



DEPARTMENT OF VETERANS AFFAIRS
Chairman, Board of Veterans' Appeals
Washington DC 20420

December 17, 1993

Hon. Jesse Brown
Secretary of Veterans Affairs
Department of Veterans Affairs
Washington, DC

Dear Mr. Secretary:

I respectfully present for your submission to Congress the Report of the Chairman, Board of Veterans' Appeals, for Fiscal Year 1993. Parts I, II, and III of this report are intended to provide an overview of the Board and its activities during fiscal year (FY) 1993 and the projected activities of the Board for FY 1994, as is mandated by 38 U.S.C. § 7101(d)(1). The specific information required by 38 U.S.C. § 7101(d)(2) and (3) is contained in Part IV of this report.

As you well know, this past fiscal year has been one of extraordinary change at the Department as a result of the dramatic changes in the law of veterans' benefits, as interpreted by the United States Court of Veterans Appeals. While judicial review has had a profound impact on the adjudication process, I believe that the organizational components involved in benefits determinations and in representation before the Court have responded effectively to develop systems to meet these challenges.

May I take this opportunity to thank you for your leadership, commitment, and invaluable assistance in enabling the Board to meet its changing responsibilities.

I hope that the enclosed report provides you, the Congress, and the veterans that we serve with a comprehensive picture of the Board and its mission and activities.

Very respectfully,

A handwritten signature in black ink, which appears to read "Charles L. Cragin", is written over a large, stylized cursive flourish.

Charles L. Cragin

Enclosure

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PART I

THE BOARD OF VETERANS' APPEALS

The Board of Veterans' Appeals (BVA or Board) is the component of the Department of Veterans Affairs (VA) that is responsible for entering the final decision on behalf of the Secretary in each of the many thousands of claims for entitlement to veterans' benefits that are presented annually for appellate review. The Board's mission, as set forth in 38 U.S.C. § 7104(a), is "to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner" and to issue quality decisions in compliance with the requirements of the law, including the precedential decisions of the United States Court of Veterans Appeals (the Court). The Board renders final decisions on all appeals for entitlement to veterans' benefits, including claims for entitlement to service connection, increased disability ratings, total disability ratings, pensions, insurance benefits, educational benefits, home loan guarantees, vocational rehabilitation, dependency and indemnity compensation, and many more. About 90 percent of the claims before the Board involve medical subject matter. In addition, pursuant to 38 U.S.C. § 5904, the Board is responsible for deciding matters concerning fees charged by attorneys and agents for representation of veterans before the Department.

HISTORICAL OVERVIEW

1933 to 1988

By Executive Order 6090, effective March 31, 1933, Veterans Regulation No. 2, Part II, President Franklin D. Roosevelt established the Veterans Administration as the organization responsible for administering all veterans' programs and benefits. The previous patchwork system of appellate adjudication of claims for veterans' benefits was eliminated and all questions of entitlement to benefits were subject to a single appeal to the Administrator of Veterans' Affairs. On July 28, 1933, President Roosevelt created the Board of Veterans' Appeals by Executive Order 6230, Veterans Regulation No. 2(a). The Board was delegated the authority to render the final decision on appeal for the Administrator and, organizationally, was directly responsible to the Administrator. The Board was charged "to provide every possible assistance" to claimants and to take final action which would "be fair to the veteran as well as the Government." Initially, the Board was composed of a Chairman, Vice Chairman, and no more than 15 associate members. In the 1930s, the Board established procedures, guidelines, and precedents, many of which eventually were codified as regulations.

In the 1940s, procedures were established for affording appellants hearings, including recorded hearings conducted in the field by traveling Board members. The Board's workload was greatly increased in the aftermath of World War II. For example, in 1949 the Board rendered almost 70,000 decisions. These decisions generally were simple,

short, and concise. The 1950s were characterized by the implementation of organizational and operational programs to achieve more efficient case management.

During the 1960s, the Board was enlarged to 14 sections of three members and the scope of the travel Board hearing program also was expanded. The Board's role in the promulgation of claims adjudication policy was terminated because it was felt that this was inconsistent with the Board's primary function as an independent, quasi-judicial agency within VA. Appellate policy also was significantly altered with the enactment of Public Law 87-666, effective January 1, 1963, which required the agency of original jurisdiction to furnish an appellant a "Statement of the Case," a decisional document containing a detailed recitation of the evidence, applicable laws and regulations, and explanation of the rationale underlying the denial of the claim. Also in 1963, the Board was granted statutory authority to obtain an advisory opinion from one or more medical experts who are independent of VA in cases involving complex or controversial medical issues. The Board's Rules of Practice were extensively revised and were first published in the Code of Federal Regulations in 1964. Currently, BVA's appeals regulations are contained in Part 19 and the Board's Rules of Practice are found in Part 20 of title 38 of the Code of Federal Regulations.

The 1970s were characterized by a significant increase in the number of appeals as part of the aftermath of the Vietnam War. In 1977, the number of new appeals exceeded 60,000. In 1982, 68,000 new appeals were filed. The average appellate processing time, measured from the date of filing of the notice of disagreement until the date of issuance of a final BVA decision, increased significantly. At the end of fiscal year (FY) 1982, the average appellate processing time was 483 days, up from 443 days the preceding year. To help with the increased workload, the President approved an increase in the number of Board members to form 19 three-member sections in 1984. The maximum number of authorized Board members subsequently was increased to 67 and 21 sections were formed. This is still the authorized strength level today. The number of appeals initiated remained in the 60,000s until FY 1989 when a peak of 74,291 was reached. This figure returned to the 60,000s in the early 1990s, with 65,676 notices of disagreement being filed in FY 1993. Appeals carried through to completion and certified to the Board for review have decreased somewhat in the early 1990s, going from almost 44,000 in FY 1990 to just over 38,000 in FY 1993.

1988 to 1993

The passage of the Veterans' Judicial Review Act (VJRA), Pub. L. 100-687 (Nov. 18, 1988), which established the U.S. Court of Veterans Appeals, has been the most revolutionary change in the adjudication system since the inception of the Board in 1933. Decisions by the Court have had a profound impact on the Board as it actively seeks ways to adapt to new interpretations of veterans' law and designs and implements new procedures required to meet the rapidly evolving requirements of the law. Few, if any, decisions of the Court have resulted in an improvement in decision productivity or timeliness in the VA adjudication system.

Response time and decision productivity have been degraded by the impact of changes in the law, as interpreted by the Court. Compliance with the law necessitates achieving and maintaining standards of decision quality at a level not contemplated prior to the enactment of the Act. As a result, BVA decisions have become lengthier and more complex. Factors affecting the timeliness of appellate processing include the development of the evidence as required by the Department's "duty to assist" the claimant; compliance with the directives of the Court in an increasing number of important decisions; the procurement of a greater number of medical opinions and increased medical research by the Board and its staff; an increased number of formal hearings before the Board, as well as increased time required for travel for hearings at VA regional offices; the requirements imposed by more formal Rules of Practice; the added responsibilities of attorney fee agreement processing and review; the readjudication of cases remanded by the Court to the Board and those returned from VA regional offices to the Board following completion of development requested by the Board on remand; and, in FY 1994, the necessity of including a certified list of all items of evidence considered by the Board in reaching each final decision, pursuant to the Secretary's recent instruction. BVA response time increased from 139 days at the end of FY 1991 to 240 days for FY 1992, and to 466 days for FY 1993.



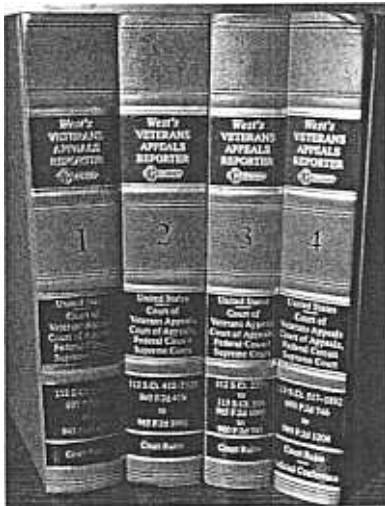
Compliance with the Court's directives has increased the amount of time required to process appeals.

Additionally, the VJRA made a hearing before "a traveling section of the Board" a matter of statutory right. This led to an increased demand for such hearings which the Board has made considerable progress in meeting. Six times as many field hearings were conducted during FY 1993 than were conducted in FY 1983.

The VJRA removed an historic \$10 limitation on the fees which may be charged by attorneys-at-law and claims agents who represent VA claimants. The Act gave the Board original jurisdiction to review agreements for the payment of such fees. Thus far, however, the private bar has shown relatively little interest in the practice of veterans' law.

Illustrations abound of Court decisions that have had a significant impact on the VA adjudication process. For example, in *Schafraht v. Derwinski*, 1 Vet.App. 589 (1991), the

Court directed that the Board consider every *potentially* applicable regulation in its decision, regardless of whether it was raised by the appellant or considered in the field. In *Bernard v. Brown*, 4 Vet.App. 384 (1993), and *Thurber v. Brown*, 5 Vet.App. 119 (1993), the Court imposed significant new procedural steps before a final decision by the Board may be issued.



Judicial review has resulted in a growing body of veterans' common law.

The Court held in *Tobler v. Derwinski*, 2 Vet.App. 8 (1991), that its decisions are binding on VA as of the date they are issued. With the repeal in August 1991 of the provision of 38 U.S.C. § 7267 which provided that the Court's decisions would become final 30 days after their issuance, and with the Court's decision in *Tobler*, the Board has no lag time in effectuating the decisions of the Court. This often requires the Board to stop the flow of cases, identify those cases that are affected by the Court's decision, and readjudicate them.

Another area in which the decisions of the Court have expanded both the complexity and workload of the Board is in the reconsideration of prior BVA decisions. In *Boyer v. Derwinski*, 1 Vet.App. 531 (1991), the Court held that, on reconsideration, the Board must entirely readjudicate the case on a *de novo* basis, as if the prior decision had never been entered.

The Court often reviews decisions of the Board which were decided before the Court issued an important binding decision in the area of law involved. Consequently, many decisions are returned to the Board for readjudication. Furthermore, because of Court decisions that are issued between the time a VA field adjudication is made and the time it comes before the Board on appeal, the Board's own remand rate has been about twice its historic level for the past two fiscal years. Both the decisions remanded by the Court to the Board and those returned from the regional offices after the Board has remanded them require readjudication by the Board and result in an increased workload.

Other decisions by the Court, particularly those interpreting the requirement of 38 U.S.C. § 7104(d) that the Board's decisions include supporting "reasons or bases," have had a profound impact on the way that the Board adjudicates cases and on the historically nonadversarial nature of Board proceedings. The result of the Court's decisions in cases like *Murphy v. Derwinski*, 1 Vet.App. 78 (1990), and *Colvin v. Derwinski*, 1 Vet.App. 171 (1991), is that the Board can no longer decide cases on the basis of the medical expertise of its members, but must rely solely on the evidence of record. Cases like *Jones v. Derwinski*, 1 Vet.App. 210 (1991), have required a candid assessment of the credibility of lay testimony not in keeping with the nonadversarial approach which has historically characterized VA proceedings. Decisions like *McGinnis*

v. Brown, 4 Vet.App. 239 (1993), and many others require that the Board also be more technical and “legalistic” in its approach to decision writing.

The Court has continued to expand the reach of its jurisdiction in decisions like *Russell v. Principi*, 3 Vet.App. 310 (1992), holding that the Court has jurisdiction to review the Board’s decisions about the existence of error in old adjudicative determinations, and *Patterson v. Brown*, 5 Vet.App. 362 (1993), in which the Court concluded that it had jurisdiction to review denials of motions for reconsideration.

INITIATIVES FOR THE FUTURE

Administrative Initiatives

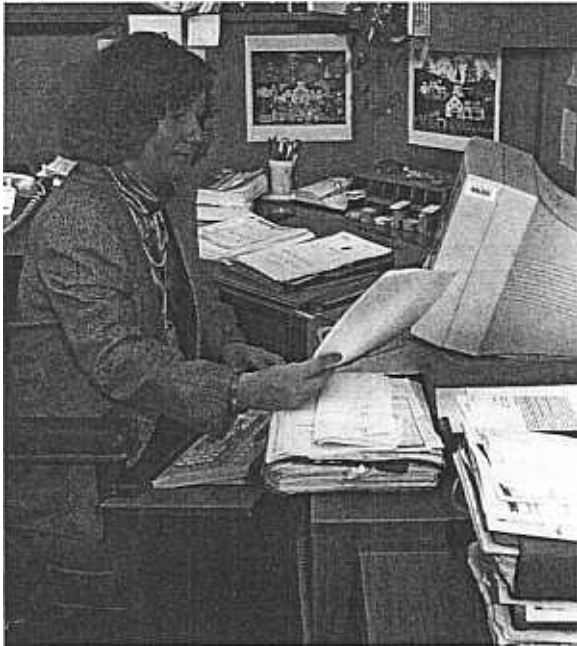
The Board has introduced several administrative initiatives to meet the challenges resulting from judicial review in order to improve the service that it provides to veterans and their families. These initiatives include the complete revision of decision analysis and format (1991); the use of single member hearings as opposed to panel hearings (1992); the introduction of a “trailing” hearing docket (1993); improvements in customer response and response to Congressional and other inquiries (1993); and the consolidation of all BVA employees in the Washington, DC, area in one building (1993). Ongoing measures include the prompt dissemination of the Court’s decisions within the Board and the provision of guidance in response to individual Court decisions; an increase in the attorney staff which prepares draft decisions; the institution of a formal, comprehensive training program for staff counsel; the introduction of computer equipment to produce decisions and track cases and other data; and the inclusion of staff physicians in quality review activities.

