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**STATEMENT OF
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COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
NOVEMBER 29, 2023**

Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at today's oversight hearing titled, "Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal."

DAV is a congressionally chartered, VA-accredited, non-profit veterans service organization (VSO) comprised of more than one million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. To fulfill our service mission, DAV directly employs a corps of benefits advisors, national service officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every Department of Veterans Affairs (VA) regional office (VARO) as well as other VA facilities throughout the nation, including the Board of Veterans' Appeals (Board).

More than 12.1 million claims for benefits have been submitted by DAV since the organization was chartered by Congress in 1932. In VA fiscal year (FY) 2022, DAV represented veterans and families in more than 13,500 decided appeals by the Board, which represented nearly 20% of all Board decisions, the largest amount of any accredited VSO.

Based on our experience, our testimony will focus on the quality of appeals decisions by examining the Board and its remand decisions, the performance of the Board in FY 2022, the Court of Appeals for Veterans Claims (Court) and its FY 2022 report, and our concerns and recommendations.

THE BOARD OF VETERANS' APPEALS

Established in 1933, the Board is an agency within the VA, which is responsible for making final decisions on behalf of the Secretary regarding appeals for veterans' benefits and services from all three administrations, the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the National Cemetery Administration (NCA), as well as the Office of General Counsel (OGC) that are presented to the Board for appellate review.

The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairman, members, and professional, administrative, clerical personnel. The principle functions of the Board of Veterans' Appeals are:

- Make determinations of appellate jurisdiction.
- Consider all applications of appeal properly before it.
- Conduct hearings on appeal.
- Evaluate the evidence of record.
- Enter decisions in writing on the questions presented on appeal.

All questions of law and fact necessary to a decision under a law that affects the provision of benefits to veterans or their dependents or survivors are subject to review on appeal by the Board. Additionally, the Board shall decide all questions pertaining to its jurisdictional authority to review a particular case.

The Appeals Improvement and Modernization Act

Starting in 2015, DAV collaborated with the VBA, the Board, and other stakeholders to improve and streamline the appeals process. The Appeals Improvement and Modernization Act (AMA), a veteran-centric appeals process, was the result of those combined efforts and was implemented in February 2019.

In the legacy appeals process, appeals could languish for several years within each VARO before being certified to the Board and then, potentially spend several more years there before a final decision.

AMA created three options, referred to as lanes, for claimants dissatisfied with the initial decisions on their claim. Claimants may seek a higher-level review of the decision based on the same evidence presented to the initial claims processors; file a supplemental claim that includes the opportunity to submit additional evidence; or appeal directly to the Board.

Claimants appealing to the Board may elect one of three appeal options: 1) a direct review of the evidence that the Agency of Original Jurisdiction (AOJ) considered; 2) an opportunity to submit additional evidence without a hearing; or 3) a hearing before a veterans' law judge (VLJ), which includes the opportunity to submit additional evidence.

The Board noted in its final FY 2023 quarterly report, published on its website, that 103,245 appeals were decided while receiving over 101,000 new appeals. There were 24,145 legacy appeals pending and over 180,000 pending AMA cases totaling 208,155 appeals pending on October 1, 2023. Of the appeals pending, it noted that AMA appeals on a direct route were pending an average of 577 days, AMA appeals with evidence were pending an average of 682 days and AMA appeals requesting a hearing were pending an average of 700 days.

Additionally, in FY 2023, the Board conducted 19,434 hearings, which is approximately 11,000 less than those held in FY 2022. At the end of the FY 2023, there were 1,054 legacy hearings and 71,411 AMA hearings pending for a total of 72,465 appeals awaiting hearings.

Legacy Remand Decisions

In the legacy appeals system, when a veteran files a VA Form 9 in response to a Statement of the Case issued by the VARO, their claim will go to the Board to be reviewed by a VLJ. The Board will then look through the veteran's file, consider all of the evidence submitted, and issue a decision. There are several situations in which the Board will decide to remand a claim, including:

- If the Board believes it needs additional information or evidence in order to come to a final determination;
- If the Board does not believe that the VARO evaluated the veteran's claim appropriately; and
- If additional evidence was submitted that the VARO did not review.

Importantly, in the legacy appeals system, the Board is obligated to remand for duty to assist errors that occurred at any time while the veteran's appeal was pending. If a veteran's case is remanded, the file will go back to the VARO, the agency of original jurisdiction (AOJ). In each remand, the Board will lay out specific remand instructions to which the VARO must adhere. For example, the Board can instruct the VARO to obtain a compensation and pension examination, medical records, service records, or other types of additional evidence. Once the VARO completes the Board's remand instructions, it will issue a decision on the veteran's claim. It can either issue a rating decision if it determines the veteran is entitled to the benefits sought on appeal, or a Supplemental Statement of the Case (SSOC), if it is unable to grant benefits. The issuance of an SSOC will automatically send the veteran's claim back to the Board so a final decision can be made.

