RICHARD PAUL COHEN, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

STATEMENT OF
RICHARD PAUL COHEN
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BEFORE THE UNITED STATES SENATE COMMITTEE ON VETERANS' AFFAIRS
JULY 14, 2010

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc ("NOVA") concerning the claim processing initiatives of the Veterans Benefits Administration ("VBA") and S. 3517, the Claims Processing Improvement Act of 2010.

NOVA is a not-for-profit § 501(c)(6) educational organization incorporated in 1993. Its primary purpose and mission is dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Department of Veterans Affairs ("VA"), the Court of Appeals for Veterans Claims ("CAVC"), and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written amicus briefs on behalf of claimants before the CAVC, the Federal Circuit and the Supreme Court of the United States of America. 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 as well as my own 18 year experience representing claimants before the VBA.

THE VBA HAS OBVIOUS PROBLEMS

NOVA's previous testimony and reports from the Department of Veterans Affairs Office of Inspector General have detailed the VBA's problems including:

- an antiquated and insecure paper claims file;
- inadequately trained employees;
- ineffective supervision;
- inadequate metrics resulting in inability to determine whether work is performed correctly;
- a work credit system which induces employees to rate claims which have not been completely developed;
- an institution which is more concerned with finding fraudulent claims than timely granting meritorious claims; and
- an institution which is so out of control that it takes years to promulgate needed regulations and which is incapable of effectively communicating policy to its employees.

VBA, under pressure from Congress and from various stakeholders, has recently initiated pilot projects incorporating techniques intended to solve, in isolation, only one problem at a time.

The four main pilots include testing of:

1) Processing claims using fully integrated claims processing teams or pods, from July 2009 to May 2010 (at the Little Rock Regional Office);

2) Paperless claims processing as part of the VA's "Business Transformation Lab"(at the Providence Regional Office);

3) Providing direct assistance and personal communications to help veterans compile documentation to complete their claims (at the Pittsburgh Regional Office); and

4) Software designed to allow users of the (soon to be created) new Veterans Benefits Management System ("VBMS") to obtain relevant information about a claim from a "dashboard" which can be used for faster and more accurate claims processing. The pilot will begin in November 2010 and deployment of the system is planned for fiscal year 2012.

Additional short term projects include:

1) An "Express Lane" (in four Regional Offices) to expedite single-issue claims;

2) To identify and pay claims at the earliest time, when the evidence substantiates the claim should be paid (at the St. Petersburg Regional Office);

3) On-line live chat between veterans and VA employees through the "e-Benefits" portal;

4) Phone calls from VBA staff directly to veterans; and

5) Shortening the application form to 12 pages from the previous 23 pages.

Still the veterans' claims adjudication system limps along month after month incorrectly deciding claims and thereby adding thousands of appeals to the system and adding to the frustrations of veterans and other claimants. During the past year, from May 15, 2009 to May 15, 2010, the VBA's Monday Morning Workload Reports show an 11% increase in pending appeals from 171,716 to 190,778. http://www.vba.va.gov/REPORTS/mmwr/historical/2009/index.asp; http://www.vba.va.gov/REPORTS/mmwr/index.asp .

The VBA knows that improperly developed claims lead to erroneous decisions and that, in the rating process, the most time is consumed by claim development. To solve those problems in claim development, the VBA continues to try different plans to generate fully developed claims

prior to rating. One part of the VBA's efforts has been placing the burden on veterans to submit what the VA refers to as "fully developed claims". Remarkably, the VBA has never advocated that veterans be permitted to hire a lawyer, for pay, from the time that the claim is initially filed to assist in claim development.

Yet, having lawyers involved to help veterans yields positive results, as is shown by the most recent annual report of the Chairman Board of Veterans' Appeals. Following enactment of the Veterans Benefits, Health Care, and Information Technology Act of 2006, P.L. 109-461, and in FY 2009, those claimants who had attorney representation at the BVA received a larger percentage of favorable results than did those without attorney representation. They also received a larger percentage of favorable results than did those who were represented by VSOs. The chart below was created by NOVA from data in the BVA's Report of the Chairman, Fiscal Year 2009.