In FY 1993, the Board introduced a procedure whereby all appellants are now immediately notified by letter when their appeals are docketed at BVA and are provided with telephone numbers and mailing addresses for BVA points of contact in regard to any questions they may have concerning their appeals. This procedure will enable VA to provide better service to appellants and concomitantly reduce the overall processing time for appeals.

The Board has introduced an ongoing, comprehensive training program for new staff counsel, designed to insure that these counsel receive consistent and in-depth training. During the period between October 1, 1992, and April 30, 1993, the Board placed 49 new attorneys in its training program.

Use of computer technology will greatly assist the productivity of Board personnel and thereby help to alleviate the growing decisional response time. Between FY 1991 and the end of FY 1993, over two million dollars was invested in new automation capacity for BVA. By the end of FY 1993, all BVA Board members and staff counsel had personal

computing tools at their disposal. As will be discussed later, BVA plans to continue to integrate appropriate new technologies into its automation structure.



Use of computing tools by Board members and staff counsel expedites the appellate process.

For many years prior to FY 1993, Board personnel were dispersed in several different buildings in the District of Columbia, which resulted in significant logistical problems, as well as difficulties in communication and staff morale. One of the most significant operational improvements at the Board was achieved with the consolidation of all BVA employees (with the exception of the Wilkes-Barre, Pennsylvania, transcription unit) and veterans' service organizations into one building. Consolidation of personnel, which was completed in March 1993, has helped to facilitate communication and to increase the efficiency and economy of the Board's internal operations. Internal communication, essential for consistency in the application of law, was also

enhanced by the construction of the Kenneth E. Eaton Board Room. This facility has enabled the Board to meet on a regular basis and share information.

Legislative Initiatives

In FY 1993, several pieces of legislation were proposed which would help the Board to meet its goals of providing timely, high quality decisions in the face of a substantially increased workload. Shortly after his appointment as Secretary of Veterans Affairs, Secretary Brown began the process of consensus building that is essential to the development and enactment of legislation to meet these challenges. On February 11, 1993, the Secretary and Deputy Secretary, together with the BVA Chairman and Vice Chairman, representatives of the Office of General Counsel, and other Department officials, met with representatives of the major veterans' service organizations and staff members of the House and Senate Veterans' Affairs Committees for a frank and open discussion of the alternatives. The most significant recommendation for change that eventually was endorsed by most of the veterans' service organizations is to amend title 38 of the United States Code to authorize the Chairman to assign all Board determinations to single Board members, except for determinations on reconsideration. This change from the historical three member panel, in itself, would result in a projected 25 percent increase in productivity at the BVA organizational level and significantly reduce response time. Enlarged panels would continue to render decisions in cases on reconsideration.



Deputy Secretary Hershel Gober discusses proposed changes to the appellate process with representatives of veterans' service organizations, Congressional committee staff, and VA personnel.

Other significant proposals for legislative change include the elimination of the statutory limitation on the number of Board members. Appointment of additional Board members as needed would eliminate the 'bottleneck' in the appellate adjudication process and increase the Board's flexibility in allocating resources to meet its expanding workload. In addition, specific authority for the Chairman to decide motions in proceedings before the Board and to decide matters relating to attorney fee agreements was recommended as a means of enhancing the consistency of adjudication in these areas and increasing the amount of time that Board members are able to devote to adjudication of appeals on the merits. The proposed legislation would authorize administrative allowance of claims by the Chairman and/or Vice Chairman based on difference of opinion or other equitable concerns. This would restore the administrative allowance procedure that was in effect prior to a May 1990 precedent opinion of VA's General Counsel, permitting the Board to provide relief in cases in which the prior decision of the Board or originating agency was legally correct but produced a harsh result. Other provisions of the Department's legislative proposal include the clarification of statutory references to hearings contained in Chapter 71 of title 38 of the United States Code and the expansion of the definition of "hearings" to include teleconferenced and videoconferenced hearings.

These proposals and other measures to help put veterans first were embodied in the draft bill entitled "The Veterans' Appeals Improvement Act of 1993," which was submitted by the Secretary to the Congress in August 1993. This proposed legislation was introduced in the Senate as S. 1445. The Secretary's proposed legislation was also incorporated as part of H.R. 3400, entitled "The Government Reform and Savings Act of

1993." That legislation, which contains a modified version of the Department's initiative, was recently passed by the House of Representatives.

ORGANIZATION OF THE BOARD

The statutory authority for organization of the Board is contained in Chapter 71 of title 38 of the United States Code. The Board's activities are directed by a Chairman, who is "directly responsible to the Secretary," as provided by 38 U.S.C. § 7101(a). The Chairman is appointed by the President of the United States with the advice and consent of the Senate and serves for a term of six years. Pursuant to 38 U.S.C. § 7101(a), the Board is authorized to consist of a Chairman, a Vice Chairman, and no more than 65 other Board members. The Board is also authorized by § 7101(a) to have "sufficient" other professional, administrative, clerical, and stenographic personnel as are necessary to accomplish its mission. (An organization chart of the Board of Veterans' Appeals is shown on page 10.)

Members of the Board other than the Chairman, Vice Chairman, and Deputy Vice Chairman occupy GS-15 positions. All members except the Chairman are appointed by the Secretary, with approval of the President, based upon the recommendations of the Chairman. They serve 9-year terms of office. Board members are the only federal employees at the GM or GS-15 level that require Presidential approval for appointment. Prior to the imposition of term limits by the VJRA as a condition of employment, Board appointments were not subject to a term of years. As provided by the VJRA, however, the initial appointments to the Board are for equal numbers of appointments to terms of three, six, and nine years. The Chairman holds an Executive level position, and the Vice Chairman and Deputy Vice Chairman are members of the Senior Executive Service.

BVA is organized into Professional and Administrative Services. The Professional Service consists of the sections of the Board, Staff Medical Advisors, and the Chairman's staff. The decisions of the Board are rendered by a majority of a Board section composed of three members. 38 U.S.C. § 7103(a). Currently, there are 21 Board sections. Each section is composed of at least two attorney Board members, one of whom is designated Chief and bears the supervisory responsibility for the section. In the past, the third Board member was almost always a physician. However, recent changes in the law, as interpreted by the Court, have altered the role of the physician in the VA adjudicatory scheme. After their initial terms of appointment expire in July 1994, physicians will no longer be recommended for appointment as members of the Board. At such time, all three members of each Board section will be attorneys. However, as discussed below, physicians will continue to play an important role in the operations of the Board, although not as adjudicators.

A professional staff of eight or nine attorneys, referred to as staff counsel, are assigned to each Board section. Staff counsel are graded from GS-9 through GS-14. The Chief member of the section reviews the section's caseload and assigns individual appeals to

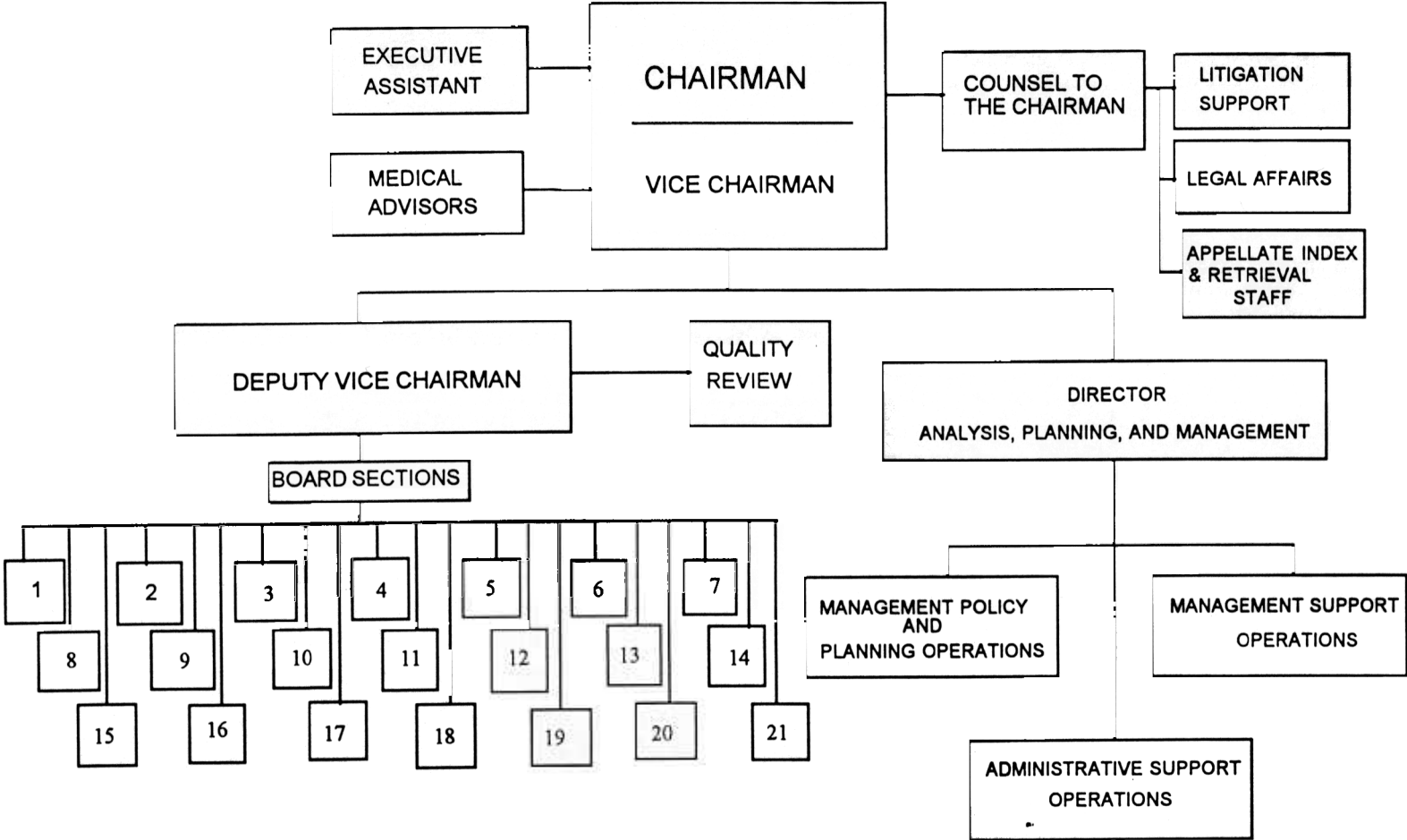
each staff counsel for the preparation of a written tentative decision. The counsel submit the completed tentative decisions to the Board section for review. The Board section typically will review the record and revise the submission or return it to counsel for revision. When a decision that is acceptable to the Board is finalized, the decision is processed through the Board's Quality Review section and then forwarded to the Administrative Service for dispatch. If the Board's decision is not unanimous or if the rationale for the decision is not agreed upon by all the Board members, a dissenting or concurring opinion will be prepared. The Chairman reviews less than unanimous decisions.

Assisting the Board members in their consideration of an appeal is a staff of Medical Advisors, who provide medical research and training of staff counsel. In addition, a medical evaluation of a case may be obtained from the VA Under Secretary for Health, the Armed Forces Institute of Pathology, or an independent medical expert who is usually a member of the faculty of a leading medical school.

The Board's Administrative Service is charged with supporting the system which permits the efficient processing of appeals. These services include case management and tracking, secretarial services, and transcription services, as well as liaison activities with veterans, veterans' service organizations, Members of Congress and their staffs, and other interested parties. The Board's transcription unit is located in Wilkes-Barre, Pennsylvania. Draft decisions, hearing transcripts, and other documents are electronically communicated from the transcription unit to the Board's offices in Washington, DC. Board counsel frequently prepare draft decisions on computer work stations in the Board's Washington, DC, offices.

In FY 1993, the Board's Administrative Service, the Office of the Special Assistant for Management, and several other support groups were reorganized into a combined Office of Analysis, Planning, and Management Operations. Responsibilities of this office include management planning, support and analysis functions, administrative support operations, information resource management and automation activities, including automation training and technical support activities. Operations and program liaison activities are also included, such as implementation of the Board's Total Quality Management (TQM) program.

Board of Veterans' Appeals



SELECTION OF BOARD MEMBERS

Although it is not required by law, all members of the Board are attorneys or physicians. As mentioned above, no further appointments of physicians to the Board will be made after their terms expire in 1994. The attorney members of the Board are selected through a highly competitive process. A Board member must have complete familiarity with the body of applicable statutory, regulatory, and judicial authority and must acquire a solid background in the medical and other areas of subject matter expertise necessary to adjudicate the wide variety of claims within the Board's jurisdiction. With very few exceptions, Board members have been drawn from the ranks of staff counsel to the Board, because the particular expertise necessary to adjudicate appeals for veterans' benefits in an expeditious manner is most commonly found in this group. Staff counsel generally require from 7 to 10 years of experience before they are considered for selection as a Board member. The selection process for the limited number of Board member openings is extremely competitive, and only the best and the brightest candidates are selected. The Board also continues to seek individuals outside the Board who have the requisite level of expertise to provide the efficient, high-quality service that veterans and their dependents deserve. In FY 1993, for the first time in many years, an individual who served with the VA Office of General Counsel, but who had no prior BVA experience, was selected to serve on the Board and is currently awaiting Presidential approval of that appointment. As selection of Board members is based solely on merit, the political affiliation, if any, of the candidates is never a factor for consideration.

