



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

February 23, 2009

The Honorable Eric K. Shinseki
Secretary of Veterans Affairs
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

Dear Mr. Secretary:

I am pleased to present the Fiscal Year 2008 Report of the Chairman, Board of Veterans' Appeals (Board or BVA), for inclusion in your submission to Congress. Information on the activities of the Board during Fiscal Year 2008 and the projected activities of the Board for Fiscal Years 2009 and 2010, as required by 38 U.S.C. § 7101(d), are provided in Parts I and II.

Fiscal Year 2008 saw the Board increase productivity to the highest level since 1991 and conduct a record number of personal hearings. Although veterans' benefits law continued to change, the employees of the Board never lost sight of the mission to produce timely, quality decisions for the Veterans we serve. Nor did they lose sight of our obligation to treat Veterans and their families with care and compassion.

I believe the enclosed report will provide you, the Congress, and the Veterans we serve with an accurate and meaningful perspective on the Board's activities of Fiscal Year 2008.

Very respectfully,

A handwritten signature in black ink, appearing to read "James P. Terry". The signature is fluid and cursive.

James P. Terry
Chairman

Enclosure

Table of Contents

Page 1	Introduction
Page 3	PART I: ACTIVITIES OF THE BOARD OF VETERANS' APPEALS
Page 3	<i>Successes</i>
Page 4	<i>Succession Planning</i>
Page 5	<i>The Board's Goals for Fiscal Years 2009 and 2010</i>
Page 5	1. <i>Eliminate Avoidable Remands</i>
Page 7	2. <i>Eliminate the Backlog</i>
Page 8	3. <i>Expedited Claims Adjudication Initiative</i>
Page 9	4. <i>Docketing Changes</i>
Page 10	5. <i>Paperless Appeals</i>
Page 10	<i>Fiscal Year 2008 Briefings</i>
Page 10	<i>Significant Judicial Precedent and Its Effect on the Board</i>
Page 13	<i>Assistance to VBA Regional Offices and VHA</i>
Page 14	<i>Veterans Service Organization (VSO) Forums and Global Training</i>
Page 14	<i>Veterans Law Review</i>
Page 14	<i>Volunteer Activities</i>
Page 14	<i>Planning for the Future</i>
Page 16	BOARD MEMBERS
Page 17	PART II: STATISTICAL DATA
Page 20	PROJECTIONS FOR FISCAL YEARS 2009 AND 2010
Page 21	ADDITIONAL INFORMATION

Introduction

The law requires that the Chairman of the Board of Veterans' Appeals (Board or BVA) report the activities of the Board at the conclusion of each fiscal year. This report includes two parts. Part I provides a discussion of BVA activities during Fiscal Year 2008 and projected activities for Fiscal Years 2009 and 2010. Part II provides statistical information related to BVA activities during Fiscal Year 2008 and projected activities for Fiscal Years 2009 and 2010.

The Board makes final decisions on behalf of the Secretary on appeals from decisions of local Department of Veterans Affairs (VA) offices. The Board reviews all appeals for entitlement to veterans' benefits, including claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and health care delivery.

The Board's mission, as set forth in 38 U.S.C. § 7101(a), is "to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner." The Board's goal is to issue quality decisions in compliance with the requirements of the law, including the precedential decisions of the United States Court of Appeals for Veterans Claims (CAVC) and other federal courts.



Department of Veterans Affairs
Fiscal Year 2008
Veterans Law Judges

PART I

ACTIVITIES OF THE BOARD OF VETERANS' APPEALS

FISCAL YEAR 2008

The Board was established in 1933 and operates by authority of, and functions pursuant to, Chapter 71 of Title 38, United States Code. The Board consists of a Chairman, Vice Chairman, Principal Deputy Vice Chairman, 60 Veterans Law Judges (VLJs), eight Senior Counsel, 296 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the Secretary of Veterans Affairs. The Board is comprised of four Decision Teams with jurisdiction over appeals arising from the Department of Veterans Affairs (VA) Regional Offices (RO) and Medical Centers in one of four geographical regions: Northeast, Southeast, Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 12 line Judges, two Senior Counsel, and 71 staff counsel. Staff counsel review the record on appeal, research the applicable law, and prepare comprehensive draft decisions or remand orders for review by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal.

The Board has jurisdiction over a wide variety of issues and matters, but the vast majority of appeals considered (94.4%) involve claims for disability compensation or survivor benefits. Examples of other types of claims that are addressed by the Board include fee basis medical care, waiver of recovery of overpayments, reimbursements for emergency medical treatment expenses, education assistance benefits, vocational rehabilitation training, burial benefits, and insurance benefits.

In Fiscal Year 2008, the Board issued 43,757 decisions and conducted 10,652 hearings with a cycle time of 155 days. Cycle time measures the time from the date an appeal is physically received at the Board until a decision is dispatched, excluding the time the case is with a Veterans Service Organization (VSO) representative. The Board physically received 40,916 appeals in Fiscal Year 2008 and expects to receive at least that many appeals in Fiscal Year 2009.

During the past fiscal year, the Board hired 75 attorneys and law clerks to fill vacant staff counsel positions and to replace departing staff counsel. In addition, seven new VLJs and seven Senior Counsel were selected through competitive processes. Senior Counsel serve as Acting Veterans Law Judges, draft decisions, mentor and train other attorneys, and assist in management.

Successes

The Board issued 43,757 decisions in Fiscal Year 2008, an increase of 3,356 over the 40,401 decisions issued in Fiscal Year 2007. The Board's productivity in Fiscal Year 2008 represents the greatest number of decisions issued by the BVA in any year since 1991, which was shortly after the beginning of judicial review of Board decisions.

VLJs conducted 10,652 hearings, which is an increase of 681 hearings over Fiscal Year 2007 and the most hearings ever held by the Board in a year. All of the line VLJs exceeded their productivity goals

and most traveled to at least three ROs to conduct one week of Travel Board hearings at each site. The number of cases pending before the Board at the end of Fiscal Year 2008 was 36,452, which is a 2,579 case decrease from the 39,031 appeals that were pending at the end of Fiscal Year 2007. This decrease occurred because of the extraordinary efforts of the VLJs, staff counsel, and administrative support staff.

In addition to dispatching the 43,757 decisions issued by the Board in Fiscal Year 2008, the Board's administrative support staff reviewed 38,726 pieces of mail, determined the nature of the correspondence, and associated them with claims files. The administrative staff also answered over 82,000 inquiries from Veterans or their representatives.

In Fiscal Year 2008, the Board focused on methods to increase decision output and the quality of the decisions rendered. The Board continued efforts to eliminate avoidable remands and increase decision output through the use of voluntary attorney overtime, production incentives for attorneys, and issuance of clear, concise, coherent, and correct decisions. BVA will continue to challenge its employees in the upcoming fiscal year to increase decision output even further and to maintain the high level of quality that was achieved in Fiscal Year 2008. The 94.8% accuracy rate for the fiscal year was slightly higher than the 93.8% accuracy rate for Fiscal Year 2007. The accuracy rate quantifies those substantive deficiencies that would be expected to result in a reversal or a remand by the CAVC. Quality deficiencies that are identified during the quality review process are addressed through appropriate follow-up training for the VLJs and attorneys.

Succession Planning

In Fiscal Year 2008, the Board obtained approval from the Secretary and the Office of Personnel Management (OPM) to create two Senior Executive Service (SES) positions and two Senior Level (SL) positions. The two SES positions are Principal Deputy Vice Chairman and Director of Management, Planning, and Analysis. The two SL positions are Chief Counsel for Operations and Chief Counsel for Policy.

