Appendix
E

Summary of Legal Analyses

Nearly a dozen legal issues pertinent to benefits for disabled veterans and their survivors were analyzed by Commission staff:

1. Character of discharge
2. Concurrent receipt of military retirement and VA disability compensation
3. Time limit to file claims for service-connected compensation
4. VA's duty to assist
5. Presumptions of service connection
6. Line of duty
7. Survivors' concurrent receipt of Survivor Benefit Plan (SBP) and dependency and indemnity compensation (DIC)
8. VA disability compensation apportionment and garnishment
9. VA compensation claims terminate upon the claimants' deaths
10. VA Vocational Rehabilitation and Employment Program (VR&E)
11. Age as a factor in evaluating service connection

1. Character of Discharge

An individual must be a veteran or the dependent or spouse of a veteran to be eligible for most benefits administered by the Department of Veterans Affairs (VA), including service-connected compensation and dependency and indemnity compensation. The statutory definition of a veteran is a person who served in active military service and was discharged there from "under conditions other than dishonorable" 38 U.S.C. 101(2) (2006).

Congress adopted this statutory definition in 1944 to establish a comprehensive standard governing basic eligibility for veterans' benefits based on the character of an individual's discharge or release from active military service. From the legislative history of the Readjustment Act of 1944, it is clear that Congress intended to liberalize the then existing requirement of a discharge under honorable conditions and correct what Congress viewed as an overly strict standard that unjustly prevented many who served faithfully, but were separated

for relatively minor offenses, from receiving veterans' benefits. At the same time, Congress recognized that a dishonorable discharge could only be given pursuant to a general court martial and that some individuals guilty of serious offenses were released without the formality of such a proceeding. In such cases, Congress was equally adamant that veterans' benefits should not be available.

Congress adopted the phrase "under other than dishonorable conditions" to accomplish its twin goals of liberalizing the standard for establishing basic eligibility for veterans' benefits while at the same time barring benefits to individuals separated for serious offenses. By adopting this phrase, Congress authorized VA to accept the characterization of a discharge or release by one of the uniformed services to the extent it is issued under clearly honorable or dishonorable conditions. It also provided VA with the authority and discretion to make its own character-of-discharge determinations for VA benefit purposes in those cases where the discharge or release is neither specifically honorable nor dishonorable.

In some instances, the statutory scheme authorizes VA to determine the character of a discharge for purposes of veterans' benefits. The scheme also continues the long-standing policy of permitting an individual with two periods of active service to receive benefits even if one of the periods of service was terminated by a dishonorable discharge, so long as the other period of service was terminated under conditions other than dishonorable. Congress reaffirmed this policy in 1977 when it amended 38 U.S.C. § 101 (2006)(18) to authorize eligibility for veterans' benefits to an individual who satisfactorily completes a period of service, but does not receive a discharge or release because of having agreed to extended active duty.

From the legal analysis completed for the Commission, it can be seen that the character of an individual's discharge or release from active military service is crucial to establishing eligibility for veterans' benefits. It is similarly evident that the primary elements of the scheme governing character-of-discharge determinations were established by Congress and have a long history. Finally, although the utility, the appropriateness, or even the wisdom of that statutory scheme has been questioned throughout the ensuing years, it continues to be applied as Congress intended.

2. Concurrent Receipt of Military Retirement Benefits and VA Disability Compensation

Some of the greatest congressional interest regarding veterans' disability benefits in recent years has been the debate over whether military retirees should be permitted to concurrently receive disability compensation from VA and military retired pay from the Department of Defense (DoD). Disabled military veterans have been granted disability compensation for service-connected

disabilities since colonial times. Congress first authorized military retirement pay in 1861 during the Civil War. As early as 1890, Congress expressly prohibited the concurrent receipt of both disability compensation and military retired pay.

Notwithstanding this long, consistent history, over the years proponents of concurrent receipt of disability compensation and military retired pay have sought to convince Congress to eliminate the prohibition. Proponents have generally argued that military retired pay and disability compensation are earned and awarded for distinctly different purposes. Military retired pay is earned compensation for services provided, and disability compensation is paid in recognition of the pain, suffering, and loss of earning capacity resulting from a service-connected disability. Arguing that the issue is a question of fairness, proponents claim that career military retirees are the only group of Federal retirees who are required to waive, or “offset,” their retirement pay to receive disability compensation.

Opponents of concurrent receipt, usually point to the costs it would generate. The Congressional Budget Office (CBO) estimated in 2001 that the 10-year cost of totally eliminating the offset would be $41 billion. Opponents of concurrent receipt also argue that eliminating the prohibition could lead to elimination of similar offsets that are common in other Federal programs. As to the alleged unfairness, opponents claim there is no unfairness in the lack of an analogous offset of disability compensation from other Federal retirement benefits because the military retirement system is unique.

Since the late 1990s, proponents of concurrent receipt have achieved some degree of success in convincing Congress to eliminate the prohibition. In 1999, Congress passed legislation providing partial concurrent receipt by awarding a special payment not subject to the offset provisions to severely disabled military retirees who were also receiving VA compensation. Congress enacted legislation in 2001 that authorized concurrent receipt but made it contingent upon passage of subsequent "qualifying offsetting legislation" that would fully offset the increased costs resulting from passage of the concurrent receipt legislation. No such "qualifying offsetting legislation," however, was enacted.