COLVIN AND THE ROLE OF THE BVA PHYSICIAN

The Court has held that the Board can no longer base its decisions on its own medical expertise, including that of a physician serving as a BVA member, but must rely upon "independent" medical evidence *on the record* in support of the determination reached. This requires that Board members provide a thorough explanation of all medical principles relied on, with discussion of and citation to independent authority, such as medical treatises, texts, journals, and epidemiological studies. In addition, the Board increasingly has been required to obtain additional medical information and/or expert opinion on the record from sources within and outside the Department. Furthermore, this line of cases has altered the manner in which BVA physicians are employed in the decision making process. In the course of his confirmation hearing in February 1991, the Chairman stated that he questioned whether the particular expertise of BVA physicians would be more effectively utilized in the role of an evaluator and analyst, rather than as an adjudicator. He further indicated that he would examine the issue in depth if he were confirmed and appointed Chairman. Later, in *Colvin*, the Court held that the Board must consider only independent medical evidence to support their findings rather than provide their own medical judgment in the guise of a Board opinion. The Court has held that the traditional use of physicians as adjudicators, deciding cases on their own medical expertise, is inappropriate. As a result, BVA is required to use its physician staff in other capacities, such as providing advice, research, training, and internal quality review. To provide the

maximum flexibility, and in anticipation of *Colvin* and its progeny, 3-year terms of office were recommended for each of the physician Board members appointed in the initial round of appointments in FY 1991. When their terms expire in July 1994, physicians will no longer be recommended for appointments to the Board.



Legal and medical research is facilitated by the Board's Research Center.

Colvin and other Court decisions have resulted in a significant increase in time spent by BVA professional staff in performing legal and medical research. The absence of medical members within Board sections has increased the responsibility of the attorney Board members

to analyze the medical evidence with increased frequency and sophistication. In addition, the attorney staff must independently recognize when additional development of the record is warranted, particularly the need for expert medical opinion. To help meet this need, the resources of the Board's Research Center have been greatly expanded. More importantly, however, BVA physicians are increasingly utilized in the capacity of medical advisors and trainers. They provide expert medical opinions "on the record" in appeals in which such guidance is required. In addition, the role of the BVA staff physician in the quality review process has greatly expanded.

The Board also continues to seek advisory medical opinions from VA sources, including the Under Secretary for Health, as well as from the Armed Forces Institute of Pathology and independent medical experts, who usually serve on the faculties of leading medical schools. In FY 1993, the Board requested 180 opinions from independent medical experts under 38 U.S.C. § 7109.

MEMBERS OF THE BOARD OF VETERANS' APPEALS

As of the close of FY 1993, the following individuals are serving as members of the Board of Veterans' Appeals. Of these, four have been appointed by the Secretary and are awaiting Presidential approval. In the interim, they are serving as acting Board members. One of the physician Board members is currently serving the remainder of his term in the capacity of acting Board member. Of the 65 individuals currently serving on the Board, 43 are veterans.

AGUAYO PERELES, JOAQUIN
ANDREWS, KENNETH R., JR.
ANTHONY, JAMES R.
AYER, FRANCIS H. (ACTING)

BAUER, ROGER K. (VICE CHAIRMAN)
BLASINGAME, JACK W.
BRAEUER, WAYNE M.
CALLAWAY, BETTINA S.

CASTELLOT, JOHN J., SR. (ACTING)	REDDY, WILLIAM J.
CHEEK, MICHAEL D.	RICE, WARREN W., JR.
CLARK, HALSTEAD H.	ROBIN, NANCY R.
CRAGIN, CHARLES L. (CHAIRMAN)	ROMO, CHARLES D.
DANNAHER, THOMAS J.	RUSSELL, CRAIG P.
DATLOW, DONALD W.	SABULSKY, MARY M.
DAY, JONATHAN E.	SAPLAN, UN HUN
DONSBACH, JAN	SCHULE, JOHN J.
DURKIN, SHANE A.	SEERY, EDWARD W.
EDWARDS, CHARLES E.	SELFON, PAUL M.
FAVA, ANTHONY	SENYK, GEORGE R.
FRANK, RICHARD B.	SHARP, JANE E.
GICK, GARY L.	SHERMAN, IRIS S.
GORMLEY, MATTHEW J., III	SHUFELT, GORDON H.
GOUGH, JEROME F.	SPICKLER, DAVID C. (ACTING)
HOGEBOOM, CHARLES E.	STANDEFER, RICHARD B. (DEPUTY VICE CHAIRMAN)
HYMAN, BRUCE E.	STEIN, DANIEL J.
JOHNSON, JAMES U.	STERLING, HAROLD
JONES, STEPHEN A.	SULLIVAN, LAWRENCE M.
KANNEE, BRUCE N.	SULLIVAN, ROBERT E.
KRENZER, EILEEN M.	SYMANSKI, CHARLES W.
MARTIN, JEFFREY J.	TOBIN, LEO W., III
MCALLISTER, HARRY M.	TUTERA, ALBERT D.
MOEHLMANN, HOLLY	WARNER, SAMUEL W.
MONROE, JACQUELINE E. (ACTING)	WILKINS, STEPHEN L.
O'NEILL, EUGENE A.	WRIGHT, PHILIP E.
PEISER, IRVIN H.	YEAGER, WILLIAM H., JR.
PHILIPP, ROBERT D.	
PHILLIPS, NANCY I. (ACTING)	
POWELL, URSULA R.	

HEARINGS BEFORE THE BOARD

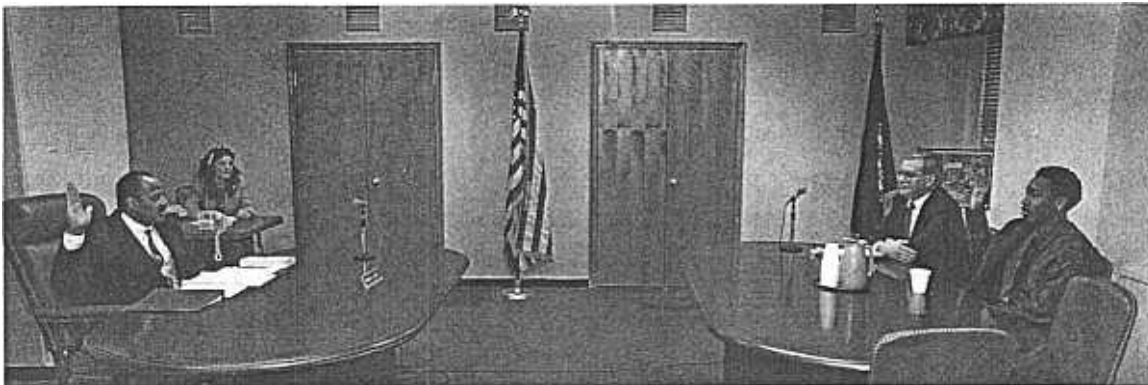
In the past, the Board conducted approximately 2,000 hearings per year, about 600 of which were held at VA regional offices by traveling sections of the Board. The remainder were held in the Board's offices in Washington, DC. These hearings are nonadversarial in nature, pursuant to the Department's statutory duty to assist the appellant in developing his or her claim, including claims which may be inferred or intertwined with those currently on appeal but which have not been raised by the claimant. At the hearing, testimony is taken under oath or affirmation and evidence or argument in support of the claim is adduced. Under the Board's Rules of Practice, cross-examination of witnesses is not permitted. However, as will be discussed below, the law as interpreted by the Court requires the Board to weigh the credibility and probative value of all evidence on the record, including testimony, in explaining the "reasons or bases" for its decision.

The VJRA imposed a statutory requirement on the Board to provide hearings at regional offices before a "traveling section of the Board." 38 U.S.C. § 7110. Previously, the Board had provided such hearings on an *ad hoc* and discretionary basis. As of September 30, 1991, there were 1,548 pending requests for hearings before a traveling

section of the Board. During FY 1991, the number of hearings conducted increased from the past average of about 600 to 873. Requests for personal hearings before the Board continued to grow in FY 1992. For example, in FY 1991, appellants requesting a BVA hearing at a regional office could expect a wait of almost three years at some locations. In response, the Board has acted to meet the increased demand for hearings and, at the same time, address the challenge of providing hearings in a timely manner.

Single Member Hearings

In order to ameliorate the hearing request backlog and to make the most effective use of the Board's available resources, in January 1992, the Chairman directed that all BVA hearings, whether held at regional offices or in Washington, DC, will be conducted by a single member of the Board section deciding the appeal. A transcript of each hearing is prepared for the record. The members of the section who were not present at the hearing necessarily will defer to the assessment of the Board member conducting the hearing as to the demeanor of witnesses at the hearing. Otherwise, as required by law, the Board's decision will be rendered by a section of three members. Of course, in the event that legislation is passed authorizing the Chairman to assign a case to a single Board member, the member conducting the hearing will also render the decision in the case. Claimants who have been afforded a single member hearing generally have reported that this format is less intimidating and enables the claimant to have the complete, individual attention of the Board member.



Single member hearings have reduced the backlog for BVA hearings at regional offices. More than 90% of veterans are represented at these non-adversarial hearings by veterans' service organizations or other agents.

This procedural change from the use of three member hearing panels, effectuated pursuant to the Chairman's authority under 38 U.S.C. § 7102(b), has enabled the Board to schedule more frequent hearings at VA regional offices and, consequently, has reduced the amount of time that a claimant must wait before such a hearing can be scheduled. BVA held 1,172 hearings in Washington, DC, and 3,533 hearings in 52 VA regional offices in FY 1993, which is a significant increase from the 1,394 hearings held in Washington, DC, and the 1,258 hearings held in VA regional offices in FY 1992. It is projected that, in FY 1994, the Board will schedule 4,000 BVA hearings at regional offices and 1,000 hearings in Washington, DC.

"Trailing Docket" Procedures

The increase in the number of hearings before the Board, particularly those at VA regional offices, has required that procedures for the scheduling of hearings be modified to make the most efficient use of available resources. In FY 1993, with the cooperation of the Veterans Benefits Administration, the Board instituted the "trailing docket" method of scheduling BVA hearings at VA regional offices. Under this system, the former practice of a fixed hearing schedule has been eliminated. Instead, several hearings are scheduled at specific intervals, usually three, throughout the day. The hearings in each group are held in order, but the starting time of each hearing can be adjusted to accommodate circumstances such as hearings of shorter length or an appellant's failure to appear for a scheduled hearing. This has expanded BVA's ability to hold hearings by reducing the waiting time between hearings and by enabling the individuals involved to react to changed circumstances, such as hearing cancellations and the failure of a claimant to appear for a scheduled hearing. It is noted that the "no show" rate for travel hearings in FY 1993 was at 25 percent. The new procedure permits more effective use of Board members' time and provides improved service to veterans.

Other measures designed to improve the hearing process include the construction of a new reception area for veterans arriving at the Board's offices in Washington, DC, for personal hearings. This facilitated, simplified, and improved access to hearings for all veterans, particularly those with physical disabilities.

REPRESENTATION BEFORE THE BOARD

In cases in which a formal hearing is not practicable, argument may be submitted to the Board. In FY 1993, 23,007 written briefs on appeal were filed, primarily by representatives affiliated with veterans' service organizations. This reflects the continued high level of appellate representation provided by veterans' service organizations. There was also a slight increase in representation by attorneys. For decisions entered in FY 1993, 87.1 percent had representation by one of the accredited service organizations, 3.1 percent had representation by an attorney or agent, and 9.8 percent had no representation. For decisions entered in FY 1992, 87.0 percent had representation by an accredited service organization, 2.4 percent had representation by an attorney or agent, and 10.6 percent had no representation.

REVIEW OF ATTORNEYS' AND AGENTS' FEE AGREEMENTS

The VJRA required filing with BVA of attorneys' and agents' fee agreements for services in connection with a proceeding for veterans' benefits before VA. It also gave BVA the authority to review fee agreements on its own motion or upon motion of a party to the agreement.

In FY 1993, the Board received over 270 fee agreements for filing. Most of the perceived problems concerning fee agreements were handled by correspondence. The Board issued only two motions for review of fee agreements for insufficiency in FY 1993. One was withdrawn upon the attorney's representation that he would not charge a fee for his services in connection with proceedings before VA. In the other, a decision has not yet been issued.

Almost all the Board's decisions concerning fee agreements involve agreements referred to BVA by VA regional offices for a determination whether the attorney is eligible for payment directly by VA under 38 U.S.C. § 5904(d). In FY 1993, 33 cases were referred for such decisions. Twenty-nine such cases were completed during the fiscal year: 11 were allowed, 9 were denied, 5 were administratively remanded, and 4 were withdrawn by the parties.

LIAISON ACTIVITIES

Correspondence and Congressional Liaison Activities

The Board responds directly to requests for information and assistance from veterans, their representatives, and Members of Congress and their staffs. Most of these requests are handled by the Board's Administrative Service and the Office of the Chairman. The Chairman provided 5,324 written responses to Congressional inquiries in FY 1993. In addition to the above noted correspondence, the Chairman responded to letters written by claimants and other interested parties to the President, the Secretary, and other government officials.

The increase in decision processing time has resulted in an increase in the number of telephone calls and letters from Members of Congress, appellants, and other interested parties. Because of the increasing complexity of the law, as interpreted by the Court, responses to such inquiries have become far more complex and time consuming. In many instances, cases must be withdrawn from active appellate consideration while a response to the inquiry is being prepared. Furthermore, the rapidly evolving state of the law necessitates continual retraining of Administrative Service employees who respond to these inquiries.