In FY 2020 and FY 2021, the legacy remand rate was 40%. In FY 2022, the legacy remand rate was 42% and the Board stated in the report, that nearly 60% of the returned legacy remands pending at the Board have been remanded by the Board to the agency of original jurisdiction two or more times. In the last FY 2023 quarterly report, the legacy remand rate was 44%, which is an increase over the past three years.

AMA Remand Decisions

Under AMA, the Board is no longer obligated to remand for duty to assist errors. However, if the duty to assist error is pre-decisional, meaning it occurred prior to the VARO adjudication on appeal, the Board can remand the appeal back to the VARO with instructions to correct the error. For example, the Board may request the VARO to obtain an advisory medical opinion if it should have done so prior to the initial decision.

Additionally, under AMA, remanded appeals are not automatically returned to the Board following development and correction. Instead, the AOJ will readjudicate the appeal by re-reviewing the record, conducting the development necessary to correct the pre-decisional duty to assist error, and issue a new rating decision. A veteran's appeal will only return to the Board if the claimant files another Notice of Disagreement within one year of the VARO's readjudication.

If there is no pre-decisional duty to assist error, the Board is instructed to grant or deny the appeal for benefits based on the evidence considered by the VARO, and any evidence submitted during or within 90 days after the NOD or Board hearing.

In FY 2020 and FY 2021 the AMA remand rate was essentially 28%. In FY 2022, the AMA remand rate was 29%. In the FY 2023 last quarterly report, the AMA remand rate increased to 32%.

CONCERNS AND RECOMMENDATIONS

We are greatly concerned about the increased rates of legacy remand rates. In the last FY 2023 quarterly report, 70,584 legacy appeals were decided in FY 2023, with a grant rate of 34%, a remand rate of 44% and a denial rate of 17%. Appellants have the ability to submit new evidence throughout a legacy appeal. While we acknowledge this could be a factor for the increase in the remand rate, we ask why only 17% of the legacy appeals were denied. There is clearly some issue regarding the quality of these AOJ decisions, which we believe can be traced to training issues.

When the Board previously conducted hearings at the VAROs, often called travel board hearings, many of the VLJs traveling to the VAROs would conduct training with the local appeals teams. While these were conducted with the permission of the VARO Director and if the VLJs had time, DAV even participated in these training sessions. It is evident by the 17% denial rate at the Board, that training is desperately needed in VBA and at the VARO level.

One of the original intents of AMA was to reduce the amount of remands by the Board of Veterans' Appeals; however, the increased rate of AMA remands establishes that VBA claims personnel are committing a high volume of duty to assist errors pre-decision. We believe this high percentage of errors is, in part, due to training issues.

We believe these high duty to assist errors are verified by the June 2021 Government Accountability Office (GAO) report, "Veterans Benefits Administration Could Enhance Management of Claims Processor Training," which made ten recommendations for VBA to implement. Additionally, the report noted, "fully applying leading practices for training would provide VBA greater assurance that its workforce is sufficiently skilled to efficiently and effectively process disability claims and provide high-quality service to veterans." The report clearly identifies training issues within VBA.

Additionally, we believe VBA places an overemphasis on their own training manuals, adjudication manuals and training memos which are not binding on the Board. As noted in title 38, Code of Federal Regulations, section 20.105, “In the consideration of appeals and in its decisions, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues.”

Further, in December 2020, the Court held in *Kennedy v Wilkie* that a VA Fast Letter does not constitute “law.” It is clear that VBA focuses training of their claims processors to their own manuals and not specific to statutes, regulations and precedent decisions.

In the FY 2022 report, the Board states, “While the overwhelming majority of remands from the Court have instructions for the Board to provide additional “reasons and bases” for its denial decision, the Board and VBA are assembling a tiger team to evaluate root causes and ways to reduce remands from the Board to VBA. While doing this, the Board is exploring options to enable it to better address original Legacy system appeals still pending that have never been seen by a Board judge because of these remands that continue to have priority.”

We recommend that the Board institute this tiger team not only to determine the root cause of remands, which we believe is partly development errors, but also to provide training on these specific issues. Additionally, the training needs to impress upon VBA it needs to focus training on the law, not internal manuals.

