



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

December 23, 1994

The Honorable Jesse Brown  
Secretary of Veterans Affairs  
Washington, DC 20420

Dear Mr. Secretary:

I respectfully present for your submission to Congress the Report of the Chairman, Board of Veterans' Appeals, for fiscal year 1994. Parts I, II, and III of this report are intended to provide an overview of the Board and its activities during fiscal year (FY) 1994 and the projected activities of the Board for FY 1995, 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.

Fiscal year 1994, like the previous fiscal year, was one of tremendous change at the Board as a result of legislative changes and the continued evolution of veterans' benefits law, as interpreted by the United States Court of Veterans Appeals. I believe the combined effects of this past year's legislative actions and the initiatives you instituted will result in a more timely system delivering a higher quality product.

I thank you for your leadership, commitment, and invaluable assistance as the Board continues to strive for excellence, improved timeliness, and increased customer satisfaction in this era of unrelenting change in the veterans' claims adjudication environment.

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

Very respectfully,

A handwritten signature in black ink, appearing to read "Cragin", with a long horizontal flourish extending to the right.

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. § 7101(a), is "to conduct hearings 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 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 (Before Judicial Review)*

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 that 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 No. 87-666, effective January 1, 1963, which required the agency of original jurisdiction to furnish an appellant a "Statement of the Case," a 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, the Board's Appeals Regulations and Rules of Practice are contained in Parts 19 and 20, respectively, 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 remained the authorized strength level until 1994, when the limit on the number of Board members was removed. 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. Appeals carried through to completion and certified to the Board for review decreased somewhat in the early 1990s, going from almost 44,000 in FY 1990 to just over 38,000 in FY 1993.

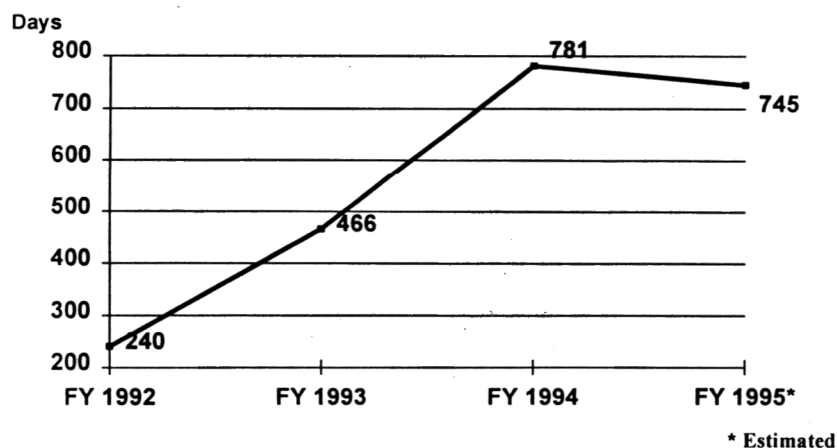
#### *1988 to 1994 (Since Judicial Review)*

The passage of the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687 (Nov. 18, 1988), which established the U.S. Court of Veterans Appeals (the Court), was 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 as the Board actively seeks ways to adapt to new interpretations of veterans' law and designs and implements new procedures required to meet the continually evolving requirements of the law. While few, if any, decisions of the Court have resulted in an improvement in decision

productivity or timeliness in the VA adjudication system, judicial review has resulted in more consistent and detailed decisions.

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 longer and more complex. Factors affecting the timeliness of appellate processing include the evidentiary development required by the Department's "duty to assist" claimants; compliance with the directives of the Court in an ever-growing number of important decisions; the procurement of a greater number of medical opinions and extensive medical research by the Board and its staff; a large volume of requests for formal hearings before the Board, as well as a significant amount of time involved in travel for hearings at VA regional offices; the strict requirements imposed by more formal Rules of Practice; the added responsibilities of attorney fee agreement processing and review; the re-adjudication 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. BVA response time increased from 139 days at the end of FY 1991 to 240 days at the end of FY 1992. At the end of FY 1993, response time was 466 days and 781 days at the end of FY 1994.

