

**STATEMENT
OF
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THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
"VETERANS' DILEMNA: NAVIGATING THE APPEALS SYSTEM FOR VETERANS'
CLAIMS"**

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For the last half decade there has been a tremendous amount of focus on reducing the backlog of veterans' claims. According to the Department of Veterans Affairs (VA) the backlog consists of claims pending longer than 125 days. Unfortunately, with such intense focus on a single topic, it is easy to lose sight of the big picture. When focus becomes narrow, what is not being seen?

According to VA¹ there are 519,530 claims awaiting adjudication of which 253,522 have been waiting longer than 125 days. That's a little under 49 percent.

Within the same report, but less publicized is the fact that 288,290² additional claims have been appealed and are awaiting adjudication.

One hundred percent of those claims have been waiting longer than 125 days.

To understand the frustrations of veterans in the appeals process, you must first understand that every single one of these claims is backlogged. With appealed claims, you can no longer think in terms of how many days you've been waiting. Appealed claims are measured in terms of how many *years* the veteran has been waiting.

According to VA's figures³, the average number of days to complete a claim is 179 days; the average number of days pending for a notice of disagreement is 407; the average number of days pending for Form 9s is 630; the average number of days pending for remands at the regional office is 550, and the average days pending at Appeals Management Center (AMC) is 171. Adding the average days together, the average veteran with a claim remanded by the Board of Veterans Appeals (BVA) would wait an average of 1,937 days or about five and 1/3 years. The stated goal of 125 days to adjudicate a claim is only 6 percent of the time that the average veteran has to wait to have a claim move through the appellate process.

¹ VA Monday Morning Workload Report – January 5, 2015

² Ibid

³ Ibid

As the nation's largest wartime veterans' service organization, The American Legion devotes substantial resources to ensuring veterans get full, equitable due process when applying for benefits derived from their medical conditions incurred in service. The American Legion accredits over 3,000 professionally trained service officers nationwide to assist veterans through the initial claims and appeals process. The American Legion's team at the BVA represents well over 9,000 veterans annually and with a high degree of success.

It's not enough simply to rely on reports from the field. The American Legion also has a dedicated process for sending experts to VA Regional Offices (VAROs or ROs) across the country to conduct Regional Office Action Review (ROAR) visits. The ROAR visits combine reviewing recently adjudicated claims with interviews conducted with VA staff at all levels of RO operation. The recently adjudicated claims are provided to The American Legion by VA in each office, and represent a random sampling of claims of veterans represented by American Legion Powers of Attorney.

Furthermore, over the past year American Legion Veteran Crisis Command Centers (VCCC)s and Veteran Benefits Centers (VBC) have reached thousands of veterans in over a dozen cities, assisting veterans with their claims and helping veterans in need receive nearly \$1 million in retroactive benefits due to them⁴. However the impact of these VCCC)s is better measured in the stories of the veterans struggling to navigate the claims and appeals system.

In August 2014, a VCCC was conducted in conjunction with The American Legion's National Convention in Charlotte, North Carolina. A female veteran sought our assistance associated with a sexual assault she suffered while enlisted in the Marine Corps. For years she suffered and was unable to get assistance for posttraumatic stress disorder (PTSD) associated with the assault. Beyond the psychological effects of the assault, she suffered physical conditions and required a walker for mobility.

Through spending an hour with American Legion accredited representatives that were working closely with VA personnel from the Winston-Salem VARO, she was granted service connection for her previous claims and the accompanying appeals. The veteran relayed overwhelming relief about *finally* being able to receive treatment through VA and to begin to close that chapter of her life.

At a VCCC in El Paso, Texas, one veteran had been attempting to receive disability benefits since 1970, but due to a lack of communication between VA and the veteran and inaccurately adjudicating the claim by VA, the veteran had been unable to receive benefits for over 40 years since filing the initial claim. This illustrates the long and tortuous nature of the appeals process.