The Board’s legacy and AMA remand decisions both increased during FY 2022 and FY 2023, which speaks directly to the quality of the decisions being made by AOJs and inversely speaks to the quality of decisions made by the Board.

QUALITY OF BOARD DECISIONS

In order to effectively discuss the quality of Board decisions, we must take a look at several factors, including the intake and docketing of AMA appeals, the GAO testimony of July 13, 2021, the Board’s FY 2022 annual report, as well as the Court and its FY 2022 annual report.

Intake and Docketing of AMA Appeals

In January 2020, the Board established the Office of the Clerk of the Board, an internal Board resource formed to ensure the proper docketing of AMA appeals. The Clerk’s Office also works to identify and correct AMA docketing errors, improve Board training around AMA issues and assists VA IT professionals in refining the technological tools used by Board staff to process AMA appeals.

Although the Clerk of the Board was created, DAV continues to discover AMA appeals that are deemed invalid and should not have been docketed. For example, veterans who have received a proposed reduction from VBA are filing an appeal, VAF 10182, directly to the Board. However, since this is a proposed action and not a final action, the issue is not under the Board's jurisdiction and thus is an invalid appeal. This invalid appeal may not be discovered for months or longer while the veteran is completely unaware. In many instances, this has negatively impacted veterans as they could not take other timely actions.

In our July 2021 testimony to this Subcommittee, we reported that DAV's National Appeals Office located at the Board estimated that 1 in 25 cases reviewed for an informal hearing presentation and 1 in 100 cases reviewed for a hearing were invalid appeals that should not have been docketed.

Then in 2021, the Board learned that a number of veterans may have had their Board Appeal forms mistakenly rejected for being untimely. The Board sent out notifications that VA Forms 10182 submitted to the Board between February 19, 2019, and March 23, 2021, may have been improperly rejected as untimely. Impacted veterans were invited to resubmit the Notice of Disagreement (NOD).

In January 2022, the Board sent out another notice that delays to the Board's ability to mail correspondence between July 13, 2021, through December 31, 2021, may have impacted timely submissions and invited veterans to request that the Board consider a previous submission that was not addressed or reconsider a prior determination that a submission was untimely.

CONCERN AND RECOMMENDATION

It is important to note that the decisions on the timeliness of the NOD is currently not a written decision made by a VLJ, but an intake clerk. This means the timeliness of the NOD determination by the Board is not appealable.

Given the problems with the intake and docketing of AMA appeals, we recommend that a decision by a VLJ on the timeliness of the NOD be added to the appeals process. To accomplish this goal, DAV supports H.R. 5891, the Veteran Appeals Decision Clarity Act as it would require a written determination on the timeliness of the NOD.

The problems identified with intaking and docketing cases, speaks to the quality of the decisions made by the Board and a need for improving the quality of decisions and a thorough quality assurance program.

GAO Testimony of July 31, 2021 before the Subcommittee

The testimony specifically notes, "Board officials recently told us that while they have conducted some analysis to ensure that decisions are accurate and consistent,

they are developing a quality assurance program that measures and reports the accuracy of its decisions on AMA appeals. Developing this program, according to Board officials, involves efforts such as determining the appropriate criteria and statistical practices to assess decision quality, collecting baseline data, and specifying an AMA quality goal. Board officials told us they plan to set and use an AMA quality goal in fiscal year 2022.”

Additionally, GAO noted, “Developing and implementing a comprehensive quality assurance program is important as the Board contends with its large workloads, which potentially create pressure to sacrifice the quality of work activities to meet timeliness goals. This scenario could result in incorrect decisions, or rework to correct errors or issue new decisions, thus affecting timeliness from the veteran’s perspective.”

In the Board’s most recent annual report, they refer to a Quality Assurance (QA) program, the Office of Assessment and Improvement (OAI) and the Board’s independent review process. However, none of this is well-defined or explained in any great detail.

The Board of Veterans’ Appeals Annual Report Fiscal Year 2022.

The report states the Board adjudicated 95,294 decisions, which is 4,000 fewer cases than adjudicated in FY 2021. Specific to the issue of quality, of the more than 3,400 cases sampled during FY 2022, statistical analysis revealed a quality assurance rate of approximately 94.66% for legacy appeals decisions, which improved over FY 2021 from 92.06%. For AMA appeals decisions, the quality assurance rate for FY 2022 was 91.91% compared to the FY 2021 quality assurance rate of 87.48%

The Board noted in its FY 2022 report, “The Board has been collaborating closely with GAO to evaluate areas for continued improvement in the Board’s Quality Assurance program. This includes evaluating potential root causes for declining, but continuing, trends related to unnecessary or improper remands under the AMA. The Board is monitoring the outcomes in cases appealed to CAVC and the United States Court of Appeals for the Federal Circuit to identify trends that may help enhance the Board’s Quality Assurance program. The Board will continue its collaboration with VA’s OGC to provide targeted trainings to VLJs based on trends seen in these court cases.”

