality work are rewarded and those who do not are finally held accountable.

Recommendation:

When implementing the results of the Secretary's upcoming report required by section 226 of the foregoing Act of Congress, the Department must include the appellate process when seeking improvements in the claims process. In doing so, one important action with respect to the appellate process should be to dissolve the AMC and return remanded appeals to those responsible for causing the remand. The appellate process must further be included in an accountability program, in accordance with section 226, that will detect, track, and hold

responsible those VA employees who commit errors while simultaneously providing employee motivation for the achievement of excellence.

THE COURT OF APPEAL FOR VETERANS CLAIMS

IV. THE VETERANS BENEFITS IMPROVEMENT ACT OF 2008

Last year Congress enacted S. 3023 into law, the "Veterans Benefits Improvement Act of 2008." In doing so, it wisely stipulated language in title VI, section 601, that authorizes a temporary expansion of judges at the Court and enhanced the Court's annual workload reporting requirements.

The DAV believes that the temporary increase of two new judges will prove beneficial in helping to control the Court's workload. In the light of the new reporting requirements stipulated under section 604 of the same legislation, Congress will be better situated to determine whether these new positions should be made permanent.

We also believe that once the Court submits its first report in accordance with the new reporting requirements, better judgments can then be made regarding large policy issues affecting the Court's workload and backlog. Such changes made too early could prove premature. We therefore limit our recommendations to those that follow.

V. ENSURE NEW JUDGES APPOINTED FROM THE FIELD OF VETERANS' ADVOCACY AND ARE EXPERIENCED IN VETERANS' LAW.

Whether Congress increases the number of judges on a permanent basis or not, the issue of judge's credentials is still of critical importance. As noted in the FY 2010 *Independent Budget*, Congress should ensure that any new judges appointed to the Court of Appeals for Veterans Claims are themselves a veteran's advocate and skilled in the practice of veterans' law.

The Court received well over 4,000 cases during FY 2008. According to the Court's annual report, the average number of days it took to dispose of cases was nearly 450. This period has steadily increased each year over the past four years despite the Court having recalled retired judges numerous times over the past two years specifically because of the backlog. Veterans' law is an extremely specialized area of the law that currently has fewer than 500 attorneys nationwide whose practices are primarily in veterans' law.

Significant knowledge and experience in this practice area would reduce the amount of time necessary to familiarize a new judge to the Court's practice, procedures, and body of law. A reduction in the time to acclimate would allow a new judge to begin a full caseload in a shorter period, thereby benefiting the veteran population. Congress should therefore consider appointing new judges to the Court from the selection pool of current veteran's law practitioners.

Recommendation:

Congress should ensure that any new judges appointed to the Court of Appeals for Veterans Claims are themselves a veteran's advocate and skilled in the practice of veterans' law. Congress should enact a joint resolution indicating that it is the sense of Congress that any new judges appointed to the Court of Appeals for Veterans Claims be selected from the knowledgeable pool of current veterans' law practitioners.

VI. THE NATION'S VETERANS HAVE EARNED THEIR OWN COURTHOUSE AND JUSTICE CENTER THAT IS WORTHY OF THEIR SACRIFICE.

Sincere consideration must be given to the location and setting of the Court. The DAV contends that the Court should be housed in its own dedicated building, designed and constructed to its specific needs and befitting its authority, status, and function as an appellate court of the United States.

During the nearly two decades since the Court was formed in accordance with legislation enacted in 1988, it has been housed in commercial office buildings. It is the only Article I court without its own courthouse. The "Veterans'" Court should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States, and especially the degree of respect that those who have born the battle for this great Nation have earned.

Rather than being a tenant in a commercial office building, the Court should have its own dedicated building that meets its specific functional and security needs, projects the proper image, and allows the consolidation of VA general counsel staff, court practicing attorneys, and veteran's service organization representatives to the court in one place.

