

ANNUAL REPORT
OF THE
CHAIRMAN, BOARD OF VETERANS' APPEALS

INTRODUCTION

This report by the Chairman, Board of Veterans' Appeals is prepared pursuant to 38 U.S.C. § 4001(d), as added by Pub. Law 100-687 (renumbered § 7101 in 1991). Part I consists of the activities of the Board during Fiscal Year 1991 and the projected activities of the Board for Fiscal Years 1992 and 1993, as required by 38 U.S.C. § 7101(d)(1). Part II consists of the statistical data required by 38 U.S.C. § 7101(d)(2) and (3).

PART I

The activities of the Board in Fiscal Year 1991 were characterized by the changes required by the Veterans Judicial Review Act, Pub. Law 100-687 (1988), (hereinafter VJRA) and by the decisions of the United States Court of Veterans Appeals. Significantly, the Court issued its first landmark decision, *Gilbert v. Derwinski*, U.S. Vet. App. No. 89-53 (Oct. 12, 1990), as the fiscal year began. The remainder of the fiscal year was punctuated by decisions of the Court which had a significant impact upon the Board's composition and decision-making activities.

The Board began Fiscal Year 1991 with 57 Members, 10 less than the maximum number allowed by 38 U.S.C. § 7101(a). Due to the passage of the VJRA, no Members of the Board were appointed between November 1988 and my appointment in March 1991. During Fiscal Year 1991, all of the incumbent Members of the Board and eight additional Members were appointed, effective July 28, 1991. Currently, six additional Members are in the process of being appointed. This procedure will be completed during Fiscal Year 1992 and will bring the Board to its full statutory complement of 67 Members for the first time since 1988. Due to the staggered initial terms of Board Members under the VJRA, approximately one-third of the initial terms will expire in Fiscal Year 1994.

The role of physicians at the Board became an issue during Fiscal Year 1991. It prominently influenced recommendations on the terms of office for Board Member appointments. Some of the earliest decisions of the Court emphasized the statutory requirements that evidence utilized in the BVA decision making process must be of "record." In *Colvin v. Derwinski*, U.S. Vet. App. No. 90-196 (Mar. 8, 1991), the Court made it clear that only independent medical judgment could be utilized in the Board's decision-making process. The concern of the Court, and the Board, is that BVA's traditional use of physicians as adjudicator/decision-makers might be in conflict with this requirement. Consequently, a careful assessment of the implications of the basic issue of the most appropriate and effective use of doctors by the Board is underway. To provide the

maximum flexibility, and in anticipation of *Colvin* and its progeny, three year terms of office were recommended for each of the physician Board Members appointed in the initial round of appointments in Fiscal Year 1991. No additional physician Board Members were recommended among the six Board Members currently in the process of appointment in Fiscal Year 1992, and it is planned that no additional physician Board Member appointments will be recommended until all of the questions revolving around this issue are resolved to the satisfaction of the Department and the Court. In Fiscal Year 1992, the physicians who had been acting Board Members will assume the role of medical advisers to the Board. In this capacity, their activities will include providing medical training to Board counsel and associate counsel, performing a medical quality review of Board decisions, and providing medical opinions in cases referred to them by the Board.

The creation of the United States Court of Veterans Appeals accented a need for increased communication between Board Members; between the Board and operational components of the Department; and between the Board and the veterans' service organizations (VSO) which provide representation to many of the veterans who seek Secretarial level appellate review from the Board. (In more than 89 percent of BVA cases, a service organization provides representation to the appellant.)