Congress created a new category of special compensation called "combat-related special compensation" in 2002. This legislation provided the financial equivalent of full concurrent receipt to some military retirees for certain defined combat-related disabilities. In 2003, Congress authorized the progressive implementation, over a 10-year period, of full concurrent receipt for military retirees with disabilities rated at least 50 percent disabling. At the same time, Congress expanded the scope of combat-related special compensation by eliminating the requirement that the disabilities resulting from the designated activities be rated at least 60 percent disabling.

In 2004, Congress eliminated the phase-in period for 100 percent disabled retirees making them eligible for full concurrent receipt effective January 1, 2005. Most recently, in 2006 Congress reduced the phase-in period from 10 years to 5 years for retirees rated 100 percent disabled by reason of a VA determination of individual unemployability.

Opponents of concurrent receipt challenge the claim that the prohibition against the practice unfairly discriminates against military retirees by requiring that only they, and no other Federal retirees, must reduce their retired pay in order to receive VA disability compensation. In this regard, opponents note that prior to the recent legislation modifying the prohibition, it had been in place for over 100 years, and during that period no member of the military had been promised concurrent receipt of both benefits. Moreover, opponents of concurrent receipt can rely on the decisions of the United States Court of Appeals in the *Absher* and *Howard* cases for the proposition that the circumstances of military retirees and other Federal civilian employees are very different. As the court noted in those cases, the special benefits accorded military retirees (e.g., commissary, recreational, travel, and health benefits as well as more liberal retirement criteria) provide a rational basis for concluding that the two groups of retirees are not similarly situated and that different provisions governing concurrent receipt of their retired pay are warranted.

The proponents of full concurrent receipt continue to advocate for elimination of all offsets. In the 109th Congress seven bills were introduced to eliminate all offsets: S. 13, S. 558, S. 845, H.R. 303, H.R. 2076, H.R. 2368, and H.R. 5881. None, however, abrogated the offset provisions.

3. Time Limit to File Claims for Service-Connected Compensation

The United States has a long history of providing generous assistance to veterans for disabilities resulting from injuries or diseases incurred during military service. With the exception of one period of time (1917–1930), veterans have never been required to file a claim for this assistance within a specified time frame or lose the opportunity to receive it. Currently, there is no time limit within which claims must be filed with VA for service-connected compensation benefits. Some commentators have suggested that the imposition of time limits for filing claims for such benefits may be reasonable. Others, however, have objected on the grounds that time limits are unwarranted and inconsistent with the intent and purpose upon which these benefits are based.

Notwithstanding that there are time limits for filing claims for many VA benefits, including insurance, education, and vocational rehabilitation benefits, traditionally, veterans and their survivors have had an unlimited period of time in which to file claims for VA compensation and dependency and indemnity

compensation (DIC). There was, however, one period during which this tradition was not maintained.

The years from 1917 through 1930 are the only period in our country's history in which veterans were required to file claims for service-connected compensation within specified time limits or lose the opportunity to do so. Despite this otherwise unbroken history, it has been recently suggested that the imposition of a time limit should be reconsidered and explored. Yet the mere suggestion that consideration be given to imposition of a time limit in which to file a claim has resulted in vigorous debate.

For example, in its December 1996 *Report to Congress*, the Veterans' Claims Adjudication Commission (VCAC) suggested, without attempting to resolve the issue, that establishing a delimiting date for claiming VA disability compensation warranted consideration. The VCAC was created by Congress to conduct a study of VA's system for adjudicating claims for veterans' benefits. Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, tit. IV, 108 Stat. 4645, 4659-63 (2006). In brief, the VCAC was charged with evaluating the efficiency of the then current VA adjudication processes and procedures and with developing recommendations and initiatives for increasing efficiency, reducing the number of pending claims, and enhancing the claims processing system.

In its discussion of the issue of establishing a delimiting date to file VA compensation claims, the VCAC recognized that traditionally veterans have had an unlimited period of time in which to file. *Report* at 266. The VCAC noted that although the generous filing privilege may be regarded as an advantage to veterans, it may also present disadvantages as well. *Id.* The VCAC listed and examined the advantages and disadvantages of a time limit in which to file claims. *Report* at 267-269.

The VCAC expressly stated that the purpose of its discussion of the advantages and disadvantages of establishing a delimiting date for VA disability claims was merely to explore the issue, not to resolve it. *Report* at 262. One commissioner, however, disagreed with the suggestion. On page 367 of the *Report*, Commissioner Chavez stated,

[EXT]

> [t]his is a right which protects veterans' vital interests. I see no evidence of large numbers of such claims to justify any delimiting periods. TAP [Transition Assistance Program] and DTAP [Disabled Transition Assistance Program] counseling will over time reduce such claims. Conformity with other private or government programs may satisfy aesthetically, but offers no discernible benefit otherwise. There is no demonstrated need to reduce or remove unlimited time for filing original claims.

Commissioner Leach responded to the suggestion by adding 10 additional factors to the commission's list of disadvantages, and concluded by stating, [EXT]

> [e]stablishment of a 5-year delimiting date will reduce the number of claims and provide reduction of work for adjudication division [sic], but it is obvious that it would deprive the veteran of benefits that were or may be promulgated into law after many years of experienced study. This could create hardship for many veterans and their dependents.