### BVA Response Time, FY 92 - FY 95



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

While the 61,618 notices of disagreement filed in FY 1994 were only slightly less than the 65,676 filed in FY 1993, only 18,067 appeals were certified to the Board. This figure is deceptively low, however, as it reflects a significant procedural change instituted during 1994 whereby a claims folder is not transferred from a VA regional office to the Board until shortly before the Board begins its active review of the associated case. This procedure, known as "advance docketing," is discussed further on pages 7 and 26-27.

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. Six times as many field hearings were conducted during FY 1993 than were conducted in FY 1983. In FY 1994, the increase in BVA response time resulted in an unacceptably long period between the time when a hearing was held and the time when the Board actively reviewed the associated case. In many cases, information provided during personal hearings was outdated, stale, or of other limited usefulness by the time the Board began its review. To reduce this lag time, the Board temporarily suspended the scheduling of all personal hearings at the Board's Washington, DC, offices and at VA regional offices from May 1, 1994, through the end of the fiscal year. In the future, hearings will be scheduled to be held at a time proximate to when the Board begins its active review of a case.

The VJRA removed an historic \$10 limitation on the fees which attorneys-at-law and claims agents who represent VA claimants may charge. The Act gave the Board original jurisdiction to review agreements for the payment of such fees. The private bar has yet to show significant interest in the practice of veterans' law.

Court decisions having a significant impact on the VA adjudication process are abundant. For example, in *Schafrath 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.



*The body of veterans' common law accessioned its sixth volume during FY 1994.*

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 is provided no time to effectuate the Court's decisions. This often requires the Board to stop the flow of cases, identify those cases that are affected by the Court's decision, and re-adjudicate them.

Another area in which the Court's opinions have expanded both the complexity of decision-making and the 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 re-adjudicate the case on a *de novo* basis, as if the prior decision had never been entered.

The Court often reviews decisions of the Board that 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 re-adjudication. 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 four 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 re-adjudication by the Board and result in a vastly 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 non-adversarial 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. In *Austin v. Brown*, 6 Vet.App. 547 (1994), the Court raised serious questions concerning the fairness and impartiality of the Board's procedures for utilizing medical adviser opinions from physicians employed by the Board. At the present time, the Board is considering a regulatory change that will expressly authorize the Board to obtain opinions on the record from Department medical personnel. 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 non-adversarial approach that 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.

In the early years of its existence, the Court expanded the reach of its jurisdiction in decisions like *Smith v. Principi*, 3 Vet.App. 378 (1992), holding that the Board is required under 38 C.F.R. § 3.105(a) to adjudicate contentions that it has committed "clear and unmistakable error" in rendering previous decisions that have since become final, and *Patterson v. Brown*, 5 Vet.App. 362 (1993), holding that the Court had jurisdiction to review the Chairman's denials of motions for reconsideration. However, the U.S. Court of Appeals for the Federal Circuit reversed the Court, holding, in *Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994), that the clear and unmistakable error review authority in 38 C.F.R. § 3.105(a) relates only to review of agency of original jurisdiction decisions and not those of the Board. The U.S. Court of Appeals for the Federal Circuit again reversed the Court, holding, in *Mayer v. Brown*, 37 F.3d 618 (Fed. Cir. 1994), that the Court had no jurisdiction to review decisions of the Chairman.

