

Mr. Robert Chisholm, Past President, National Organization of Veterans Advocates

Statement of  
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Past President of the  
National Organization of Veterans Advocates  
Before the  
Committee on Veterans' Affairs  
United States Senate  
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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates (?NOVA?) on the current state of VA claims adjudication and the appeal process. NOVA is a not-for-profit educational organization created under 26 U.S.C. § 501(c)(3) for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents, before the Court of Appeals for Veterans Claims (?CAVC?) and on remand before the Department of Veterans Affairs (?VA?). NOVA has written many amicus briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit (?Federal Circuit?). The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000. The positions stated in this testimony have been approved by NOVA's board of directors and represent the shared experiences of NOVA's members.

For the past fourteen years I have been representing claimants at all stages of the veteran's benefits system from the VA regional office to the Board of Veterans' Appeals to the CAVC as well as before the Federal Circuit. My testimony, which has been approved by NOVA's board of directors, is based on my experiences during those fourteen years, which have been shared by my colleagues in NOVA.

#### The Appeals Process Before the VA

The VA appeals process begins with the filing of the ?notice of disagreement.? A disappointed claimant has one year from the date of the unfavorable decision in which to file the ?notice of disagreement.? The VA is then required to respond to the ?notice of disagreement? with a new decision or with an explanation to the claimant in greater detail why the claim was denied. If the claimant remains dissatisfied with the response from the VA, the claimant is required to file a substantive appeal (in essence a second appeal letter) to bring the case before the Board of Veterans' Appeals. The Board can grant the claim, deny the claim or remand the claim back to the regional office if it determines the regional office erred in deciding the claim. It is not uncommon to see claims remanded from the Board back to the regional office multiple times before a final decision is made on the claim. The Chicago Tribune ran a story on May 16, 2005 illustrating how the repeated remand process harms veterans.

When the case is denied by the Board, the claimant has a 120 day window to appeal the case to the CAVC. It will ordinarily take another twelve to eighteen months for the CAVC to decide the appeal. When the Court acts in the claimant's favor, the result will most likely be a remand back

to the Board of Veterans' Appeals. See *Swiney v. Gober*, 14 Vet. App. 65 (2000) (wherein the CAVC acknowledged "outright reversal on the merits has been very rare" and remands are the norm). The remand from the CAVC provides the claimant with the opportunity to submit additional evidence and arguments in favor of the claim at issue, and it preserves the claimant's favorable effective date if there is an award of benefits. With the average age of a veteran now at 58, the problem is that many claimants do not survive the protracted adjudicatory process. Those claimants who do survive are fatigued and discouraged by interminable delays before the VA. The chart below shows average time periods for each stage of the administrative process (i.e., excluding time at court).

Time Interval	Responsible Party	Average Elapsed Processing Time
Initial Claim to Issuance of Rating Decision	Regional Office	165 days
Notice of Disagreement Receipt to Statement of the case	Regional Office	165 days
Statement of the case issuance to Substantive Appeal receipt	Veteran	48 days
Substantive Appeal Receipt to Certification of Appeal to Board of Veterans Appeals	Regional Office	521 days
Receipt of Certified Appeal to Issuance of BVA decision	Board of Veterans Appeals	203 days
Total		1102 days (3.02 years)

If a claimant appeals a Board decision to the Court of Appeals for Veterans Claims, it may easily take another twelve to eighteen months for the Court to decide the appeal.

#### Problems in Current Va Claims Adjudication

1. There are no deadlines imposed on the VA to complete any of the steps in the adjudication of a claim. One famous decision reported that the claim had been contested for more than seven years at that point. *Dambach v. Gober*, 223 F.3d 1376, 1381 (Fed. Cir. 2000). One CAVC Judge commented during an oral argument that a 14-year delay is not unknown.

2. The multi-step appeals process is redundant and unnecessarily complicated because it imposes upon the veteran a specific pleading requirement; i.e., the veteran must assert an additional affirmative intent to seek appellate review.

3. Too many cases, not enough staff. According to a recent survey of rating specialists and decision review officers at the regional offices, 65% stated that they had insufficient staff to "ensure timely and quality service." The same survey reported that 57% believed "it was too difficult to meet production standards if they adequately develop claims and thoroughly review the evidence before issuing rating decisions."

4. The regional offices are not getting the decisions right the first time and this results in claimants filing appeals to the Board which are then remanded back to the regional office. Many claimants are stuck on this proverbial hamster wheel for years.

5. The Board of Veterans' Appeals causes delay in the adjudication of claims by: (1) failing to follow judicial precedent and forcing veterans to appeal their claims to Court, and (2) failing to handle claims expeditiously as Congress intended when it enacted the Veterans Benefits Act of 2003.

6. The Appeals Management Center has become a "parking lot" for both Court and BVA remanded cases. As of October 2004, there were about 21,000 claims at the AMC. As the caseload increases at the Appeals Management Center, longer delays are inevitable.

## NOVA's Recommendations To Alleviate Problems In The VA Adjudication Of Claims

1. Congress should impose mandatory time frames for each step in the VA adjudication process. These time limitations should be subjected to limited extension when the delay is clearly not due to any inaction on the part of the VA.
2. Have one appeal from a denial by the regional office and eliminate the requirement that the claimant file two documents to obtain appellate review, the "notice of disagreement" and the "substantive appeal." The claimant should not be required to appeal the matter twice in order to bring the case before the Board of Veterans' Appeals. This proposal would require an amendment to 38 U.S.C. § 7105.
3. Even though the VA has not asked for it, an increase in staff is necessary at the regional office level. Specifically, NOVA believes that increasing the numbers of decision review officers at the regional offices would be helpful because they can clear cases and have the authority to review the case de novo at the regional office level. The use of decision review officers at the regional office level has been successful.
4. NOVA believes that the Board of Veterans' Appeals should be replaced by independent Administrative Law Judges like those in the Social Security system. This would eliminate the delay inherent in the centralized Board. Alternatively, Congress should consider decentralizing the Board of Veterans' Appeals by placing the Board Members at the regional offices. Instead of having to transfer cases from the regional offices to the Board in Washington, the Board Member would be co-located at the regional office.
5. This Committee should consider legislation permitting a veteran to hire and compensate an attorney earlier in the process. Presently, a veteran cannot retain counsel until after the Board of Veterans' Appeals issues the first final decision in the case. This is too late in the process for counsel to be truly effective because by the time the Board makes a decision on the claim, the record is effectively closed. As the VA Inspector General's Report has shown, the initial adjudicators do not have enough time and staff to make timely and quality decisions. The same report noted that it is not possible for the adjudicators to fully develop the claims and meet production deadlines. Attorneys would be helpful in obtaining, organizing and presenting records on behalf of the veteran and making sure that the VA processes the claim in a timely and accurate manner. An amendment to 38 U.S.C. § 5904 is necessary.

### Conclusion

On behalf of NOVA, I would like to thank the committee for the opportunity to present this testimony. Oversight of the VA adjudication process is critical and necessary to ensure that the VA fulfills the intent of Congress that it compensate veterans and their families for all benefits which can be supported in law. NOVA believes that the most effective means is to permit all claimants to hire an attorney from the beginning of the claims process. The current system merely reinforces the adjudicatory errors of the VA and compounds needless delay of these claims. NOVA submits that amendments to 38 U.S.C. §§ 5904 and 5905 to permit legal representation at the initial claim level are necessary.