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STATEMENT ON BEHALF OF THE
NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.
BY RICHARD PAUL COHEN, EXECUTIVE DIRECTOR
BEFORE THE UNITED STATES SENATE COMMITTEE ON VETERANS' AFFAIRS
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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, Inc. ("NOVA") concerning the appeals process and the operation of the Board of Veterans' Appeals ("BVA").

NOVA is a not-for-profit § 501(c)(6) educational and membership organization incorporated in 1993. NOVA is dedicated to training and assisting attorneys and non-attorney practitioners who are accredited by the Department of Veterans Affairs ("VA") to represent veterans, surviving spouses, and dependents before the VA, and who are admitted to practice before the United States Court of Appeals for Veterans Claims ("CAVC") and the United States Court of Appeals for the Federal Circuit.

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 experience in representing veterans for the past fifteen years.

A. Overview of the VA Appeals Process

1. Entire Process is Dependent on RO Functioning

The VA's benefits system is premised on a "claimant-friendly, non-adversarial" approach to deciding claims.1 Accordingly, the VA, the veteran, and the veteran's representative are all meant to share the same goal: making sure veterans and their dependents receive the VA benefits they deserve. Cognizant of this shared goal, it is important to remember that these adjudicatory bodies - the 58 VA Regional Offices ("RO"), the BVA, and the CAVC - do not exist in a vacuum. CAVC functioning is dependent upon the quality of BVA's decision-making. Similarly, BVA's decision-making efficiency and quality are directly related to the RO's claim development and adjudication quality.

All veterans' claims are initially adjudicated at the RO level. From the moment the veteran files a notice of disagreement ("NOD") in response to an adverse rating decision, unacceptable delays ensue. As noted in BVA's 2007 Annual Report, it takes the VA an average of 213 days to issue a Statement of the Case ("SOC") in response to a veteran's NOD.2 If the veteran disagrees with the SOC, another two years will pass before the BVA issues a decision.3

Despite the unreasonable time VA currently takes to adjudicate claims at the RO level, the vast majority of appeals arrive at BVA inadequately developed and, or improperly decided - in 2007,

35 percent were remanded to the RO for re-adjudication. Although a BVA decision's quality is typically higher than that of an RO's, it is still poor.

The numbers BVA provides concerning the quality of its decisions are misleading at best. NOVA believes that a much more accurate assessment of the quality of BVA's work can be ascertained by analyzing the statistics maintained by the CAVC. These numbers show only 20 percent of BVA's denials are affirmed, and fully 60 percent are remanded or reversed due to BVA errors.4

Simply stated, higher quality RO and BVA decisions would dramatically improve the overall functioning and efficiency at both the BVA and the CAVC. Fully-developed veterans' claims lead to more complete, substantive RO and BVA decisions which, consequently, lead to significantly fewer remands.

2. RO Problems are Compounded at BVA Level

In the vast majority of cases, a BVA staff attorney is the first person to review a veteran's claim with even a basic understanding of relevant CAVC case law and its potential application to that claim. RO adjudicators are almost completely untrained in and unaware of CAVC jurisprudence, and the low quality of their decisions reflects this ignorance. In addition, some of the Decision Review Officers ("DROs"), who serve as the first line of appeal adjudicators at the ROs, ignore their duty as set forth in M21-MR, Part 1, Chapter 5, Section C, pp. 5-C-3, 5-C-15, to hold informal conferences. When DROs refuse to do so, they deny claimants and their representatives an important time-saving opportunity to narrow issues and resolve appeals.

Although BVA is often criticized for its remand rate, BVA remands are sometimes the only way to get an RO to develop a claim properly. This is especially true in cases of unrepresented veterans who rely heavily on VA to develop their claims fully and fairly. Nonetheless, the fact remains that BVA suffers from enormous delays and backlogs of its own making as well.

BVA's share of delays is due in part to inadequate staffing levels. Currently, BVA has 56 Veteran Law Judges ("VLJs") divided into four teams. Each team is comprised of two chief VLJs and 11 line VLJs who are supported by 60 staff counsel.5 BVA adjudicators are required to decide a high number of cases each week. In our opinion, Congress cannot expect individual BVA attorneys and VLJs to work faster than they already do without causing an even greater decline in decision quality.

