

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement for the Record

Before the

Senate Committee on Veterans' Affairs

Concerning

**The State of the VA: A Progress Report on Implementing 2017 VA Reform
Legislation**

January 17, 2018

Chairman Isakson, Ranking Member Tester, and members of the Committee, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to provide a statement in response to Secretary Shulkin's testimony regarding VA reform legislation passed in 2017. Our statement will focus on implementation of the Veterans Appeals Improvement and Modernization Act of 2017.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 600 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

Attorneys and agents handle a considerable volume and growing number of appeals at the Board of Veterans' Appeals (BVA). In FY 2015, for example, attorneys and agents handled 14.9% of appeals before BVA. This number was fourth only behind Disabled American Veterans (28.1%), State Service Officers (16.5%), and American Legion (15%). U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2015* at 27. In FY 2016, this number grew to 15.9%, third only to Disabled American Veterans (28.1%) and American Legion (19.6%). U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2016* at 26. Similar statistics are available for FY 2017, with attorneys and agents representing appellants in 17% of cases, again third behind Disabled American Veterans (31%) and American Legion (18%).

NOVA members have been responsible for significant precedential decisions at the CAVC and Federal Circuit. In addition, as an organization, NOVA has advanced important cases and filed amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011)(amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013)(addressing VA's failure to honor its commitment to stop applying an invalid rule); *Gray v. Secretary of Veterans Affairs*, No. 16-1782 (Jan. 3, 2018)(amicus in support of petition for rehearing before the Federal Circuit); *Robinson v. McDonald*, No. 15-0715 (July 14, 2016)(CAVC amicus).

We detail below concerns that should be addressed to ensure implementation of the appeals reform legislation preserves the long-standing intent of Congress: that the VA benefits adjudication and appeals process be veteran friendly and nonadversarial.

OVERVIEW

NOVA appreciated the opportunity to participate in the discussion of appeals reform that led to the passage of the Veterans Appeals Improvement and Modernization Act of 2017. We also applaud VA's ongoing inclusion of stakeholders in the discussion of its implementation plans, which has included opportunities to review draft regulations and documents related to its Rapid Appeals Modernization Program. NOVA remains committed to providing constructive feedback in response to these opportunities, and urges VA to consider and implement the recommendations of the stakeholder community.

As we have previously noted, successful implementation will be key if appeals reform is truly to be the positive change veterans deserve and VA promises. Successful execution of VA's proposed process hinges on its ability to consistently meet its goals of adjudicating and issuing decisions in the 125-day window identified for supplemental claims and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans.

RAPID APPEALS MODERNIZATION PROGRAM (RAMP)

Relying on section 4 of P.L. 115-55, VA implemented the Rapid Appeals Modernization Program (RAMP) in November 2017. According to the Standard Operating Procedures (SOP) designed for RAMP, the Veterans Benefits Administration (VBA) "will administer this pilot during the 18-month period after enactment allowed for full implementation of the new process and continue processing elections by Veterans as long as necessary thereafter to continue to accelerate resolution of legacy appeals." SOP at 1. Based on VA's proposed rollout of this program, as of January 1, 2018, VA sent approximately 15,500 letters to veterans with appeals eligible for acceptance into RAMP. Secretary Shulkin testified that, to date, three percent of invited veterans have elected to opt into RAMP, and 75 percent of those decided have received a grant.

As an initial matter, stakeholders need information and statistics on a regular basis to understand the current status of RAMP. How many appeals have been withdrawn from the legacy system and moved into RAMP, and what option was selected? What constitutes a grant? Have the 25 percent who received denials chosen to take any additional action? We realize it is still early in the process and some statistics might not yet be available. However, such data is important to stakeholders to understand the current state of the program and provide the best advice to veterans and their families. Data is also a critical component of any true pilot program to measure its success, and VA must commit to regular updates so stakeholders can gauge progress and suggest improvements. Furthermore, VA should ensure its field staff is receiving regular communications and training on RAMP operations, as well as updates on its progress.

From NOVA's perspective, there are a few reasons why there is a low opt-in rate to RAMP. First, VA chose not to extend the program through to BVA. Therefore, a veteran who withdraws his or her pending appeals (with no opportunity to return to the legacy system), is denied after either a higher-level review or supplemental claim, and wishes to appeal to BVA must now wait until the system is fully implemented – at the earliest in February 2019 – to obtain BVA review. While VA has stated those veterans will be first in line for BVA review upon full implementation of the system, many representatives are reluctant to counsel an appellant to move into a program that does not extend to BVA and does not provide a full understanding of how the procedure will ultimately operate at BVA. Furthermore, VA's recently submitted implementation plan indicates that the “average processing time goal for appeals under § 7107 does not apply to appeals submitted to the Board in response to a decision under VBA's RAMP.” U.S. Department of Veterans Affairs, *Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System* 8 (November 2017).