Report at 384-385

More recently, consideration of the issue of establishing a time period for filing VA compensation claims was raised before the Veterans' Disability Benefits Commission. Admiral Daniel L. Cooper, Under Secretary for Benefits for the Department of Veterans Affairs, suggested,
<EXT>

> [t]oday, there is no time limit for a veteran to submit an initial claim for disability compensation….I recommend this committee [sic] review and discuss this question.

Several veterans service organizations responded and presented their views on the issue to the Commission. In statements presented at the Commission's September 15, 2005, meeting, The American Legion, the Vietnam Veterans of America, the AMVETS, and the Military Coalition all expressed their opposition to imposition of a time limit. The Disabled American Veterans expressed its opposition in a letter dated August 10, 2005, from David W. Gorman, executive director of its Washington headquarters, to the Secretary of the VA. A copy of Director Gorman's letter was sent to the Commission.

4. VA's Duty to Assist

As early as the Revolutionary War, the United States Government demonstrated a commitment to assisting veterans. The concept of a Veterans' Administration, or what is now known as the Department of Veterans Affairs, did not become a reality until after World War I. Historically, VA has always assumed a policy of assisting claimants in marshalling evidence to substantiate their claims for VA benefits. The legislation governing the adjudication of veterans' benefits claims was intended to be nonadversarial, proclaimant, and veteran friendly. This philosophy culminated in the introduction and passage of two significant pieces of legislation that facilitate the development and full, fair evaluation of VA benefits claims:

1. The Veterans Judicial Review Act (VJRA) of 1988 (which created the statutory "duty to assist" veterans in developing their benefits claims)

2. The Veterans Claims Assistance Act (VCAA) of 2000

Prior to these two major legislative actions, there were previous administrative practices and procedures as well as regulatory provisions that defined the “duty to assist” within VA. There have also been several court decisions that addressed the plausibility of a claim to a fair and impartial adjudicator (i.e., “well-groundedness”) and its relationship to the duty-to-assist requirements. The Commission’s legal analysis of this issue explored significant case law relating to the duty-to-assist requirement, paramount among them being the 1999 *Morton* decision, which reaffirmed the “well-grounded” claim prerequisite for the activation of the “duty to assist” in adjudication of VA benefits claims and ultimately led to enactment of the VCAA.

The Veterans Judicial Review Act (VJRA) ended more than a century of congressional measures that precluded adjudication of veterans' benefits claims in the appellate court system. 38 U.S.C. § 7251 (2006). Prior to this new law, any decision made by VA about a veteran's claim was deemed final, and there was no recourse for independent judicial review of an appeal. The legislation created the statutory “duty to assist,” modified the existing Board of Veterans Appeals (BVA) to enhance its independence from VA, and established a Court of Veterans Appeals (CVA), which later became the Court of Appeals for Veterans Claims (CAVC), with jurisdiction to review BVA decisions. The VJRA also allows attorneys to represent veterans before the CVA and receive more appropriate remuneration.

Another pivotal development in the VA’s adjudication process for veterans’ claims was the passage of the Veterans Claims Assistance Act of 2000 (VCAA). 38 U.S.C. § 7251 (2006). This act restored and enhanced VA's duty to assist (previously abrogated in the *Morton* decision in 1999) claimants in developing their claims for veterans benefits. The VCAA requires VA to take very specific, clearly delineated steps to assist claimants. Although VA was already required to notify a claimant whose application was incomplete, under the VCAA, VA must now also inform a claimant of any medical or lay evidence necessary to substantiate his or her claim. The VCAA also specified that this notice must indicate what proportion and type of corroborating evidence is to be provided by the claimant and which portion VA will attempt to obtain on behalf of the claimant.

5. Presumptions of Service Connection

A presumption may be most simply viewed as a conclusion or inference drawn from the existence of some fact or group of facts. In the context of the adjudication of VA compensation claims, a somewhat more precise and legalistic view is that a presumption relieves a VA claimant of the burden of producing evidence that directly establishes one or more facts that would otherwise be

necessary to substantiate the claim. For example, in the case of a veteran claiming disability compensation, if the evidence shows manifestation of a disease covered by a presumption of service connection within the specified period, then service connection may be established (so long as the veteran currently suffers from that same disease at the time that the claim is filed). In such a case, service connection is established even though there is no medical evidence of an actual connection between the disease and the veteran's military service. The effect of the presumption is to shift the burden to the Government to prove that there is no connection between the disease and service.

There are several reasons that justify the widespread use of presumptions in the adjudication of VA benefit claims. Presumptions may simplify and streamline the adjudication process by eliminating the need to obtain evidence and decide complex issues. Presumptions also promote accuracy and consistency in adjudications by requiring similar treatment in similar cases. Presumptions may relieve claimants and the VA of the necessity of producing direct evidence when it is impractical or unduly burdensome to do so. Finally, presumptions may implement policy judgments that the burdens arising in certain cases be borne by the Government rather than the veteran claimants notwithstanding the uncertainty surrounding the issue of whether the claimants' disabilities were, in fact, incurred or aggravated by service.

As noted, presumptions are used throughout the process of adjudicating claims for various VA benefits. Their use occurs most extensively, however, in meeting a key requirement necessary to substantiate a claim for VA compensation benefits, meaning establishing service connection, the showing of a connection between military service and incurrence or aggravation of a veteran's disease or injury. In claims for VA compensation benefits, veterans generally bear the burden of proving their disabilities result from diseases or injuries that were incurred in or aggravated by military service. This burden is generally met by producing evidence the disease or injury occurred coincident to the military service. Once the evidence establishes that a presumption of service connection applies, however, the veteran is relieved of the burden of proving service incurrence or aggravation. In such a claim, unless there is affirmative evidence showing that the disease or disability was not incurred in or aggravated by service, VA must grant service connection.