Efforts in Fiscal Year 1991 to develop an environment in which Board Members could meet regularly for discussion resulted in the construction of a conference room to be utilized for meetings, training and conferences. This conference room was dedicated early in Fiscal Year 1992, in memory of my predecessor, as the "Kenneth E. Eaton Board Room." Communication within the Board was also enhanced by the inauguration, in Fiscal Year 1991, of monthly Board Member Convocations, in which senior staff and Members of the Board present discussion topics concerning appellate issues. The need for enhanced liaison between VA organizational units in order to respond properly to Court-induced systemic modifications resulted in the establishment, in Fiscal Year 1991, of a top-level steering group consisting of members of the Office of the General Counsel, the Veterans Benefits Administration, and the Board. This "Triad" group meets regularly to ensure proper communications and organizational response to Court decisions. The Board also initiated "VSO Forums" which are held quarterly, in which veterans' service organization representatives meet with me to discuss issues applicable to the appellate review process. Additionally, beginning in Fiscal Year 1991, copies of all of the Chairman's numbered memoranda were distributed directly to VSOs, and others who requested copies, to transmit information concerning the changes in process and/or organization at the Board. Outreach activities to the VSOs included participation in several VSO events during Fiscal Year 1991. For example, informational presentations were made at the national conventions of the Disabled American Veterans and the American Legion, at the national meeting of the state government veterans' service departments, and at the Proficiency Training Conference of the Veterans of Foreign Wars of the United States. At the first VSO Forum in Fiscal Year 1992, the representatives were requested to convey to their organizations the Board's willingness to participate in additional informational and training programs in Fiscal Year

1992, and it is anticipated that activities in Fiscal Years 1992 and 1993 will continue to include such outreach activities.

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. § 4010 (renumbered § 7110 in 1991). 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. Historically, the Board has conducted approximately 600 hearings per year on a traveling basis. During Fiscal Year 1991, that number was increased to 873. It is anticipated that the demand for hearings by Board Members at regional offices will increase. Consequently, beginning in Fiscal Year 1992, hearings both in Washington, D.C., and at regional offices will be held by a single Board Member. The Board's decisions will continue to be made by a section generally consisting of three Board Members; however, 38 U.S.C. § 7102(b) (formerly § 4002(b)) permits the hearing to be held by a single member of the section rendering the Board's decision. Naturally, the other members of the Board section will have to defer to the member who held the hearing as to judgments of credibility based on demeanor. The Board will then have the potential to provide more than twice as many hearings than could be afforded by three member hearing panels. The possibility of providing hearings through the use of video-teleconferencing was studied in Fiscal Year 1991; it was determined that this method of providing hearings was prohibitively expensive at this time.

An incident involving a traveling section of the Board in Fiscal Year 1991 highlighted the increased need for security arising, in part, from the increase in hearings held by Board Members at regional offices in Fiscal Year 1991 and the anticipated continued higher volume of "travel Board" hearings in Fiscal Years 1992 and 1993. As a result, the first BVA Bailiff was hired in Fiscal Year 1991, and a second bailiff will be hired in early Fiscal Year 1992. The bailiffs will provide an orderly environment conducive to the conduct of hearings, evaluate crime prevention programs, act as liaison with local security officers in addressing threats to traveling Members of the Board, and be responsible for the integrity of the claims folders and all Board materials for traveling sections of the Board.

The relocation of the Hearing Section, as part of the physical reorganization of the Board begun in Fiscal Year 1991, also enhanced the Board's hearing function. This move was completed early in Fiscal Year 1992 and established a reception office on the first floor of our headquarters building at Vermont Avenue so that veterans, upon entering the building to attend a hearing, would be immediately directed to an adjacent reception area. Previously, veterans entering the building were "cast adrift" to fend for themselves and seek out our reception area on the third floor.

Fiscal Year 1991 also saw the institution of a prototype of BVA's long-term automation arrangements for increasing its automated data processing capacity. Board Members and Board counsel in two of the Board's 21 sections now perform all of their decision development, drafting, editing and finalization at networked computer workstations.

Through their use of these automated tools, we expect to be able to eventually reduce the Board's needs for clerical support in the preparation of decisions, to boost professional staff productivity and to improve upon the quality of the Board's work product. During Fiscal Year 1992, automation will include adding additional Board sections to the Board's automated data processing and further steps in the Board's conversion from the Wang environment to a LAN (local area network) environment, part of the Department's NOAVA conversion. During Fiscal Year 1993, it is anticipated that automation will move towards the completion of Board section automation and the conversion to a LAN environment.

All of these activities accomplished in Fiscal Year 1991 and planned for Fiscal Years 1992 and 1993 reflect the Board's response to changes brought about by the VJRA. These activities have been planned and taken in the spirit of the Total Quality Management initiative of the Department. In addition, the Board's TQM activities in Fiscal Year 1991 included the reorganization of the Board's Administrative Service, which was effectuated at the beginning of the fiscal year, and "workout sessions" for members of the Board's Administrative Service to identify problem areas and recommendations for solutions. TQM activities planned or suggested for Fiscal Years 1992 and 1993 include meetings between the Chairman and members of the Board's Administrative and Professional Services, and an Implementation and Functions analysis.