These new positions allow the Board to recruit the best and the brightest to manage Board operations, and are critically important in the increasingly complex world of veterans' benefits appellate adjudication. Since the creation of the CAVC and the rapidly increasing involvement of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), the complexity of BVA decisions has increased tremendously as the Board must comply with the decisions of our reviewing Courts. The number of claims filed at regional offices and medical centers continues to increase, and the Board's workload will also increase at least proportionally to the increase of the workload of the originating agencies. In addition, the work of the Disability Benefits Commission suggests that veterans' benefits law is likely to continue to evolve. The intensified requirements of the claims adjudication system are aligned with the responsibilities of other SES and SL level officials.

In Fiscal Year 2008, seven new VLJs were appointed to the Board, and seven new Senior Counsel were selected through competitive selection processes. The newly appointed VLJs had an average of eleven years of veterans' law experience prior to their appointment as VLJs.

The Board's business plan contemplates that Senior Counsel positions function as a training ground for future VLJs. The creation, in Fiscal Year 2003, of two Senior Counsel positions on each decision team provides the necessary flexibility to maintain productivity despite short-term personnel shortages.

Senior Counsel perform as Acting VLJs, Team Leaders, and attorneys drafting decisions. In addition, Senior Counsel mentor and evaluate newly hired attorneys and supervise more experienced attorneys in need of special attention or assistance. The creation of the Senior Counsel positions has allowed the Board's current leaders to train and mentor future leaders and has provided significant advancement opportunities for our staff attorneys.

The Board also has a rigorous recruitment program and is able to hire some of the best qualified attorneys and administrative personnel available. In Fiscal Year 2008, the Board hired 75 new attorneys and law clerks, as well as 15 administrative professionals. The Board attracts high caliber law clerks, attorneys, and administrative personnel because the mission to serve Veterans is one that is particularly attractive to those seeking a career in public service. During the summer of Fiscal Year 2008, the Board hired 12 law clerks to work with attorneys and VLJs to draft decisions and other work products. In addition to completing challenging writing assignments, the summer law clerks also participated in training activities and were mentored by BVA attorneys. The goal is to have them apply for permanent employment with the Board after graduation.

The Board's Goals for Fiscal Years 2009 and 2010

The two most significant challenges for Fiscal Year 2009 and 2010 are to continue to eliminate avoidable remands and to reduce the backlog of pending appeals.

1. Eliminate Avoidable Remands

Veterans deserve timely and correct decisions on claims for benefits. The record must contain all evidence necessary to decide the claim and show that all necessary due process has been provided. If the record does not meet these requirements, and the benefits sought cannot be granted, a remand for further development is necessary. However, remands from the Board to the Agency of Original Jurisdiction (AOJ) significantly increase the time it takes for a Veteran to receive a final decision. A remand typically adds more than a year to the appellate process. Furthermore, about 75% of cases remanded are subsequently returned to the Board, which increases both the AOJ's and the Board's workload and further degrades timeliness. Eliminating avoidable remands is a goal that will provide better service to Veterans and their families and, ultimately, help diminish the growing backlog. The Board has made significant progress toward this goal. BVA's remand rate was 36.8% in Fiscal Year 2008, which is down from a high of 56.8% in Fiscal Year 2004.

In Fiscal Year 2009 and 2010, the Board will focus on the following:

- ❖ ***Data Collection:*** The Board and the Veterans Benefits Administration (VBA) will continue to collect data that tracks the reasons for remand so that training can be planned and corrective action taken. A joint project between the Board and VBA led to a revised and simplified reasons for remand checklist, so that VBA can more accurately track data with respect to the leading reasons for remands, and training can be tailored accordingly.
- ❖ ***Training:*** The Board and VBA will continue to conduct training to address the most common reasons for remand, which are the need for a medical examination or opinion, the need to obtain medical records, or the need to correct a notice error under the Veterans Claims Assistance Act (VCAA).

- ❖ **Concise Explanations of the Reasons for Remanding a Case:** The Board will continue to provide a concise explanation of the reasons for remand in individual decisions in order to reduce ambiguity and to improve field processing. Better understanding of and compliance with remand directives decreases the risk of a second remand in a particular case and may help avoid future remands because of the same deficiency.

- ❖ **Prejudicial Error Analyses:** One reason for the high remand rate of 56.8% in Fiscal Year 2004 was the VCAA which, among other things, heightened VA's duty to assist and duty to notify claimants of the type of evidence needed to substantiate their claims. Following the issuance of *Pelegriani v. Principi*, 18 Vet. App. 112 (2004), in which the CAVC held that a VCAA notice letter must be provided to a claimant prior to an initial adverse adjudication, the Board attempted to avoid remands, when possible, by conducting an analysis to determine if any notice deficiency provided to the claimant was prejudicial. If prejudice was not found, most Board judges issued final decisions. If the deficiency was prejudicial, judges remanded the case to the RO to cure the defect. In *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), and *Simmons v. Nicholson*, 487 F.3d 892 (Fed. Cir. 2007), *cert. granted*, 76 U.S.L.W. 3529 (U.S. June 16, 2008) (No. 07-1209), the Federal Circuit held that failure to provide adequate notice under the VCAA is presumed prejudicial to the Veteran, but that presumption can be overcome based on the specific facts of a particular case. In light of these decisions, the Board will continue the practice of conducting a prejudicial error analysis whenever a VCAA duty to notify defect is found in order to issue final decisions in cases where a lack of prejudice to the Veteran can be found.

- ❖ **Waivers of AOJ Review:** The remand rate has trended downward since 2004, due, in part, to the restoration of a regulatory amendment that allows the Board to request a waiver of initial AOJ review of new evidence. Before February 22, 2002, if the Board accepted any evidence not previously considered by the AOJ, it was required to remand the case for review and preparation of a Supplemental Statement of the Case, unless the appellant or representative waived, in writing, initial AOJ consideration of the evidence, or the VLJ could fully grant the benefit(s) sought on appeal. 38 C.F.R. § 20.1304(c) (2001). Effective February 22, 2002, the Board's Appeals Regulations and Rules of Practice were amended to allow the BVA to consider additional evidence without referring the evidence to the AOJ for initial consideration and without obtaining the appellant's waiver. However, in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit invalidated that portion of the Board's regulations that allowed BVA to consider additional evidence without remanding the case to the AOJ for initial consideration and without obtaining the appellant's waiver. Following this decision, the Board amended its regulations to add a substantially similar version of the prior 38 C.F.R. § 20.1304(c). See 69 Fed. Reg. 53,807 (Sep. 3, 2004). By soliciting waivers in those cases where an appellant or representative submits evidence without a waiver, the Board can in many cases avoid unnecessary remands.

As a result of the above efforts, the Board's remand rate decreased from 56.8% in Fiscal Year 2004, to 36.8% for Fiscal Year 2008.

