

**STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
JUNE 18, 2013**

Chairman Runyan, Ranking Member Titus and Members of the Subcommittee:

On behalf of the DAV (Disabled American Veterans) and our 1.2 million members, all of whom are wartime wounded and injured veterans, thank you for asking DAV to submit testimony to the Subcommittee for today's hearing examining the multi-layered processes and procedures available to veterans who believe that their claims for benefits have not been properly or fully granted by the Veterans Benefits Administration (VBA). As the nation's leading veterans service organization (VSO) assisting veterans seeking disability compensation and other benefits, DAV has tremendous experience and expertise relating to the processing of claims as well as the various ways veterans may appeal adverse actions and decisions.

Mr. Chairman, over the past several years, much attention has been rightly focused on efforts to reform VBA's claims processing system and reduce the unacceptable backlog of pending disability compensation claims. DAV continues to advocate that the only way to truly address both of these problems is by creating a new system and culture focused on getting each claim done right the first time.

However, even if VBA is able to reach its overly ambitious targets of all claims completed within 125 days at 98 percent accuracy that will still leave a large number of decisions that veterans will choose to appeal in some manner. Just as the number of claims is expected to continue rising in the coming years, particularly as more combat veterans return from battlefields across the globe and separate from service, so too are the number of appeals projected to rise commensurately. And just as there is an unacceptable backlog of claims pending at VBA, there is also an unacceptable backlog of appeals awaiting decisions from the Board and the Court.

To fulfill our mandate of service to America's wounded, injured, and ill veterans and the families who care for them, DAV employs a corps of more than 260 National Service Officers, all of whom are wartime service-connected disabled veterans who successfully complete their rigorous training in concert with VA's Vocational Rehabilitation and Employment Service. The military experience and personal claims coupled with treatment experiences of DAV NSOs through military health care and VA not only provide a significant knowledge base, but also help promote their passion for helping other veterans through the labyrinth of the VA system. DAV NSOs are situated in all VA regional offices (VARO) as well as in other VA facilities throughout the nation.

During 2012, DAV NSOs interviewed over 187,000 veterans and their families; reviewed more than 326,000 VA claims files; filed over 234,500 new claims for benefits; and obtained more than \$5.1 billion in new and retroactive benefits for the wounded, injured, and ill veterans NSOs represented in more than 287,000 VA rating actions.

To further assist veterans whose claims are denied or otherwise not fully satisfied, DAV employs National Appeals Officers (NAOs) located at the Board of Veterans' Appeals (Board) whose duty is to represent veteran claimants in their appeals before the Board here in the nation's capital. In FY 2012, our cadre of NAOs provided representation in 31.1 percent of all appeals decided before the Board, a caseload of approximately 13,789 appeals. Nearly 47 percent of the cases represented by DAV resulted in remands for further development. These remands resulted in additional consideration or development for over 6,400 claimants who had appealed cases that were not adequately considered by VARO's. In more than 29 percent of the cases, involving over 4,000 appellants represented by DAV, the veteran claimants' appeals were allowed, and the VARO denials were overturned. This means that approximately three-quarters of the appeals represented by DAV NAOs resulted in original decisions being overturned or remanded for additional development and re-adjudication.

When the Board determines a case requires further development before it can render a final decision, the cases are remanded to the Appeals Management Center (AMC) in Washington, D.C., with explicit instructions on the necessary actions. DAV NSOs collocated at the AMC's offices ensure that those cases for which we hold power-of-attorney (POA) are properly reviewed and re-adjudicated by AMC staff and that the Board's remand requirements are successfully met.

In addition, once the Board reaches a final decision veteran claimants have the right to appeal a Board decision to the United States Court of Appeals for Veterans Claims (Court). While DAV does not employ attorneys to provide representation before the Court, we do work closely with two private law firms that have agreed to provide pro bono services to veteran claimants pursuing their appeals. In 2012, these pro bono attorneys offered free representation before the Court in nearly 1,300 denied appeals and provided representation in over 1,000 of those cases. Since the inception of DAV's pro bono program, our attorney partners have made offers of free representation to more than 3,700 veteran claimants and have provided free representation in over 2,200 cases.

As we continue to state, if VBA can create a culture of deciding each claim right the first time, it will save tremendous time and resources for both veterans and the Department. The best way to resolve differences between what a veteran claimant seeks and what VBA provides is at the earliest stage in the process. By the time it reaches the Board or the Court, it is typically years after the claim was originally filed. For that reason, any review of the appellate process should begin with opportunities for resolution at the VARO level.