Recommendation:

The Court should have its own home, located in a dignified setting with distinctive architecture that communicates its judicial authority and stature as a judicial institution of the United States dedicated to those who served this Country in uniform. Construction of a courthouse and justice center requires an appropriate site, authorizing legislation, and funding. Therefore, Congress should enact legislation and provide the funding necessary to construct a courthouse and justice center for the Court of Appeals for Veterans Claims.

VII. CONGRESS SHOULD REQUIRE THE COURT TO AMEND ITS RULES OF PRACTICE AND PROCEDURE TO PRESERVE ITS LIMITED RESOURCES.

Congress is aware that the number of cases appealed to the Court has increased significantly over the past several years. Nearly half of those cases are consistently remanded back to the Board of Veterans' Appeals.

The Court has attempted to increase its efficiency and preserve judicial resources through a mediation process, under Rule 33 of the Court's Rules of Practice and Procedure, to encourage parties to resolve issues before briefing is required. Despite this change to the Court's rules, the VA's General Counsel routinely fails to admit error or agree to remand at this early stage, yet later seeks a remand, thus utilizing more of the Court's resources and defeating the purpose of the program.

In the above practice, the VA usually commits to defend the Board's decision at the early stage in the process. Subsequently, when the VA's General Counsel reviews the appellant's brief, they then change their position, admit to error, and agree to or request a remand. Likewise, the VA agrees to settle many cases in which the Court requests oral argument, suggesting acknowledgment of an indefensible VA error through the Court proceedings. The VA's failure to admit error, to agree to remand, or to settle cases at an earlier stage of the Court's proceedings does not assist the Court or the veteran, it merely adds to the Court's backlog.

Recommendation:

Congress should enact a Judicial Resources Preservation Act. Such an Act could be codified in a note to section 7264. For example, the new section could state:

(1) Under 38 U.S.C. § 7264(a), the Court shall prescribe amendments to Rule 33 of the Court's Rules of Practice and Procedure. These amendments shall require that:

> (a) If no agreement to remand has been reached before or during the Rule 33 conference, the Department, within 7 days after the Rule 33 conference, shall file a pleading with the Court and the appellant describing the bases upon which the Department remains opposed to remand;
>
> (b) If the Department of Veterans Affairs later determines a remand is necessary, it may only seek remand by joint agreement with the appellant;
>
> (c) No time shall be counted against the appellant where stays or extensions are necessary when the Department seeks a remand after the end of 7 days after the Rule 33 conference;
>
> (d) Where the Department seeks a remand after the end of 7 days after the Rule 33 conference, the Department waives any objection to and may not oppose any subsequent filing by appellant for Equal Access to Justice Act fees and costs under 28 U.S.C. 2412.

(2) The Court may impose appropriate sanctions, including monetary sanctions, against the Department for failure to comply with these rules.

VIII. CONGRESS SHOULD ENFORCE THE BENEFIT-OF-THE-DOUBT RULE.

The Court upholds VA findings of "material fact" unless they are clearly erroneous, and has repeatedly held that when there is a "plausible basis" for the Board's factual finding, it is not clearly erroneous. Title 38, United States Code, section 5107(b) grants VA claimants a statutory right to the benefit of the doubt with respect to any benefit under laws administered by the Secretary of Veterans Affairs (Secretary) when there is an approximate balance of positive and negative evidence (*relative equipoise*) regarding any issue material to the determination of a matter.

Yet, the Court must usually affirm many BVA findings of fact when the record contains only minimal evidence necessary to show a "plausible basis" for such finding. This renders a claimant's statutory right to the benefit of the doubt meaningless because claims can be denied and the denial upheld when supported by far less than a preponderance of evidence. In other words, the weight of evidence for and against a claim can be equal, therefore invoking the *equipoise* standard; however, the Court must still uphold a denial based on weaker evidence if it finds plausibility despite the unfavorable evidence failing to equal the value of the favorable evidence. This effectively moots the benefits of the doubt. These actions render congressional intent under section 5107(b) meaningless.