2. *Eliminate the Backlog*

The Board will continue to focus in the coming year on eliminating the backlog, within existing resources, by concentrating on the following:

- ❖ ***Eliminating avoidable remands:*** Fewer remands mean fewer appeals returned to the Board and, thus, a reduced backlog. At the end of Fiscal Year 2004, there were 31,645 remands pending at VBA. By the end of Fiscal Year 2008, that number had decreased to 27,292. Additional efforts to eliminate avoidable remands should reduce the number of Board remands in the field even further.
- ❖ ***Strengthening BVA's intra-agency partnerships:*** Joint training efforts with VBA, the Office of the General Counsel (OGC), and the Veterans Health Administration (VHA) will improve case development and decision quality and reduce remands. In addition, BVA meets with representatives from VHA, VBA and OGC on a monthly basis to discuss and resolve issues of mutual concern that adversely impact the quality of case output.
- ❖ ***Training:*** The Board's full-time training coordinator organizes training evolutions for the Board's attorneys and judges. Training for new attorneys in Fiscal Year 2008 included courses on basic veterans' law and off-site training at the Adjudication Academy in Baltimore. The latter training included overview presentations on the functions of the ROs, OGC, VSOs, the U.S. Army and Joint Services Records Research Center (JSRRC), the Appeals Management Center, and the VA Medical Centers. Throughout the past year, the Board's professional staff attended courses on topics such as Rating the Spine, Evaluation of Lay Evidence, Obtaining Medical Opinions, Reasons for Remand, Evaluating Medical Nexus Evidence, Adjudicating Psychiatric Disorders, *Vazquez-Flores v. Peake*, Rating Disorders of the Ear, and Adjudicating Claims for an Earlier Effective Date. Continued training efforts in the new fiscal year will provide the VLJs and attorneys with the latest information on a variety of legal and medical topics.
- ❖ ***Writing clear, concise, coherent, and correct decisions:*** The Board's leadership continued to stress to the VLJs and attorneys the value of writing clear, concise, coherent, and correct decisions in Fiscal Year 2008. The benefits of this initiative continued to be apparent, and the Board issued more decisions than anticipated. In the long term, it is expected that this initiative will enable VLJs and attorneys to continue to produce more and better quality Board decisions.
- ❖ ***Utilizing employee incentive, mentoring, and training programs:*** A number of programs have been introduced to increase employee motivation and satisfaction as well as to increase productivity and decision quality. Two of the most popular programs are the student loan repayment program and the flexiplace program. The student loan repayment program provides for loan assistance for up to eight highly qualified attorneys per year. Attorneys selected for this program are required to remain with the Board for at least three years and maintain exceptional levels of achievement in all critical areas of performance. Effective November 1, 2005, the Chairman authorized a permanent flexiplace program to permit a limited number of

attorneys to prepare draft decisions and other work products at their primary residence. This program enabled the Board to retain attorneys who might otherwise have resigned due to the location of the primary residence, other personal reasons, or because another agency would allow more extensive telecommuting. In connection with this program, the Board successfully implemented a number of data security safeguards, such as encryption software for Board laptops used by flexiplace program participants, and locked cabinets at the primary residence for the laptop and original claims folders. Each flexiplace participant agrees to abide by the rules of the program, which include strict safeguards to protect sensitive data. Participants are not permitted to use their own personal computers for drafting decisions, and the home work sites are periodically inspected to ensure continued compliance with the Board's rules.

- ❖ ***Making use of overtime:*** The Board will continue to use overtime within existing resources to enhance output.

- ❖ ***Increasing use of paralegals:*** The Board established a paralegal unit for non-decisional support activities to free up the legal staff to decide appeals. In the second quarter of Fiscal Year 2006, the Board transferred the primary responsibility for drafting certified lists of the relevant evidence considered by the Board in a decision on appeal to the CAVC from the Board's staff counsels to the paralegal unit. In Fiscal Year 2008, BVA provided 1,834 certified lists to VA's OGC. Effective May 1, 2008, the CAVC amended its rules and required a joint appendix rather than certified lists. The Board's paralegals who had been producing these certified lists will be transferred to other responsibilities which will enhance the Board's abilities to efficiently handle appeals and administrative tasks.

- ❖ ***Draft Decisions:*** VLJs will draft decisions, in addition to reviewing decisions drafted by staff counsel, as time permits.

These measures will work to reduce the backlog and to shorten the time it takes for a Veteran to receive a fair, well-reasoned Board decision.

3. Expedited Claims Adjudication Initiative

At the direction of the Secretary and in coordination with VBA, the Board has proposed an Expedited Claims Adjudication (ECA) initiative that will be launched as a two-year pilot program at four select ROs. In order to help accelerate the timely processing of all claims and appeals, VA will offer represented claimants the option of participating in the ECA initiative for expedited processing of claims and appeals. A claimant who elects to participate in the ECA will voluntarily waive specified procedural rights and, in return, be placed on a fast track for adjudication. The expected rapid disposition of these claims should reduce the backlog and thereby ultimately improve the overall timeliness of claims processing.

Participation in the ECA initiative will be offered in writing by VA as an option when a claim is received. During the pilot program, participation will extend to claims for benefits administered by VBA at four locations (Philadelphia, Nashville, Lincoln, and Seattle) for Veterans who are represented. Participation will be open to claims for disability compensation benefits under 38 C.F.R. Parts 3 and 4,

excluding a narrow class of claims including pension benefits, survivor benefits, and simultaneously contested claims.

In addition to expedited claims at a participating RO, any claims appealed to the Board under the ECA initiative will be screened upon arrival at the Board to ensure that the record is adequate for decisional purposes when the appeal reaches its place on the Board's docket. If the record is inadequate, the Board will take prompt action under existing regulations, such as soliciting a waiver of RO consideration of additional evidence, and remand the case for further development, if necessary.

The final regulations to implement the ECA were published in the Federal Register on November 5, 2008 and are effective on December 8, 2008. The Department is very excited about this program and the positive impact expected in speeding up the adjudication of claims and appeals before VA.

4. Docketing Changes

Effective October 1, 2008, the Board places an appeal on its docket when it is received at the Board. This change will allow Veterans and their representatives to receive more accurate information regarding the location and status of their appeal. The Board expects the new docketing procedure to identify delays in appeals processing more accurately by more clearly identifying the location of the appeal. This procedure is in keeping with the Secretary's policy of placing a renewed emphasis throughout the Department on expediting the claims adjudication and appeals process in its entirety.

In January 1994, the Board began to docket appeals when the VA Form 9 had been filed by the Veteran at the RO indicating his or her formal reasons for appeal to the Board. This action was taken to allow appeals to remain at the RO at a time when the Board had a three year backlog of cases physically located at its offices. Prior to that time, the Board docketed cases on the date they arrived at the Board and were subject to the Board's jurisdiction. A return to a modified form of this former process is appropriate. Recent data collection indicates that cases in which a formal appeal document (VA Form 9) has been filed by the Veteran are not being timely forwarded to the Board for a variety of reasons. During this extended interval, these cases are not subject to the Board's appellate jurisdiction. Rather, these cases remain at the RO, often undergoing further development, and do not physically arrive at the Board for consideration until a long period of time has passed.

Although the Board will not place a case on the docket under this new process until it is received at the Board, the Veteran will not be prejudiced in the consideration of his or her case by processing delays at an RO. When the RO enters information into the VACOLS system regarding the filing of the VA Form 9, a priority date will be automatically assigned in the system to preserve the Veteran's place in line. Thereafter, when the case is received and docketed by the Board, the docket number that is assigned will correspond to this priority date. This process recognizes the need to ensure fairness to every Veteran in the processing of his or her claim at all levels of consideration, while at the same time clarifying that cases are not docketed and ready for Board consideration until they are actually received by the Board.