In many, if not most, claims, it is relatively simple for veterans to meet the burden of proving their disabilities are service connected. The veteran's military records may clearly describe and document the circumstances and medical treatment for an injury or an illness suffered while in service as well as any resulting disability. In such a claim, the veteran's burden of proving service connection is easily met.

In other claims, however, where the manifestation of the disability is remote from the veteran's service and any relation between the disability and service is not readily apparent, the burden of proving service connection can be daunting. The

difficulties that can arise in proving service connection were recognized very early. In 1921, Congress first enacted a presumption of service connection for specific diseases to assist veterans in meeting the difficult burden they faced when attempting to establish a connection between their military service and the development of disabilities resulting from such diseases. Act of August 9, 1921, ch. 57, § 18, 42 Stat. 147. That act provided that pulmonary tuberculosis or neuropsychiatric disease developing to a degree of 10 percent or more within 2 years after service would be considered to have been incurred in, or aggravated by, service. Since that time, the application of presumptions within VA has been greatly expanded to encompass, among others, World War II and Korean War veterans, former prisoners of war (POW), and Vietnam and Persian Gulf theater veterans who incurred injuries or illnesses due to exposure to either mustard gas, ionizing radiation, or agent orange, among other precipitants or irritants.

6. **Line of Duty**

The "line of duty" requirement has been included in one form or another in the statutory provisions governing entitlement to service-connected disability and death benefits since the beginning of the Federal Government. Throughout much of this period, the appropriate interpretation to be accorded to the phrase was a matter of constant debate, uncertainty, and confusion. The phrase has been the subject of numerous administrative opinions by a variety of executive departments as well as conflicting judicial decisions. The discussion in each instance centered primarily on whether, for benefit entitlement purposes, the phrase required a causal connection between the performance of military duty and the disease contracted or the injury incurred in service that resulted in disability or death, or was it sufficient merely that the disease or injury occurred coincident with military service.

For purposes of service-connected disability and death benefits currently administered by VA, the question has been resolved by statute, 38 U.S.C. § 105 (2006). Under section 105, a veteran is entitled to compensation, for example, for any disability resulting from injury incurred or disease contracted during a period of active military service unless such injury or disease is the result of the veteran's own willful misconduct or abuse of alcohol or drugs. Compensation will also be barred if, when the injury is incurred or the disease is contracted, the veteran is deserting or absent without leave or confined under sentence of a court martial or a civil court for commission of a felony. Although much ambiguity and confusion has been eliminated under the provisions of the present statutory definition found in section 105, the debate as to whether a causal connection between the disability or death and the performance of military duty *should be required* continues.

Evidence of the debate's ongoing nature, aside from the fact that the issue is being addressed by the present Commission, is found in the testimony of the

General Accounting Office (GAO) dated September 23, 2003, prepared for the United States Senate Committee on Veterans' Affairs. U.S. General Accounting Office, *VA Benefits: Fundamental Changes to VA's Disability Criteria Need Careful Consideration*, GAO-03-11727T (Washington, DC: September 23, 2003). In the testimony, GAO stated that in March 2003, the Congressional Budget Office (CBO) reported that veterans received about $970 million in VA compensation in fiscal year 2002 for diseases GAO identified as neither caused nor aggravated by military service. Moreover, CBO estimated that VA could have saved $449 million in fiscal years 2004–2008 if compensation payments to veterans with several previously service-connected, disease-related disabilities were eliminated in future cases. GAO also noted its earlier report, U.S. General Accounting Office, *VA Benefits: Law Allows Compensation for Disabilities Unrelated to Military Service*, GAO/HRD089-60 (1989), and reiterated its suggestion therein that Congress might wish to reconsider whether diseases not caused or aggravated by performance of military duties ("line of duty") should be compensated as service-connected disabilities.

7. **Survivors' Concurrent Receipt of Survivor Benefit Plan and Dependency and Indemnity Compensation**

Among the issues facing Congress recently has been the benefits for military survivors, especially those of service members killed during the war on terrorism in Afghanistan and Iraq. A key aspect of this issue is the current provisions that prevent the concurrent receipt of full benefits payable under the DoD Survivor Benefit Plan (SBP) and the VA dependency and indemnity compensation (DIC) programs that are intended to sustain military survivors in the long term. Several veterans service organizations have asserted that concurrent receipt (without an "offset," or adjustment in amount of another benefit received by the same beneficiary) of these benefits is imperative to the financial viability of both the survivors of service members killed on active duty and the survivors of retirees who die of a service-connected cause. The current "offset" provisions of these survivor benefits programs have thus become a source of contentious debate.

Benefits for survivors of deceased members of the armed forces vary significantly in purpose and structure. Benefits such as the death gratuity provide immediate cash payments to assist these survivors in meeting their financial needs during the period immediately following a member's death. Similarly, the Servicemembers' Group Life Insurance (SGLI) provides the policy value in a lump sum payment following the service member's death. The DIC and SBP are designed to provide long-term monthly income. Additional death benefits provided to survivors and dependents include housing assistance, health care, commissary and exchange benefits, educational assistance, and burial, funeral, and related benefits. Survivors may also receive death benefits from Social Security.