FY 2009

	Allowed		Remanded		Positive Outcome	
Representation	No.	%	No.	%	No.	%
VSO's Overall	7,688	24.8	11,714	37.8	19,402	62.6
American Legion	2,100	23.5	3,469	38.8	5,569	62.3
Amvets	65	25.6	91	35.8	156	61.4
DAV	3,853	25.5	5,607	37.1	9,460	62.6
MOPH	179	31.7	191	33.8	370	65.4
PVA	118	28.7	156	38.0	274	66.6
VFW	1,138	24.2	1,746	37.2	2,884	61.3
VVA	235	23.8	454	46.0	689	69.8
State Svs. Org	1,975	24.1	2,802	34.2	4,777	58.3
Attorney	853	22.7	1,743	46.4	2,596	69.0
Agents	21	23.1	32	35.2	53	58.2
Other Rep	304	28.1	357	33.1	661	61.2
No Rep	886	18.7	1,554	32.9	2,440	51.6
Total	11,727	24.0	18,202	37.3	29,929	61.3

A recent law review article published in The Federal Circuit Bar Journal quantifies the value to veterans of attorney representation and concludes that the denying veterans the right to hire a lawyer at the outset of a claim "may cost a single veteran millions of dollars" Benjamin W. Wright, The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney, 19 FCBJ 433,435 (No. 3, 2009).

Not only has the VA failed to recognize the value of allowing veterans the right to hire lawyers at the evidence development stage, but the VA's pilot projects and other initiatives ignore the value of direct communication and partnering with a veteran's representative during the rating and appeals stages of claims adjudication. Instead, the Pittsburgh pilot is directed at improving communications directly with veterans.

SOLUTIONS REQUIRE AN ORGANIZATIONAL OVERHAUL

NOVA focuses on three primary deficiencies which the VA must correct, simultaneously, if the system is to be fixed. They are lack of a well defined business model and plan, lack of adequately trained staff and administrators to carry out the plan, and lack of accurate and reliable metrics to monitor performance.

NOVA has observed that there are too many levels of management in the VA's organizational chart which has led to institutional "stove piping", institutional paralysis, and the inability to act expeditiously and properly. It has also resulted in the VA issuing mixed messages to veterans.

Additionally, the VBA must become user friendly and must consider the needs and limitations of veterans in order to efficiently and accurately assist veterans. The only way the VA can design a system which is user-friendly is by including veterans, attorneys who work in the system (and their associations, such as NOVA), together with Veterans' Service Organizations and VA employees in the redesign process.

Veterans must be given all the help they need and desire in processing their claims, including the right to hire an attorney. The VA should operate under the assumption that veterans generally file meritorious claims which should be fully and quickly granted. Such a change in outlook would logically lead to a triage system for claims management, such as has been proposed in S. 3517, which would dramatically reduce backlogs.

Veterans and their families must not be overburdened by useless paperwork and redundant, indecipherable requests for information. Ill and impaired veterans should not be required to initiate their claims with more than a simple one page form. Presently, the VA offers claimants a new eight page combined compensation and pension application form, VA Form 21-526, which is still too long and too complicated for many veterans. Although the Fully Developed Claim form, VA Form 21-526EZ, is two pages long, it requires the veteran to complete a certification that the veteran has no more information or evidence which will support the claim. Additionally, the veteran is required to submit with the form all private medical records. There is no reason why applications for VA compensation must be more than one page long if workers compensation benefits applications are one page long.

In a system which truly treats veterans as clients, they would be given face-to-face interviews and the right to participate in hearings and review claim files without the need to travel four or more hours to participate in the adjudication of their claims. Rather than the present system containing 57 Regional Offices which requires many veterans to travel large distances, a veteran friendly system would disperse most of the functions of the present Regional Offices to locations in or in close proximity to each VA Hospital, or Vet Center. Decentralizing the VA would allow veterans to be interviewed, complete forms, assist in evidence development, and attend hearings close to home. Centralized state offices could house the rating boards. Active veteran participation would result in more complete and accurate claim development. Obviously, the previously discussed recommendation to decentralize the VA would not work without a 21st century veterans' claim system which is paperless and which allows access by veterans and their representatives. Also, the VA will never deserve the confidence of our country and our veterans until it can demonstrate that claims files are tamper proof and safely stored. A somewhat analogous system has been utilized by the Social Security Administration which has a paperless

file, centralized offices for reviewing the evidence, and multiple local offices dispersed throughout each state for taking applications, dispensing information and conducting interviews.