Other Liaison Activities

As previously discussed, at a meeting convened in February 1993 by Secretary Brown, the Chairman made a presentation to many of the veterans' service organizations concerning the backlog of appeals and the Board's initiatives to increase productivity and improve timeliness of decisions. The Chairman discussed a proposal to amend title 38 of the United States Code to permit BVA to issue decisions (other than reconsiderations) by individual members of the Board rather than sections composed of three members.

Projections indicate that this change would increase productivity by 25 percent without incurring additional costs.

On several occasions during the year, the Chairman testified before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs. In May he described the impact of the Veterans' Judicial Review Act on the Board and addressed administrative initiatives that the Board had adopted to insure responsiveness to the changes in veterans' law and to improve decision productivity and response time. In October he testified regarding the Department's proposed "Veterans' Appeals Improvement Act of 1993" and expressed VA's comments on other bills. He emphasized that the improvements proposed in the Department's bill are urgently needed and that current BVA procedures must be revised to permit the Board to improve its productivity and timeliness. He also discussed specific provisions of the draft legislation that would authorize administrative allowances on the basis of difference of opinion, allow the Board to use modern telecommunications technology to hold hearings with the presiding Board member in Washington, DC, and the claimant in a remote location, and authorize the Chairman to assign cases to individual Board members for final decision.

During the year, the Board was visited by Congressmen Jim Slattery, Chairman, and Michael Bilirakis, Ranking Minority Member, of the House Subcommittee on Compensation, Pension, and Insurance; members of the staff of the House and Senate Veterans' Affairs Committees; staff of individual Members of Congress; VA



Meetings between the Chairman and representatives of veterans' service organizations provide a forum for discussion of important issues.

Assistant Secretaries; and Clerks and legal staff of the U. S. Court of Veterans Appeals. The Chairman briefed the visitors regarding the Board's operations, the appellate review process, and various legislative and administrative initiatives to improve productivity and timeliness.

During FY 1993, speakers at the Board's quarterly luncheon programs included VA Secretary Jesse Brown, then Executive Director of the Disabled American Veterans; John F. Sommer, Jr., Executive Director of the American Legion; and VA Deputy Secretary Hershel Gober.

The Chairman addressed several of the veterans' service organizations at their national conventions and participated in discussions during their annual training programs. He addressed the service organizations on changes at the Board and initiatives to improve the

appellate review process. He stressed that, with the expanding requirements of appellate review, changes bringing about a more efficient operation are required in order to meet the Board's objective of issuing timely, consistent, quality decisions.

In addition the Board continued its practice of holding quarterly "Veterans Service Organization Forums." These meetings provide those who represent veterans, including members of the private bar, with the opportunity to question and discuss issues of mutual concern with the Chairman and members of his senior staff.

The University of Maine School of Law conducted its first Veterans' Law Symposium in September, focusing on the changes brought about by judicial review of the Department's claims adjudication process. Chief Judge Frank Nebeker, U. S. Court of Veterans Appeals, and the Chairman addressed the participants and have written articles to be published in the school's law journal. Mr. Robert Nelson, General Counsel of the Paralyzed Veterans of America, and Mr. Robert Campbell, founder and Executive Director of Trinity Post 7-45, also addressed the symposium.

The Second Annual Judicial Conference of the United States Court of Veterans Appeals was held in October. The opening address was presented by the Honorable G. V. (Sonny) Montgomery, Chairman of the House Committee on Veterans' Affairs. The Honorable John D. Rockefeller IV, Chairman of the Senate Committee on Veterans' Affairs, addressed the participants during luncheon. Both Members of Congress voiced concern over the backlog in cases experienced at the Department and expressed their support for efforts aimed at the timely processing of claims. Chief Judge Nebeker, who acted as host of the conference, spoke on effective appellate advocacy. The Chairman also addressed the participants and discussed the effects on the Board of changes in the law resulting from the Court's decisions (see Part II for the full text of the Chairman's presentation).

AUTOMATION INITIATIVES



Word processing training is provided to all Board members and staff attorneys.

The Board's on-going automation project is intended to increase the efficiency of its operations and thereby offset, to the extent practicable, the adverse effects of judicial review on BVA productivity and

timeliness. In FY 1993, over 300 personal computers were installed for use by the Board's Professional and Administrative Services. Office automation was introduced during the year into 15 additional Board sections for a total of 19 automated Board sections.

Automation of the remaining two Board sections was completed in November 1993. Planning is complete and equipment has been procured for the automation upgrade of the Wilkes-Barre, Pennsylvania, transcription unit, which is scheduled for the first quarter of FY 1994. The Wang word processing equipment will be replaced with personal computers connected via a network.

The first CD-ROM of Board decisions was produced this year. The entire text of all calendar year 1992 BVA decisions and the index of these decisions were issued on the CD-ROM. This product gives researchers the capability to search all 1992 decisions for relevant topics and to display or print the text of the decisions matching the search criteria.

During the year a successor system for the Board's case tracking system was selected and the process of customization, installation, and conversion was started. The new system will be fully operational in the third quarter of FY 1994. The Board made the case tracking system available via telecommunications to other VA organizations in a continuing effort to disseminate information where it is needed. Individuals in the Office of General Counsel, VBA, and VA regional offices were issued passwords to allow them to perform inquiries on the system. The Office of General Counsel opened their Court of Veterans Appeals Database to Board inquiries and increased productivity in the litigation support area.



One CD ROM disc replaces 200,000 pages of decisions and allows instantaneous search and retrieval of information.

TRAINING



Formal training is provided to BVA staff counsel.

The ultimate effect of judicial review on BVA, as well as on the entire VA benefits adjudication system, is not yet quantifiable. However, it is clear that the Board's work product has already become increasingly detailed, thorough, and complex. In the era of judicial review, the focus of the Court's decisions is on BVA's decision making process at least as much as on the ultimate

determinations reached by the Board. It is safe to say that, as a result of the Court, the responsibilities of the Board and its professional and administrative staffs have been significantly increased.

In response, the Board has introduced a new approach to the training and professional development of staff counsel. A centralized training program providing intensive program education and computer training has been established for attorneys beginning their careers at the Board. The training program includes medical lectures, computer and word processing courses, and attendance at the Veterans Benefits Administration's Adjudication Academy, located in the Baltimore, Maryland, area.

TOTAL QUALITY MANAGEMENT (TQM) INITIATIVES

The Board of Veterans' Appeals recognizes the valuable contributions that its employees can make in improving the quality and timeliness of the services provided to veterans. Cross-functional teams have been established to deal with the ongoing process of finding better ways of accomplishing the Board's mission. For example, teams have worked on implementation of "computer-assisted" decision writing; development of a glossary of frequently-used language; preparation of guidelines to ensure consistency in citations to legal and medical sources; preparation of Congressional correspondence; expansion of the Board's offices to the sixth floor of the Lafayette building; measurement of production and quality of draft decisions prepared by staff counsel; and revision of performance standards for employees in the Administrative Service.

The Administrative Service currently has a TQM Legal Technician functional team that is composed of nine employees who act as representatives from their respective Control Divisions and from other staff offices within the Service. The team members have been trained and certified in implementation of the principles of the quality improvement process. The group is presently engaged in drafting recommendations for reducing the numbers of mishandled cases and accelerating case movement to the Professional Service. The team members have also formed smaller groups to gather and prepare statistical data which will be presented to the Chairman in support of their recommendations.

The Board's efforts in support of total quality management have also included programs to provide ongoing training and development of its employees, who constitute the Board's most valuable resource. Intensive, formal training is now available



Total quality management affords BVA employees an opportunity to make improvements to the system.

to all newly hired attorneys. Medical lectures are held on a regular basis and are attended by all staff counsel. State-of-the-art training was also provided during this fiscal year to attorneys, administrative staff, and the Board's transcription unit located in Wilkes-Barre, Pennsylvania, in the use of the various software products and in keyboarding skills, as necessary. Employees of the Board also attended the Federal Quality Institute's National Conference and the Federal Executive Institute.

THE BOARD'S 60th ANNIVERSARY

In April 1993, the Disabled American Veterans held a reception ceremony at their National Service and Legislative Headquarters in Washington, DC, to salute 60 years of service by the Board of Veterans' Appeals. Mr. Joseph C. Zengerle, National Commander of the Disabled American Veterans (DAV), was joined for the occasion by Secretary of Veterans Affairs Jesse Brown and several hundred attendees, including the Chairman and senior Board officials. The DAV leader praised the Board for its "historical commitment to assuring just and equitable treatment for disabled veterans, their families and their survivors." Commander Zengerle called the Board a model government agency dedicated to recognizing the sacrifice of America's disabled veterans and presented the Chairman with a resolution and a plaque in recognition of the occasion. Mr. John Hanson of the American Legion, Mr. George Estry of the Veterans of Foreign Wars of the United States, Mr. Richard Glofelty of the Paralyzed Veterans of America, and Mr. Noel Woosley of AMVETS presented plaques on behalf of their organizations. Congressman G. V. (Sonny) Montgomery, Chairman of the House Committee on Veterans' Affairs, attended the reception and extended his personal congratulations to the Secretary, the Chairman, the Board, and its staff on the occasion of the anniversary celebration.

Secretary Brown addressed the attendees at the reception, commending the Board for achieving high standards in decision-making, noting that only a relatively small percentage of all Board decisions have been reversed by the U. S. Court of Veterans Appeals. He expressed his concerns over timeliness standards and backlogs that, in his opinion, have now become unacceptable. The Secretary reminded the audience that "we are caught in

an inescapable network of mutuality." He stressed that if all parties continue to work together, solutions to these problems will be identified.



Secretary Brown and Chairman Cragin receive presentation from the DAV in recognition of the Board's 60th Anniversary.

In September, more than 270 people gathered at a dinner dance held at the Renaissance Hotel in Washington, DC, to celebrate the 60th anniversary of the founding of the Board of Veterans' Appeals. The Board's guest of honor, the

Honorable Hershel Gober, Deputy Secretary of Veterans Affairs, presented the Board with a Resolution issued by Secretary Jesse Brown calling on VA employees and facilities throughout the nation to "provide appropriate recognition of the Board's accomplishments." Deputy Secretary Gober lauded the Board on its anniversary and noted that "while the Board was originally established as a 'temporary' measure by President Franklin Roosevelt, it has grown into a young and dynamic organization. Indeed, one-half of all of the Board counsel have been hired within the last three years."

Mr. Gober also delivered a letter to the Board from President Bill Clinton. The President extended his "grateful appreciation for the Board's tireless efforts on behalf of our nation's veterans" and observed that the "fact that the appointment of each Board member requires the personal approval of the President of the United States is testimony to the high level of expertise required." The President concluded that "'Putting Veterans First' is more than just a slogan. It is a mission statement of the Department. I am confident that as the Board applies the rule of law in a compassionate and understanding manner, it will ensure that decisions on claims have, in fact, put veterans first."

Representatives of several veterans' service organizations and of the House Committee on Veterans' Affairs joined in the festivities. Rear Admiral James Miller, USN (Ret.), President of the U.S. Navy Memorial Foundation, presented the "Lone Sailor Award" to the Board "in grateful recognition of its sixty years of service to America's veterans."

PART II

**REMARKS OF THE CHAIRMAN
AT THE SECOND JUDICIAL CONFERENCE
OF THE UNITED STATES COURT OF VETERANS APPEALS
OCTOBER 1993**

The Chairman was invited by the Court to address the Second Judicial Conference of the United States Court of Veterans Appeals on October 18, 1993. While a more detailed discussion of certain topics covered by the Chairman's remarks is presented in the narrative portions of this report, the Chairman's remarks at the Judicial Conference are included below because they provide a comprehensive overview of the impact of judicial review on the Board and the VA benefits adjudication system, a description of the administrative and legislative efforts that have been undertaken to ameliorate some of the adverse consequences of judicial review, and an appreciation of the respective roles of the Court and the Board in the adjudication process. The text of the Chairman's remarks follows:

INTRODUCTION

Chief Judge Nebeker and members of the Court, distinguished guests, and colleagues of the Board of Veterans' Appeals, it is an honor to be invited to participate in the Second Annual Judicial Conference of the United States Court of Veterans Appeals. I apologize for not being able to be with you this morning. However, the "powers that be" in OMB thought this morning would be a good day to discuss my fiscal year 1995 budget request. I went to that meeting because I'm a believer in the "golden rule." Whoever has the gold rules!

Today is the birthday of the Mason-Dixon line, the boundary that was later regarded as separating the North from the South. It was adopted on this day, in 1767, as the border between Maryland and Pennsylvania. And that border has remained where they put it, ever since. When you draw a good line, it works. The question always is when and how you decide where to draw the line, not only on the map, but in terms of rules of law, procedures, and precedents.

JUDICIAL REVIEW -- AN HISTORICAL PERSPECTIVE

In 1803, the Supreme Court of the United States drew a good line in *Marbury v. Madison* in its definitive articulation of the responsibilities of the judicial and executive branches of government. In that decision, the Supreme Court observed: "[i]t is

emphatically the province and duty of the judicial department to say what the law is." Chief Judge Nebeker commented to me one day as we were sharing thoughts about the evolving process that "the Court of Veterans Appeals has now moved beyond *Marbury v. Madison*."