The Defense Authorization Act of 2002 authorized SBP eligibility for survivors of all members who die on active duty. Pub. L. No. 107-107. The legislation provided that the SBP annuity is to be calculated as if the member was disability retired with a 100 percent disability on the date of death. Previously, survivors of members who died on active duty were not eligible unless the member had at least 20 years of service. Pub. L. No.107-107 § 642.

Congress has considered the offset issue over the years. An attempt at policy reform in the 109th Congress to repeal the "offset" provisions occurred with the advent of parallel legislation introduced in the House (H.R. 808) and in the Senate (S. 185). However, the John Warner National Defense Authorization Act for Fiscal Year 2007, signed by President Bush on October 17, 2006, retained the offset for at least the immediate future.

8. VA Disability Compensation Apportionment and Garnishment

VA compensation can only be garnisheed to pay child support when a former member of the Armed Forces, who has waived all or a portion of military retired or retainer pay in order to receive the compensation, and then only the amount of VA compensation that represents the military retired pay or retainer pay that has been waived is subject to garnishment for child support.

By statutory authority, military retired pay and retainer pay is subject to garnishment for child support. *See* 42 U.S.C. § 659(h)(1)(A)(II)(2006). Section 5304, of title 38, United States Code, prohibits a retiree from receiving retired pay and compensation at the same time. Because military retirees are required to waive their military retired pay in order to receive VA compensation, this cannot be shelter from the garnishment that would otherwise occur. Therefore, VA compensation can be garnisheed pursuant to a court order to pay child support or alimony, but only when a veteran receives the compensation in lieu of military retired pay with a partial or total waiver. *See* 42 U.S.C. § 659(h)(1)(A)(V)(2006) and 5 C.F.R. 581.103(c)(7)(2006). Disability compensation is the only VA benefit subject to garnishment for child support. *See* 42 U.S.C. § 659(h)(1)(B)(iii)(2006) and 5 C.F.R § 581.104(b)(2006).

When a garnishment order is received by a VA regional office, it is referred to the district counsel. The district counsel is responsible for reviewing the order and preparing a memorandum explaining the legal basis for any further action and the amount of the garnishment that is to be established. The memorandum is forwarded to adjudication, where an award withholding the garnishment amount is processed. Garnishment of VA compensation is not subject to the advance notice required for other types of benefit reductions and can be implemented upon receipt. *See* 38 C.F.R. 3.103(b)(3)(vi)(2006). The veteran may appeal to

the Board of Veterans' Appeals only those issues involving VA's implementation mechanics. The provisions or inherent legality of the garnishment order are under the jurisdiction of the issuing court.

The Defense Authorization Acts of 2003 and 2004 created combat-related special compensation (CRSC) and concurrent retirement disability payments (CRDP), and the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 eliminated the phase-in period for CRDP for retirees who are receiving 100 percent VA compensation. The effect of CRSC and CRDP on the garnishment of VA compensation is currently under review.

Apportionment

An apportionment refers to a distribution or allotment of a benefit. VA benefits can be apportioned between a veteran and his or her dependents (but not garnisheed unless received in lieu of military retirement). For an apportionment to be considered by VA, a claimant must make an application, and the evidence submitted must meet VA's requirements. Unlike cases of garnishment where there has been a court order, in apportionment cases VA must follow regulations to ensure due process in making a determination of a claim. Veterans are kept informed of all allegations, and both parties are asked to furnish statements of net worth, annual income, and expenses. Apportionments are not made by VA when it would cause undue hardship to the veteran, if there are other resources available for the spouse, or if the spouse has been found guilty of conjugal infidelity or is publicly known as someone else's spouse. Former spouses are not entitled to apportionments. Apportionments are made when a veteran is not reasonably contributing to a child or to children not living with the veteran. Veterans' benefits can also be apportioned in cases where there is a dependent parent or if the veteran is incompetent, has disappeared, is incarcerated, or has forfeited his or her benefits. In 1998, the VA acting general counsel reported that, "There are currently nearly 23,000 cases in which running awards of VA benefits of all kinds are being apportioned to spouses for children." As of June 2007, there were 1,569 cases involving survivors and 15,080 with veterans and dependents.

An apportionment of a veteran's benefit can only be made when a complete claim and evidence is received by VA. 38 C.F.R. §§ 3.450-3.458 (2006) regulates how award actions should be handled, such as effective dates, adjustments, development and due process, and notification to veteran and apportionment claimant. According to the acting general counsel, "The unavailability of garnishment in most cases with respect to VA benefits is relieved somewhat by the availability of administrative apportionment." Apportionments are made to the veteran's spouse, if he or she is not living with the veteran, or to the veteran's children, if they are not in the custody of the veteran.

There are a number of factors that must be considered when determining whether and to what extent to apportion a veteran's benefits. For example, a veteran's benefits may be apportioned when the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support. This stipulation ensures that only those veterans who are not meeting their parental or spousal responsibilities are subjected to apportionment. Also, VA gives consideration to whether the apportionment would cause an undue hardship for the veteran. Based on this concern, the amount of benefits the veteran receives, the veteran's resources compared to the dependent's resources, and the special needs of the veteran and dependents are all considered. Obviously, such stipulations and considerations will vary in each case, making apportionment cases unique.