We are encouraged by the increase in the quality assurance of the decisions for the legacy and AMA appeals and an improved quality assurance program. However, the Board is quick to point out that the mere discovery of an “error” in a decision does not mean that the Board’s decision was “wrong.”

In FY 2022, of the total 261 errors called, only 4 errors were deemed clearly and unmistakably erroneous, where the decision erroneously states the facts or the law and, but for the error, the decision result would have been manifestly different. The report further states there are many other quality “error” categories that do not necessarily involve a procedural defect or incorrect outcome.

Additionally, they report “approximately 7.28% of errors identified in the Board’s Quality Assurance process were based on a need for the Board to fully address all raised contentions and theories of entitlement. Again, please note that fully addressing each contention or theory of entitlement does not necessarily result in a different outcome.” Through the lens of quality and accurate decisions, we view this as a very troubling statement from the Board. Their focus should be on the requirements of law, which requires it to consider all theories or avenues of entitlement, because in many cases that can result in a grant of the benefits being sought.

The report also states that, “OAI reviews Board decisions to ensure compliance with the duty to assist and evidentiary rules under the AMA, even if such an “error” is not adverse to the appellant.” This is a stunning statement considering the Board has vastly increased remand decisions based on duty to assist errors as previously noted.

The FY 2022 report does show improvement in the quality of the Board’s decisions, yet the Board downplays the significance of certain errors that are discovered in its decisions, which fall under the jurisdiction of the Court of Veterans Appeals. Let’s review the Court and its FY 2022 Annual Report.

The Court of Appeals for Veterans Claims

Until the Court was established in 1988, veterans had no court of law where they might appeal the decisions on veterans’ benefits. A veteran whose claim VA denied was therefore afforded no independent review of VA decisions; that veteran was therefore denied the right to go to court to challenge the decision of an administrative agency. Prior to the establishment of the Court, the last line of appeal for veterans and their families was the Board of Veterans’ Appeals.

In order to obtain review by the Court of a final decision of the Board of Veterans’ Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date of the decision.

The Court has exclusive jurisdiction to review decisions of the Board and has the power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate. The Court must confine its review to the Board decision and may not consider any evidence which was not of record before the Board. In other words, an appeal to the Court cannot contain new evidence.

Court of Appeals for Veterans Claims FY 2022 Annual Report

According to its annual report, in FY 2022, the Court received 7,344 appeals along with 280 petitions and 6,530 Equal Access to Justice Act (EAJA) applications. During FY 2022, the Court issued 15,136 decisions addressing 8,164 appeals, 260 petitions, and 6,534 EAJA applications.

The number of new cases filed at the Court in FY 2022 decreased by 8%. This decrease correlates to a reduction of final decisions issued by the Board. The report states, "In FY 2022, the Board decreased production of final decisions from 99,721 in FY 2021 to 95,294. Over the course of FY 2022, the Court averaged 612 appeals filed per month, and reached a high of 717 appeals filed in March 2022."

Out of the 8,164 decisions decided, the Court affirmed the Board's decision in 411 appeals, affirmed or dismissed in part, reversed or vacated and remanded in part 3,245 appeals, reversed or remanded 3,629 appeals, and dismissed 879 appeals.

CONCERNS AND RECOMMENDATIONS

Based on the GAO report of July 2021, the Board has implemented and improved its quality. It reported an increase in the quality of decisions for legacy appeals at 94.66% and AMA appeals at 91.91%; however, the Court only affirmed the Board's decision in 5% of appeals. This, coupled with the Court reversing or remanding 44% of the Board's decisions, acknowledges an issue with the quality of decisions.

The Board has indicated it needs to train VBA on remand issues and it is clear training from the Court is needed due to the large number of remanded cases. We recommend a renewed focus on quality by establishing a training program for VLJs. This should include feedback and input from attorneys and judges at the Court.

For many veterans and appellants, while appeals are streamlined by the AMA it can still take years to get a decision from the Board and the Court. With the Court reversing or remanding 44% of the Board's decisions, this can lead to more years of waiting for a remand decision to be finally decided. The Board has shown improvement in quality; however, with the amount of remanded cases and the low percentage of affirmed cases, quality is still a major issue and concern for DAV.

Mr. Chairman, this concludes my testimony on behalf of DAV. I am happy to answer any questions you or members of the Subcommittee may have.