By far the most significant impact of the VJRA on the Board's activities was the establishment of the United States Court of Veterans Appeals. The decisions of the Court, beginning with *Gilbert v. Derwinski*, have had the greatest impact upon the Board's daily decision-making processes and its organizational structure. These landmark decisions of the Court have resulted in re-adjudication of a significant number of the Board's decisions as well as profound change in the Board's decision-making process. The Court's landmark decisions in Fiscal Year 1991 included *Gilbert v. Derwinski*, issued in October 1990, which interpreted the amendment of 38 U.S.C. § 4004(d)(1) by the VJRA (renumbered § 7104(d)(1) in 1991), now requiring the Board to include the "reasons and bases" for its findings and conclusions in its decisions, in such a way as to render the Board's previous decision format inadequate under the new statutory standard; *Littke v. Derwinski*, issued in December 1990, which required the Board to remand cases for evidentiary development under the Department's duty to assist the claimant in developing the facts pertinent to the claim under 38 U.S.C. § 5107(a) when the appellate record is deemed inadequate; *Manio v. Derwinski*, issued in February 1991, which interpreted 38 U.S.C. § 3008, added by the VJRA and renumbered § 5108 in 1991, to require a different standard of review than that formerly used in consideration of claims which had previously been denied; and *Colvin v. Derwinski*, issued in March 1991, which held that the Board may consider only independent medical evidence to support its findings. Each of these landmark decisions has been followed by later decisions refining these opinions initially promulgated by the Court in Fiscal Year 1991 and requiring both the re-adjudication of additional Board decisions and the continued revision of the Board's decision-making process.

The Court's decisions in Fiscal Year 1992 already indicate a continuation, if not an acceleration, of this trend. 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 the Court's decision in *Tobler v. Derwinski*, issued in October 1991, the Board now has no leeway in effectuating the decisions of the Court. The Board must re-adjudicate cases currently in process in light of the decisions of the Court beginning on the day each Court decision is issued. In instances of landmark decisions of the Court, which have a broad impact upon the Board's daily decision-making process, this requires the Board to stop the flow of cases, identify the cases which are affected by the Court's decision, cease adjudication of any cases affected by the Court's decision until instructions concerning the implementation of the Court's decision can be issued to the Board sections, and re-adjudicate any cases at the Board which are affected by the Court's decision. This process is particularly disruptive to the orderly flow of administrative case processing for the dispatch of decisions from the Board once cases leave a Board section. Two such landmark decisions were *Rowe v. Derwinski* and *Schafraath v. Derwinski*, issued in November 1991, which altered the Board's decision-making process concerning appeals involving increased ratings for service-connected disabilities. In response to these two decisions of the Court, a Chairman's Memorandum was issued instructing all Board sections in new procedures to be followed in pertinent appeals. Approximately 1,000 cases were identified, at various stages of BVA out-processing, which had to be re-adjudicated. There were also a substantial number of additional cases at earlier stages of BVA adjudication which also had to be reworked under the new analytical requirements of *Schafraath* and *Rowe*. The November *Rowe* decision was vacated in early January 1992, which again required the Board to identify and rework cases in light of the Court's decision to vacate its earlier decision.

The Board is assiduously attempting to comply with the decisions and instructions of the Court. However, it is only able to apply the Court's decisions prospectively. The Department is currently in a hiatus in which the Court is reviewing decisions of the Board which were decided *before* the Court issued most of the opinions which constitute the body of decisional law which now binds the Department. A disturbing trend in the Court's decisions remanding cases to the Board for re-adjudication in light of decisional law promulgated after the issuance of the BVA decision on appeal to the Court is the inclusion of a deadline for the issuance of a supplemental Board decision. It appears to be a paradox that, while the Board strives for quality and comprehensiveness in its decisions, the Court feels compelled to impose time constraints which impede the production of that type of decision.