For example, the 1,100 Administrative Law Judges ("ALJs") within the Social Security benefits system issued 560,525 decisions during FY 2007, or 510 decisions per ALJ. In contrast, BVA's 56 VLJs currently issue over 40,000 decisions per year, or more than 700 decisions per VLJ, even though veterans' claims are generally much more complex. This complexity stems from the fact that VA claims can include a multitude of separate physical and psychiatric disabilities and are routinely based on paper records that run to thousands of pages, spanning a veteran's life since active duty. Thus, records may date back as far as World War II or as recent as Iraq and Afghanistan. The increased work demands on VLJs are reflected in the results. The affirmance rate in federal court for SSA decisions is 41 percent; that is more than double the affirmance rate of BVA decisions at the CAVC.6

NOVA's opinion is that it would be unreasonable to expect more output from individual VLJs without sacrificing quality to an unacceptable degree. Realistically, the only way to responsibly increase the number of decisions BVA issues is to increase the number of attorneys who write them and the number of VLJs who sign them.

3. The BVA Should Not be Eliminated

NOVA considers BVA's role to be useful and important to the functioning of the Veterans Benefits Administration ("VBA") in two key respects. First, by statute, 38 U.S.C. § 7104(a), the BVA provides a unique opportunity for a de novo review of an appealed claim "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." Additionally, because the BVA is the highest appellate body within the VA, it acts as a buffer between the 58 RO's and the CAVC. Thus, without the BVA's intermediary role in reviewing and re-adjudicating claimed errors prior to court appeals, the CAVC could feasibly face a 1,000 percent increase in its caseload from a little over 4,000 newly filed appeals each year to over 40,000.7

4. Some of CAVC's Delays Are Caused by Its Failure to Decide All Issues Raised

The CAVC claims to be one of the busiest federal appellate courts with an incredibly challenging caseload, as evidenced by the more than 6,000 cases inventoried in 2007.8 In 2008, because of the continuous filing of over 4,000 new appeals, it took, on average, 446 days from the initial filing to the ultimate disposition of the appeal.

NOVA's members can attest to the frustration of veterans whose dispositive statutory arguments have been ignored by a court decision providing a remand because the BVA failed to explain its decision adequately, or the VARO failed to provide proper notification prior to issuing a rating decision. Not only does such a narrowly-constructed remand add more delays to both the CAVC's and the VA's caseloads, but it also ensures a second, third, and even fourth appeal based on the same arguments, until the CAVC finally resolves all of the issues. This "hamster-wheel" of never-ending remands leaves all parties - the CAVC, the veteran's attorney, and most importantly, the veteran - wholly disgusted, dismayed, and disenchanted with the very process meant to assist disabled veterans.

B. Specific Recommendations to Improve the Timeliness and Quality of Appeals

1. Streamline the Appeal Process via Congressionally-Mandated Pilot Program

By its own statute and regulation, the VA must provide a pre-adjudication notice to claimants informing them of any outstanding evidence needed to support their claim. However, these VA letters, known as "VCAA notices," are generic and confusing. In addition, the different decisional documents a veteran must review (e.g., the rating decision, SOC, the Supplemental SOC ("SSOC")), and the various pleadings a veteran must file to have an appeal reviewed and re-adjudicated by the BVA creates an unnecessarily complex, time-consuming, and inefficient appeal process.