Actually, the first opportunity to address concerns or challenge a VBA claims decision is by NSOs who are given 48 hours to review claims decisions before they are formally issued. Our NSOs examine the evidence considered, the decision rendered, and the reasons and bases stated for that decision. When we disagree with the decision, our NSOs can discuss directly with

the VBA rating specialist who rendered the decision in order to discuss the particulars of the case and request that it be reconsidered before being issued. If still not satisfied, an NSO can bring the case to a Coach (supervisor), service center manager, or even the VARO Director to continue to seek changes. In some cases, NSOs are successful in pointing out evidence, facts, rules, regulations and/or laws that have not been properly applied, thereby resulting in a better, more accurate decision being issued by the VARO. Unfortunately, there are still too many instances in which the VARO effectively ignores valid arguments put forth by NSOs, resulting in unnecessary delays and denials of claims.

Once a decision is rendered by the VARO, the veteran has the right to appeal the decision to the Board and has one year from the date of notification to do so in the form of a Notice of Disagreement (NOD). DAV NSOs assist veteran claimants in initiating the NOD and all other steps at the VARO level. Because the majority of veteran claimants intent on appealing the VARO's decision submit their NOD well within the one year period, a false belief has come to light within VBA that a reduced appeal period of 180 days is all that is necessary. In fact, VBA recently testified before the Senate Veterans' Affairs Committee that the appeal period should be shortened to 60 days from the date of decision notification. DAV strongly disagrees with shortening the appeal period because many veteran claimants need the entire current one-year period to gather any additional supportive evidence. As such, DAV is opposed to any attempt to erode this important aspect of the appellate process simply for statistical gains for VBA.

In filing the NOD, the claimant is provided with the option to seek additional review of the decision at the VARO by a Decision Review Officer (DRO) in addition to a formal appeal to the Board. In most cases, our NSOs recommend that veteran claimants utilize the DRO process because a DRO has de novo review authority and can overturn the decision, whereas the Board is limited in its scope of review. The choice to pursue resolution through the DRO process resides with the veteran claimant and if they do not seek DRO resolution the appeal will continue to the Board; however, the DRO process is typically much quicker than an appeal before the Board and allows for additional opportunity for resolution at the VARO level.

A major concern that continues to plague the DRO process is the assignment of routine claims work to DROs by VARO leadership who are focused on reducing their pending workload. This is not how the process was intended to work, as these skilled individuals should be performing actions within the limited scope of appeals. In fact, prior to implementing the DRO process years ago, VAROs had specific individuals working as hearing officers, who amongst other duties would regularly conduct local hearings following the submission of a NOD from the veteran claimant. If requested by the veteran claimant, the hearing officer would conduct the hearing and render a new decision in the case. Many felt this process to be more beneficial to those veteran claimants who had representation; for this reason, as well as hearing officers becoming inundated with work, the DRO process was created to be more expansive and beneficial to all veterans.

Nonetheless, as stated, DROs are often not performing only appeals related actions; rather, they are routinely pulled away from their respective duties to assist with development and rating actions normally performed by veteran service representatives (VSRs) and rating veteran service representatives (RVSRs). In order for the DRO process to be fully effective as

envisioned, VAROs must not divert DROs from their intended work to help meet local work quotas and targets. If the veteran claimant remains unsatisfied with the DRO's decision, the appeal will continue to the Board.

Additionally, when submitting a VA Form 9, Appeal to Board of Veterans' Appeals, thereby perfecting the appeal and outlining the basic contentions and reason for appeal, the veteran claimant can request a formal hearing before the Board. Hearings are conducted either in person at the Board with the veteran claimant bearing the cost of travel; a hearing before the travelling section of the Board at the local VARO; or a hearing before the Board by way of live videoconference, which are usually set up for the veteran claimant at the nearest VARO. The first two offer in-person or face-to-face interaction with the Board member but there are challenges in terms of cost and delay.

As stated, the veteran claimant can appear before the Board in Washington, DC, but the veteran claimant must bear the cost of travel. Should the veteran claimant wish to appear before the travelling section of the Board at the nearest VARO, the time it takes to actually have the hearing can be 18 months to 2 years because of the amount of veteran claimants requesting this type of hearing and the Board's limited ability to hear cases during the periods when they are at VAROs, usually about 100 per week.

The more expedient type of hearing before the Board is the videoconference hearing. While this type of Board hearing has been slow in gaining wide acceptance, nearly 40 percent of all Board hearings last year were conducted via videoconference. In fact, DAV recommends this type of hearing to all veteran claimants who wish to appear before the Board as the technology and equipment used between the Board and VARO is quite satisfactory and the decision results are not adversely impacted. Furthermore, DAV supports the use of videoconference hearings as the default choice for hearing by the Board, provided the veteran claimant retains the absolute right to choose an in-person hearing before the Board in the alternative.

The Board makes final decisions on behalf of the Secretary on appeals from decisions of local VAROs. It reviews all appeals for benefit entitlement, including claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and health care delivery, primarily dealing with medical care reimbursement and fee-basis claims.