The addition of the statutory requirement that the Board's decisions include "the reasons or bases" for its findings and conclusions resulted in significant changes in the format of the Board's decisions in Fiscal Year 1991. The initial result was an increased frankness in the Board's decisions in the discussion of the credibility of witnesses and documentary evidence. *Gilbert* dictated significant changes in the analysis used to evaluate appeals before the Board, instituting a three-prong analysis of the claim itself, the development of the evidentiary record, and, only after consideration of these other factors,

the merits of the claim. *Manio* interpreted a statutory provision added by the VJRA to require a two-prong evaluation of previously denied claims for the presentation of "new and material evidence" to reopen the claim and remove the finality of the prior denial. These changes resulted in the discussion of different aspects of the evidence, at times at much greater length than under the old analysis. A Chairman's Memorandum issued in June 1991 discussed the changes in analysis and decision format resulting from *Manio* and subsequent decisions on finality of the Department's administrative decisions. A Chairman's memorandum announcing the revised review process and decision format was issued in August 1991. The format of the Board's decisions was changed to eliminate the separate sections for the evidence and the laws and regulations. The pertinent evidence and the applicable laws and regulations are now set forth in the section which explains the reasons and bases for the decision. We have also renamed some sections of the decision to more accurately reflect their function, reordered the sections within the decision and added some additional information to provide the reader with a better grasp of the Board's decision-making process. We look forward to the time when the Court will have an opportunity to review decisions promulgated by the Board since the decision-making process and format were reconstituted in mid-1991.

The impact of the changes flowing from the Court's decisions will result in an increase, on average, in the amount of time needed to prepare a Board decision. As a consequence, the productivity and statistical criteria applied by the Board in the past are no longer meaningful. BVA decisions are now much more complex and longer than in the past. Moreover, the Board is now required to continually alter its product in response to the Court's decisions. Its decisions continue to evolve toward increasing complexity and comprehensiveness. Consequently, the Board's former systems of productivity measurement are of very limited use in accurately measuring or establishing current meaningful standards of productivity.

At present, there are insufficient data to establish new standards. Moreover, the situation is not sufficiently static to attempt a meaningful study of productivity and timeliness at the Board due to the continuous issuance of precedential Court decisions which significantly alter the way in which VA adjudicates appeals. The complexity and length of BVA decisions continues to increase exponentially. BVA plans to institute a comprehensive review of its productivity and timeliness measurement standards and procedures as soon as matters reach a point where meaningful parameters can be established, perhaps in the second quarter of Fiscal Year 1992. At that time, a comprehensive productivity and work measurement study will be conducted to provide data essential for the Board's review.

Currently, the measurement standards in effect yield statistics which do not present the most accurate reflection of the Board's real productivity and timeliness. The current system of statistics does not draw distinctions between classes of cases which have a meaningful impact on timeliness and productivity. For example, cases in which the appellant is represented by a veterans' service organization require additional time for the veterans' service organization representative to prepare written argument to be presented

to the Board; this averaged approximately 42 days in early Fiscal Year 1992 and can vary significantly from case to case. In contrast, cases in which no additional written argument is submitted to the Board might be decided more quickly. Additionally, in cases in which a travel Board hearing is requested, time is expended waiting for a place on the regional office's travel Board hearing schedule, but the time is not included in the Board's timeliness statistics; cases in which a hearing is requested before the Board in Washington, D.C., do include time spent waiting for a place on the hearing schedule in the timeliness statistics.

Nonetheless, until more accurate measurements are devised, the statistics reported in Part II indicate, to the extent possible, the timeliness and productivity of the Board, as required by 38 U.S.C. § 7101(d)(2) and (3). In particular, it should be noted that the General Accounting Office formula used to measure the elapsed time for remands does not provide a true measurement of the elapsed time required in these cases.