In the legislative arena, two pieces of FY 1994 legislation have had and will continue to have a significant effect on the Board and the quality and timeliness of its decision-making. Signed into law by the President as Pub. L. No. 103-271 on July 1, 1994, the "Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994" fundamentally changes the way the Board operates by providing for decisions by individual Board members, rather than by panels of three members. This Act also consolidated BVA hearing procedures and permitted, for the first time, advancement on the hearing docket for BVA hearings at regional offices. Undoubtedly, this is one of the most significant pieces of legislation affecting the Board in the Board's 61-year history. Pub. L. No. 103-446, the "Veterans' Benefits Improvements Act of 1994," enacted after the close of FY 1994, provides career incentives and stability for the Board's most experienced members, thereby correcting a significant problem with attrition to the administrative law judge program. In addition, this Act, for the first time, permitted the Board to screen cases out of docket order in order to insure that the record is ready for final consideration on the merits. Both of these measures are discussed in greater detail, beginning on page 10 of this report.

## **1994: A YEAR OF CHANGE AND REINVENTION**

### *Administrative Initiatives*

Over the past several years, the Board has introduced numerous administrative initiatives to meet the challenges resulting from judicial review and to improve the service it provides to veterans and their families. These initiatives have included the complete revision of decision analysis and format (1991); the use of single Board member hearings as opposed to panel hearings (1992); the introduction of a "trailing" hearing docket (1993); improvements in direct responses to customers and responses to Congressional and other inquiries (1993); and the consolidation of all BVA employees in the Washington, DC, area in one building (1993).

In 1994, a number of initiatives were implemented:

- o The preparation of certified lists of relevant evidence -- for a time prepared for every Board decision -- is now limited to those cases for which a Notice of Appeal has been filed with the Court. Anecdotal information indicated that counsel spent an additional 4 to 6 hours on each case to identify and list every item of relevant evidence. Board members also expended additional time in reviewing, considering, and acting on each item listed.
- o Internal administrative procedures have been revised to expedite the processing of paperwork.
- o The length of the "Introduction" section of Board decisions has been reduced to minimize the time-consuming restatement of the history of each case.

- o The Board implemented "advance docketing" procedures, permitting the placement of cases on the Board's docket as soon as a "substantive appeal" (VA Form 9) is filed, rather than when an appeal folder is received at the Board. This procedure assures that all appellants are treated fairly in docket order assignment. It also greatly reduces the need to transfer records between the Board and VA regional offices, thereby reducing the time expended on responding to case status inquiries and on the case transfer and tracking processes. In addition, "advance docketing" permits VA to comply with the Court's decision in *Ebert v. Brown*, 4 Vet.App. 434 (1993), by providing regional offices with access to veterans' records to act on new claims while appeals of earlier decisions remain in appellate status.

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 that prepares draft decisions; the institution of a formal, comprehensive training program for staff counsel; the introduction of computer equipment to facilitate the production of decisions and the tracking of cases and other data; and the inclusion of staff physicians in quality review activities.

The Board is currently working on the following additional administrative measures:

Revising hearing scheduling procedures so that case hearings are conducted nearer to the time when cases are reached on the Board's docket.

Examining BVA's current staffing to eliminate or combine positions not directly associated with the generation of decisions, thereby permitting the appointments of additional Board members and the hiring of additional counsel without exceeding existing limits on the number of BVA employees authorized.

Attempting to expand programs to reward exceptional performance and special contributions by BVA employees, thereby providing incentives for more efficient decision production.

Realignment of the Board's operational processes to more effectively operate in a single Board member decision environment.

#### *Select Panel on Productivity Improvement*

In February 1994, the Chairman advised the Secretary that, while the administrative initiatives implemented by BVA, in the aggregate, would help to improve productivity and response time, they would not restore these traditional measures of organizational effectiveness to historic levels. Long-term measures that would address the underlying causes of the backlog, to the extent possible within this new legal environment, were needed.

Accordingly, the Chairman suggested that the Secretary establish a Select Panel charged with exploring new approaches to enable the Board to redefine the way it operates and to develop and consider any changes that would enable the Board to meet more effectively the challenges posed by the current adjudication and appellate environment. Given the experience of the Blue Ribbon Panel, which was convened last year to deal with a similar set of circumstances in the Veterans Benefits Administration, the Board hoped that such intensive, concentrated effort would provide significant insight.