5. Paperless Appeals

In Fiscal Year 2008, the Board completed its first paperless appeal. For some time now, VA has been processing Benefit Delivery at Discharge (BDD) claims for separating service members by using a paperless claims processing system at ROs in Salt Lake City, Utah and Winston-Salem, North Carolina. The first appeal of one of these claims reached the Board in 2008 and allowed the Board to begin planning how to handle the expected growing caseload of paperless appeals. The Board found several areas of improvement while working on the first appeal and those will be implemented to make other appeals proceed as expeditiously as possible. Paperless claims and appeals provide many benefits to Veterans and to VA. Electronic files are secure from loss or damage and are backed up daily. In addition, electronic files are not subject to mailing delays between offices, and allow multiple offices to work on parts of the file simultaneously, preventing the need for down-time while another office works on the claim. The Board fully supports VA's goal of increasing the use of paperless claims and appeals processing.

Fiscal Year 2008 Briefings

During the fiscal year, the Chairman or his representatives discussed the Board's successes, challenges, and general activities at the Service Officers School of the Georgia Department of Veterans Services, VA's National Creative Arts Festival, the New Jersey Association of Veterans Service Officers Annual Training, the American Legion's 85th Annual Veterans Affairs and Rehabilitation Conference, the CAVC's Tenth Judicial Conference, the Federal Circuit Judicial Conference, the National Association of County Veterans Service Officers Convention, the Disabled American Veterans 87th National Convention and Legislative Seminar, the Ohio Association of County Veterans Service Officers Conference, and the Georgia Department of Veterans Service Conference.

In addition, the Chairman briefed both majority and minority staff of the Senate Veterans Affairs Committee on the "State of the Board".

Significant Judicial Precedent and Its Effect on the Board

❖ *Hart v. Mansfield*, 21 Vet. App. 505 (2007):

In *Hart v. Mansfield*, the CAVC held that staged ratings are appropriate for an increased rating claim when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings (similar to initial disability claims, *See Fenderson v. West*, 12 Vet. App. 119 (1999)). In reaching this conclusion, the CAVC observed that when a claim for an increased rating is granted, the effective date assigned may be up to one year prior to the date that the application for increase was received if it is factually ascertainable that an increase in disability had occurred within that timeframe. 38 U.S.C. § 5110. Accordingly, the relevant focus for adjudicating an increased rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim. If VA's adjudication of an increased rating claim is lengthy, a claimant may experience multiple distinct degrees of disability that would result in different levels of compensation from the time the increased rating claim was filed until the final decision on that claim is made. Thus, VA's determination of the "present level" of a disability may result in a conclusion that the disability

has undergone varying and distinct levels of severity throughout the entire time period the increased rating claim has been pending.

❖ ***Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008):**

This appeal involved a claim of entitlement to service connection for hearing loss of the left ear. The disability was initially characterized as conductive hearing loss and was denied in 1955. Many years later, the claimant again filed for service connection for left ear hearing loss which was described as sensorineural hearing loss. The Board treated the new claim as an attempt to reopen a finally denied claim and denied reopening because no new and material evidence had been submitted. The CAVC affirmed in a nonprecedential decision. The issue on appeal to the Federal Circuit concerned the correct legal standard for deciding whether two claims for service connection are one and the same, i.e., have the “same factual basis,” for purposes of 38 U.S.C. § 7104(b). As a general rule, section 7104(b) provides that “when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.”

The Federal Circuit reversed and remanded, holding that claims that are based upon distinctly and properly diagnosed disease or injuries must be considered separate and distinct claims. A claim for one diagnosed disease or injury cannot be prejudiced by a prior claim for a different diagnosed disease or injury. Rather, the two claims must be considered independently because they rest on distinct factual bases. In this case, the Federal Circuit found that the CAVC erred as a matter of law in finding that claims based on distinctly diagnosed diseases or injuries can be considered the same for purposes of section 7104(b) merely because those diseases or injuries involve the same or overlapping symptomatology.

❖ ***Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008):**

The Federal Circuit reversed and remanded the decision of the CAVC in *Haas v. Nicholson*, 20 Vet. App. 257 (2006). In that decision the CAVC reversed and remanded a Board decision that denied the appellant’s claim for service connection for diabetes mellitus, with peripheral neuropathy and retinopathy, as a result of exposure to herbicides. For purposes of applying the presumption of exposure to herbicides set forth under 38 C.F.R. § 3.307(a)(6)(iii), the CAVC held that “service in the Republic of Vietnam” will, in the absence of contradictory evidence, be presumed based upon the Veteran’s receipt of a Vietnam Service Medal (VSM), without any additional proof required that a Veteran who served in waters offshore actually set foot on land in the Republic of Vietnam. In reversing, the Federal Circuit held that VA’s requirement that a claimant must have been present within the land borders of Vietnam at some point in the course of duty in order to be entitled to the presumption of herbicide exposure and service connection constitutes a permissible interpretation of 38 U.S.C. § 1116(a)(1) and 38 C.F.R. § 3.307(a)(6)(iii). Following a detailed and lengthy review of the complex history of the legislative and regulatory measures directed to the issue of herbicide exposure in Vietnam, the Federal Circuit agreed with the CAVC that the phrase “served in the Republic of Vietnam” contained in section 1116 is ambiguous as applied to service in the waters adjoining the landmass of Vietnam. Further, the language of section 3.307(a)(6)(iii) is similarly ambiguous in that “duty or visitation” in the Republic of Vietnam could be understood to refer to “duty” or “visitation” within the broader area encompassed, for example, by the territorial waters

of the Republic. Turning to VA's interpretation of its own regulations, the Federal Circuit held that VA's interpretation requiring physical presence within Vietnam in order to be entitled to the presumption of herbicide exposure was not plainly erroneous or inconsistent with the language of section 3.307(a)(6)(iii). The agency's current interpretation has been consistent for more than a decade, and was in effect before the appellant filed his claim for benefits. While the regulation itself is subject to competing interpretations, it is not unusual for an interpretive regulation to be itself ambiguous. Further, although the 1991 version of the VA Adjudication Procedure Manual M21-1 ("In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the records show that the Veteran received the Vietnam Service Medal."), provides evidence of a different earlier interpretation, such a prior inconsistent interpretation does not deprive VA's current and longstanding interpretation – as reflected by statements included in General Counsel precedent opinions and regulatory comments dating back to 1997 – of the right to judicial deference. Further, as an interpretive rule the pre-2002 version of the Manual was not a substantive rule that could be amended only by notice and comment rulemaking, and hence it was erroneous for the CAVC to so hold. The claimant filed a *certiorari* petition with the Supreme Court, which was denied on January 21, 2009.

❖ ***Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008):**

This case was an appeal for an increased rating for nephrolithiasis (kidney stones). The CAVC held that the VCAA notice was inadequate. The CAVC found that, at a minimum a 38 U.S.C. § 5103(a) notice requires that the Secretary notify the claimant that, to substantiate such a claim;

- (1) the claimant must provide, or ask the Secretary to obtain, medical or lay evidence demonstrating a worsening or increase in the severity of the disability and the effect that the worsening has on the claimant's employment and daily life;
- (2) if the Diagnostic Code (DC) under which the claimant's disability is rated contains criteria necessary for entitlement to a higher disability rating that would not be satisfied by the claimant demonstrating a noticeable worsening or increase in severity of the disability and the effect that worsening has on the claimant's employment and daily life (such as a specific measurement or test result), the Secretary must provide at least general notice of that requirement to the claimant;
- (3) the claimant must be notified that, should an increase in disability be found, a disability rating will be determined by applying relevant DCs, which typically provide for a range in severity of a particular disability from 0% to as much as 100% (depending on the disability involved), based on the nature of the symptoms of the condition for which disability compensation is being sought, their severity and duration, and their impact on employment and daily life; and
- (4) the notice must also provide examples of the type of medical and lay evidence that the claimant may submit (or ask the Secretary to obtain) that are relevant to establishing entitlement to increased compensation; e.g., competent lay statements describing symptoms, medical and hospitalization records, medical statements, employer statements, job application rejections, and any other evidence showing an increase in the disability or exceptional circumstances relating to the disability.