PART II

1. 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 1991: 43,093

(B) Number of cases pending before BVA at the start of FY 1991: 19,450

Number of cases pending before BVA at the end of FY 1991: 17,235

(C) Number of cases filed during each of the 36 months preceding FY 1992:

<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 91</u>	<u>FY 90</u>	<u>FY 89</u>	<u>FY 91</u>	<u>FY 90</u>	<u>FY 89</u>
October	4,327	4,156	2,915	5,787	6,113	5,546
November	3,188	3,657	3,746	5,392	5,855	5,519
December	4,488	5,280	3,073	4,795	4,821	5,570
January	3,248	2,102	2,688	5,578	5,576	5,842
February	3,231	2,958	3,311	5,254	4,770	5,903
March	3,464	4,356	4,163	5,993	5,778	6,956
April	3,524	4,189	3,778	6,289	5,115	7,280
May	3,525	3,397	4,678	5,960	5,773	6,411
June	3,302	4,398	3,823	5,483	5,510	6,093
July	3,888	2,942	3,261	5,685	5,684	5,890
August	3,599	2,847	4,688	5,755	5,948	7,270
September	<u>3,300</u>	<u>3,526</u>	<u>4,105</u>	<u>5,471</u>	<u>5,224</u>	<u>6,021</u>
FY Total	43,093	43,808	44,229	67,442	66,127	74,292

(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	58 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	59 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	185 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	160 days
Average Remand Time Factor	Field Station	36 days

E) Number of Members of the Board at the end of FY 1991: 57 Members

Number of professional, administrative, stenographic, clerical, and other personnel employed by the Board at the end of FY 1991: 420 Employees for a total of 411 FTE

2. 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 1992:	46,500
Fiscal Year 1993:	50,000

(B) Evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by 38 U.S.C. §7103(d):

(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 1992 was computed as follows:

44,500 Decisions ÷ 365 Days = 121.92 Decisions per Day
19,235 Appeals Pending before the BVA (end of FY 1992) ÷ 121.92 Decisions per Day = 158 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 our budget submission for FY 1993, is 158 days for FY 1992, and 141 days for FY 1993. These response time projections are contingent upon the appeal receipts estimates for FY 1992 and FY 1993 shown in paragraph 2(A) of this part, above.

However, since our budget submission in August 1991, statistics indicate that our initial projections and estimates will be adversely affected by subsequent events. Precedential decisions of the United States Court of Veterans Appeals have imposed and will likely continue to impose additional requirements for case analysis and development at the Board. As decisions of the Court are effective when issued, precedents of this type may require the Board to re-adjudicate a large number of cases which had been adjudicated, but not dispatched from the Board. For example, in *Schafrath v. Derwinski*, U.S. Vet. App. No. 89-114 (Nov. 26, 1991), the Court interpreted provisions of Title 38, Code of Federal Regulations, to require additional analysis in cases involving claims for increased ratings for service-connected disabilities. It is initially estimated that these additional analytical requirements will result in approximately sixty percent of the Board's decisions requiring the expenditure of twenty percent more time by attorney-advisers. In addition, in FY 1991 and FY 1992, the Board filled its complement of Board membership by promoting 14 of the Board's senior attorney staff. The Board is unable to replace these attorneys during FY 1992 due to FTEE limits for that year. Therefore, there are fewer Board counsel engaged in the preparation of tentative decisions for review by Board Members. Moreover, due to the institution of single-member hearings, both in Washington and at regional offices, in order to meet the increased demand for hearings before the Board, Board Members will be expending proportionally less time in case deliberation. As a consequence of (1) the additional time, effort, and resources necessary to comply with the directives of the Court; (2) the dilution of the Board's experienced attorney personnel in FY 1992; and (3) the increased demands placed upon the Board Members' time, the estimated number of appellate decisions to be produced in FY 1992 has been decreased from the estimate of 44,500 contained in the budget submitted to the Office of Management and Budget (OMB) in August 1991.

It is now estimated that the impact of *Schafrath* will have the effect of reducing the Board's current output by approximately 5,400 decisions per year. This would reduce the projected output for FY 1992 from 44,500 to 39,100 decisions. The number of decisions issued per day would be reduced from 121.92 to 107.12. If the estimated number of cases appealed to the BVA remains as projected (46,500), the BVA response time on appeals would be lengthened to 229.97 days from 158 days.