In response, in March 1994, the Secretary chartered the Select Panel on Productivity Improvement at the Board of Veterans' Appeals. The Panel, chaired by Mr. Guy McMichael, Chairman of the Board of Contract Appeals, included the Under Secretary for Benefits and representatives from the leading veterans' service organizations, the Social Security Administration, the General Counsel's office, and the Board. It was charged with "conduct[ing] a systematic review of the Board of Veterans' Appeals and its relationship with other Departmental elements, and mak[ing] recommendations regarding the mission, structure and operations of the Board that will result in more timely processing of claimants' appeals."

The Panel explored a variety of approaches and presented 12 specific recommendations to the Secretary in June 1994. The recommendations, all of which were subsequently approved by the Secretary, reflected a consensus, if not unanimity, of the group. At least in part, the recommendations involved not only the Board, but other elements of the Department. The Board is now in the process of implementing each of these recommendations.

First, the Panel recommended that the Department revise its timeliness measurement system to address the claimants' real concern -- the total time from the filing of a claim to the receipt of a final VA decision. The Board has begun to implement this new timeliness measure, in addition to others that address budgetary and future planning needs.

The Panel also advised that the Veterans Benefits Administration (VBA) continue its aggressive efforts to implement the recommendations of the Blue Ribbon Panel that, in 1993, examined the problems causing delay in the adjudication process at the Regional Office (RO) level. The Panel stressed that VBA should continue to give a high priority to its efforts to improve the development of evidence at the RO, which would ultimately reduce the number of cases remanded to the RO by the Board for needed development. In addition, the Panel counseled that expedited treatment be afforded to cases that have been remanded to the RO by the Board. The Under Secretary for Benefits directed that this latter measure be implemented immediately.

The Panel recommended that the Board be granted the authority to perform an initial review or "prescreening" of appeals in advance of the time when that case would ordinarily be considered and decided in docket order. This prescreening procedure

enables the Board to identify deficiencies in the record and initiate corrective action while the case awaits final consideration on the merits based on its place on the docket. Language amending 38 U.S.C. § 7107 to authorize such prescreening procedures was included in legislation that was enacted by Congress and was being considered by the President at the close of the fiscal year. On November 2, 1994, the President signed the "Veterans' Benefits Improvements Act of 1994" into law as Pub. L. No. 103-446. (A discussion of this legislation is included in this report, as its development and passage by Congress was one of the most significant events affecting the Board in FY 1994.)

The Panel also recommended providing better and more comprehensive training and performance measurements for BVA staff counsel; modifying the VA Form 9 (substantive appeal) to encourage appellant consultation with a service representative; seeking legislation to increase hearing options by authorizing the conduct of BVA hearings, at the claimant's option, by a RO official acting as an agent for the Board; exploring the possibility of expanding the geographic locations at which hearings may be held by the use of teleconferencing technologies; improving the training and methods of evaluating performance of staff counsel; increasing the use of advanced technological systems, such as document imaging and the use of CD-ROM and other on-line computer technologies; and resolving attrition problems at the Board resulting from the loss of pay equity between Administrative Law Judges (ALJ) and Board members, and those resulting from the imposition of fixed terms of employment on Board member positions.

Perhaps the most interesting recommendations of the Panel focused on redefining the Board's role in the VA benefits adjudication system. The Panel concluded that the Department should increase individual accountability in the appellate adjudication process to improve timeliness and ensure the highest quality consideration of a claim's merit. It recommended that the Secretary promulgate regulations granting the Board complete authority to develop, consider, and dispose of a case once a substantive appeal (VA Form 9) is filed. This represents a significant change from the current procedure for dealing with cases in which the record is insufficient for appellate adjudication on the merits. The Board generally remands such cases to the agency of original jurisdiction, which is charged with developing the record and then re-adjudicating the claim.