Because these reviews take place at all of the regional offices across the country, variances in the decision-making process may occur. A centralized location that handles all of the apportionment claims could be possible. The Commission has seen examples of such VA practices when it conducted site visits and heard testimony on the efficiency of centralizing benefits delivery at discharge cases at two locations. The Commission is also aware that VA centralizes insurance cases at a single location in Philadelphia, education claims at four locations, pension claims at three locations, loan guaranty at nine locations, and all overseas cases are handled in Pittsburgh. Centralization of apportionment decisions might allay concerns that there are variations in apportionment decisions by VA.

9. VA Compensation Claims Terminate Upon the Claimants' Deaths

Under the statutory scheme governing service-connected disability compensation benefits administered by VA, a veteran's claim for compensation, which is pending at the time of the veteran's death, is terminated because only veterans can receive compensation. Benefits owed to a veteran but unpaid are available to survivors or the veteran's estate as accrued benefits. The one exception to this rule is provided in the procedure governing the filing of a claim for accrued benefits. The accrued benefits procedure, however, is limited in that it permits certain survivors to recover only benefits to which the entitlement has already been established or can be readily established based on evidence in the file at the date of the veteran's death, and that are as yet unpaid. In addition, applications for accrued benefits must be submitted within 1 year after the veteran's death.

The courts, interpreting the overall statutory scheme governing compensation, dependency and indemnity compensation (DIC), and accrued benefits, have consistently held that a pending claim for compensation terminates upon the claimant's death. Some veterans' advocates, however, have argued that the

statutory provisions are unfair and should be amended to permit the continuation of not only a pending VA compensation claim, but a claim for other VA benefits as well, and allow a claimant's survivors or estate to receive the full benefits that would have been paid if the claimant had survived.

The United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims (CAVC) have reviewed the issue of whether a veteran's pending claim for VA compensation survives the veteran's death on several occasions. In their decisions, the court has described the statutory scheme, explained how the structure and language of the scheme manifest an intent to terminate a veteran's claim to disability compensation at death, and have consistently ruled that, based upon the overall statutory scheme, such claims do not survive the veteran's death.

In *Landicho v. Brown*, 7 Vet. App. 42, 47 (1994), the CAVC, then the Court of Veterans Appeals, first discussed the overall statutory scheme governing disability compensation, and concluded that veterans' pending claims for compensation under that scheme do not survive their deaths. In this regard, the CAVC noted that veterans' and survivors' benefits are, for the most part, provided in title 38 of the United States Code. Further, the court stated that while chapter 11 of title 38 provides for disability compensation, it makes no provisions for survivors. Instead, chapter 13 of title 38 provides DIC benefits to specified survivors of veterans whose deaths are service-connected or who have been rated 100 percent for service-connected disabilities for a required period immediately before death. Moreover, the scheme specifically provides in 38 U.S.C. § 5112(b)(1)(2006) for termination of disability compensation by reason of the veteran's death to occur on the last day of the month before the death, and in 38 U.S.C. § 5110(d)(2006) for DIC benefits to begin, when the DIC application is received within 1 year of the veteran's death, on the first day of the month in which the death occurred. In the CAVC's view this overall statutory scheme created "a chapter 11 disability compensation benefit that does not survive the eligible veteran's death." *Id.*

The court also briefly noted the one exception to the rule that a veteran's claim for disability compensation does not survive the veteran's death contained in the accrued benefit procedures provided in 38 U.S.C. § 5121(2006). In this regard, citing 38 U.S.C. § 5121(a) and (c)(2006), the court stated that in the accrued benefit provisions, "Congress has set forth a procedure for a qualified survivor to carry on, to the limited extent provided for therein, a deceased veteran's claim for VA benefits by submitting an application for accrued benefits within 1 year after the veteran's death." *Id.*

The Court of Appeals for the Federal Circuit in *Haines v. West*, 154 F. 3d 1298, 1300 (Fed. Cir. 1998), *cert. denied,* 526 U.S. 1016 (1999), analyzed the same statutory provisions and reached the same conclusion. The *Haines* court also discussed the accrued benefit provisions found in 38 U.S.C. § 5121(2006). The

court explained the limited nature of the accrued benefits exception noting that a survivor may only seek payment of those benefits that were due and unpaid at the time of the veteran's death. The court observed that the statute, as then written, limited payment to those benefits that were due and unpaid for a period not to exceed 2 years prior to the veteran's death. According to the court, the accrued benefits provision "thus creates a narrowly limited exception to the general rule that a veteran's claim for benefits does not survive the veteran." *Id.*

The Federal Circuit again addressed the issue in *Richard v. West*, 161 F. 3d 719 (Fed. Cir. 1998). In *Richard*, a veteran died while his appeal of VA's denial of his claim for service-connected disability compensation was pending in the Court of Veterans Appeals. The deceased veteran's brother, on behalf of the veteran's estate, sought to have himself substituted as a party to continue the appeal. The brother's principal argument was that the silence of the statutory scheme concerning disability payments to survivors and the lower court's procedural rules expressly allowing substitution compel the conclusion that the veteran's estate may be substituted for the veteran in a pending appeal. According to the brother, a conclusion that sections 5121 and 5112 were intended to prevent heirs of a deceased veteran from pursuing pending appeals because chapter 11 is silent regarding survivorship would contravene the broad remedial purposes of the statute. *Id.* at 721-722.