This important decision significantly increased the responsibility to provide notice to all claimants seeking an increased rating and imposed substantial new requirements on VA to ensure adequate notice. The Board worked with VBA to develop procedures that would provide the necessary notice with the least possible disruption to the processing of current claims and appeals.

❖ ***Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), and *Simmons v. Nicholson*, 487 F.3d 892 (Fed. Cir. (2007), cert. granted, 76 U.S.L.W. 3529(U.S. June 15, 2008) (No. 07-1209):**

Both of these decisions addressed the issue of application of the prejudicial error rule in the context of the VCAA, including who has the burden of proving before the CAVC that any error committed by VA in providing notice of the information and evidence necessary to substantiate a claim for benefits under 38 U.S.C. § 5103(a) was prejudicial.

In *Sanders*, the Federal Circuit held that any error by VA in providing the notice required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1) is presumed prejudicial; and that once an error is identified by the CAVC as to any of the notice elements, the burden shifts to VA to demonstrate that the error was not prejudicial to the appellant. The Federal Circuit stated that requiring an appellant to demonstrate prejudice as a result of any notice error is inconsistent with the purposes of both the VCAA and VA's uniquely pro-claimant benefits system.

Instead, the Federal Circuit held in *Sanders* that all VCAA notice errors are presumed prejudicial and require reversal unless the VA can show that the error did not affect the essential fairness of the adjudication. To do this, the VA must show that the purpose of the notice was not frustrated, such as by demonstrating that any defect was cured by actual knowledge on the part of the claimant, or that a reasonable person could be expected to understand from the notice what was needed, or that a benefit could not have been awarded as a matter of law.

In *Simmons*, the Federal Circuit, applying the holdings in the concurrently issued decision in *Sanders*, affirmed the CAVC's holding that an error by VA in providing notice of the information and evidence necessary to substantiate a claim under 38 U.S.C. § 5103(a) is presumptively prejudicial, and that in such a case the burden shifts to VA to demonstrate that the error was not prejudicial to the appellant. The United States filed a petition for a writ of *certiorari* with the Supreme Court, which was granted by the Court on June 16, 2008. Oral argument was held December 8, 2008 and a decision is expected before the end of the Court's term in June.

Assistance to VBA Regional Offices and VHA

During the past year the Board continued its efforts to help the ROs reduce their backlog of cases on appeal through the Travel Board program. For most Travel Boards, an attorney travels with a VLJ to an RO to assist in preparing for scheduled hearings. An average of more than 40 hearings per judge is scheduled each week. During the course of the week, the attorneys often provide various types of assistance and training to the RO staff.

In Fiscal Year 2008, 146 attorneys provided assistance to 54 ROs. The attorneys conducted training for adjudication personnel at 52 of the ROs visited.

With respect to appeals originating from VA hospitals, the Board participated in conference calls with the VHA staff across the country that handle appeals to the Board to discuss issues of concern related to the processing of claims and appeals. In addition, the Board provided training on medical center appeals at several locations.

Veterans Service Organization (VSO) Forums and Global Training

The Chairman invites the VSOs and attorneys who represent appellants before the Board to VSO Forums on a quarterly basis. These meetings address questions that are raised by representatives and also facilitate the exchange of ideas and information. An update on the Board's activities is provided, and matters of general interest are addressed.

The Board also provides global training to VSO representatives who are co-located with the Board to familiarize them with our processes and procedures and with the various functions of the administrative personnel, attorneys, and VLJs. VSOs are also invited to provide training to attorneys and judges and to participate in the in-house training that is provided to BVA staff.

Veterans Law Review

During Fiscal Year 2008, the Board established the Veterans Law Review. This new journal will provide a scholarly look at veterans benefits law and other issues facing the Board and VA. The Veterans Law Review will provide the opportunity for attorneys at the Board, the Office of General Counsel, and the private bar to write on topics critical to the rights of Veterans and the legal obligations of those who serve them. The Veterans Law Review will also review books addressing Veterans benefits and will include case notes as well. Articles will be authored by both VA and non-VA employees. The first annual issue will be published in early 2009.

Volunteer Activities

The Board proudly supports Veterans and their families and educates VA employees by creating educational exhibits at the Board on subjects such as the Vietnam War, Korean Conflict, Operation Enduring Freedom, Operation Iraqi Freedom, female Veterans and Prisoners of War (POWs). The Board also facilitates the collection and donation of comfort items for distribution to Veterans at the Washington VA Medical Center and the United States Armed Forces Retirement Home (U.S.A.F.R.H.); distributes United States Department of Defense, VA POW/MIA Day and Veterans Day posters to Veterans; collects Toys for Tots for the United States Marine Corps Reserve; and facilitates the collection of calendars and valentines for Veterans to distribute at the U.S.A.F.R.H. Board employees have participated in donating material to Fisher House at Bethesda National Naval Medical Center. The Board provided volunteers to assist at the Winterhaven Homeless Veterans Stand Down in January, and the Welcome Home Celebration at the Washington VA Medical Center in June. The Board also participates actively in the Combined Federal Campaign.

Planning for the Future

- ❖ ***Leadership Initiative:*** The Leadership Initiative (LI) provides opportunities for all Board employees, as well as employees of other organizations within and outside of VA, to improve

their leadership skills through training, mentoring, and networking. Events during Fiscal Year 2008 included programs where Appellate Group attorneys shared their insights and experiences with regard to career development; networking breakfasts; and participation in Operation Homefront providing support and building morale for service members and their families. This year LI volunteers collected decorations, candy, and costumes to help create a fun Halloween party for service members' children. LI volunteers also assisted at the airport and various memorials with the Honor Flight program that provides trips to Washington for our nation's World War II heroes and other Veterans.

- ❖ ***Non-BVA Training Initiatives:*** The Board sends high producing, high quality attorneys, VLJs, and administrative professionals to Leadership VA, as well as leadership seminars and programs offered through OPM's Federal Executive Institute and the Management Development Centers. Two employees were competitively selected to attend Leadership VA during the past year, which seeks to contribute to the development of leaders within VA. Through a series of experiences, Leadership VA strives to provide an integrated view of VA to further the goal of achieving One VA, explore the internal and external forces affecting VA, give insight into the current and predicted challenges facing the Department in its delivery of services and benefits to the veterans' community, provide interchange between officials from various levels and organizational elements of VA, and increase leadership skills and provide opportunities for refining them through practice in group settings. The Board also selected two employees to attend Leadership for a Democratic Society at the Federal Executive Institute. This comprehensive four-week course builds the participants' knowledge and skills in personal leadership, transforming public organizations, and the policy framework in which Government leadership occurs. Finally, the Board sent eight employees to OPM Management Development Centers to participate in courses such as the Supervisory Leadership Seminar: Learning to Lead and to other leadership development courses. All of these various training courses are an integral part of the Board's plan to develop its future leaders.

- ❖ ***Facilities:*** The Board has been advised that a building move will not occur during Fiscal Year 2009 or 2010. The Board continues to work with GSA and VA Facilities Management to upgrade the current location at the Lafayette Building at 811 Vermont Ave, NW, as well as to seek to obtain additional office space within the building.