NOVA suggests legislation be introduced to simplify and improve the appeal process at the RO level. In addition, NOVA suggests the proposed changes be implemented via a pilot program that requires regular, detailed reports by the VA to Congress. The proposed changes include strengthening the VCAA notice requirement, eliminating the SOC and SSOC requirements, as

well as eliminating the requirement that the veteran submit a second, post-NOD pleading in order for the BVA to review the denied claim. This pilot project could be utilized as an adjunct to the pilot program for expedited treatment of fully developed claims, contained in Section 221 of S.3023, which was passed by Congress last session, and which was implemented by the VA on December 17, 2008.10

Specifically, NOVA recommends that the legislation include a directive that, as part of the pilot program, the VCAA notice required by 38 U.S.C. § 5103(a) is to be claim-specific and prepared after pre-adjudication review of the veteran's claims file, but before the RO issues a rating decision. The pre-adjudicatory VCAA notice should state precisely what additional evidence is needed to substantiate the claim (e.g., "statement by a medical professional who has reviewed your relevant medical records opining that it is at least as likely as not that your current medical disability was caused or aggravated by your in-service injury,") and what provisions of law and, or regulation are preventing the VA from granting the claim based upon the evidence already of record.

The pilot project should provide that, once an NOD has been filed, the veteran need not submit a "substantive appeal" or a "formal appeal" as is presently required by 38 U.S.C.§§ 7105 (a) and 7105A. Instead, once a veteran submits an NOD, 60 days will be provided to allow for the submission of additional evidence, and, so long as no additional evidence is submitted, then the appeal will be directed to the BVA for de novo review. However, in cases where the claimant requests a hearing or submits additional evidence, then the appeal will remain at the RO for a new decision, which addresses the additional evidence and, or argument, and either confirms the prior denial or grants in whole or in part the relief requested.
NOVA further suggests that this pilot project include the transfer of RO staff who presently perform decision review functions (e.g., DROs) to the beginning stages of the appeal process to do pre-adjudication reviews and prepare the VCAA notices. Finally, NOVA contemplates that the present DRO process be eliminated in the pilot program.

2. Eliminate Unnecessary Medical Exams
NOVA recommends amending 38 U.S.C. § 5125 to eliminate unnecessary medical exams. Currently, if a veteran submits a complete and well-reasoned supporting medical opinion from a treating or examining physician, VBA's general procedure is to request yet another medical examination, referred to as a Compensation & Pension ("C&P") examination. The VA physicians who provide these medical examinations are employed by VBA, which is separate and distinct from the VA physicians who provide medical care to veterans and are employed by the Veterans Health Administration (VHA).

NOVA suggests the title of Section 5125 be amended to read "Acceptance of Reports of VHA and Private Physician Examinations." The body of the statute should be amended to read as follows: "For purposes of establishing any claim for benefits under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.], a report of a medical examination administered by a VHA treating physician or a private treating or examining physician that is provided by a claimant in support of a claim for benefits, including a claim for increased benefits, under that chapter, if requested by the claimant, shall be accepted without a requirement for confirmation by an examination by a VBA physician, so long as the report is sufficiently complete to be adequate

for the purpose of adjudicating such claim." By doing this, the VA would be able to diminish delays and save money by eliminating unnecessary medical exams and the subsequent C&P reports.

3. VA Should Harmonize its Databases and Move to Paperless Files

Veterans' records are maintained in a claims file folder referred to as the "C file." Both the ROs and the BVA use the C file, and thus, ship it between offices nationwide in order to adjudicate claims and appeals. Further compounding the problem is the fact that the ROs and BVA transfer and manage the C files using different computerized tracking systems. BVA currently uses a database called "VACOLS" to track appeals, while the ROs use a database called Benefit Delivery Network ("BDN") and "COVERS." Together, these logistical problems result in inefficiency and more delays-not to mention the very real problem of records getting lost or damaged in transit. Thus, we support Secretary Shinseki's initiative to implement the universal use of one computerized file.

Related thereto, it is NOVA's understanding that VA has been working on the creation of a paperless records system for years, and Secretary Shinseki has called for the universal use of one computerized file for each veteran. The benefits of doing so are obvious, and we strongly support VA's efforts in this regard.

4. VA Should Allow Veterans' Counsel to Contact BVA Adjudicators Directly

In every legal setting, responsible communication between the parties is key to efficient claim resolution. Many needless remands and delays could be avoided if veterans' counsel were allowed to contact BVA adjudicators on an informal basis, akin to the informal contact permitted with a DRO at the RO level. Unfortunately, BVA continues to forbid contact between its adjudicators and veterans' counsel.