The VCCC)s also provided examples highlighting the close connection between homelessness and breakdowns in the claims adjudication process. Virtually all locations had stories of veterans suffering from homelessness or near homelessness. In Fayetteville, North Carolina, a veteran living in a car sought and received disability benefits. So pleased with the outcome, he returned to the Legion post hosting the event and announced to the other attendees that his bank

⁴ <http://www.legion.org/veteranshealthcare/225719/legion-benefits-centers-start-townhall-meeting>

account reflected an \$11,000 retroactive payment and was thrilled that he and his son could move out of his car and into a stable living environment.

When veterans struggle to navigate the claims and appeals system, this is the very real and visceral outcome. This is why it is critical to end the cycle of repetitive error and reform appeals by getting the claims done right the first time.

Throughout these efforts – whether through service officers, interviewing VA employees, working at the Board of Appeals, or helping veterans in VBCs across the country -- certain things have become quite clear about the claims process. Pressure and focus to produce quantity over quality leads to needless errors that could be corrected the first time around and would cut out years of delay; there is a disconnect between the VAROs and the BVA over the Duty to Assist required by law; and VARO employees in many offices have an improper understanding of the authorities granted to VA in the claims process, leading to a lack of decision making at the lower levels which could prevent years of waiting in delays.

American Legion employees represented over 9,100 veterans at the BVA between October 2013 and September 2014 (FY 2014). Approximately 75 percent of those claims were either granted outright to the veteran (28.1 percent) or remanded because the RO had not done their proper work (46.4 percent). Again, nearly three quarters of the claims at the Board of Appeals are erroneously adjudicated at the RO level, or inadequately developed and/or prematurely denied at the RO level.

For years VA has consistently stated that they do not place priority on quantity over quality when adjudicating claims, yet this is not borne out under close scrutiny. During routine ROAR visits over the past decade, American Legion staff trained to review claims note 40 percent or more of the claims reviewed are improperly or erroneously adjudicated according to American Legion analysis. While VA has claimed accuracy rates in the 90 percent range and higher, the Government Accountability Office found “VBA does not follow accepted statistical practices and thus generates imprecise accuracy data⁵.” Furthermore, the same report indicates VA has shifted to a new method for measuring accuracy that increases their accuracy numbers, but The American Legion disputes whether this really is reflecting the impact of errors on veterans’ claims. Under the new system, adopted in October of 2012, “a veteran could submit one claim seeking disability compensation for five disabling medical conditions. If VBA made an incorrect decision on one of those conditions, the claim would be counted as 80 percent accurate under the new issue-based measure⁶.” Under the old system, if VA made an error on the claim, the claim counted as being in error.

What the new accuracy system fails to reflect is the interconnected nature of many veterans’ disabilities. Veterans’ disabilities are often characterized by how they interact with one another, and disabilities caused or aggravated by other service connected disabilities can be service connected themselves. If a veteran’s damaged knees and hips lead to lower back problems, the veteran is entitled to have their back problems treated and compensated. Likewise if a veteran’s

⁵ Government Accountability Office report GAO 15-50 VETERANS’ DISABILITY BENEFITS Improvements Could Further Enhance Quality Assurance Efforts - NOV 2014

⁶ Ibid

diabetes caused by exposure to Agent Orange causes peripheral neuropathy to develop, the veteran is due treatment and compensation for that painful nerve disorder.

Under VA's new accounting system for errors, if VA erroneously denied service connection for diabetes, the error monitoring would not note how that impacted the claims for neuropathy, eye disorders, foot disorders and other problems common to those who suffer the effects of diabetes. In the interest of generating high accuracy numbers, the big picture of how veterans' lives are impacted by their disabilities is being lost.

But the accuracy numbers alone do not reflect the additional challenges. Interviewing VA employees during ROAR visits, the employees reflect that meeting their production numbers drives all work demands in the RO level. Employees are being rushed to complete these claims, and rushing through those claims leads to errors. When a veteran's claim is decided in error, it must be appealed. As noted earlier, when a claim goes to appeals status, the wait is no longer measured in hundreds of days, but in thousands.

If accuracy was truly equal to production numbers, these errors could be eliminated and the number of appeals could come down dramatically. It's all about getting it right the first time.