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PART II

STATISTICAL DATA

Fiscal Year (FY) 2008 Information

The following information is required by 38 U.S.C. § 7101(d)(2):

38 U.S.C. § 7101(d)(2)(A)

Number of cases physically received at the Board during FY 2008: **40,916**
 Number of cases added to docket by filing appeal during FY 2008: **43,351**

38 U.S.C. § 7101(d)(2)(B)

Cases pending before the Board at the start of FY 2008: **39,031***
 Cases pending before the Board at the end of FY 2008: **36,452***

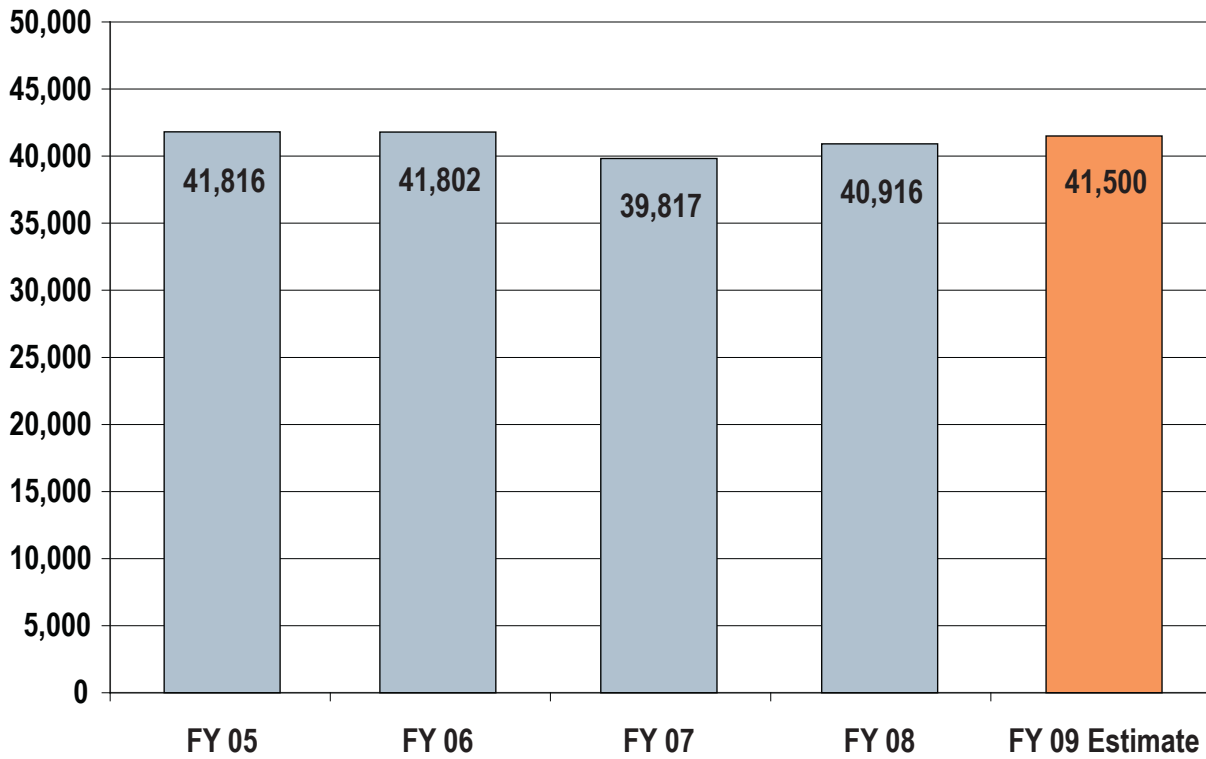
*Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

38 U.S.C. § 7101(d)(2)(C)

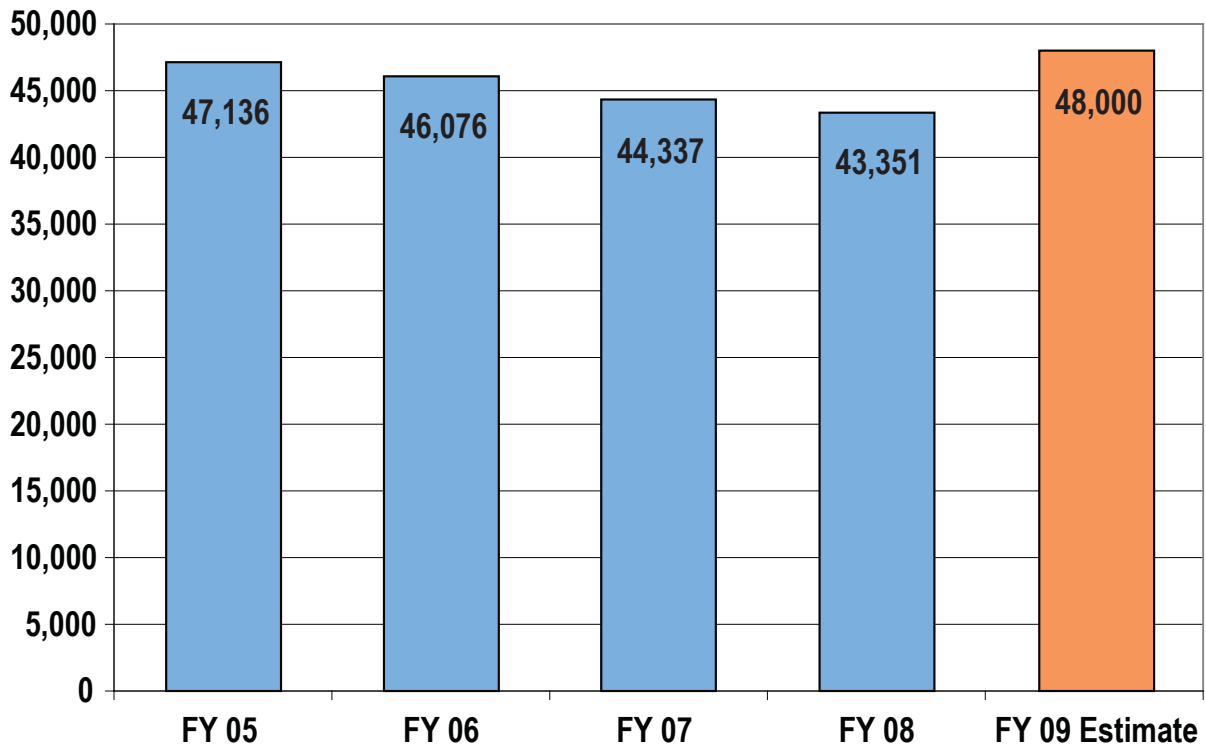
Number of cases received at BVA and new appeals filed during each of the 36 months preceding FY 2008.