To correct this situation, Congress amended the law with the enactment of the Veterans Benefits Improvement Act of 2002[4] to expressly require the Court to consider whether a finding of fact is consistent with the benefit-of-the doubt rule. The Court has not upheld the intended effect of section 401[5] of the Veterans Benefits Act of 2002. This is in part due to the Court's jurisprudence of reviewing the Board's application of section 5107(b) as a finding of fact. As long as that is the case, it is reviewed by the Court under the clearly erroneous standard, which invokes the plausible-basis standard by direction of higher courts' jurisprudence.

The Veterans Benefits Act section 401 amendment to section 7261(a)(4), directs the Court to "hold unlawful and set aside or reverse" any "finding of material fact adverse to the claimant…if the finding is clearly erroneous."[6] Furthermore, Congress added entirely new language to section 7261(b)(1) that mandates the Court to review the record of proceedings before the Secretary and the BVA pursuant to section 7252(b) of title 38 and "take due account of the Secretary's application of section 5107(b) of this title…."[7]

The Secretary's obligation under section 5107(b), as referred to in section 7261(b)(1), is as follows:

> (b) BENEFIT OF THE DOUBT – The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary

[4] Pub. L. No. 107-330, 401, 116 Stat. 2820, 2832.

[5] Section 401 of the Veterans Benefits Act, effective December 6, 2002, amended title 38, United States Code, sections 7261(a)(4) and (b)(1).

[6] 38 U.S.C. § 7261(a)(4) (emphasis indicates amendments by Veterans Benefits Act section 401(a)). See also 38 U.S.C. § 7261(b)(1).

[7] See 38 U.S.C. § 7261(b)(1).

> with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. [8]

Reading amended sections 7261(a)(4) and 7261(b)(1) together, which must be done in order to determine the effect of the Veterans Benefits Act section 401 amendments, reveals that the Court is now directed, as part of its scope-of-review responsibility under section 7261(a)(4), to undertake three actions in deciding whether BVA fact-finding that is adverse to a claimant is clearly erroneous and, if so, what the Court should hold as to that fact-finding.

Specifically, the three actions to be taken as noted in the plain meaning of the amended subsections (a)(4) and (b)(1) requires the Court to: (1) to review all evidence before the Secretary and the BVA; (2) to consider the Secretary's application of the benefit-of-the-doubt rule in view of that evidence; and (3) if the Court, after carrying out actions (1) and (2), concludes that an adverse BVA finding of fact is clearly erroneous and therefore unlawful, to set it aside or reverse it.

Therefore, as the foregoing discussion illustrates, Congress intended the Veterans Benefits Act section 401 amendments to section 7261(a)(4) and (b) to fundamentally alter the Court's review of BVA fact-finding. This is evident by both the plain meaning of the amended language of these subsections as well as the unequivocal legislative history of the amendments.

Amendments to section 7261, dealing with the same elements as did Veterans Benefits Act section 401, were included in S. 2079, introduced by Sen. Rockefeller on April 9, 2002.[9] Sen. Rockefeller stated in full regarding section 401:

> Section 401 of the Compromise Agreement would maintain the current "clearly erroneous" standard of review, but modify the requirements of the review the Court must perform when making determinations under section 7261(a) of title 38. CAVC would be specifically required to examine the record of proceedings—that is, the record on appeal—before the Secretary and BVA. Section 401 would also provide special emphasis during the judicial process to the "benefit of the doubt" provisions of section 5107(b) as CAVC makes findings of fact in reviewing BVA decisions. The combination of these changes is intended to provide for more searching appellate review of BVA decisions, and thus give full force to the "benefit of doubt" provision. . . . . However, nothing in this new language is inconsistent with the existing section 7261(c), which precludes the Court from conducting trial de novo when reviewing BVA decisions, that is, receiving evidence that is not part of the record before BVA.[10]

In light of this background, the post–Veterans Benefits Act section 401 mandate supersedes the previous Court practice of upholding a BVA finding of fact unless the only

[8] 38 U.S.C. § 5107(b)(emphasis added).
[9] See S. 2079, 107th Cong., 2d Sess., § 2.
[10] 148 CONG. REC. S11334 (remarks of Sen. Rockefeller) (emphasis added).

permissible view of the evidence of record is contrary to that found by the Board and that a Board finding of fact must be affirmed where there is a plausible basis in the record for the determination. Yet, the nearly impenetrable "plausible basis" standard continues to prevail as if Congress never amended section 7261. Why? The DAV believes this is because the Court cannot reasonably find a way around the clearly erroneous review applicable to factual findings.