BVA has argued such communication would be "ex parte," despite the fact that there is no opposing party in the VA's non-adversarial, pro-claimant system. BVA also argues that its mandate requires a review of the written record and that any oral communication with veteran's counsel would contradict that mandate. This argument ignores the VA's own regulation, 38 C.F.R. § 20.708 (2007), which provides for pre-hearing conferences to clarify and narrow the issues on appeal, avoid needless remands and thus, speed the resolution of appeals and promote decision-making accuracy.

In addition to pre-hearing conferences, advocates also require open communication between VLJs and private counsel to discuss and resolve procedural matters. Such informal communication could lower BVA's remand rate dramatically when an issue, e.g., evidence needed to grant a claim is missing from the veteran's C file or waiver of issue development, could be resolved via a ten-minute phone call as opposed to a ten-month paper chase. Moreover, it would help to counter many veterans' opinions that the VA is not interested in assisting them with their claim for disability benefits.

5. The Same VLJ Should Not Re-Adjudicate Claims They Previously Denied

Currently, when a VLJ denies a claim which is appealed to and remanded by the CAVC, it is returned to the same VLJ who issued the original denial for yet another decision. This is blatantly unfair to veterans, both in appearance and in practice. Human nature being what it is,

many VLJs get angry and defensive when their decisions are remanded by the CAVC. They are pre-disposed to defend their prior adverse decision and deny the veteran's claim again. Yet, BVA defends this unfair practice by claiming it saves time in readjudicating the veteran's claim, reasoning that the same VLJ who previously denied it will be more familiar with it than would a different VLJ. This argument ignores the fact that these cases routinely take one to two years to wind their way through the CAVC. In that time, the typical VLJ will have decided another 700-1,400 veterans' claims. Indeed, BVA's implication that VLJs can and do spend less time reviewing cases they previously decided is itself a significant reason to stop the practice immediately.

6. VLJs Should Not be Subject to Annual Recertification

NOVA believes that 38 U.S.C. § 7101A should be amended to eliminate the requirement that VLJs undergo annual recertification. The threat of being decertified is a blatant restriction of BVA adjudicators' independence. This threat puts too much pressure on each VLJ to produce high numbers while keeping grants, remands, and denials "in line" with those of other VLJs.

7. RO Adjudicators Need More Training

Many RO adjudicators, including supervisors and the more experienced DROs, have only a vague understanding of what the CAVC is, much less the effects of its precedential cases on the claims sitting on their desks. It is imperative to the proper adjudication of a veteran's claim that the RO adjudicators understand the relationship between the CAVC and the VA. Sadder still is that veterans without counsel and, or those who do not appeal their cases to the BVA never experience the benefit of the CAVC's existence.

In addition, as evidenced in their rating decisions, RO adjudicators who develop and rate claims continually fail to appreciate relevant presumptions and evidentiary burdens set forth in VA statutes and CAVC case law. This is easily corrected. During the 110th Congress, the House of Representatives passed H.R. 5892 which contained provisions in Section 105 for certification and training for RO adjudicators. A bill such as this should be reconsidered, as it is essential to providing the quality decision-making veterans deserve.

8. VA Should Hire More Adjudicators

At all stages of VA claims adjudication, it is a simple fact that the fewer adjudicators there are, the greater the pressure is for each adjudicator to issue more decisions. This means that an adjudicator will spend less time on each case and quality will suffer. Poor quality decisions lead to more appeals, which lead to numerous readjudications of the same claim. Simply put, the current system's problems are self-perpetuating; but, by increasing the number and quality of RO and BVA decision-makers, the current burden on the appeals system will eventually decrease.

9. BVA Should Function Independently and VLJ's Should Not be Selected or Hired Exclusively from Within VA

According to VA regulations, 38 C.F.R. parts 19 and 20, BVA is to function independently of the ROs. Instead, BVA and RO personnel conduct joint training and hold monthly meetings to "resolve issues of common concern." This lack of independence is also apparent in the role of VLJs who "provide various types of assistance and training to RO staff."11 Furthermore, VLJs are selected almost entirely in-house from the attorneys who have been staff counsel with the BVA. NOVA believes 38 U.S.C. §7101, et seq. should be amended to re-categorize the VLJs as

Administrative Law Judges ("ALJs"), and to require that the BVA's ALJs be hired through the Office of Personnel Management from a pool of qualified attorneys in the same manner ALJs are hired for other federal agencies.