#### Select Panel on Productivity Improvement for the BVA



Purpose: To conduct a systemic review of the Board of Veterans' Appeals and its relationship with other Departmental elements, and make recommendations regarding the mission, structure and operations of the Board that will result in more timely processing of claimants' appeals."

Jesse Brown  
Secretary March 25, 1994

*The Secretary's Select Panel on Productivity Improvement presented 12 specific recommendations.*



The Panel suggested that the new procedure permitting the Board to obtain evidence directly or otherwise develop the claim without remanding the case to the RO for development and re-adjudication should be perfected in a trial or pilot program. Claimants would be allowed to "opt out" of the revised system and continue to have their appeals processed in the current manner.

### *Legislative Initiatives*

FY 1994 was a year of enormous legislative accomplishment for the Board. The President signed into law two measures that are fundamentally changing the way the Board does business and will ensure that the Board is able to retain the best and brightest of its members.

On July 1, 1994, the President approved S. 1904, the "Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994," as Pub. L. No. 103-271. This measure, which resulted in part from the personal involvement of the Secretary and the Chairman in coordination with veterans' service organizations, ended the 60-year requirement that decisions be issued by a panel of three members, authorizing instead decisions issued by single Board members. This change was estimated to result in a 25 percent increase in productivity at the Board and significantly reduce response time. The law also (1) eliminated the statutory limit on the number of Board members (previously 67, including the Chairman and Vice Chairman); (2) authorizes the use of various electronic media to conduct hearings; (3) bars the original decision-making member(s) from reconsideration decisions; (4) provides an exception to docket-order hearings in cases of severe financial hardship or illness; and (5) requires the Chairman to conform to the Code of Judicial Ethics of the U.S. Court of Veterans Appeals as that code relates to partisan political activities.

Another significant legislative accomplishment is Pub. L. No. 103-446, the "Veterans' Benefits Improvements Act of 1994," which was actively supported by the Board and the Department and contains a number of measures affecting the Board. It incorporates several of the recommendations of the Select Panel on Productivity Improvement discussed earlier.

Title II of Pub. L. No. 103-446 restored the practice of pay equity between Board members and federal ALJs, ended terms for Board members, and instituted performance standards for members. Until 1990, both ALJs and Board members were paid at the same level. Beginning in 1991, ALJ pay was increased by about 20 percent. In addition, since passage of the Veterans' Judicial Review Act in 1988, Board members have been subject to terms of nine years, while ALJs were not. The net result was a loss of the most experienced Board members to the ALJ ranks -- more than 15 percent during the period from July 1993 through July 1994. Title II sets Board member pay at the same level as ALJs and eliminates terms. At the same time, the bill requires "recertification" of Board members at least once every three years under performance standards developed by the Chairman with the approval of the Secretary. Title II also permits the Chairman to

continue to serve after the expiration of his appointment -- with the approval of the Secretary and within certain time limitations -- until a successor is appointed.

Pub. L. No. 103-446, title III, in pertinent part, permits the Board to "screen" appeals to determine the adequacy of the record for decision-making purposes or to remand the case immediately for additional development. Provisions of title III also require the Secretary to provide expeditious treatment by the Board of any case remanded by the Court of Veterans Appeals.

Finally, title IV of the new law established the "Veterans' Claims Adjudication Commission," designed to examine and make recommendations concerning the entire claims-processing system, including the Board. The Commission will be composed of nine members, only one of whom will be a VA employee. The Commission is required to issue a preliminary report in November 1995, with a final report due in May 1996.

### *Claims File Security*

One of the most unfortunate situations in recent Board history was disclosed in FY 1994. Board members detected unusual patterns of decision recommendations prepared by two staff attorneys. In each of these apparently unrelated cases, the attorneys in question recommended that an unusually high percentage of appeals be remanded to VA regional offices to obtain essential documents. The reviewing Board members suspected that the two attorneys were altering documents in or removing records from appellants' files, thus necessitating the return of the appellants' claims folders to VA regional offices for further development.