The court disagreed, however, stating that the brother's statutory argument could not overcome "the clear intent expressed by the structure and language of the statutory scheme at issue—that a veteran's claim to disability benefits terminates at death." *Id*. After reiterating the analysis of the statutory scheme as stated in its earlier *Haines* decision, the court reaffirmed that analysis and noted that the brother's argument would both swallow the narrowly limited exception of section 5121 and render section 5112(b)'s express termination of the payment of disability compensation virtually meaningless. *Id.*

In reaching its decision, the court in *Richard* also briefly discussed the legislative history of the accrued benefits procedure eventually codified at 38 U.S.C. § 5121 (2006). According to the court, instead of providing for the payment of disability compensation to survivors, "Congress in 1943 established a procedure whereby a limited amount of 'accrued benefits' due to the deceased veteran could be recovered by designated individuals. Act of July 13, 1943, ch. 233, Pub. L. No. 78-144, 57 Stat. 554, 557. *Id.* at 721. The court later observed that nothing in the legislative history persuaded it to change the results it reached in *Haines*. Although the court stated that it considered the legislative history to be inconclusive to its inquiry, it did note that it demonstrates "a record that broadly reflects a transition from express prohibitions of payments to veterans' estates to explicit allowance of payments to certain individuals. *See, e.g.,* H.R. Rep. No. 78-463, at 14 (1943); S. Rep. No. 78-403, at 11 (1943). *Id.* at 722-723.

One final argument that the court addressed in *Richard* was the brother's claim that any construction of the statutory scheme that reaches the conclusion that a deceased veteran's compensation claim terminates at death would violate the constitutional requirement of procedural due process. *Id.* In response, the court noted that to raise a due process challenge, a claimant must have a property interest entitled to due process protection. In this instance, because a veteran's entitlement to disability compensation is terminated at death, a veteran, and therefore a veteran's estate, cannot have a protected property interest in such compensation. The court cited *Lyng v. Payne*, 476 U.S. 926, (1985) for the proposition that the Supreme Court has never held that applicants for benefits, as opposed to benefits recipients, have a legitimate claim of entitlement protected by the due process clause of the fifth or the fourteenth amendment.

As the Federal Circuit observed, the provisions of 38 U.S.C. § 5121(2006) are not identical to the provisions of the 1943 statute that established the accrued benefits scheme. The court in *Richard* characterized the changes that had occurred in the scheme until that point in time as minor. *Richard*, 161 F. 3d at 723. However, in 2003, Congress enacted a substantial change to the accrued benefits scheme.

Prior to enactment of the Veterans' Benefits Act of 2003, Pub. L. No. 108-183 § 104(a), section 5121(a) provided that VA monetary benefits, including disability compensation, due and unpaid at a claimant's death for, at most, 2 years were payable to the claimant's eligible survivors. The act amended section 5121(a) to remove the 2-year limitation period on a survivor's recovery of such accrued benefits. In doing so, Congress repealed a major feature of the 1943 accrued benefits scheme, and, instead of limiting the amount of accrued benefits payable, provided survivors with the opportunity to receive the full amount of benefits that would have been paid if the veteran had survived.

Some have criticized the statutory scheme under which a veteran's claim for VA disability compensation that is pending at the time of the veteran's death is terminated. One such critic, Congressman Lane Evans, introduced H.R. 3733 in the 107th Congress and H.R. 1681 in the 108th Congress, both titled the "Veterans Claims Continuation Act," a bill "[t]o amend title 38, United States Code, to allow for substitution of parties in the case of a claim for benefits provided by the Department of Veterans Affairs when the applicant for such benefits dies while the claim is pending."

Former Congressman Evans discussed H.R. 3733 in a statement in the *Congressional Record*. 148 Cong. Rec. E176 (daily ed. Feb. 15, 2002) (statement of Rep. Evans). The congressman called H.R. 3733 an important measure that would allow families of veterans to continue claims for benefits that are pending at the time of a veteran's death and assure that they receive the full benefits that would have been paid, if the veteran had survived. He cited the decision of the United States Court of Appeals for Veterans' Claims in *Marlow v.*

West, 12 Vet. App. 548 (1999), as a particularly egregious case demonstrating the need for a change in the accrued benefits law.

The congressman noted that due to the backlog of cases pending in VA, it is inevitable that some claimants will die while their claims are pending. Further, he stated that many veterans' families have incurred substantial expenses and suffered financial hardship while claims were pending. If benefits are justified, these families should be made whole. He also stated that older veterans have expressed concern that VA uses delaying tactics, hoping the veteran will die before the claim is allowed. Although he stated he had no evidence that VA was using such tactics, the congressman observed that the inability of family members to continue claims and the 2-year limitation on any accrued benefits payable then in the law may erroneously give veterans this impression. Congressman Evans noted that other government benefits, such as Social Security benefits, are not extinguished when a claimant dies, and that the families of veterans deserve no lesser rights than Social Security claimants.

In a letter dated November 4, 2003, to the chairman of the Committee on Veterans Affairs, United States House of Representatives, then Secretary of Veterans Affairs Anthony J. Principi expressed VA's opposition to H.R. 1681, 108th Congress. In the letter, the Secretary stated:

> VA opposes this legislation primarily because it would represent a significant departure from established principles governing provision of veterans benefits. Traditionally, VA monetary benefits have been provided to meet subsistence needs of veterans and their dependents and survivors. By making such benefits subject to claim by the veteran's estate, the benefits would be transformed into property to be inherited by estate beneficiaries or claimed by creditors. Further, benefits could pass from the estate to individuals who had little or no contact with the veteran. We do not believe the limited funds available for payment of veterans benefits should be expended in this manner.