10. The Quality of BVA's Work Should be Accurately Recorded

Rather than maintaining the artificial and erroneous accuracy rate calculation system presently in place, 38 U.S.C. § 7101(d) should be amended to require the BVA to report on the percentage of unfavorable Board decisions which are appealed and later reversed or remanded in whole or in part by the CAVC.

NOVA's opinion is that the best way to ascertain the overall quality of BVA's decisions is to look at CAVC's figures and compare the number of BVA decisions it affirms with those it vacates.

11. Eliminate the Appeals Management Center ("AMC")

In 2003, the U.S. Court of Appeals for the Federal Circuit ruled that BVA is precluded from developing evidence. See Disabled American v. Sec. of Veterans Affairs, 327 F.3d 1339 (Fed. Cir. 2003). As a result, the BVA established the AMC and transferred personnel from the former BVA evidence development unit to the AMC.12 In essence, the AMC acts as a special RO to which all BVA remands are funneled for disposition. If the veteran is not represented by an attorney, then the AMC is responsible for complying with BVA's remand orders and conducting any further case development. Once the development is completed, the AMC then re-adjudicates the claim.

The AMC was an interesting concept, but it simply does not work. AMC development is much slower than RO development, and AMC adjudicators' work product is of extremely poor quality. Moreover, the AMC operates primarily unfettered because veterans who are represented by private counsel have their cases adjudicated at the RO level, not at the AMC. In essence, the VA has taken its least protected claimants and given them the worst service possible.

NOVA urges Congress to eliminate the AMC immediately. If this cannot be done, then a thorough investigation of the AMC is certainly warranted. In particular, we urge Congress to investigate the overwhelming anecdotal evidence regarding correspondence sent to the AMC which has not been associated with the veteran's C file.

12. Eliminate Review of "Extraordinary Awards"

By administrative fiat and without formal rule-making, the VBA now singles out rating decisions which would result in payment of benefits "with an effective date retroactive eight years or more or that would result in a lump-sum payment of $250,000 or more" and requires additional, secret review of them by the VA's Compensation and Pension (C&P) Service in Washington, D.C.13 This additional review adds months of delay before the RO actually issues its decision to the veteran. What's worse, if the C&P Service does find error in the RO's adjudication, then neither the veteran nor the veteran's representative is ever notified of the C&P Service's recommended changes to the rating decision. This is so because the entire review process is conducted under a cloak of secrecy. Moreover, this additional review is completely unnecessary since VA's prior policy required multiple RO supervisors' signatures for awards exceeding $25,000.

NOVA recommends the VA eliminate this undisclosed, unlawful, and unchallengeable review without delay. Indeed, if the VA were to improve its RO adjudicators' training, this type of secret review would be completely unnecessary. On the other hand, for the VA to continue this policy

(i.e., paying two separate VA staff in two separate offices to review the same grant of benefits) would simply exemplify the VA's failure to focus on long-term improvements so desperately needed to stop the delays, errors, and backlog currently found in the VA's appeals process.

Finally, it must be noted that although the VA deems these as "extraordinary awards," these large payments actually represent "extraordinary errors" committed by the VA due to its improper denial of a veteran's claim. But for tenacity of the veteran and his or her advocate, the veteran would continue to suffer undue financial hardship, marital stress and strain, compounded health issues, and a lack of opportunity for the veteran's children while they're still young. Veterans who finally receive these large awards deserve an apology from the VA, not more bureaucracy and delays.

13. Require the CAVC to Decide All Relevant Assignments of Error
During the 110th Congress, the House of Representatives passed H.R. 5892 which contained provisions in Section 202 requiring the CAVC to decide "all relevant assignments of error raised by an appellant." A bill such as this should be reconsidered, as it is essential to providing the quality decision-making veterans deserve.