Investigations undertaken by the VA Office of Inspector General, at BVA's request, revealed evidence that the two suspect attorneys had tampered with documents from some claims files assigned to them for review. One of the attorneys resigned in January 1994 and is still under investigation by the U.S. Attorney's Office for the District of Columbia. The second attorney pleaded guilty to a felony charge of unlawful concealment, removal, and mutilation of government records and, at the end of the fiscal year, was awaiting sentencing in federal court.

After discovering the tampering, the Board initiated a systematic review of the approximately 1,800 decisions handled by the two attorneys since 1990, to identify those in which tampering may have occurred. During the course of FY 1995, the Board will notify all appellants whose cases were handled by the two attorneys and inform them of the results of the review. In all cases, whether the Board's review revealed evidence of tampering or not, appellants and their representatives will be afforded the opportunity to personally review their records and, if they suspect tampering, to provide information about missing or altered documents or take other appropriate action.

Corrective actions available to appellants include the submission of additional or duplicate evidence, as well as comments or arguments, and, if a final decision was made

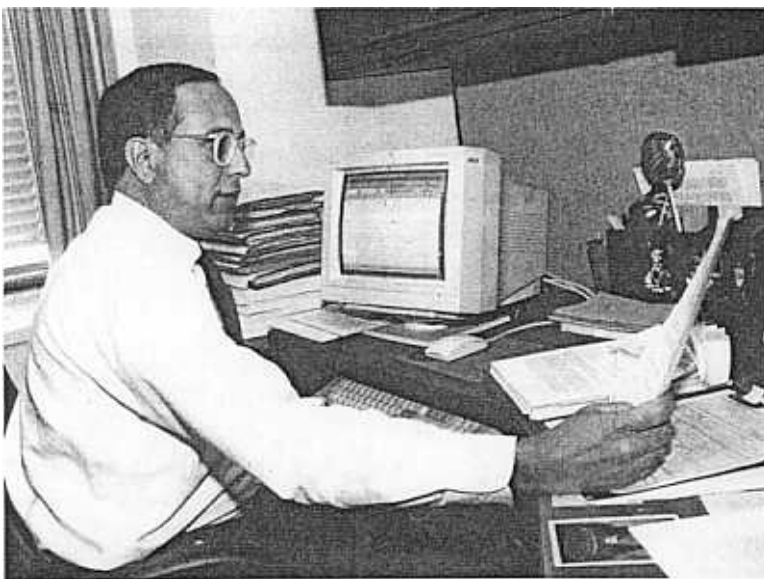
on an incomplete or altered record, filing a motion for reconsideration. Cases involving file tampering will be handled in an expedited manner and will be subject to the same standard of review as applied to cases involving the destruction of official records that occurred in the 1973 fire at the National Personnel Records Center in St. Louis, Missouri.

While the Board has no indication that any other employees tampered with official records, the damage done by these two attorneys was considerable. In most instances, the tampering resulted in further delay in an already too lengthy appeal process. The short-term effect on the Board has been substantial in terms of time and costs expended to investigate and correct this matter and in terms of the perceived loss of integrity of the Board's appellate procedures. Long-term effects are not known. However, the more precise monitoring of appellate records made possible by the FY 1995 upgrade of the Board's computerized case tracking system, along with the possible future implementation of document imaging technology, will reduce or eliminate the likelihood of any recurrence of this problem.

Because of the expertise of Board members, it was the Board that discovered the tampering; it was the Board that caught it; and it was the Board that stopped it.

## 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 an unlimited number



*Pub. L. No. 103-271 authorized single Board member decisions.*

of Board members. The Board is also authorized by § 7101(a) to have "sufficient" professional, administrative, clerical, and stenographic personnel as are necessary to accomplish its mission. (BVA's organization chart is shown on page 14.)

