The Honorable Kenneth B. Kramer, Former Chief Judge of the United States Court of Appeals for Veterans Claims

Statement of
The Honorable Kenneth B. Kramer
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Battling the Backlog:
A Retired Judge Looks At the VA Claims Adjudication and Appeals Process

Mr. Chairman, Ranking Member Akaka, and Members of the Committee:

It is an honor to be asked to provide my thoughts as to how the VA claims adjudication and appeal process might be able to provide more timely and accurate decisions. My suggestions are based upon my personal observations growing out of a career in which I have had the privilege of serving first in the military and then as a civilian in all three branches of the Federal government. The last 15 years of my service was as a Judge of the U.S. Court of Appeals for Veterans Claims (Court), the last four of which was as Chief Judge, the position from which I retired last fall.

As preliminary matters, I want to make sure that it is understood that I speak only for myself, not for the Court, and that my remarks are not in any way meant to be critical of any individual or institution but only directed to what I see are systemic problems that no individual or institution could remedy without statutory changes. I also want to make sure that it is understood that I do not pretend to offer perfect solutions, only starting points to fixing the major problem as I see it ? the almost never-ending cycles of both Board of Veterans' Appeals (BVA) and Court ordered remands in far too many cases. These remands clog the system and prevent timely justice for all claimants, those who are trapped in the remands themselves and those who wait for those who are trapped. Lastly, I congratulate the Committee for its willingness to begin to take on the challenge of changing a system that has already been the subject of significant study and its recognition that, despite that study, the system is still plagued by backlog and delay and the frustration that accompany them. Making major changes will not be easy ? there will be opposition from those feeling threatened by new ways of doing business, but I believe that, if all the stakeholders are permitted to participate actively in crafting these changes, they can happen.

I have three major recommendations, the first of which would affect both the administrative and judicial processes, the second of which would affect primarily the former, and the third of which would affect primarily the latter.

1. Despite the controversy and resources expended over the former requirement of a claimant having to present a well-grounded claim before being entitled to the VA-provided duty to assist, and despite the controversy and resources already expended in the purported fixing of the problem, it appears that little has changed regarding what is, in most cases, the major need for such a duty: That is, to provide a thorough medical opinion as to the causative relationship between present disability and military service. Indeed, it appears that 38 U.S.C. § 5103A(d)(2)(B), in essence, reimposes a well-grounding requirement to obtain such an opinion. To avoid much future litigation and future cycles of both BVA and Court ordered remands, this provision should be clarified.

Where causation is at issue, I believe that obtaining a medical opinion on this issue at the earliest possible time in the claims process would likewise result in much earlier finalization.

One approach could be that once there is evidence of both present disability and a possible event in service, a claimant would be entitled to such an opinion.

Needless to say, this would put a heavy burden on VA, but I would be hopeful that both cost and emotional savings from early resolutions, would offset the expenditures and reorganization that such a change would require. One possible quick fix would be for every VA physician treating a new condition to fill out a standard form addressing causation including possible comment on the need for the consideration of additional documentation prior to rendering an opinion.

2. I have seen too many claims that have remained in the VA administrative system despite the passage of more than a decade. Many of these are caught in a cycle of remands between a VA regional office (RO) and the BVA and the confusion and bureaucracy that is created by the back and forth transmission of documents. And many times the claimants are themselves part of the problem by continuously sending in more and more papers that in turn result in delay and frequently new adjudications.

In my view, in keeping with the theme expressed in my preceding recommendation, the adjudicative objective should be to finalize as many claims as possible at the RO level. In order better to achieve this objective, I also recommend that Administrative Law Judges (ALJs) or, at a minimum, Veterans Law Judges (VLJs), working at the final stage of RO adjudication where there is claimant disagreement, should insure that all necessary development has taken place and that, in the event of such a judge's continuing denial, should prepare, in lieu of a Statement of the Case, a decision as thorough as one now prepared by the BVA. In essence, what is being suggested is to decentralize high level administrative decision making. (I would also note that the VA itself has taken initial steps in this direction by implementing a voluntary Decision Review Officer program staffed by more experienced adjudicators.)

Once such a decision was rendered, only formal motions that specified and articulated errors in the decision or made offers of proof would be accepted by the ALJ or VLJ. In such event, claimants would be permitted to hire counsel, if they chose to do so, to file such motions. Under present law, counsel may only be retained after an adverse BVA decision. Some will oppose such a change as upsetting the non-adversarial agency process, which in my mind is illusory once you have said ?no? to a claimant. Permitting such a motion prior to an appeal to the BVA would allow for additional building of the evidentiary record often critical to success. Only after the prerequisite motion had been filed and a response from the ALJ/VLJ resulted in continuing denial would an appeal to the BVA be allowed. At this point, the record would be closed and no further evidentiary submissions could be made.