There is no question that judicial review has provided a convenient forum for testing the validity of VA regulations and settling disputed points of veterans' law. It has helped in establishing a more systematic approach to benefits claims adjudication. It has also provided a forum to veterans for dispute resolution outside the Department when they may feel that VA has not treated them fairly. Nevertheless, these benefits have not been achieved without costs, particularly in increased formality and complexity of the adjudication process.

While the U.S. Court of Veterans Appeals reviews appeals from decisions by the Secretary of Veterans Affairs on claims for veterans' benefits, those decisions are rendered for the Secretary by the Board of Veterans' Appeals. Thus, in a very real sense, the Board serves as the interface between the Court and the Department and is the first to receive the Court's guidance, often in very direct terms, on the meaning of the law and the procedures that must be followed in the administrative adjudication process.

On July 28, 1993, the Board celebrated its sixtieth anniversary. Because of the changes in the law resulting from the enactment of the Veterans' Judicial Review Act, as interpreted by the decisions of the Court that was created by that Act, life at the Board has changed more completely and dramatically in the past three years than it had in the prior 57 years of its existence. As Chairman of the Board since March 1991, I believe that I have had the unique opportunity to observe, participate in, and, in some sense, influence the unfolding of events in this historical process. I believe that, in any event, I can articulate what the impact of the Court of Veterans Appeals has been on the "receiving end" of the *Marbury v. Madison* interface. Thank you for providing me with this opportunity.

At the outset, it is interesting to note the comments of VA's General Counsel, in his statement to the House Committee on Veterans' Affairs in June 1986, in opposition to judicial review legislation. Judge Ivers made some candid, some would suggest "dire," predictions as to the effect of judicial review on the VA benefits adjudication system. Judge Ivers acknowledged that the supporters of judicial review had (and I quote):

... the laudable intention of preserving intact this informal and cooperative system, simply by adding another available remedy. In other words, they intend to add icing to the cake. What we believe they have not foreseen, and what is central to our opposition, is that the current system would inevitably be changed for the worse by the mere availability of judicial review. Resort to the Courts, if you will, would spoil the cake.

Enactment of judicial review would interject an adversary relationship into what has been a cooperative process. As a matter of principle, VA should never be placed in an adversary position, much less become an opposing litigant, with respect to claimants. The prospect of court scrutiny and repeated challenges to our pro-veteran process would necessarily result in more rigid and formal procedures.

VA would be thrust into the unaccustomed adversarial role of developing evidence to refute a claimant's contentions in order to assure that the record supports denial of an unmeritorious claim to the satisfaction of a reviewing judge. The Agency would have to document every factor and consideration that led to denial of a claim, that is, "build the record." Each procedural step would have to be recorded, including minor ministerial actions. Unable to rely on the medical judgment of its adjudicators, VA would have to develop additional record evidence such as scientific treatises or journal articles, for the benefit of judges untrained in the medical profession.

. . . I can assure you that judicial review of claims matters based on the record prepared administratively, particularly with increased involvement of attorneys whose training and experience are geared to adversarial proceedings, will alter the process in a fundamental and pervasive manner. Moreover, rigidity, formality, and subtle changes in attitude will be inherent, regardless of the best intentioned statutes and regulations.

It appears that Judge Ivers and his colleagues on the Court may be engaged in the implementation of a self-fulfilling prophecy. Clearly, the Court is an adversarial system grafted on to one which was designed to function in a paternalistic, nonadversarial, and *ex parte* manner. The result is that the "mere availability of judicial review" has made the administrative adjudication process more formalistic, rigid, and inherently more time-consuming. The landmark decisions of the Court all have had the effect that Judge Ivers predicted. For example, *Manio*, *McGinnis*, *Grottveit*, *Schafrath*, and *Bernard* require application of more formalistic legal analysis and adherence to procedure. *Gilbert* and *Godwin* illustrate the necessity of "building the record" to permit judicial review. *Ivey*, *Murincsak*, and *Bell*, for example, require the documentation of relatively minor "ministerial acts" in order to demonstrate compliance with the Department's "duty to assist" and the formal requirements of regulation. *Colvin* and its progeny introduce expert medical opinion, medical journals, and treatises into the record because VA adjudicators may no longer rely on their own expertise. Moreover, under *Thurber*, the Board is required to provide notice and an opportunity to comment or provide rebuttal evidence to any evidence, such as a medical treatise, that it obtains and intends to rely upon in reaching its decision.

The Court has been creating a body of "veterans' common law" through its precedent decisions. The applicable law, as articulated by the decisions of the Court, is changing on

almost a daily basis. As one of the members of the BVA team recently observed, "I don't mind jumping through hoops, I just wish they would hold them steady."

Because of the increasing complexity and rapidly evolving state of the law, BVA decisions are lengthier, more complex, and require more time to prepare than ever before. As a consequence, speedy justice in VA claims adjudication has become an elusive, moving target.

IMPACT OF JUDICIAL REVIEW ON BVA APPEALS ADJUDICATION

Relatively few decisions of the Board actually come before the Court. In fiscal year 1993, the Board rendered 26,400 decisions. Of that number, 36.9 percent of those dispositions were denials of all benefits sought, 16.9 percent were allowances of at least one of the benefits sought, 44.0 percent were remand decisions, and 2.2 percent were characterized as "other" dispositions, such as withdrawn appeals. In total, 53.8 percent were final BVA decisions and, therefore, appealable to the Court. The Court received 1,265 notices of appeal during the past fiscal year. Thus, only about 5 percent of the Board's final decisions wind up before the Court. Nevertheless, all BVA decisions must be prepared to withstand the scrutiny of judicial review. Preparation of cases according to these standards, which include all notice and due process procedures, has increased the length and complexity of BVA decisions, added a legalistic and adversarial tone to the decision making process, and dramatically increased the time it takes the Board to issue a decision.

I noted in my 1992 *Annual Report to Congress* that no decision of the Court, with the exception of *Bethea v. Derwinski*, 2 Vet.App. 252 (1992), has yet resulted in an improvement in decision productivity or timeliness in the entire VA adjudication system. Many decisions have had exactly the opposite result. Also, by its very nature, another layer of appellate review adds to processing time as lower level adjudicatory bodies struggle to meet new requirements.

The Court, in *Tobler v. Derwinski*, 2 Vet.App. 8 (1991), has held that its decisions must be given full force and effect immediately. The precedent panel or *en banc* decisions of the Court announcing important changes in interpretation of the law affect each of the thousands of cases that are in progress in the system at any given time and may require returning to "square one" with all affected cases. Occasionally, the process must be repeated twice in the same case when the Court reverses itself on further review. For example, in *Abernathy I*, the Court held that the Board should apply the *Manio* two-step analysis to pension claims. Several months later in *Abernathy II*, the Court retreated from this position on reconsideration. This is an offshoot of judicial review that often adds to claim processing time.

Remands of Cases to VA Regional Offices

Another factor that significantly increases the time it takes for final resolution of a claim is the necessity for the Board to remand more cases for additional development than it has in the past. For the decade prior to the passage of the VJRA, the Board's fiscal year remand rates ran from a low of 13.4 percent to a high of 20.7 percent. With the full impact of judicial review, the remand rate hit 50.5 percent in fiscal year 1992. The rate for fiscal year 1993 is only somewhat improved, at 44 percent. Most cases remanded to the originating agency are returned to the Board for final adjudication. Therefore, this "improvement" in the remand rate, at least in part, is attributable to the fact that an increasing number of decisions issued by the Board involve cases returned to the Board following development on remand. Because these cases are generally the oldest docketed appeals, they must be worked before the later docketed appeals, which have not been reviewed, to determine if additional development is required.

Several factors contribute to the increase in the number of cases remanded. First, the Court's precedential decisions generally are given retroactive effect. As Judge Steinberg noted in a recent dissent, quoting a Supreme Court decision, "[i]ndeed, a legal system based on precedent has a built-in presumption of retroactivity." Thus, VA regional office decisions that were rendered prior to the issuance of a controlling precedent decision of the Court often must be remanded to the originating agency to cure the defect. We affectionately refer to these situations as "being caught in the *Karnas* time machine."

Obviously, this principle of "retroactivity" is equally applicable to BVA decisions. In fact, once it enters the jurisdiction of the Court, a BVA decision may be required to be revised several times to comport with new precedents established during the pendency of the appeal before the Court. The appeal of Clarence T. Hatlestad provides a graphic illustration of "retroactivity" in action. The Court's first decision in Mr. Hatlestad's appeal was issued in March 1991. In that decision, the Court vacated a December 1989 BVA decision and remanded the case to the Board for readjudication in accordance with its opinion. The Board, among other things, was directed to provide additional explanation of the reasons or bases for its determination in regard to the extent of the veteran's disability due to pain, consistent with the Court's opinion in *Gilbert v. Derwinski*, an October 1990 decision. The Board issued a decision in June 1991 and, in discussing issues concerning the veteran's complaints of pain and the disabling effects of nonservice-connected disabilities, relied on several medical texts to explain the bases for its decision. In July 1992, the Court issued its second opinion in the case, which affirmed the Board's June 1991 decision. However, in September 1992, *sua sponte*, the Court held in abeyance the issuance of its judgment of the July 1992 decision and, following several other procedural developments, issued an opinion "in supplementation" of its July 1992 decision. In that decision, issued in September 1993 and referred to at the Board as "*Hatlestad III*," the Court vacated the June 1991 BVA decision and remanded the case for readjudication, in part, to provide the appellant with notice and an opportunity to comment on the medical texts cited by the Board, a requirement initially established by the Court's May 1993 decision in *Thurber v. Brown*. (I will return to the subject of *Thurber*

later in my discussion.) While the *Hatlestad* situation is unusual, it demonstrates the adverse effect on productivity and response time resulting from the repeated readjudication of a case to comport with rapidly changing legal precedent. Stay tuned for a future report on "*Hatlestad IV!*"

It should be noted in passing that the Board is limited by the requirements of the formal rule-making process, as provided by the Administrative Procedures Act, in attempting to react immediately to changes in the law. A recent example that comes to mind followed the Secretary's instruction that the Board prepare a list of the relevant evidence that it considered in reaching each of its final decisions. Questions were raised as to the standard of "relevancy" that was to be applied. However, the Board cannot simply "adopt" a standard to be applied on a Board-wide basis, even that set forth explicitly in the Federal Rules of Evidence. Rather, in establishing a consistent standard, the Board must follow rule-making procedures as prescribed by the Administrative Procedures Act. While there is no objection to this process, it is time-consuming, delays responsiveness, and, in the current situation, does not serve to improve response time.

"Duty to Assist" in the Development of Claims

Perhaps the most significant factor contributing to the increase in the number of cases remanded by the Board has been the Court's interpretation of the Department's duty to assist claimants in the development of their claims. Various decisions of the Court require VA to seek out possibly relevant additional service records, private and VA medical records, Social Security Administration records, new physical examinations, and more complete examinations. Others have expanded the scope of appeals, under the "duty to assist" rubric, to include "inferred" claims for ancillary benefits and "issues raised in all documents or oral testimony submitted prior to the BVA decision," even though those issues may not have been mentioned at all in an appellant's formal appeal. The technical requirements for filing often are given what can fairly be described as an expansive interpretation by the Court. For example, in *Tomlin v. Brown*, the Court held that an oral statement by an appellant's representative during a regional office hearing, which was later transcribed by the Department, was sufficient to comport with the requirement under 38 U.S.C. § 7105(b) that a Notice of Disagreement (NOD) must be in writing. Moreover, the NOD was considered to have been timely filed when the remarks were uttered, not when they were transcribed a few months later. Some would suggest that this is a classic example of judicial transubstantiation!

"Due Process" Remands

"Due process" remands by the Board have also increased and are likely to continue to increase. The Court's tendency to expand the scope of issues on appeal, making it more likely that an issue will have been missed and, therefore, not adjudicated below, has already been noted. The Court has also been extremely expansive about what statutory and regulatory authorities must be addressed. For example, in *Schafrath v. Derwinski*, the Court stated that "[w]here a VA regulation is made *potentially* applicable through the

assertions and issues raised in the record, the Board's refusal to acknowledge and consider that regulation is 'arbitrary, capricious, an abuse of discretion,' and 'not in accordance with the law,' and must be set aside as such." Thus, the Board must identify and discuss all potentially applicable statutes and regulations even though they have not been raised or specifically considered below. This, in turn, creates additional due process considerations.

In *Bernard v. Brown*, the Court stated that:

[W]hen, as here, the Board addresses in its decision a question that had not been addressed by the RO, it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby.

It should be emphasized that a Board section's decision to remand a case to the field is not necessarily a reflection on the work product of various VA field offices. There may be a substantial interval between the time that a decision is made in the field and the time that decision is reviewed by the Board—an interval that is unfortunately growing longer in the current climate. As the recent past has proven, the state of veterans' law can change rapidly. What was accepted practice when a field decision was made may no longer be legally appropriate when the Board reviews the decision. As I have also noted, the Board's decision may likewise be overtaken by rapid changes in the legal environment.

BVA's Use of Medical Evidence

Another example of a case that significantly extends the time involved in reaching a final decision is *Thurber v. Brown*. The evolution of the Court's reasoning began earlier with its decision in *Colvin*, in which it concluded that the Board could only consider independent medical evidence and could not rely on the medical judgment of its members. Often the medical evidence received by the Board does not include a reasoned, well-supported opinion about the main medical question at issue although the raw data upon which to base such an opinion is present. The Court seemed to realize this difficulty and went on to state in *Colvin* that "[i]f the medical evidence of record is insufficient, or, in the opinion of the BVA, of doubtful weight or credibility, the BVA is always free to supplement the record by seeking an advisory opinion, ordering a medical examination or citing recognized medical treatises in its decisions that clearly support its ultimate conclusions."