All members of the Board, except the Chairman, are appointed by the Secretary, with approval of the President,

based upon the recommendations of the Chairman. The fixed terms of office for Board members that existed since the enactment of VJRA in 1988 were eliminated by legislation approved by Congress in FY 1994. This legislation, Pub. L. No. 103-446, also increased Board member pay to a level comparable to that of Administrative Law Judges. Prior to the enactment of this law, Board members were the only federal employees at the GM or GS-15 level that required Presidential approval for appointment. The Chairman holds an Executive level position, and the Vice Chairman and Deputy Vice Chairman are members of the Senior Executive Service.

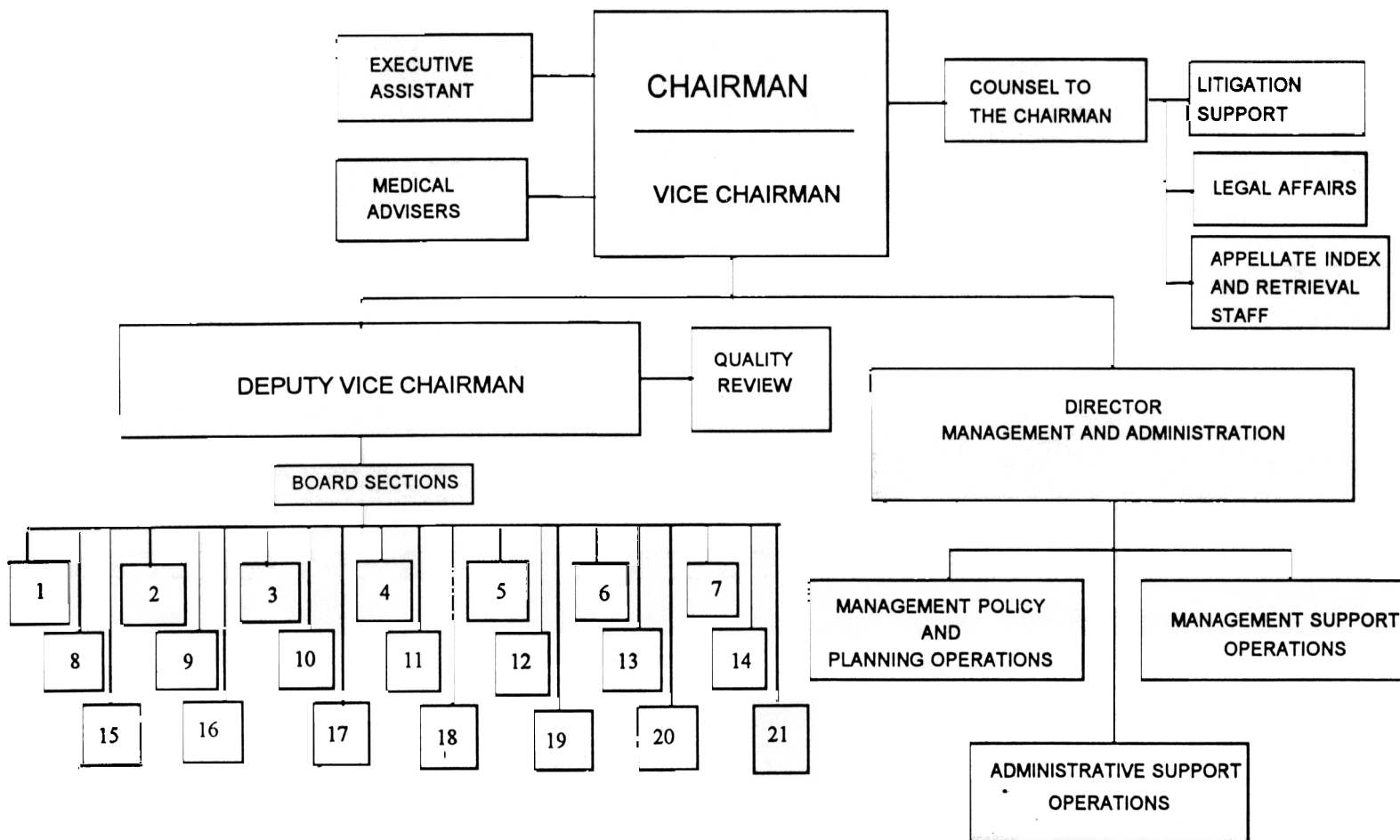
BVA is organized into Professional and Administrative Services. The Professional Service consists of Board members, staff counsel who support the Board members, staff medical advisers, and the Chairman's staff. Since the enactment of Pub. L. No. 103-271, which was signed into law on July 1, 1994, most decisions of the Board are reviewed and decided by individual Board members. This is a change from past procedures wherein, as required by law, three member panels reviewed and decided each appeal. Currently, the Board is divided into 21 decision-making units (Board sections), each composed of at least two attorney Board members, one of whom is designated Chief and bears the supervisory responsibility for the section.