A user-friendly system would begin the claim development phase by clearly and precisely requesting specific documentation from the veteran, such as a necessary DD-214 or current medical records. Rather than utilizing an assembly line approach with six teams performing separate tasks, an efficient system would utilize one decision unit to handle everything from reviewing the application for completeness in predetermination through gathering the evidence and producing rating decisions. It is crucial that the combined development/adjudication unit be directed to partner with the claimant and the claimant's representative (if the claimant is represented) to fully understand and develop the claim. If additional information is necessary, the team should issue an understandable and case-specific VCAA notice, assist with any additional development, and then issue the rating decision.

Because most of the delay in processing claims involves development, particularly waiting for and obtaining C&P exams , NOVA suggests that the VBA utilize 38 U.S.C. § 5125(a) to forego obtaining an additional exam where the record already contains an exam sufficient for rating purposes which would result in a grant of the benefit requested. In addition, veterans who apply for benefits should have the advantage of the treating physician rule so that the opinion of their treating physician is given more weight than that of an examining physician employed by the VA to provide an opinion. This would place veterans who apply for benefits in the VA system on par with those who apply for benefits in the Social Security system and have the benefit of that rule.

A user friendly system must also no longer deprive veterans of the same rights citizens have in any other circumstance: the option to hire a lawyer for assistance from the very beginning of the process. Presently, veterans who are notified of the possibility that their rating will be reduced are not permitted to hire an attorney, for a fee, to represent them even after they formally object to the notice of reduction. A veteran must wait until after his rating has actually been reduced (when he has less income) to hire a lawyer, for a fee. Similarly, veterans who believe that an earlier denial was the result of clear and unmistakable error must prepare a request for revision of the erroneous decision without being allowed to hire a lawyer, for a fee. Not only should the veteran's right to choose to hire a lawyer be expanded, but after a lawyer or other representative is hired, neither the VBA nor the BVA should view the veteran's representative as having interests opposed to the VA's central mission of providing proper benefits to veterans and their families. Rather, the VA should partner with the claimant's representative and use informal conferences to speed claim development and to narrow the issues to be decided.

Because the present rating system is difficult for veterans to understand, and for rating boards to apply, the complexity of the Rating Schedule frequently leads to erroneous decisions. It is essential that the VA rework the entire Schedule for Rating Disabilities in 38 C.F.R. Part 4 to simplify and update the ratings. The pilot project mandated by Section 101 of S. 3517 presents the opportunity to begin the overhaul process. Being mindful of the increasing number of veterans whose lives are in shambles because of PTSD or TBI, in rewriting the Schedule for Rating Disabilities, the VA should comply with the recommendation that ratings be designed to compensate veterans for loss of quality of life in addition to loss of earning capacity.

To control the ever increasing backlog, the VBA must adequately triage claims. Increased use of presumptions would eliminate the need for development of evidence regarding the incidents of military service for all those who were deployed to a war zone regardless of their military occupational specialty or place of assignment within that zone. Thus, for example, anyone who was deployed to a war zone, whether during WWII, Korea, Vietnam, the Gulf War or the GWOT who is subsequently diagnosed with PTSD should have the sole inquiry (during the rating stage of their claim) concentrate on the severity of their symptoms. Anyone who is diagnosed with a medical condition while on active duty and who is presently being treated for that condition should not be required to prove a medical nexus between the conditions. Additionally, veterans who are receiving Social Security Disability or Supplemental Security Income benefits based on conditions which are related to service should be presumed to be unemployable.

Following an unfavorable rating decision, the claimant should only be required to file one request for an appeal instead of both a notice of disagreement ("NOD") and a substantive appeal to the BVA. Section 208 of S. 3517 which substitutes a meaningful post-notice of disagreement decision for the often useless statement of the case is a welcome change. Eliminating the requirement of filing a substantive appeal would save additional time and paperwork. After filing the single request for appeal, the claimant and his representative should have the right to submit further evidence or argument and to have a de novo review on the record, or a hearing by a Veterans Law Judge (VLJ) sitting in a BVA office close to the decentralized Regional Offices.