Month	Cases Received at BVA				New Appeals (VA Form 9) Filed			
	FY05	FY06	FY07	FY08	FY05	FY06	FY07	FY08
October	2,664	3,750	3,206	3,713	3,566	3,700	3,341	4,133
November	2,171	3,610	2,754	3,201	3,708	3,631	3,321	3,646
December	3,264	3,182	3,275	2,767	3,695	3,559	3,196	2,956
January	3,202	4,142	2,949	3,248	3,543	3,899	3,615	3,703
February	3,562	3,886	3,404	3,701	3,786	3,871	3,519	3,579
March	4,124	4,293	3,498	4,351	4,552	4,357	4,085	3,389
April	3,055	2,575	2,854	3,337	3,461	3,615	3,694	3,651
May	3,104	3,093	3,532	3,121	4,331	4,115	4,170	3,629
June	4,730	3,341	3,190	3,279	4,334	4,381	3,963	3,559
July	4,655	2,941	3,695	3,107	3,445	3,531	3,855	3,696
August	3,890	3,313	4,281	3,443	4,378	3,920	3,993	3,517
September	3,395	3,676	3,179	3,648	4,337	3,497	3,585	3,893
FY Total	41,816	41,802	39,817	40,916	47,136	46,076	44,337	43,351

Cases Received at BVA FY 05 - FY 08



New Appeals (VA Form 9) Filed FY 05 - FY 08



38 U.S.C. § 7101(d)(2)(D)

The average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year:

Time Interval	Responsible Party	Average Elapsed Processing Time
Notice of Disagreement Receipt to Statement of the Case	Field Station	218 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	43 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	563 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	255 days
Average Remand Time Factor	Field Station	136 days

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2008: **60 members**

The number of professional, administrative, clerical and other personnel employed by the Board at the end of FY 2008: **451 employees not including 60 members above**

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2008: **78**

Number of cases in which such members participated: **8,806**

38 U.S.C. § 7101(c)(2)

Number of acting members of the Board in terms of full-time employee equivalents: **11.7**

PROJECTIONS FOR FISCAL YEARS 2009 AND 2010

The following information is required by 38 U.S.C. § 7101(d)(3):

38 U.S.C. § 7101(d)(3)(A)

Estimated number of cases that will be appealed to BVA:

Fiscal Year 2009:	Cases received at BVA:	41,500
	Cases added to BVA Docket	48,000
Fiscal Year 2010:	Cases received at BVA:	41,500
	Cases added to BVA Docket:	48,000

38 U.S.C. § 7101(d)(3)(B)

Evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by 38 U.S.C. § 7101(a):

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 group of pending appeals. For response time computation, the term “appeals pending before the Board” includes appeals at the Board and those that have been certified for BVA review but are held in the field pending BVA Travel Board or video conference hearings.

The following categories are calculated as follows:

$$\frac{\text{FY 2008 decisions (43,757) (divided by)}}{262 \text{ work days}} = 167.01 \text{ Decisions per Work Day}$$

$$\frac{\text{Cases Pending end of FY 2008 (36,452) + New Cases expected in FY 2009 (41,500)}}{262 \text{ work days}} = 77,952 = \text{Total Workload in FY 2009}$$

$$\frac{\text{Total Workload (77,952) (divided by)}}{\text{Decisions per Work Day (167.01)}} = 467 \text{ Work Days}$$

$$\frac{\text{Work Days (467) (divided by)}}{262 \text{ work days}} = 1.8 \text{ Years}$$

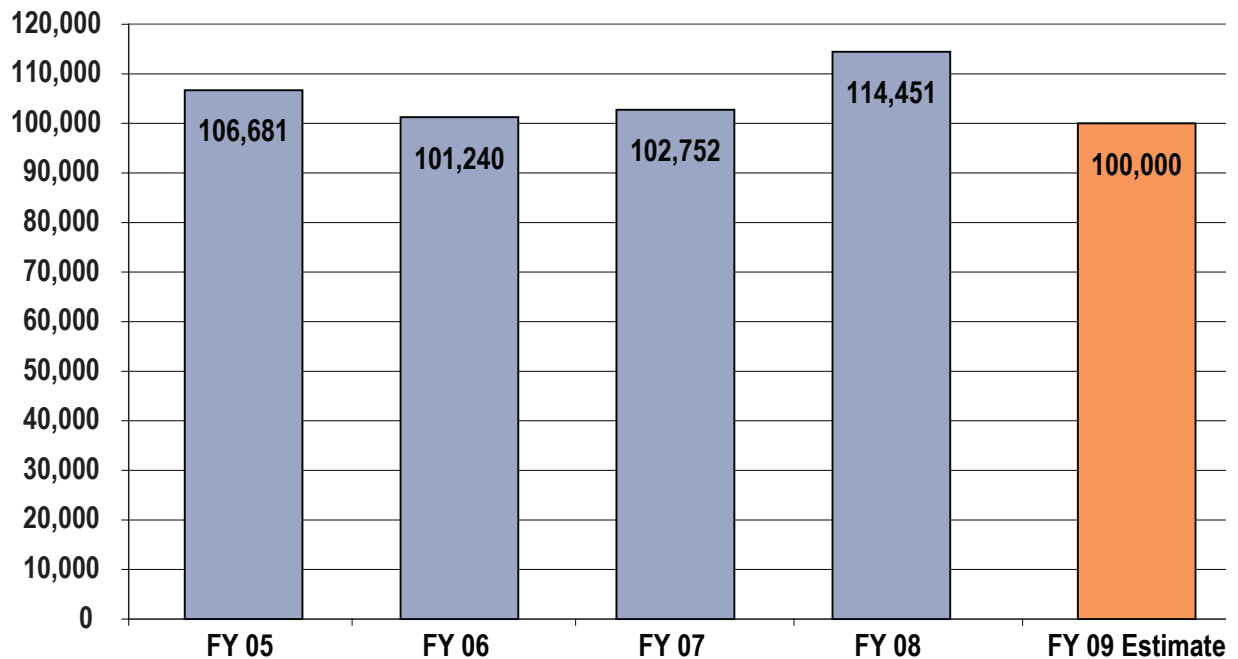
$$\text{Work years (1.8) x 12 (months)} = 21.6 \text{ months}$$

ADDITIONAL INFORMATION

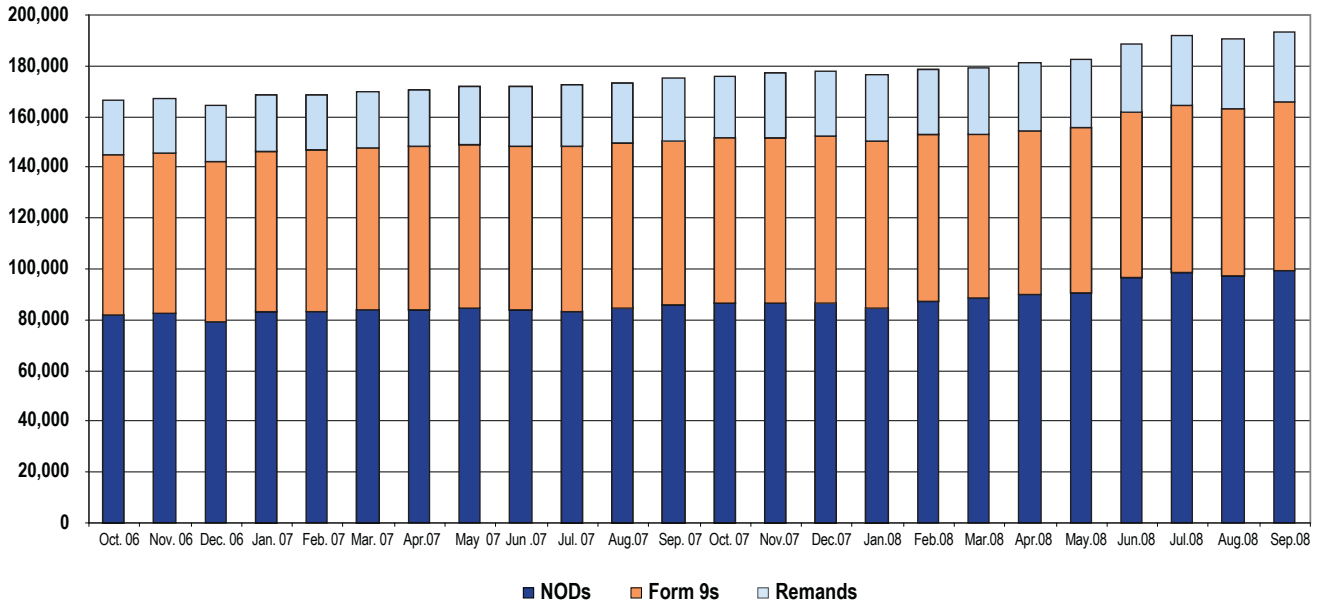
Potential BVA Workload in VBA (information)