With the foregoing statutory requirements, the Court should no longer uphold a factual finding by the Board solely because it has a plausible basis, inasmuch as that would clearly contradict the requirement that the Court's decision must take due account whether the factual finding adheres to the benefit-of-the-doubt rule. Yet, such Court decisions upholding BVA denials because of the "plausible bases" standard continue as if Congress never acted.

As stated earlier, entitlement to the benefit of the doubt is a statutory right, meaning its application should be an issue of law, not one of fact. However, its application is inherently measured against a set of facts. It therefore stands to reason that the Court should review issues concerning section 5107(b) with regard to how the Board applies a specific law to a specific set of facts. Consequently, the Court reviews the Board's application of law to facts under an arbitrary and capricious standard of review. Under such a standard, the Secretary's decision is still entitled to deference from the Court, unlike a *de novo* review wherein the Secretary receives no deference from the Court.

The VA is a unique, non-adversarial forum for the adjudication of veterans' benefits claims. The long-standing principle that those who have borne the battle have earned a statutory right to the benefit of the doubt when doubt arises in their disability claims is the backbone of our great system. Proper and consistent application of the benefit-of-the-doubt rule is critical to maintaining the unique characteristics of this status.

Recommendations:

- Congress clearly intended a less deferential standard of review of the Board's application of the benefit-of-the-doubt rule when it amended 38 U.S.C. § 7261 in 2002, yet there has been no substantive change in the Court's practices. Therefore, to clarify the less deferential level of review that the Court should employ, Congress should amend 38 U.S.C. § 7261 to specify that the Board's application of section 5107(b), the benefit-of-the-doubt rule is an application of law to facts and therefore entitled to review by the Court under an arbitrary and capricious standard.

- Congress should enact a joint resolution concerning changes made to title 38, United States Code, section 7261, by the Veterans Benefits Act of 2002, indicating that it was and still is the intent of Congress that the Court of Appeals for Veterans Claims provide a more searching review of the Board's findings of fact, and that in doing so, ensure that it enforce a VA claimant's statutory right to the benefit of the doubt.

- Congress should require the Court to consider and expressly state its determinations with respect to the application of the benefit-of-the-doubt doctrine under 38 U.S.C. § 7261, when applicable.

IX. EXPLORE THE PROS AND CONS OF PROVIDING THE COURT WITH SUMMARY DISPOSITION AUTHORITY.

The DAV would welcome meaningful discussion on the benefits and potential risks of providing the Court with limited authority to summarily dispose of certain classes of appeals. At this time, the DAV has not had the opportunity to explore this option to a degree that provides us comfort as an organization to fully support or oppose the concept. We nonetheless invite an open dialogue on the matter.

CONCLUSION

We are confident these recommendations, if enacted, will help streamline the protracted appeals process and drastically reduce undue delays. Some of recommendations contained herein may appear novel and/or controversial at first; they may even draw criticism. However, such a response would be misdirected. These recommendations are carefully aimed at making efficient an inefficient process without sacrificing a single earned benefit.

Until such improvements are made, the VA will never be able to maximize its recent increases in staffing. However, if such improvements are made, only then will the VA see vast improvements in its entire claims process—improvements that are essential to achieving the broader goals of prompt *and* accurate decisions on claims. Likewise, only then will the VA be able to incorporate training, quality assurance, and accountability programs demanded by the veterans' community. It has been a pleasure to appear before this honorable Committee today.