Adequate training, supervision and accountability are essential to create a system which fulfills the mission to correctly decide all claims. This requires reworking the organizational chart to provide reporting and direct accountability from the Regional Offices to the Secretary. Presently, there is an excessive number of layers of executives in the system which impedes the flow of knowledge and inhibits accountability. Files do not get lost, shredded or compromised in a modern business with direct accountability. Also, in a system with direct accountability, poorly trained workers are not called upon to perform functions essential to the mission. It is essential that the pressures placed on rating specialists and VLJs to turn out decisions be replaced with a system which expects the right decision to be made at all levels of the process. Veterans deserve a system which does not issue a decision until the claim is fully developed, which involves a true partnership between the claimant and the VA, and which rewards prompt and correct decision making. NOVA's experience confirms the findings in the 2005 report of the Office of Inspector General that the present work credit system is providing a disincentive to properly deciding claims. It should be replaced. To complement new expectations of increased accuracy and accountability, it is essential that VA employees be repeatedly and adequately trained and supervised. Additionally, the high rate of VLJ decisions which are returned by the CAVC to the BVA because of inadequate reasons and bases is unacceptable and contributes to the backlog and to the reputation of "hamster wheel" adjudications. Doing away with the requirement for adequate reasons and bases is not the answer. Doing away with poor decision making is.

In a system with adequate training and accountability VLJs do not write decisions which are affirmed on appeal only 20% of the time. To ensure efficient, convenient, timely and proper appellate review at the administrative level, the Board of Veterans' Appeals should be decentralized and dispersed within reasonable distances from the many Regional Offices. Not only should the VLJs be moved out of their fortress in Washington, D.C., but they must be

reconfigured into a corps of truly independent and well trained Federal Administrative Law Judges.

Appeal from the VLJ's decision should go to the CAVC and then to the Federal Circuit. NOVA recommends two changes to the operation of the court. First, the CAVC should be granted class action jurisdiction so as to be able to remedy situations which affect a broad class of veterans. Second, the CAVC should be required to resolve all issues which are reasonably raised, (except for constitutional claims) if the appeals can be resolved without reaching the constitutional claims. Section 211 of S. 3517 which requires the CAVC to decide all issues raised is a good start. To prevent the VA from arguing that veterans have waived arguments which only became apparent after a BVA decision has been issued, it would be a valuable addition to that section to require that the CAVC decide all arguments raised in the Court regardless of whether they were raised prior to the BVA's decision.

S. 3517

THE CLAIMS PROCESSING IMPROVEMENT ACT OF 2010

S. 3517 is a compilation of some veteran-friendly provisions which would help the VA become more efficient and effective and a few ill-advised provisions which are similar to those which had been suggested by the VA during May 2010 in a proposed bill entitled the "Veterans Benefit Programs Improvement Act of 2010" ("VBPIA 2010").

(A)

NOVA SUPPORTS THESE SECTIONS WHICH WOULD HELP VETERANS

Section 101

This provision requires the VA to create a pilot program to assess the feasibility and advisability of utilizing a newly created system to identify and evaluate disabilities of the musculoskeletal system. Rather that utilizing the archaic Schedule of Ratings, diseases and injuries would be identified, for rating purposes, utilizing the same nomenclature that is used by physicians in their medical reports to insurance companies, i.e. the International Classification of Diseases ("ICD"). The next step is to assess residual functional capacity ("RFC") by evaluating frequency, severity and duration of symptoms. Finally, a mechanism would be created to convert the RFC into ratings. Overall, such a change has the potential to simplify the rating of disabilities and to make it easier for physicians to convey accurate information to the VA and for the VA to more easily and accurately rate impairments.

Section 201

This provision would eliminate rating delays in multi-issue claims and reduce the time a veteran must wait before being paid on one of many theories of compensation. It directs the VA to

expeditiously assign a rating for any condition which is ready to be rated without regard to other conditions which may require further development.

Section 202

This section would save time by eliminating unnecessary notifications. It clarifies that a notice of what information or evidence would substantiate the claim is required only when the necessary information or medical or lay evidence had not previously been provided to the VA.

Section 203

This section may induce the VA to eliminate requests for unnecessary medical opinions because it requires the VA to treat private medical opinions with the same deference as that given to a VA provider's opinion if the private opinion complies with the VA's established standards. Additionally, if the private exam is not entirely adequate, this section requires the VA to ensure that the VA provider has professional qualifications which are equal to or better than the qualifications of the provider of the private medical opinion. A useful addition to this section would be incorporation of the treating physician's rule and an amendment to 38 U.S.C. § 5125(a), both of which were previously discussed.

Section 204

This section requires the VA to introduce procedures to speed up the claim review process through use of a triage system and a process for identifying developed claims. The triage system requires the VA to perform a preliminary review to identify and process claims which have the potential to be adjudicated quickly, which could result in a temporary disability rating, or those which were filed by claimants who are homeless, terminally ill, or who have severe financial hardship. For those claims in which the claimant states that there is no additional information or evidence to submit (the developed claims) the VA is required to take any necessary development and decide the claim on the record.