Reliance on medical treatises is an attractive alternative in routine cases, although it can sometimes be extremely difficult to find an authority for very basic principles. For example, try to prove a negative in the medical literature, such as when a claimant asserts that a laceration to his thumb resulted in peripheral neuropathy of the lower extremities with residual foot drop forty years later.

In *Thurber*, the Court addressed for the first time the due-process implications of using evidence, in this case medical texts, which had not been part of the record below and which the appellant had not had an opportunity to attempt to rebut. The Court held that:

[B]efore the BVA relies, in rendering a decision on a claim, on any evidence developed or obtained by it subsequent to the issuance of the most recent [statement of the case] or [supplemental statement of the case] with respect to such claim, the BVA must provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it. If, in the course of developing or obtaining or attempting to so develop or obtain such evidence, the BVA becomes aware of any evidence favorable to the claimant, it shall provide the claimant with reasonable notice of and a reasonable opportunity to respond to the favorable evidence, and shall in its decision provide reasons or bases for its findings with respect to that evidence.

I have exercised my authority under 38 C.F.R. § 20.2 (1992) to prescribe a procedure to meet the Court's *Thurber* requirements. Essentially, this procedure provides notice and comment opportunities similar to those provided by 38 C.F.R. § 20.903 (1992) when the Board intends to rely on medical treatises or other evidence gathered following the most recent statement of the case (SOC) or supplemental statement of the case (SSOC). Compliance with *Thurber* adds at least 60 to 90 additional days to the processing of cases affected by that decision.

Attorney Fee Agreements

Decisions of the Court have also affected the Board's new duties -- established by the Veterans' Judicial Review Act of 1988 -- concerning the review of fee agreements for services in connection with proceedings before the Department for VA benefits. Under 38 U.S.C. § 5904(c)(2), attorneys' and agents' agreements concerning fees for representing a claimant before the Department, including the Board, must be filed with the Board. The Board may review these fee agreements on its own motion, or at the request of either party, and may order a reduction in the fee if it finds that it is excessive or unreasonable.

Initially, the Board established procedures to review fee agreements soon after they were filed. If a deficiency was noted, the Board issued a notice that it would review the fee agreement on its own motion. Rulings on these motions were by the Chairman, in letter format. This was an efficient and expeditious means of dealing with the agreements that did not meet the statutory requirements for charging a fee. It also had the benefit of alerting attorneys immediately if there appeared to be a problem with their ability to charge a fee under 38 U.S.C. § 5904(c).

The Court's initial decision concerning 38 U.S.C. § 5904 invalidated the early review of fee agreements by the Board. In *Nagler v. Derwinski*, in June 1991, the Court held that the Board was authorized to review a fee agreement only when there is representation before VA or the Board *after* a first final decision by the Board. In *Nagler*, it was not disputed that there was no substantive claim pending before the BVA and no representation under the fee agreements being provided before either the BVA or VA. Each fee agreement, by its terms, covered representation before both the Court and the Department, but only representation relating to an appeal to the Court had been undertaken at the time of the Board's actions. Consequently, the Court held that the Board lacked the authority to review these fee agreements because, at the time the reviews were initiated, there was no representation being provided before VA or the BVA after the first final BVA decision.

Nagler led to changes in the Board's procedures. Rather than reviewing fee agreements when they were filed, the Board began to review them as soon as it had entered a final decision. In other respects, however, the procedures remained essentially the same. The Court's next decision concerning the Board's review of fee agreements required a complete change in the Board's procedures.

In a decision concerning the Board's ruling on a fee agreement involving attorney William G. Smith, the Court held in October 1991 that the Chairman did not have statutory authority to act for the Board under 38 U.S.C. § 5904(c). Therefore, the Court dismissed the appeal from the Chairman's ruling on the fee agreement.

Since that Court decision, the Board has issued few rulings on fee agreements on its own motion. After the Court's decision in *Matter of Smith*, any ruling by the Board under 38 U.S.C. § 5904(c) must be by means of a decision issued by a Board section. This requires the expenditure of more resources than would a letter by the Chairman ruling on a fee agreement. Most of the Board's decisions concerning fee agreements since 1991 have been in cases involving payment by the Department under 38 U.S.C. § 5904(d). We have only issued two notices of review of a fee agreement on our own motion. One was withdrawn after the attorney involved said that he would not charge a fee, and the other is currently pending.

Rather than burden both the parties to the fee agreement and the Board with a motion on a fee agreement that may be unnecessary, we attempt to resolve any perceived problems with a fee agreement through correspondence rather than through formal motions and decisions on motions. This appears to be working well.

When we receive a fee agreement for filing, we acknowledge receipt of the fee agreement immediately. Then, we check the fee agreement against our records to see if the statutory and regulatory requirements appear to be met. If there appears to be a problem -- for example, if we have no record of a final BVA decision under the name or claim number submitted, or if the fee agreement is dated more than one year after the most recent final BVA decision -- we notify the attorney of the potential problem and ask for

any additional information that would establish that the requirements for charging a fee are met. Only if the matter cannot be resolved through correspondence, and the requisites articulated in *Nagler* are met, would we issue a notice of review of a fee agreement on our own motion. If the fee is wholly contingent and is based on an award of past-due benefits, we have, to date, deferred filing a notice of motion until the VA regional office has made an award. If the agreement provides for payment of the fee by the Department under 38 U.S.C. § 5904(d), and if there has been representation before the Department, the VA regional office refers it to the Board when an award of past-due benefits is made. These referral procedures were established in mid-1992.

From mid-1992 until October 13, 1993, the Board has received 48 cases for review of a fee under 38 U.S.C. § 5904(d). Of those cases, 33 have been decided as follows: 4 (or 12.1 percent) were withdrawn by the attorney or claimant, 5 (or 15.2 percent) were returned to the VA regional office due to a procedural problem, 10 (or 30.3 percent) were denied, and 14 (or 42.4 percent) were granted. There are currently 15 cases pending before the Board.

There have been some problems with the procedures established for authorizing payment under 38 U.S.C. § 5904(d). These problems stem from actions by the attorneys, the VA regional offices, and the Board. With VBA, we have taken steps to solve some of these problems.

The VA regional offices have sometimes missed the presence of a fee agreement providing for payment directly by VA when they are processing their award action. The Court's decision in fee agreements involving attorneys William G. Smith, Hugh D. Cox, and Bruce Tyler Wick, in August 1993, concerned three instances in which VA regional offices failed to withhold 20 percent of the past-due benefits awarded pending a decision on whether each attorney's fee should be paid by VA. As you will note from the number of decisions denied or withdrawn, there have also been instances in which the fee agreement on file in the claims folder did not provide for payment by VA under 38 U.S.C. § 5904(d), yet the case was forwarded to BVA for a decision on whether the attorney should be paid under this section.

To diminish the number of unnecessary referrals of fee agreements to the Board for a decision, we have recently initiated a procedure whereby we will advise the VA regional office before any award action -- or during the award action, if we haven't done so already -- whether to send the fee agreement to the Board if an award of past-due benefits is made. This will allow 100 percent of the past-due benefits to be paid to the claimant without delay, if a fee agreement does not, on its face, provide for payment of the fee directly by VA. Attorneys will be notified at the time they receive acknowledgment of BVA's receipt of the fee agreement whether we have instructed the VA regional office to send the file to the Board for review of the fee agreement if an award of past-due benefits is made.

We also issued instructions in September 1993 to expedite the processing of fee agreement cases at the Board. The Board's response time had degraded significantly due to the backlog of pending appeals at the Board, and attorneys were waiting many months for a decision on whether they could be paid under 38 U.S.C. § 5904(d). Even with this expedited processing, however, we anticipate that it should take at least two months for the Board to issue a decision on a fee agreement.

IMPACT OF JUDICIAL REVIEW ON TIMELINESS AND PRODUCTIVITY

To reiterate, Board decisions now simply take a great deal more time to prepare and review because of their increased complexity. The relatively simple, result-oriented decisions of the past are not adequate to meet the Court's requirements. The old rule of thumb used by the Board for planning purposes in estimating resource requirements was that an average Board decision was 240 typed lines, or about 6 pages, in length. Average decision length in fiscal year 1993 was 300 lines. Even this 25 percent increase does not tell the full story. In fiscal year 1993, 44 percent of the Board's decisions were remands. These are not final decisions and the remand documents are typically a good deal shorter than decisions on the merits. This is in contrast with fiscal year 1990, when the Board remanded only 23.5 percent of its cases.

The average cost per decision has increased dramatically, more than doubling from fiscal year 1988 to date. This relates primarily to the time it takes to perform the detailed research and prepare the lengthy explanations that are now required in even relatively simple cases.

The heavy workload of the Board is fact beyond dispute and, as Judge Holdaway observed recently: "The Court judicially notes that the Board has an extremely heavy work load and is striving very hard to meet new requirements that are, in part, due to cases from this Court."

- Compliance with the requirements of the evolving "veterans' common law" has caused the Board to fall further and further behind as it attempts to do more and more with limited resources, including the current statutory limitation on the number of Board members.

A way of looking at the situation is in terms of "response time," the projected number of days it would take the Board to decide all currently pending appeals based on the average number of decisions rendered per day over the preceding year. Response time increased from 139 days in FY 1991 to 240 days in FY 1992. In FY 1993, that figure reached an all-time high of 466 days.

Without any significant changes in the situation, based on current data, it is projected that BVA's average response time will be 725 days, essentially two years, in FY 1994 and 945 days, or two years and seven and one half months, in FY 1995. Another contrast is

provided in the number of decisions rendered. For example, in FY 1988, the Board received 43,792 appeals and issued 41,607 decisions. In FY 1993, the Board received 38,147 appeals, but was only able to dispose of 26,400. Productivity for FY 1994 is projected at 24,350 decisions.

"Certified Lists" of Evidence Included in BVA Decisions

In a memorandum of June 8, 1993, the Secretary of Veterans Affairs instructed the Board to include in or attach to each of its final decisions entered on and after October 1, 1993, a list of the specific evidence that the Board relied on in arriving at its decision. This "Certified List" includes all items of substantive evidence, as well as evidence covering all procedural and "duty to assist" issues, which were considered by the Board. It is anticipated that this list will be utilized by VA General Counsel in its designation of records in cases on appeal to the Court.

At this point, the Board understandably has limited data upon which to quantify the effect of the preparation of the "Certified List" on the productivity and timeliness of decisions. Clearly, it will not have a salutary effect on either. Anecdotal information, to date, indicates that counsel spend an additional 4 to 6 hours on each case to identify and list each item of relevant evidence. Board members also expend additional time in reviewing, considering, and acting upon each item listed.

AUTOMATION

Simpler times are unlikely to return. In the meantime, the Board is doing its best to meet the challenges. Board decision formats have been completely redesigned to meet the Court's requirements. We are promptly distributing the Court's decisions to Board members and staff counsel. Revised procedures are devised as rapidly as possible to meet changing needs when new interpretations of the law are received. The Department has allocated funds to increase our staff of attorneys to assist with decision preparation, as well as to implement computer automation plans.

The Board is in the midst of an aggressive automation plan. I expect that the Board will be fully "automated," using state-of-the-art computer technology, by the end of this month. By the end of October, all Board sections (252 employees) will have received training in the use of personal computers. When an employee is trained, the next day a computer is installed on his or her desk and is connected to our "local area network".

The content and quality of the training were critical to the success of the project. Board sections were trained in small groups with subject matter targeted to the specific Board application of the technology. Counsel now have the choice of dictating or typing decisions. Automated methods of information retrieval enable counsel to access reference material and copy pertinent text into documents.

The goal of automation is to assist counsel to achieve higher quality decisions in a more timely manner. In the past, BVA decisions were prepared primarily by dictation and transcription, an inefficient and time-consuming process. For example, removing the four day "turnaround" for the transcription of an attorney's dictated work product eliminates the need for the attorney to refamiliarize him or herself with the case when it returns for further processing. If attorneys key decisions at their desks, they can compose, write, and revise a draft decision more effectively in a shorter period of time. Moreover, the reviewing Board members can review, edit, and revise the draft decision with the same ease and efficiency. Advanced automation such as voice activated word processing is under consideration for the future.

COMPUTERIZED RESEARCH CAPABILITIES

In July of this year, we utilized new technology to archive all BVA decisions issued in calendar year 1992 on a single CD-ROM disc, permitting exhaustive data searches with sophisticated software. This media allows searches of the entire text of all decisions produced in the period covered by the data. For example, if an individual was interested in all decisions about "non-Hodgkin's lymphoma," a search of the data would return the number of occurrences of the phrase and the number of decisions in which it appeared. The person could search through the decisions on the computer screen and print or electronically retrieve the ones most appropriate to the research. It should be noted that, in compliance with the requirements of the Privacy Act, the names of appellants and other personal identifiers are deleted from the text of the decisions before the CD-ROM is produced.

The Board shares information with a number of other VA organizations. The General Counsel and VA regional offices can dial into our case tracking database and retrieve information on veterans' appeals. We are also active participants in the Department's Master Veteran Record project. This initiative will, for the first time in VA history, maintain a directory of all the activity underway or accomplished for a veteran. The database will be the one location where key veteran information, such as mailing address and telephone number, will be maintained. The goal of the project is to eliminate redundant (and often conflicting) information in numerous locations and have all systems rely on the veracity of the Master Veteran Record.

