

RICHARD PAUL COHEN PRESIDENT OF THE NATIONAL ORGANIZATION OF
VETERANS ADVOCATES

STATEMENT OF
RICHARD PAUL COHEN
PRESIDENT OF THE
NATIONAL ORGANIZATION OF VETERANS ADVOCATES
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
NOVEMBER 7, 2007

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 S. 2090, S. 2091, and other legislation pending before the Committee that touches on the operation of the United States Court of Appeals for Veterans Claims (CAVC). NOVA is a not-for-profit § 501(c)(6) educational organization created for attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the CAVC and on remand before the Department of Veterans Affairs ("VA"). NOVA's dedication to training veterans' advocates and to advocacy on behalf of veterans has included submitting many amicus briefs on behalf of claimants before the CAVC and the United States Court of Appeals for the Federal Circuit ("Federal Circuit") and led to recognition of NOVA's work on behalf of veterans, by the CAVC, 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 fourteen-year experience representing claimants at all stages of the veterans' benefits system from the VA Regional Offices to the Board of Veterans' Appeals to the CAVC as well as before the Federal Circuit.

BACKGROUND ON CAVC

When a veteran files an appeal with the CAVC, the case is docketed with the Court and the docketing date is the triggering date for all filings. NOVA believes there are two critical time spans in the judicial review process that should be discussed. First, the time it takes from the date a case is docketed until it is fully briefed. Second, the time it takes from the date the case is fully briefed until the judge or judges decide the appeal. Without reliable data on these two time periods, Congress cannot accurately assess how well the CAVC functions. Under current rules, it takes at least 8 months from the date of docketing until a case is ready to be sent to a judge's chambers. During that 254 day window, the parties prepare the record that the CAVC will review and then file their briefs. Many cases filed with the CAVC never reach a judge's chambers because: (1) they are dismissed for jurisdictional reasons, e.g., the veteran did not file a timely appeal or lacks a final BVA decision; or (2) the parties agree to a disposition of the claim, typically, by remanding the case to the Board due to an error committed by the VA.

NOVA is not aware of any data that captures the amount of time it takes from the date a case is fully briefed until it is decided by the Court. While one could review each Court docket sheet to compile this information, that would be burdensome. A quick survey of decisions issued by the Court in the months of September and October 2007 shows the following:

Appeal Filed	Decided September 2007	Decided October 2007
2004:	9	2
2005:	82	34
2006:	36	34
2007:	10	11

This table shows that the CAVC takes over two years to render a decision on most appeals from the time the appeal is filed. From 1995 through 2004, the number of appeals filed in the CAVC remained fairly steady in the 2,100 to 2,500 range. However, in 2005, the CAVC docket increased by one-third as the number of appeals filed that year rose to 3,400, in 2006 the number of appeals filed was 3,700 and in 2007 the number of appeals filed was 4,643. NOVA believes the increase in the number of appeals filed is due to two primary reasons. First, the Board of Veterans' Appeals has issued more decisions over the last two years denying claims, and these veterans are appealing their claims to Court. Second, the CAVC has an established practice of deciding only one issue appealed by a veteran, regardless of any other issues simultaneously appealed and fully briefed for the Court's consideration. See *Best v. Principi*, Vet. App. 18 (2001); *Mahl v. Principi*, 15 Vet. App. 37 (2001). Perhaps this practice was well-intentioned but the practical result is that many, many veterans are stuck on a proverbial hamster wheel because those issues left unaddressed by the CAVC get re-adjudicated by the VA, oftentimes erroneously, thereby sending the veteran back to the CAVC for another appeal and another single-issue decision. Sadly, it is not unusual for a veteran with a meritorious claim to have to appeal to the CAVC three, four, or five times on the same issue. The Court is taking important steps to decrease the amount of time it takes from the date the veteran files an appeal with the Court until a decision is reached. First, over the last year, Chief Judge Greene has recalled all five available retired judges, each of whom served for ninety days. Unfortunately, this has not increased the number of precedential decisions issued by panels. Instead, almost all the decisions of the Court have been decided by single judges rather than by a panel and result in a non-precedential decision. Thus, in October 2007, there were 78 single judge non-precedential decisions but only 3 panel decisions. Similarly, in September 2007, there were 133 single judge non-precedential decisions and only 2 panel decisions. The serious and deleterious effect of so many single judge decisions results from the risk of lack of uniformity and the negative effect on the Court's jurisprudence caused by issuing a large number of decisions which carry no precedential weight. Second, the CAVC is changing its rules of practice regarding the record process, which could reduce the processing time by 4 to 6 months. Next, at the recent Bar and Bench Conference, the CAVC explored methods to resolve cases through such measures as alternative dispute resolution and new pre-briefing conference procedures. Finally, the CAVC is committed to using the Federal Court E-Filing process that will also help cases move more quickly through the Court. NOVA supports these measures and believes that they represent realistic steps to help the Court move cases more expeditiously and control its increasing docket.

Notwithstanding these positive measures at the CAVC, NOVA believes that Congress should consider the following four recommendations to help veterans obtain justice more timely in Court.