The Board's mission is to conduct hearings and issue timely, understandable, and accurate decisions for veterans and other appellants in compliance with the requirements of law. While the BVA controls jurisdiction over a host of issues, historically, 95 percent of appeals considered involve claims for disability compensation or survivor benefits.

In FY 2012, the Board conducted 12,334 hearings, about 2,400 fewer than the prior year, and issued 44,300 decisions, about 4,300 less than in FY 2011. The average cycle time from receipt to decision was 117 days, two days fewer than the year prior. The Board's accuracy rate for FY 2012 was reported at 91 percent, about the same as the prior year. While the number of

appeals filed fell from 38,606 to 37,326 in FY 2012, the number of appeals docketed at the Board increased from 47,763 in FY 2011 to 49,611 in FY 2012.

Based on historical trends, the number of new appeals to the Board averages approximately five percent of all claims received; as the number of claims processed by the VBA is expected to rise significantly, especially with the new Veterans Benefits Management System (VBMS), so too will the Board's workload rise accordingly. It is worth noting that in both FY 2011 and FY 2012 a significant number of VARO employees who would otherwise have normally worked on certifying appeals to the Board were instead focused on processing *Nehmer* and other Agent Orange-related cases, creating a backlog of appeals to be certified.

In addition, while the VBA is continuing the implementation of its new organizational model and VBMS system, the focus on processing claims has also shifted away from certifying appeals to the Board. With the *Nehmer* work now finished, and as the transformation process winds down over the course of the year, the VA is expected to turn to the backlog of pending appeals to be certified. This will undoubtedly lead to a surge of new appeals being sent to the Board in the next couple of years, further impacting the Board's already resource-constrained capacity to handle the rising workload.

Yet, despite the fact that workload is rising, and is projected to grow significantly as the VAROs begin to process both the backlog of claims and pending appeal certifications, the budget provided to the Board has been declining, forcing it to reduce the number of employees. Although the Board had been authorized to have up to 544 FTEEs in FY 2011, its appropriated budget could support only 532 FTEEs. In FY 2012, that number was further reduced to 510. Recently, the Board was provided an additional \$8 million, which has allowed them to begin increasing staff. As a result, it is our understanding the Board recently added new staff and will continue to do so with a projected FTEE of 538 by the end of FY 2013 and an FTEE of 618 by end of FY 2014. This increase in staffing will significantly help the Board reduce its pending caseload; however, we are concerned it may not be enough to keep pace with projected future increases in workload.

Moreover, this increase does not make up for the downward trend over the past several years at the pace the Board's workload is projected to rise. Additional workload is also expected to come from cases recently decided by VBA through its provisional rating decision program, wherein all cases older than two years were identified and are in the process of being rated before the end of June, as well as the paperless VBMS system directed at producing ratings quicker. Based on the expected workload increase in FY 2014, and even adjusting for productivity gains, we believe the Board is going to experience an increase of appeals from the current caseload of approximately 45,000 to a projected caseload of approximately 112,000 by FY 2017.

Concurrent with staffing increases, the Board will need to ensure that it has sufficient office space to house new FTEE. We are concerned about reports that as a result of VA initiatives to consolidate and eliminate excess office space, the Board may not have sufficient space for the planned staffing increase. Furthermore, in order for the Board to work efficiently, it will be necessary to have VBA's new IT system, the VBMS, fully deployed and integrated

with both VBA and the AMC. VBA must prioritize the final development and implementation of VBMS to the Board.

Beyond the Board, the veteran claimant has the right to appeal adverse decisions to the United States Court of Appeals for Veterans Claims (Court). This review process allows an individual to challenge not only the application of law and regulations to an individual claim, but also to contest whether VA regulations accurately reflect the meaning and intent of the law.

Just as the Board can remand cases back to the AMC or VARO, the Court has the ability to remand cases back to the Board when it finds errors in the application of the laws and regulations, affording additional opportunity for the claim to be favorably resolved. However, in some instances, the Court may issue a remand without resolving all issues related to the appeal. This can have the unfortunate result of further delaying what has already been a long and arduous process for a veteran or survivor seeking benefits. To help ensure that claimants that have already been waiting for years do not unnecessarily wait longer, Congress should consider amending Section 7261 of title 38, United States Code, so that the Court is required to render a decision on every legal issue raised by the appellant if it satisfies three conditions:

1. The Court has proper jurisdiction under section 7252 of title 38;
2. The issue does not require further adjudication or fact-finding below; and
3. The issue does not depend on the outcome of the remand of another issue before the Court.

During the 21 years 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 that does not reside in its own courthouse. The Court should be accorded at least the same degree of respect enjoyed by other appellate courts of the United States. Congress allocated \$7 million in FY 2008 for preliminary work on site acquisition, site evaluation, preplanning for construction, architectural work, and associated other studies and evaluations. No further funding has been provided. Congress should provide all funding as necessary to construct a courthouse and justice center in a location of honor and dignity to the men and women who served and sacrificed so much to this great nation.