SINGLE MEMBER HEARINGS AND "TRAILING DOCKET" APPROACH TO SCHEDULING PERSONAL HEARINGS

I have also taken steps to increase the Board's ability to meet the demand for personal hearings. Effective in January 1992, I exercised my authority to direct that Board hearings be conducted by single members of the Board, rather than panels of members, in order to provide hearings more rapidly and to free members for other duties.

In FY 1993, with the cooperation of the Veterans Benefits Administration, the Board began to institute the "trailing docket" method of conducting BVA hearings at VA regional offices. Under this system, instead of a fixed schedule of hearings, several hearings are scheduled at specific intervals, usually three, throughout the day. The hearings in each group are held in order, but the starting time of each hearing can be adjusted to accommodate circumstances such as hearings of shorter length or an appellant's failure to appear for a scheduled hearing.

This increased the Board's ability to hold hearings by reducing the waiting time between hearings and reacting to cancellations and "no shows." It allowed more effective use of Board member time and improved service to claimants. Measures such as these are especially important in view of the increased workload in general and the increase in the number of hearing requests since the right to a hearing in the field became statutory with the passage of the VJRA. The Board held 1,172 hearings in Washington, DC, and 3,533 hearings at VA's regional offices in fiscal year 1993, a significant increase from the 1,394 hearings held in Washington, DC, and the 1,258 hearings held in VA regional offices in fiscal year 1992.

As you know, under 38 U.S.C. § 7101, appeals to the Board generally must be considered in docket order. Under current procedures, appeals are docketed in consecutive order at the time the appellant's records are received at the Board. Given the current backlog of 33,728 appeals pending at the Board at the end of FY 1993, the existing procedures present significant administrative problems in records storage. Problems are also presented in the transfer of records between the Board and the regional offices, which is required in order to permit the processing of other claims while the case is in appellate status, pursuant to the Department's obligation, as articulated in *Ebert v. Brown*, 4 Vet.App. 434 (1993).

In addition, the current procedures present a fairness problem in that appeals are now considered based on the order in which the appellant's records are received at BVA, rather than at the time an appeal to the Board was taken. This particularly affects appellants who exercise their statutory right to request a BVA hearing at a regional office. Such a hearing is usually requested when the appellant files the VA Form 9, the "Substantive Appeal" to BVA. The records of these appellants are kept at that regional office until the hearing requested can be conducted. As the Board may conduct hearings at some regional offices only once or twice a year, there is usually a significant delay between the time an appeal is filed and the transfer of records to the Board, which is now required in order to enter that appeal on the Board's docket. Clearly, this puts appellants who request BVA hearings at regional offices at a disadvantage, because other appellants, who may have filed an appeal at a later time, will have their cases considered first simply because their records were the first to arrive at and be docketed by the Board.

"ADVANCE DOCKETING" OF APPEALS TO THE BOARD

I recently have proposed procedures to permit the "advance docketing" of appeals to the Board, which would obviate both the administrative and "fairness" problems associated with the current practice. Coordination of the details of this plan is now underway with the Veterans Benefits Administration and the Veterans Health Administration. Under this plan, when a Substantive Appeal (VA Form 9 or its legal equivalent) is filed at a regional office, that document will be forwarded to the Board. The appeal then would be entered on the Board's docket, based on the date of receipt of the Substantive Appeal.

Additional appellant information would be made available electronically to BVA to facilitate docketing, data collection, and case assignment. The appellants' claims folders would remain at the regional office, where they would be readily available for processing of other claims. As the Board progressed through its docket, the regional office would be notified which appeals would be considered by the Board in the immediate future and the records in those cases would then be transferred to the Board.

In time, the plan would be expanded to include centralized scheduling by the Board of all BVA hearings, including those at regional offices, in order to insure overall fairness and consistency in the BVA hearing process.

OTHER MEASURES TO IMPROVE PRODUCTIVITY

We have also initiated a formal, comprehensive training program for staff counsel. This includes medical lectures by the Board's staff of physician-advisors, as well as intensive training for new staff counsel. Also in the past year, Board employees, who were previously dispersed in several locations within the District of Columbia, have been consolidated into one building to improve communications and case movement logistics. Nevertheless, it is unlikely that improvements in administrative efficiency alone will be able to restore appeal resolution to the previous levels of response time.

The Department has proposed legislation that would help to alleviate the case backlog. One of the changes contained in the draft bill is a provision that would permit individual Board members to decide cases, as opposed to the current system of review by three-member Board sections. It is projected that this would result in an approximate 25 percent overall increase in decision productivity. Furthermore, other proponents of the legislation, such as the American Ex-Prisoners of War, suggested at a hearing conducted by the Subcommittee on Compensation, Pension and Insurance of the House Veterans' Affairs Committee that single member decisions would squarely place accountability on a single veterans' law judge. Dr. Charles Stenger told the Subcommittee that "the full responsibility given that individual should result in a more thorough and evaluative review of all the evidence in the entire record."

In addition, the draft bill would authorize the Board, at the option of the appellant, to conduct some hearings with the Board member remaining in Washington and taking testimony of appellants and witnesses in the field through the use of modern communications technology. This should cut down on productive time lost during travel and permit the Board to offer hearings more promptly.

Under the proposed legislation, the Chairman, or another single Board member, would also be able to rule on procedural motions and other matters not requiring extensive familiarity with all of the evidence in a case. This could permit streamlined motions disposition procedures that would free other members to review and decide cases on the merits. The proposed legislation also would permit more flexibility to meet case-load needs by removing the current statutory ceiling on the total number of Board members.

Another feature is a provision specifically authorizing the Board to utilize medical experts employed by VA and other government agencies to help meet the demand for medical opinions generated by the *Colvin* decision—authority already implied by 38 U.S.C.A. § 7109 (West 1991). While we believe that such authority presently exists, it is not explicit. Were the Board unable to utilize VA employed physicians to provide "on the record" opinions, the timeliness of decision processing would be further degraded.

EFFECTS OF JUDICIAL REVIEW

Judicial review is achieving some of its intended results. It has provided a convenient forum for testing the validity of VA regulations and settling some long-disputed points of veterans' law. It has helped in establishing a more systematic approach to benefit claims adjudication. By providing a forum for dispute resolution outside the Department, it has enhanced the perception of fairness and objectivity in the adjudication process.

It is noteworthy that the Board's allowance rate (reversal of decisions by VA regional offices) has increased from a range of 12.8 percent to 14.4 percent between fiscal year 1982 and fiscal year 1991, to 15.8 percent in fiscal year 1992, and 16.9 percent for fiscal year 1993. Some of the feared results, such as a nonadversarial system being overwhelmed by attorney-induced contentiousness and complexity, have not come to pass.

Nevertheless, there have been offsets in the form of requirements for extensive, costly, and time-consuming record building; more bluntness in evaluating credibility; formality and a less paternalistic tone in decisional documents; and new legal and procedural complexity that considerably lengthens claims resolution at the administrative level. In fact, average response time now has increased to more than threefold from what historically had been considered "timely." Only partial relief can be attained by improvements in administrative efficiency at the Board. Some legislative initiatives, particularly permitting appellate decisions by individual Board members rather than panels of members, may provide additional relief.

As was noted by the Federal Circuit in its decision in *Gardner v. Brown*, the establishment of the Court of Veterans Appeals by the Veterans' Judicial Review Act has ended what Congress referred to as VA's unique status, standing in "splendid isolation as the single federal administrative agency whose major functions [were] explicitly insulated from judicial review." It is clear that the rapid evolution of veteran's law will not soon end. It is incumbent on the Department to fully, and with "all deliberate speed," adapt to its changing legal environment. Clearly, whatever its relative merits and demerits, a new system has been created and the old system must change proactively, on its own initiative, or be changed by the decisions of the Court. The Circuit Court's cautionary observation in *Gardner* merits thoughtful consideration by the Department as a whole:

Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them. If anything, Congress's lengthy deliberation and carefully crafted scheme for judicial review of VA regulations counsels for vigorous review.

60TH ANNIVERSARY OF THE BOARD

I have said much about the process and our, hopefully, proactive response to the Court's "province and duty to say what the law is." Let me just take a few moments to say something about the human factor that deals, on a daily basis, with this historic evolution of veterans' common law.

The Board, while sixty years old, is fast becoming a young, vibrant, intellectually-charged organization that sees change as challenging and exciting. Since taking office in March of 1991, I have recommended twenty individuals for initial Board membership. Sixteen have been appointed by the Secretary with the approval of the President. The four remaining appointees are currently awaiting President Clinton's approval. These appointments represent approximately one third of the Board's current statutorily authorized complement.

Furthermore, the composition of the Board's staff of counsel and associate counsel has increased and changed dramatically in the last three years. As we have been authorized to increase the size of our organization, we have primarily directed our activities at increasing the number of staff counsel, as well as replacing those individuals promoted to membership on the Board. At present, we have a counsel staff of 179. During my tenure as Chairman, we have hired 92 attorneys and, of those hired, fifty percent are women, or, to put it another way, fifty percent are men.

Four hundred and forty nine men and women make up the BVA team, serving as Board members, counsel, legal technicians, transcriptionists, and administrative support personnel. Each plays a vitally important personal role in providing each veteran and his

or her family with a decision that affects their lives. Each person at the Board is a valued member of a team that is striving to apply the rule of law in a fair, compassionate, and objective manner. We will work to put veterans first in our deliberations. We are confident that the Court, in its work, will do the right thing for veterans in declaring what the law is.

Thank you for this opportunity to present another perspective.

PART III

FY 1993 STATISTICAL DATA

During FY 1993 BVA produced a total of 26,400 decisions. This represents a significant reduction from FY 1992, when 33,483 appellate decisions were produced. The reduction is directly attributable to the Board's implementation of the precedent decisions of the Court. For example, in FY 1993, 44 percent of the cases were remanded to VA regional offices. A breakdown of the disposition of the Board's decisions by category of appeal is provided below.

Category	Total	Allowed	Remanded	Denied	Other
Disability compensation	21699	3912	9614	7746	427
Disability pension	1225	114	736	346	29
Medical	404	35	101	233	35
Insurance	47	2	9	34	2
Death	1424	127	523	747	27
Training	333	14	119	193	7
Waivers	477	90	203	166	18
Loan guaranty	322	83	148	81	10
Reconsiderations	161	55	70	35	1
Character of discharge	52	6	17	28	1
Miscellaneous	256	33	74	125	24
Totals	26400	4471	11614	9734	581

<u>Appellate Processing Categories</u>	DAYS	
	FY 1992	FY 1993
Notice of Disagreement to Statement of the Case	57	66
Statement of the Case to Substantive Appeal	59	62
Substantive Appeal to the BVA	194	215
Processing Time through the BVA	179	246
Average Remand Time Factor	<u>30</u>	<u>70</u>
Total Processing Time All Categories	519	659

Overall Representation

<u>Representation</u>	Total Decisions		Allowed		Remanded		Denied		Other	
	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>
The American Legion	4,769	18.1%	747	15.7%	2,039	42.8%	1,884	39.5%	99	2.1%
AMVETS	937	3.5%	165	17.6%	456	48.7%	300	32.0%	16	1.7%
American Red Cross	235	0.9%	37	15.7%	100	42.6%	94	40.0%	4	1.7%
Disabled American Veterans	10,499	39.8%	1,936	18.4%	4,705	44.8%	3,623	34.5%	235	2.2%
Jewish War Veterans	28	0.1%	3	10.7%	10	35.7%	15	53.6%	0	0.0%
Military Order of the Purple Heart	348	1.3%	58	16.7%	156	44.8%	127	36.5%	7	2.0%
Paralyzed Veterans of America	939	3.6%	210	22.4%	400	42.6%	304	32.4%	25	2.7%
Veterans of Foreign Wars	2,621	9.9%	406	15.5%	1,092	41.7%	1,055	40.3%	68	2.6%
Vietnam Veterans of America	101	0.4%	23	22.8%	67	66.3%	5	5.0%	6	5.9%
State Service Organizations	2,174	8.2%	323	14.9%	981	45.1%	839	38.6%	31	1.4%
Attorneys	786	3.0%	145	18.4%	434	55.2%	187	23.8%	20	2.5%
Agents	17	0.1%	2	11.8%	10	58.8%	5	29.4%	0	0.0%
Other Representation	350	1.3%	84	24.0%	147	42.0%	112	32.0%	7	2.0%
No Representation	2,596	9.8%	332	12.8%	1,017	39.2%	1,184	45.6%	63	2.4%
-										
TOTALS	26,400	100.0%	4,471	16.9%	11,614	44.0%	9,734	36.9%	581	2.2%