The number of BVA decisions produced in FY 1993 should rise with the increase in the number of attorneys budgeted for that year. At least twenty-six of the thirty-five additional attorneys budgeted should be active in case production; the remaining attorneys are budgeted to be used for additional work requirements resulting from the designation of records on appeal to the United States Court of Veterans Appeals and the increased demand for Board hearings at regional offices ("travel Board hearings"). If twenty-six additional attorneys produce decisions, output for FY 1993 should approximate 47,130 decisions. Decisions per day would be 129.11 and BVA response time would be 213.03 days.

If all thirty-five additional attorneys produce decisions in FY 1993, output should approximate 49,900 decisions; however, this would be at the expense of other necessary activities, including the duties for which the additional attorneys had been budgeted. If thirty-five additional attorneys produce decisions, decisions per day would be 136.73. BVA response time would be 180.90 days.

Estimates based upon the actual statistics for the first quarter of FY 1992 are even less encouraging. The Board produced 8,711 decisions in that quarter. If the Board continues to produce 8,711 decisions per quarter, the Board will only produce 34,844 decisions for the year, for 95.46 decisions per day. If the projection of 46,500 cases received remains accurate, BVA response time for the year will be 302.83 days. Projections for FY 1993, based on BVA output of 47,130 decisions by an additional twenty-six attorneys producing decisions, would be a response time of 246.14 days. Based on BVA output of 49,900 decisions by an additional thirty-five attorneys, projected response time for FY 1993 would be 212.16 days.

The calculations based upon the actual number of cases produced divided by the actual number of days in the quarter differ slightly from the calculations based upon estimates of FY 1993 production reached by projecting the production for the first quarter of FY 1993 over the fiscal year, as was done above. In the first quarter of FY 1993, the Board actually produced 94.68 decisions per day, which was calculated by dividing the 8,711 decisions produced by the 92 days in the quarter. The Board had approximately 18,391 cases pending at the beginning of the second quarter of FY 1992. Dividing the number of cases pending at the beginning of the second quarter by the 94.68 decisions per day actually produced, BVA response time is 194.24 days, which is still unacceptably high.

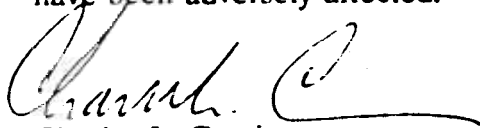
Projections for FY 1993, assuming that BVA produced 34,558 decisions in FY 1992 at the rate of 94.68 decisions per day, would be calculated on the basis of 29,177 cases pending at the beginning of FY 1993 plus the projected number of 50,000 cases received. On this basis, BVA response time would be 248.21 days for output of 47,130 decisions by an additional twenty-six attorneys. BVA response time would be 214.12 days based on BVA output of 49,900 decisions produced by thirty-five additional attorneys.

These estimates do not take into account the factor that the Board's rate of remanding cases to the regional offices steadily increased through the latter part of FY 1991 and into

FY 1992, and reached a remand rate of approximately 50 percent in November and December of 1991. The majority of these cases will be returned to the Board for adjudication, increasing the number of appeals received by the Board beyond the estimate submitted with the budget in August 1991. The estimates also do not encompass the additional cases received annually as the result of cases remanded from the United States Court of Veterans Appeals to the Board for re-adjudication. This number has also been rising.

Another factor which will increase the BVA response time is the necessity to stay adjudication of certain classes of cases if the Department's policy differs from a holding of the Court. For example, appeals affected by *Fugere v. Derwinski*, U.S. Vet. App. No. 89-72 (Dec. 27, 1990)(certain claims for disability for defective hearing), and *Gardner v. Derwinski*, U.S. Vet. App. No. 90-120 (Nov. 25, 1991)(claims for benefits under 38 U.S.C. § 1151) have been stayed pending resolution of an appeal to the Federal Circuit and a motion for reconsideration by the Court of Veterans Appeals, respectively. Cases which are held at the Board pending resolution of motions for reconsideration by the Court or appeal to the Federal Circuit will increase the BVA response time. Cases which are returned to the regional offices will not increase BVA response time.

In short, the creation of the United States Court of Veterans Appeals has introduced additional variables into the calculation of estimates of the Board's timeliness and productivity. There are currently insufficient data and experience to enable us to accurately predict the Board's timeliness and productivity. Initial experience, however, indicates that, at least in the initial stages of the Court's existence, the Board's timeliness and productivity have been adversely affected.



Charles L. Cragin
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