1. Congress Should Expand The Number of Judges on the CAVC.

Specifically responding to S. 2091, NOVA has observed that the number of notices of appeals

filed with the CAVC has continued to increase, with the number of appeals filed in the CAVC during FY 2007, setting an all time high of 4,643. Because NOVA expects this trend of new appeal filings to continue, we support S. 2091 which would authorize adding two more judges. The addition of these two new judges will help to maintain current processing times in Court. NOVA believes that Congress needs to be proactive in this area given the trend of increasing appeals filed because the number of appeals is likely to continue to increase at the CAVC. Indeed, Congress should also consider adding two judges for every two thousand additional appeals filed.

2. Congress should pass Legislation to Clarify that Reversal is Proper in the CAVC.

NOVA's experience suggests that a significant portion of the current backlog is related to the Court's historical treatment of cases and claims; i.e., it has typically remanded, not reversed, when it deemed that the Board of Veterans' Appeals erred. And, once it determines that remand is proper, it will generally decline to review other errors. *Best v. Principi*, 14 Vet. App. 18 (2001); *Mahl v. Principi*, 15 Vet. App. 37 (2001). As a result, many cases on appeal to the Court are there for the second, third, or fourth time, often with the same issues to be decided. Add those to the cases that are on appeal for the first time, and a backlog cannot help but be created. Even the most hard-working and productive Judges will not be able to keep up.

NOVA believes that there has been resistance to reversal of Board decisions by the Court. This has discouraged the VA from realistic efforts at settlement of some or all issues in a case.

Veterans' representatives accept offers to remand cases on terms that do not resolve many issues because they perceive that the odds of obtaining greater relief from the Court are very low and because the delays are so long. It appears to NOVA that the Office of the General Counsel could understandably believe that, because the odds of reversal are low, they have nothing to lose by refusing to resolve issues in a meaningful way and instead force a decision from the Court.

Congress attempted to correct the relatively small percentage of reversals in 2002 when it added the phrase "or reverse" to 38 U.S.C. § 7261(a)(4). Veterans Benefits Act of 2002, § 401, Pub. L. 107-330, 116 Stat. 2832 (2002). The Court has not yet established parameters through its case law that would support a greater percentage of reversals. Rather, the Court has long held that reversal is only possible when the only permissible view of the evidence is contrary to the Board's decision, see *Hersey v. Derwinski*, 2 Vet. App. 91, 95 (1992). Only when the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is generally the appropriate remedy. *Washington v. Nicholson*, 19 Vet. App. 362, 371-372 (2005). But if the evidence does not preponderate against the claim, or where the Board has made all the necessary factual findings, the Court could - and should - reverse. See *Washington*, at 375 (dissent by Kasold, J.); *Rose v. West*, 11 Vet. App. 169, 172 (1998) ("This is not to say that medical evidence of nexus could not be rebutted, in an appropriate case, by medical evidence that demonstrates the significance of a lack of continuity of symptomatology. However, no such evidence exists and it is not the function of judicial review simply to accord the government a remand to obtain such evidence.").

3. Congress Should Amend Title 38 To Permit Substitution of Parties.

Similarly, although not contained in any current legislation under consideration, another suggestion would be to allow the substitution of parties in claims that are pending and the veteran passes away before a decision is made. This would provide a large measure of relief to our aging veteran population. Under the CAVC's current case law, when the veteran dies while the case is in Court, substitution is not permitted and the case is dismissed. Congress needs to

consider the plight of our World War II veterans who are dying at the rate of 1,056 a day. A veteran who is 85 years of age will have a life expectancy of about 6 years and will have a 42% chance of living to age 90. See National Vital Statistics Report, Vol 54, No 14, April 19, 2006, Tables A&V. Congress has the power to truly provide justice for these veterans who are elderly and who do not typically survive. In the past few years, more than a few of my clients have died during the appeals process. Other attorneys report as many as 10 deaths during the appeal process. A quick search on Westlaw revealed that in the last few years over 100 appeals have been dismissed by the CAVC because the veteran died while the case was pending before the Court. The practical effect of this is that a surviving spouse or dependent is not permitted to step into the shoes of the deceased veteran in Court; instead, they are required to initiate proceedings anew at the Regional Office. A veteran who has appealed his case to the Court most likely has been in the system for 5-7 years, and to force the surviving spouse or dependent child to commence this process anew is fundamentally unfair. NOVA recommends that Congress amend Title 38 to permit the substitution of the next of kin or estate when the veteran dies while the case is pending before the Court. If the prohibition on substitution is permitted to stand, the VA is rewarded for its delay and deserving veterans and their heirs suffer the consequences.

4. Congress Should Require the CAVC To Add to the Information Reported Annually

Detailed review of the content of the CAVC's Annual Report compels NOVA to suggest that the following additional information should be included to provide valuable insight into the operation of the CAVC. This additional information will assist Congress in analyzing the CAVC's case load and work load:

- The number of appeals filed annually.
- The number of petitions filed annually.
- The number of applications filed under section 2412 of title 28 annually.
- The number of cases resolved by the parties before a judge issues a decision.
- The number of cases in which a single judge, panel of judges or the full court issues a decision.
- The number of oral arguments requested and held.
- The median time from filing to disposition.
- The median time it takes from the date a case is fully briefed until a decision is reached.

Obviously, NOVA is concerned with protecting the privacy and security concerns of veterans whose appeals are filed in Court and this concern is heightened by the move to provide for electronic filing and retrieval of records. For that reason we support S. 2090. RICHARD PAUL COHEN