Number of New Notices of Disagreement Received in the Field				
Month	FY05	FY06	FY07	FY08
October	8,949	8,967	9,288	10,217
November	8,293	7,989	8,131	8,781
December	8,016	7,594	7,400	7,962
January	9,048	8,715	8,701	9,552
February	9,053	8,322	8,154	9,654
March	10,265	9,815	9,551	10,020
April	9,208	8,122	8,615	10,245
May	9,390	9,093	8,836	9,745
June	9,256	8,700	8,573	9,704
July	8,428	7,630	8,627	10,230
August	9,307	8,576	9,326	9,503
September	7,468	7,717	7,550	8,838
FY Total	106,681	101,240	102,752	114,451

Notices of Disagreement Received FY 05 - FY08



Potential BVA Workload in VBA



BVA Dispositions by VA Program

FY 2008

APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	6	7.7%	14	17.9%	56	71.8%	2	2.6%	78	0.2%
Compensation	9,243	22.4%	15,354	37.2%	15,760	38.1%	967	2.3%	41,324	94.4%
Education	28	10.2%	78	28.5%	156	56.9%	12	4.4%	274	0.6%
Insurance	1	4.5%	6	27.3%	14	63.6%	1	4.5%	22	0.1%
Loan Guaranty	2	25.0%	3	37.5%	3	37.5%	0	0.0%	8	0.0%
Medical	96	18.1%	173	32.6%	231	43.6%	30	5.7%	530	1.2%
Pension	83	12.1%	174	25.3%	405	58.9%	26	3.8%	688	1.6%
VR&C	4	5.7%	25	35.7%	36	51.4%	5	7.1%	70	0.2%
Other Programs	9	17.0%	5	9.4%	34	64.2%	5	9.4%	53	0.1%
BVA Original Jurisdiction	8	8.3%	5	5.2%	56	58.3%	27	28.1%	96	0.2%
Multiple Program Areas	91	14.8%	259	42.2%	254	41.4%	10	1.6%	614	1.4%
GRAND TOTAL	9,571	21.9%	16,096	36.8%	17,005	38.9%	1,085	2.5%	43,757	100.0%

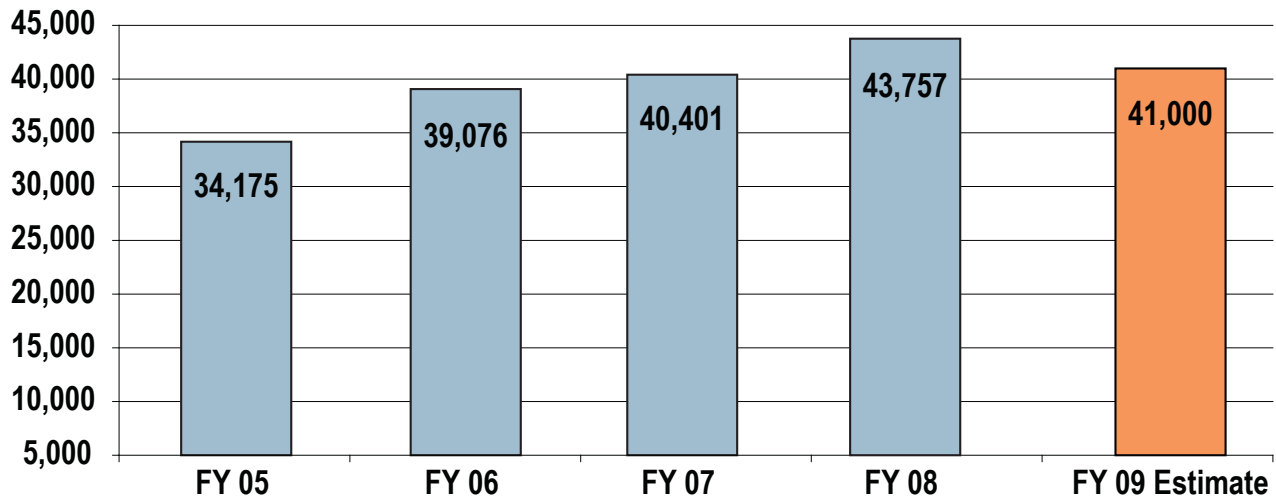
**BVA Dispositions by Representation
FY 2008**

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	1,802	23.0%	2,872	36.7%	2,939	37.6%	206	2.6%	7,819	17.9%
AMVETS	56	24.2%	87	37.7%	86	37.2%	2	0.9%	231	0.5%
Disabled American Veterans	2,841	23.9%	4,496	37.8%	4,274	35.9%	280	2.4%	11,891	27.2%
Military Order of the Purple Heart	141	25.2%	205	36.6%	203	36.3%	11	2.0%	560	1.3%
Paralyzed Veterans of America	113	28.9%	151	38.6%	93	23.8%	34	8.7%	391	0.9%
Veterans of Foreign Wars	952	22.3%	1,576	36.8%	1,654	38.7%	96	2.2%	4,278	9.8%
Vietnam Veterans of America	184	23.7%	316	40.6%	246	31.6%	32	4.1%	778	1.8%
State Service Organizations	1,721	21.0%	2,750	33.6%	3,550	43.4%	157	1.9%	8,178	18.7%
Attorney	698	20.1%	1,608	46.4%	1,037	29.9%	124	3.6%	3,467	7.9%
Agents	12	17.4%	31	44.9%	24	34.8%	2	2.9%	69	0.2%
Other Representation	209	22.2%	334	35.5%	373	39.6%	26	2.8%	942	2.2%
No Representation	842	16.3%	1,670	32.4%	2,526	49.0%	115	2.2%	5,153	11.8%
GRAND TOTAL	9,571	21.9%	16,096	36.8%	17,005	38.9%	1,085	2.5%	43,757	100.0%

BVA DECISIONS

Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2005	34,175	20.8%	38.6%	38.1%	2.5%
2006	39,076	19.3%	32.0%	46.3%	2.4%
2007	40,401	21.1%	35.4%	40.9%	2.6%
2008	43,757	21.9%	36.8%	38.9%	2.5%

BVA Decisions FY 05 - FY 08



BVA Operating Statistics				
	FY05	FY06	FY07	FY08
Decisions	34,175	39,076	40,401	43,757
Case Receipts*				
Added to Docket	47,136	46,076	44,337	43,351
Received at BVA	41,816	41,802	39,817	40,916
Cases Pending**	37,539	40,265	39,031	36,452
Hearings - VACO	738	554	421	672
Video	2,618	2,719	2,870	2,891
Field	5,220	5,885	6,680	7,089
TOTAL	8,576	9,158	9,971	10,652
Decisions per FTE	79.1	86.4	90.3	93.2
BVA FTE	433	452	447	469
BVA Cycle Time	104	148	136	155
Cost per Case	\$1,453	\$1,381	\$1,337	\$1,365
<p>* Case Receipts composed of: (1) new cases added to BVA's docket; and (2) cases received at BVA, which consist of all cases physically received at the Board, including original appeals and cases returned to the Board's docket (i.e., cases returned following remand development, cases remanded by the Court, and cases received for reconsideration or vacate actions).</p> <p>** Pending figures include certified appeals pending in the field awaiting BVA hearings, as well as cases pending before the Board.</p>				