VA also claimed that the legislation would impose significant additional burdens on VA. Unlike under the current provisions of 38 U.S.C. § 5121 (2006), H.R. 1681 would require VA to undertake substantial evidentiary development on the claim after the veteran's death when the veteran would not be available to provide the critical information and assistance necessary to such development. According to VA, because of the nature of the evidence to be developed to properly adjudicate claims for disability compensation and obligations imposed on VA under the Veterans Claims Assistance Act, it may be impossible for VA to obtain the information necessary to resolve such claims. VA estimated that enactment of H.R. 1681 would result in mandatory benefit costs of $18.8 million for the first year, $47.4 million over 5 years, and $65.4 million over 10 years.

Enactment would also result in discretionary administrative costs of $750,000 in the first year, $2.9 million over 5 years, and $5.4 million over 10 years.

Legislation similar to H.R. 1681 has not been reintroduced in Congress to date.

10. VA Vocational Rehabilitation and Employment Program

The Vocational Rehabilitation and Employment (VR&E) Program is authorized by Congress under 38 U.S.C. § 31 (2006). The mission of VR&E is to help veterans with service-connected disabilities to prepare for, find, and maintain suitable jobs. For veterans with service-connected disabilities so severe that they cannot immediately consider work, VR&E offers services to improve their ability to live as independently as possible.

VR&E is a long-standing compensatory benefit for disabled military veterans. Since its inception during World War I under the War Risk Insurance Act, its mission has been to provide empirically validated, cost-effective vocational rehabilitation services and educational benefits to veterans with service-connected disabilities as well as to dependents, and, in some cases, nonservice-connected veterans (such as those engaged in VA's Transition Assistance Program and Disabled Transition Assistance Program (TAP/DTAP) authorized under Public Law 101-237 and Public Law 101-510.) A long line of legislation elucidates the processes that were conceived and implemented to facilitate a "seamless transition" from military service to successful rehabilitation and suitable employment. Persistent criticism, as noted by the 2004 VR&E Task Force, has been leveled against VR&E since its inception regarding its lack of efficacy, efficiency, and accountability. In a previous task force in the late 1970s, an attempt was also made to address these problems. It culminated in the creation of the current iteration of VA's VR&E Program through the enactment of the Veterans' Rehabilitation and Education Amendments of 1980 (Pub. L. No. 96-466).

Repeated efforts at reform through the years have met with varying degrees of success. Since the inception of the major 1980 reforms, VR&E has been significantly affected by statutory changes, such as Public Law 101-508, which in 1990 eliminated entitlement for veterans with a 10 percent service-connected disability. Then, in 1993, Public Law 102-568 changed the law again so that veterans with a 10 percent service-connected disability were once again entitled to benefits. In 1996, Public Law 104-275 defined and provided for "limited rehabilitation" as participation in self-employment and the completion of training for homebound veterans with severe service-connected disabilities to achieve vocational rehabilitation. On January 10, 2000, VR&C officially became known as VR&E to emphasize its focus on finding and maintaining suitable employment for rehabilitated veterans.

More recently, VA has attempted to address the vocational and employment reintegration needs of returning Operation Iraqi Freedom/Operation Enduring Freedom (OEF/OIF) service members is the Coming Home to Work initiative (CHTW). Through this initiative, unpaid work experience in a government facility is made available to VR&E-eligible service members pending medical separation from active duty at military treatment facilities. Participants work directly with a VR&E vocational rehabilitation counselor to obtain volunteer or work experience in a government facility that supports their career goals. The CHTW initiative provides valuable civilian job skills, exposure to opportunities, and work experience history to service members facing medical separation from the military and uncertain futures. VA is also facilitating successful reintegration via priority processing of OEF/OIF service member applications, and an ongoing alliance to facilitate job development and placement activities with the Department of Labor Veterans Employment and Training Service (DOL-VETS).

11. Age as a Factor in Evaluating Service Connection

Under current law, VA assigns evaluations of service-connected disabilities pursuant to authority contained in 38 U.S.C. § 1155 (2006). This section provides for a schedule of ratings of reduction in earning capacity resulting from specific injuries or combinations of injuries. Under section 1155, ratings are to be based, so far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations.

The Commission's research regarding this issue did not reveal any past or present statutory provisions concerning age as a factor in evaluating service connection. However, in the Schedule for Rating Disabilities currently used by VA under authority of section 1155, age is not a factor in the assignment of a service-connected disability evaluation. In this regard, VA regulation 38 C.F.R. § 4.19 (2006) specifically provides as follows:

> § 4.19 Age in service-connected claims.
>
> Age may not be considered as a factor in evaluating service-connected disability; and unemployability, in service-connected claims, associated with advancing age or intercurrent disability, may not be used as a basis for a total disability rating. Age, as such, is a factor only in evaluations of disability not resulting from service, i.e., for the purposes of pension.

The regulatory history of VA's Schedule for Rating Disabilities shows that it included a version of section 4.19 substantially identical to its current provisions when the Schedule was added as part 4 of chapter I to title 38 of the Code of Federal Regulations on May 22, 1964. 29 Fed. Reg. 6,718 (2006). The preamble to the 1964 regulatory action explained only that the Schedule was

being added to title 38 of the Code of Federal Regulations and that it was commonly referred to as the 1945 Rating Schedule, which had become effective April 1, 1946. *Id.*