Second, VA is targeting the oldest appeals. While we understand this strategy is designed to be fair to those who have been waiting the longest, many veterans currently receiving invitations are close enough to a BVA decision that they do not wish to move into something new, particularly in light of Secretary Shulkin's welcome statement that BVA intends to decide 81,000 appeals in FY 2018.

In addition, veterans with cases in remand status may be more likely to stay in the legacy system because BVA will retain jurisdiction over the appeal. The veteran will be entitled to expedited consideration upon return to BVA if he or she is not satisfied with the action taken on remand, as well as enforcement of the prior order.

Finally, although NOVA appreciates VA efforts to ensure attorneys and agents receive copies of RAMP correspondence sent to veterans (required under its M21-1 Adjudication Procedures Manual for **all correspondence**), VA's mailing systems remain seriously flawed both for RAMP and overall adjudication procedures. NOVA receives nearly daily complaints from members that copies of correspondence are not being received. While VA has stated it plans to launch a centralized outgoing mailing system to rectify these issues, far too much correspondence has gone unmailed and unreceived. When VA fails to properly notify, important deadlines are missed and additional claims and appeals must be pursued to address VA's failures, resulting in yet more delay in the process.

It is clear that VA is not fulfilling its responsibilities in this regard. In July 2017, the Government Accountability Office (GAO) completed a report addressing VA's outgoing mail deficiencies. United States Government Accountability Office, Report to the Chairman, Committee on Veterans Affairs, House of Representatives, *Veterans Affairs: Actions Needed to More Effectively Manage Outgoing Mail*, GAO-17-581 (July 2017). In

addition to finding VA has an outdated mail management policy directive and handbook, it noted that “VA cannot ensure consistent mailing practices in its administrations and facilities because it has not provided mail managers with appropriate authority and responsibilities to oversee mail operations across the agency.” GAO Report at 7; *see also* GAO Report at 15. VA must improve its mailing practices, so veterans and their representatives receive proper notice of claims and appeals processing.

IMPLEMENTATION OF THE VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

As part of the reporting requirements imposed under P.L. 115-55, in November 2017, VA submitted its first report, *Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System* (hereinafter *Comprehensive Plan*). VA does not provide sufficient details for how it will handle legacy appeals in relation to modernized appeals once the new system is implemented. Based on several statements made in the report, it appears VA intends to devote resources first to modernized appeals and allocate “leftovers” to legacy appeals. *See, e.g., Comprehensive Plan* at 4 (“VA will allocate available resources to meet the timely processing goals in the new system, as outlined in section 3(a)(3), and remaining resources are then employed to process legacy appeals.”); *Comprehensive Plan* at 9 (“VA intends to allocate resources in an efficient manner that will establish timely processing in the new process and will allocate all remaining appeals resources to address the inventory of legacy appeals.”); *Comprehensive Plan* at 10 (“VBA intends to allocate field resources in an efficient manner that will establish timely processing in the new process and will allocate all remaining resources to address the inventory of legacy appeals.”). VA needs to provide more details about how it will continue to process legacy appeals in a fair and timely manner while fulfilling its obligations under the new legislation, to include how it will address the substantial backlog of BVA hearing requests.

Furthermore, in its implementation plan, VA stated it needs enhancements to the Veterans Benefits Management System (VBMS) to meet the statute’s specifications. *Comprehensive Plan* at 15. Secretary Shulkin also testified to VA’s “enterprise-wide efforts to modernize the appeals process through improvements in technology.” Statement of the Honorable David J. Shulkin, M.D., Secretary of Veterans Affairs, for Presentation Before the Senate Committee on Veterans’ Affairs, *The State of VA: Progress Report on Implementing 2017 VA Reform Legislation* 3 (January 17, 2018). Congress must ensure VBA and BVA continue to receive sufficient resources to implement necessary technological upgrades to its systems, particularly VBMS and Caseflow. VBMS was not designed with appeals processing in mind, and it lacks many features that would make work for VBA employees, BVA employees, and representatives easier and more efficient. VA should ensure VBMS enhancements continue, Caseflow is fully operational, and **all**

representatives have access to as many features as appropriate to help them represent veterans as effectively as possible.

CONCLUSION

NOVA is committed to continue working with this Committee, VA, and fellow stakeholders to ensure the appeals process for veterans is fair, timely, and preserves veterans' due process rights. We again thank the Committee for allowing us to provide our views on implementation of appeals reform.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this topic. For questions regarding this testimony or if you would like to request additional information, please feel free to contact:

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