BVA Decisions

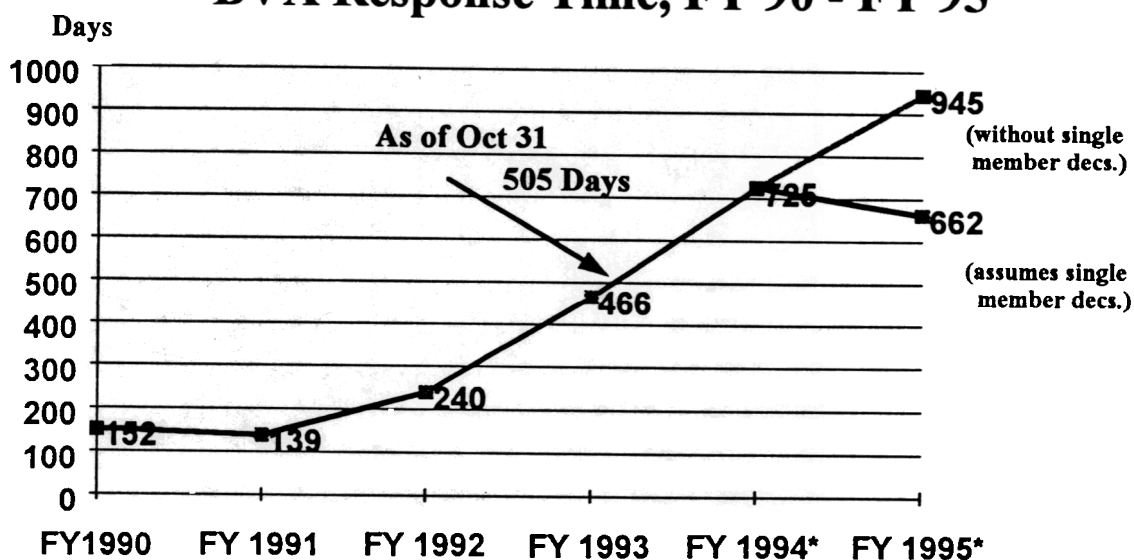
FY	Decisions	Allowed	Remanded	Denied	Other
1990	46,556	13.4%	23.5%	62.0%	1.1%
1991	45,308	13.8%	29.7%	55.4%	1.2%
1992	33,483	15.7%	50.5%	32.7%	1.1%
1993	26,400	16.9%	44.0%	36.9%	2.2%

BVA Operating Statistics

	FY90	FY91	FY92	FY93	Estimated FY94
Decisions	46,556	45,308	33,483	26,400	24,350*
Appeals Received	43,808	43,093	38,229	38,147	39,000
Pending (EOY)	19,450	17,235	21,981	33,728	48,378
Hearings - VACO	1,244	1,502	1,394	1,172	1,000
Hearings - Field	440	873	1,258	3,533	4,000
Decisions per FTE	114.7	110.2	81.5	59.9	54.2
BVA FTE	406	411	411	441	449
Response Time	152	139	240	466	725
Cost per Case	\$421	\$486	\$684	\$1,046	\$1,127

* Estimated decision production does not assume enactment of single member decision-making legislation currently under consideration

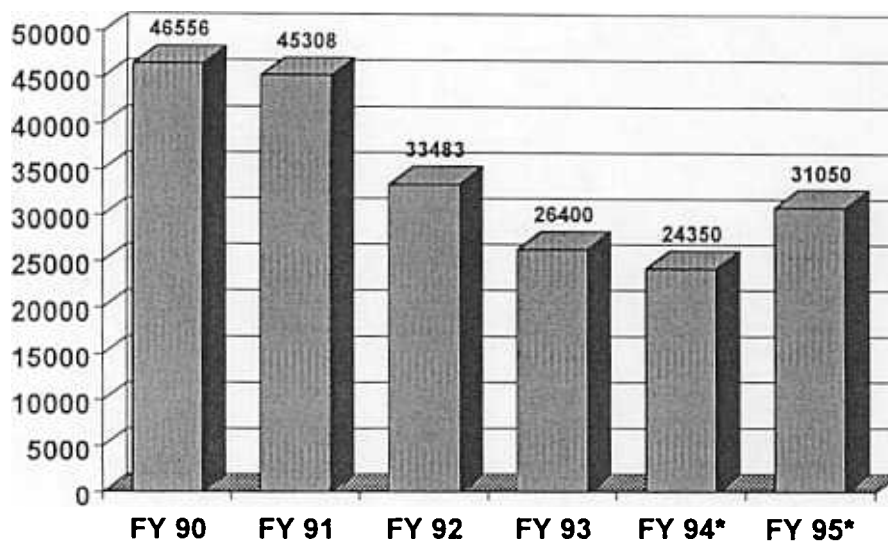
BVA Response Time, FY 90 - FY 95



* Estimated

Response time is defined as the number of days it would take BVA to render decisions on all pending appeals at the processing rate of the immediately preceding one-year timeframe

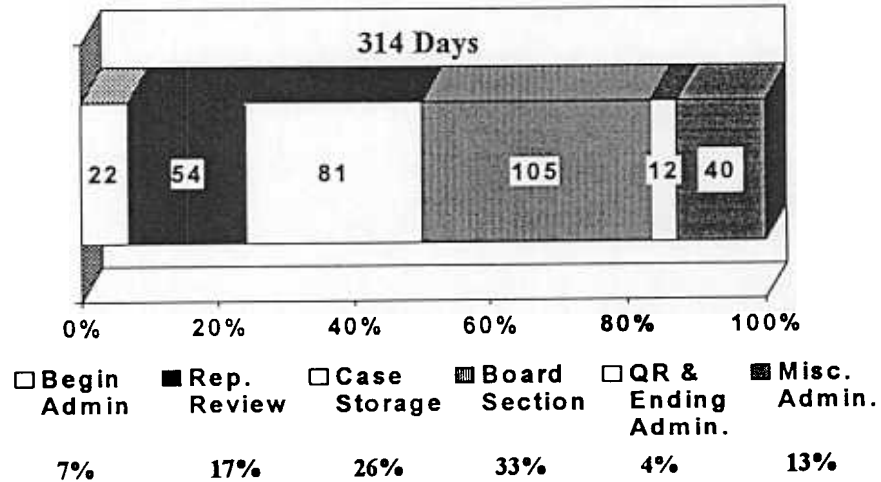
Number of Decisions, FY 90 - FY 95



* Estimated (FY 95 estimate assumes single member decisions; otherwise, it would remain at FY 94 estimate)

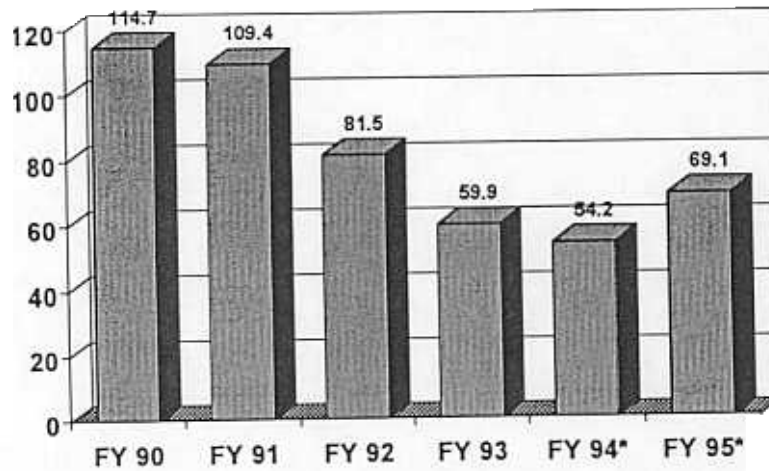
Estimated Processing Time Breakdown

Average Processing Time* for Appeals Decided in October 1993



*For a discussion of “average processing time” and “average response time,” see Part IV.

Decisions per FTE, FY 90 - FY 95



* Estimated (FY 95 figure assumes single member decisions; otherwise, estimate would remain at FY 94 level of 54.2)

BVA Personnel Structure

	<u>FY 92</u>	<u>FY 93</u>	<u>FY 94</u>
Executive/Management	9	9	9
Board Member Positions*	66	66	66
Attorneys	132	169	175
Professional Support	54	52	54
Administrative Service	150	145	145
Total	411	441	449

*Does not include the Chairman.

PART IV

ADDITIONAL INFORMATION PROVIDED PURSUANT TO STATUTORY REQUIREMENTS

38 U.S.C. § 7101(d)(2)

The following information pertaining to preceding fiscal year(s) is required by 38 U.S.C. § 7101(d)(2):

- (A) Number of cases appealed to BVA during FY 1993: 38,147
- (B) Number of cases pending before BVA at the start of FY 1993: 21,981
Number of cases pending before BVA at the end of FY 1993: 33,728
- (C) Number of cases filed during each of the 36 months preceding FY 1994:

<u>Month</u>	<u>Number of Appeals Received at the BVA</u>			<u>Estimated Number of New Notices of Disagreement Received in the Field</u>		
	<u>FY 93</u>	<u>FY 92</u>	<u>FY 91</u>	<u>FY 93</u>	<u>FY 92</u>	<u>FY 91</u>
October	3,360	3,665	4,327	5,386	3,694	5,787
November	2,951	3,255	3,188	5,416	6,638	5,392
December	2,956	3,233	4,488	5,421	6,210	4,795
January	2,720	3,188	3,248	4,567	6,474	5,578
February	3,074	3,360	3,231	4,557	5,777	5,254
March	3,766	3,652	3,464	6,457	6,472	5,993
April	2,927	2,870	3,524	5,715	5,978	6,289
May	2,766	2,650	3,525	5,573	5,506	5,960
June	3,090	2,857	3,302	5,635	5,900	5,483
July	3,064	3,335	3,888	5,305	5,939	5,685
August	3,882	3,451	3,599	6,109	5,525	5,755
September	<u>3,591</u>	<u>2,713</u>	<u>3,309</u>	<u>5,535</u>	<u>5,815</u>	<u>5,471</u>
FY Total	38,147	38,229	43,093	65,676	69,928	67,442

(D) Average length of time a case was before the BVA between the time of the filing of an appeal and the disposition during the preceding fiscal year:

<u>Time Interval</u>	<u>Responsible Party</u>	<u>Average Elapsed Processing Time</u>
Notice of Disagreement Receipt to Statement of the Case Issuance	Field Station	66 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	62 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	215 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	246 days
Average Remand Time Factor	Field Station	70 days

(E) Number of members of the Board at the end of FY 1993: 60 members (+ 5 acting)
 Number of professional, administrative, stenographic, clerical, and other personnel employed by the Board at the end of FY 1993: 452 employees
 TOTAL: 441 FTE.

38 U.S.C. § 7101(d)(3)

The following projections pertaining to the current fiscal year and the following fiscal year (budget year) are required by 38 U.S.C. § 7101(d)(3):

(A) Estimated number of cases that will be appealed to the BVA:

Fiscal Year 1994: 39,000
 Fiscal Year 1995: 39,000

(B) Evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required:

(1) Background on BVA Timeliness Projections. The indicator used by the BVA to forecast its future timeliness of service delivery is BVA response time on appeals. By taking into account the Board's most recent appeals processing rate and the number of appeals that are currently pending before the Board, BVA response time projects the average time that will be required to render decisions on that same group of pending appeals. BVA response time is computed by first determining the BVA's average daily appeals processing rate for a recent given time period. This is determined by dividing the number of appeals decided by the calendar day time period over which those appeals were

dispatched. BVA response time is then computed by dividing the number of appeals pending before the Board by the average daily appeals processing rate. As an example, BVA response time for FY 1994 is computed as follows:

Estimated 24,350 Decisions in FY 1994 ÷ 365 Days = 66.71 Decisions per Day

48,378 Appeals Pending before the BVA (end of FY 1994) ÷ 66.71 Decisions per Day = 725 Day Response Time on Appeals

(2) Response Time Projections: Based upon existing and projected levels of resources, the estimate of BVA response time, as given in the Board's budget submission for FY 1995, is 725 days for FY 1994 and 945 days for FY 1995. These response time projections are contingent upon the appeal receipts estimates for FY 1994 and FY 1995 shown in paragraph 2(A) of this part, above.

ESTIMATES OF FUTURE TIMELINESS AND PRODUCTIVITY

The Board anticipates that the precedent decisions of the United States Court of Veterans Appeals will continue to impose additional requirements for case analysis and development. In addition, pursuant to the instruction of the Secretary, the Board is required to list in each final decision all relevant items of evidence in the record that were considered in reaching that decision. Because decisions of the Court are effective when issued, precedents of this type may require the Board to readjudicate a large number of cases that had already been adjudicated, but not yet dispatched from the Board. Moreover, because of the marked increase in the numbers of hearings held by the Board, both in Washington, DC, and at VA regional offices, Board members expended proportionally less time in case deliberation while traveling and presiding at hearings in FY 1993. This trend will continue as an increase in the hearing workload is projected for fiscal year 1994.

Estimates of the Board's future timeliness and productivity can only approximate the impact of the fact that the Board's rate of remanding cases to the regional offices steadily increased from the latter part of FY 1991 through FY 1992. The remand rate in FY 1993 was 44 percent. The majority of these cases will eventually be returned to the Board for adjudication, but the Board cannot anticipate when the requested development will be completed. The estimates also do not include the additional cases returned annually to the Board by the Court of Veterans Appeals for readjudication. This number has also been rising.

It is anticipated that these trends of the past fiscal year will continue: (1) the directives of the Court will continue to require the Board to expend additional time, effort, and resources in producing appellate decisions; (2) increased demands for hearings will diminish the time which Board members may dedicate to case deliberation; (3) the Board will continue to stay the adjudication of certain classes of cases pending resolution of

appeals from decisions of the Court of Veterans Appeals; (4) the Board will continue to remand a large proportion of cases to the VA regional offices for further development; (5) the Board will continue to receive cases remanded for readjudication from the Court of Veterans Appeals; and (6) the Board will continue to prepare a "certified list" of all relevant evidence for each of its final decisions. These trends will likely continue to slow decision production, but it is unclear to what degree. In addition, unanticipated factors may arise to affect decision production.

As previously noted, legislation providing single member decision authority and other administrative and legislative initiatives will, if enacted, help to ameliorate the decline in BVA decision productivity and average response time, but would be unlikely to restore them to past levels.