The approach suggested here will likely require many more ALJs or VLJs than the number of VLJs presently at the Board. Some will come from the present Board but others will have to be hired along with staff. Thus, as with the additional expenditures and reorganization of the medical side of the house likely needed for the implementation of my first recommendation, this recommendation also will carry with it additional expenditures and the need for reorganization of the adjudicative side of the house. Nevertheless, it is possible that here, too, overall savings will result by removing vast amounts of paper and vast numbers of the adjudicative hours required by the present system.

3. I am a big believer in the success of independent judicial review. It has caused VA decision-making to be light years ahead of where it was before such review by requiring that decisions be based on the real evidence and hard analysis, often previously missing. The bottom line is that judicial review has done much to bring about accurate decisions and helped insure fairness to our nation's veterans.

That said, judicial review has done little, if anything, to improve timeliness and, indeed, viewed objectively, can be seen as a real part of the problem. In the worst case, which happens more than occasionally, a veteran dies, leaving a case unresolved. Just as the administrative process itself is involved in the ever-revolving RO-BVA two-step, judicial review turns that two-step into a four-step, adding on additional years to the process with a cycle of remands between the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) and the Court and between the Court and the BVA. As to the latter, I myself have seen too many cases come back to the Court after two previous Court remands to the BVA and the passage of nearly a decade since the initial appeal to the Court was first brought. As to the former, an appeal to the Federal Circuit from the Court often carries with it two more years of the claimant's life; and in the event of a Federal Circuit remand back to the Court, I would estimate that another year can be added on, to say nothing of the additional years that will be involved if the Court in turn remands the case back to the BVA.

Under existing law, there are four levels of possible appeal ? one administrative appeal to the BVA and THREE levels of judicial involvement: The Court, the Federal Circuit, and the Supreme Court. Stated simply, this is more ?justice?? than the system can properly bear. Indeed, justice delayed is justice denied and the timeliness problem cannot be fixed without reforming the judicial process.

There is no compelling reason to have so many layers of judicial review. The only fathomable argument in support is that the party who has lost at the Court will have one more opportunity to demonstrate the rightness of that party's view. Although there is no question that the Court does make mistakes and is not omniscient, the same is true of the Federal Circuit. Indeed, the Court has far greater expertise in veterans law. This capability is an outgrowth of nothing more complicated than the fact that this subject is the Court's sole business, while it is only a part-time focus of the Federal Circuit. Moreover, the reality of confusion over conflicting judicial decisions is directly proportionate to the number of judicial bodies involved in the process.

In my view, the best fix would be to make the Court, in all respects, the final arbiter of veterans law, short of the Supreme Court to which appeals still, of course, should be allowed. Moreover, to provide for greater finality and fewer remands to the BVA, I would change the Court's organic law to clarify the Court's power to review BVA benefit-of-the-doubt determinations. Where a fully developed evidentiary record clearly reflects entitlement to a benefit or clearly reflects a claimant's inability to succeed, the Court, in spite of otherwise remandable BVA error, should end the matter, either respectively, with an award of a benefit or an affirmance based on non-prejudicial error.

The other possible approach to eliminating layers of judicial review would be to merge the Court into the Federal Circuit. The Federal Circuit's history itself reflects one of merger and spin-off. Such a merger would give the Federal Circuit a much bigger diet of veterans cases, thereby increasing its expertise. And it would provide for Article III decision making, the very reason that the Federal Circuit was originally put into the process. Despite these considerations, it is my view, with 15 years of history behind the Court, that the preferable course of action would be to eliminate Federal Circuit review. First, I think it is preferable to have judicial review exclusively focused on veterans cases. Second, even with an added focus on such cases, the Federal Circuit's primary focus will remain with intellectual property matters, the compelling reason for its own creation. At this juncture, I would think that few proponents still remain of the need for Article III review, short of the Supreme Court, of veterans cases. The Court's history shows that the threat of its being captured by its constituents has never materialized.

Lastly, the model of Article I court review being the final stop before review to the Supreme Court has been in place for half a century. Indeed, appeals from the only other Article I appellate court-The U.S. Court of Appeals for the Armed Forces-are brought directly to the Supreme Court.

Thank you for the opportunity to be heard. If I can be of further assistance in providing our veterans with the best justice system possible, I stand ready to help in any way that I can.