Section 205

This section will help veterans by more precisely defining the basis for an RO decision in requiring the VA to summarize the evidence relied upon. This would replace the current requirement to summarize all the evidence considered without regard to whether the evidence was relied upon in the decision. Veterans will find it easier to comply with the technical requirements of the NOD with the addition of the provision that the VA must provide a form for it.

Section 206

This will allow for electronic filing of a Notice of Disagreement and will allow for good cause exceptions to timely filing. As was previously discussed, considerable time and paperwork would be saved if the NOD was the only document required for an appeal to the BVA. The requirement to file a substantive appeal is an unnecessary burden on veterans.

Section 208

This substitutes a post-NOD disagreement decision for the statement of the case. Veterans will be helped by the requirement that such decision must contain a description of the specific facts in the case and pertinent laws and regulations that support the agency's decision. Similarly, the requirements that each issue be addressed and that reasons be provided why the evidence relied upon supports the agency's conclusion would lead to better decision making.

Section 211

This section, which requires the CAVC to decide all issues raised by the appellant, would tend to reduce the number of times an individual appellant must bring the same issue to the CAVC to finally obtain a decision on the issue. As was discussed previously, it would also be helpful to include language clarifying the fact that veterans are not required to raise arguments before the BVA in order to assert those arguments before the Court.

Section 213

This section mandates a pilot program on participation of local and tribal governments in improving the quality of submitted disability compensation claims.

(B)

NOVA OPPOSES THESE SECTIONS WHICH WOULD NOT HELP VETERANS

Section 207

This section mandates that a request for extension of the 60 day period to file a substantive appeal to the BVA must be filed within 60 days from the date the post-NOD decision is mailed. In restricting extensions of time to appeal to the BVA, 17 years of Court precedent would be overturned, including Percy v. Shinseki, 23 Vet. App. 37 (2009) which just last year confirmed that 38 U.S.C. § 7105(d)(3) is not a jurisdictional bar to the Board's consideration of a substantive appeal filed more than 60 days after the statement of the case is mailed. The proposition that the timely filing of a substantive appeal is not jurisdictional and that an untimely substantial appeal does not bar the appeal follows a long line of cases going back to Rowell v. Principi, 4 Vet. App. 9 (1993). It is also ill-advised to adopt the provisions which seek to require a veteran to identify the particular determinations being appealed and to allege specific errors of fact or law. Presently, § 7105 does not require identification of the particular determination being appealed although the Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. The large number of veterans who are still unrepresented during the appellate stage would have great difficulty in complying with stricter pleading writing requirements.

Section 209

This section provides for automatic waiver of agency of original jurisdiction ("AOJ") consideration of new evidence which is submitted with or after the filing of the substantive appeal, unless a request for such review is made within 30 days of the evidence submittal. Such a change in existing law is harmful to veterans and to the VBA claims adjudication system because it denies the AOJ the opportunity to make the right decision before the appeal is heard by the BVA. Automatic waiver would create long delays for veterans due to the huge delays in certifying appeals to the BVA and the long time between certification of the appeal and the BVA decision . The AOJ is in the best position to evaluate the new evidence in view of the prior decision.

Section 210

This section would allow the BVA to determine the location and manner of a veteran's appearance for hearings without the opportunity for appellate review of the BVA's choice. Obviously, the BVA wants to control its budget by not providing travel board hearings and by providing video hearings in almost all appeals. Yet in terms of judging credibility of appellants and to provide a veteran friendly hearing an in person hearing option is essential. Imposing video hearing on veterans, many of whom are impaired because of PTSD and TBI, violates the Secretary's duty to ensure the appearance of fairness, Hodge v. West, 155 F.3d 1356,1363 (Fed. Cir. 1998); Barrett v. Nicholson, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

Section 212

This section provides for an extension, for good cause, of additional 120 days of the 120 days within which an appellant must file an appeal to the CAVC. By comparison, S. 3192, the bill introduced by Senator Specter, is far better in that it provides for tolling "for such time as justice may require" and applying to all appeals from BVA decisions which were issued on or after July 24, 2008.

(C)

SUMMARY

In summary, NOVA supports those provisions of the S. 3517 which are veteran-friendly, including, sections 101, 201-206, 208, 211 and 213, but NOVA opposes sections 207, 209, 210, and 212.