Not every error at the RO level is based on speed and accuracy. By examining thousands of claims at the Board of Appeals, The American Legion commonly sees errors regarding proper Duty to Assist that the Board must remand to the RO for proper development. The veterans' disability benefits process is intended to be non-adversarial. The VA is required to assist veterans with certain aspects of their claim, such as ensuring they receive medical exams to determine the nature and severity of their injuries. Common VA errors with Duty to Assist include failing to schedule compensation and pension exams, inadequate compensation and pension exams, failure to assign a proper rating to disabilities, and failure to consider conditions manifesting secondary to a previously service connected disability.

This failure to consider secondary service connected conditions is understandable in light of VA's accuracy numbers failing to recognize the interconnected nature of service connected disabilities. However, though it is understandable, it is not right, and it does not reflect the veterans' rights under the law.

Even more troubling is the cyclical nature of many of the remands. When a claim is remanded by the BVA, it is sent to the Appeals Management Center (AMC) to conduct the development the administrative law judge determined was necessary to adequately adjudicate the claim. Often, this involves scheduling another compensation and pension exam or requesting additional documentation be provided by the veteran or other federal government organizations. Despite the BVA judge providing clear instructions to AMC personnel, often times American Legion representatives note a failure to comply with the clear instructions and again the claim is remanded and this begins the hamster wheel of remands where a veteran remains in an adjudication purgatory until a final decision can be rendered by BVA.

Failure to comply with specific instruction from the Board of Appeals cannot be allowed to continue.

Beyond the error rate noted on American Legion ROAR visits and BVA grant/remand rates is the perception that BVA administrative law judges have authorities not granted to the VA adjudicators. Due to the VA health care scandal that broke in 2014, The American Legion established Veterans Crisis Command Centers to assist veterans that were not receiving their entitled benefits and health care. During one of the events, a veterans' service center manager stated that he could not approve a claim; however, a BVA judge may be able to approve it due to being a judge. Nowhere within the Code of Federal Regulations (CFR) or in case law does it state a BVA judge has additional authority over any other level of the claims process.

Furthermore, on ROAR visits when discussing decisions of the Court of Appeals for Veterans Claims (CAVC) and case law with VA adjudicators, American Legion personnel are routinely told "Oh, that's a court case, that's for the Board to figure out." This is inaccurate and deeply troubling. Precedential court decisions apply at all levels of the veterans' claims process, and must be integrated more effectively into training.

Some of these problems can be fixed with some simple changes. A renewed emphasis on attention to detail would help. Increased emphasis on training at all levels is essential. Ensuring the VA adjudicators understand the law and process at all levels can help.

The biggest impact on the appeals process would be working to eliminate appeals in the first place. This comes from getting the claims right the first time they cross the VA's desk. The American Legion believes a revision to the current work credit system would be instrumental in inculcating a "get it right the first time" culture within VA. The American Legion believes that the work credit system needs to be amended so adjudicators receive credit not only for the quantity of work, but also for the quality of work. By this, we would like to see a work credit system that adequately applies negative credit to work found to be in error, whether by decision overturned on appeal, through internal reviews within the VA, such as the Systematic Technical Accuracy Review, or by any other means that are applicable⁷.

If work is found to be in error, it needs to be taken out of the count of claims completed, because that claim has not been completed. By this simple adjustment to the work credit system, the focus of the workers, and the managers who drive them, is balanced. Sure speed remains important, as it should. However, if you start working so fast that you're missing details and getting the claims wrong, you don't deserve credit for that work.

Fixing the appeals process begins with adherence to strict standards for quality at all levels of the disability claims process. With so much attention this year devoted to monitoring whether VA will meet former Secretary Shinseki's stated goal of "no claim pending more than 125 days with 98 percent accuracy" it is important not to lose sight of the peripheral side effects of that goal. With so much effort directed at driving down the initial claims numbers, we must be vigilant to ensure they're not just being passed on into the appeals pile – and turning hundred day waits into thousand day waits.

Questions concerning this testimony can be directed to The American Legion Legislative Division (202) 861-2700, or lprovost@legion.org

⁷ American Legion Resolution 139: Revision of Work-Rate Standards for Department of Veterans Affairs Adjudicators – AUG 2014