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 a section reviews the section's caseload and assigns individual appeals to staff counsel for the preparation of written tentative decisions. These draft decisions are typically prepared by counsel on individual computer work stations. The counsel return completed tentative decisions to Board members for review. The Board member 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 member is finalized and signed by the member, the decision is processed through the Board's Quality Review section and then forwarded to the Administrative Service for dispatch.

A staff of medical advisers assist Board members by conducting medical research and training staff counsel on medical issues. In addition, medical evaluations 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 supports the system by facilitating the efficient processing of appeals. This support includes case management and tracking, docket control, scheduling of hearings, secretarial 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, located in Wilkes-Barre, Pennsylvania, electronically transmits draft decisions, hearing transcripts, and other documents to the Board's offices in Washington, DC.

# Board of Veterans' Appeals



## MEMBERS OF THE BOARD OF VETERANS' APPEALS



*The Honorable Jesse Brown administers the oath of office to new Board members.*

At the close of FY 1994, the following 57 individuals, 34 of whom are veterans, were serving as members of the Board of Veterans' Appeals. No Board member appointments are awaiting Presidential approval. There are no physicians serving as Board members.

AGUAYO-PERELES, JOAQUIN  
ANDREWS, KENNETH R., JR.  
ANTHONY, JAMES R.  
BAUER, ROGER K. (VICE CHAIRMAN)  
BLASINGAME, JACK W.  
BRAEUER, WAYNE M.  
BROWN, DEREK R.  
CALLOWAY, BETTINA S.  
CHEEK, MICHAEL D.  
CLARK, HALSTEAD H.  
COPELAND, BARBARA B.  
CRAGIN, CHARLES L. (CHAIRMAN)  
DANNAHER, THOMAS J.  
DAY, JONATHAN E.  
DONSBACH, JAN  
DURKIN, SHANE A.  
FLOWERS, FRANK J.  
FRANK, RICHARD B.  
GICK, GARY L.  
GOUGH, JEROME F.  
HOGEBOOM, CHARLES E.  
HYMAN, BRUCE E.  
JOHNSON, JAMES U.  
JORDAN, VICKY L.  
KANNEE, BRUCE N.  
KRENZER, EILEEN M.  
LYON, MICHAEL D.  
MARTIN, JEFFREY J.  
MOEHLMANN, HOLLY

MONROE, JACQUELINE E.  
O'NEILL, EUGENE A.  
ORMOND, JOHN E. (ACTING)  
PELLETIER, RENEE M.  
PHILIPP, ROBERT D.  
PHILLIPS, NANCY I.  
POWELL, URSULA R.  
REDDY, WILLIAM J.  
RICE, WARREN W., JR.  
ROBIN, NANCY R.  
RUSSELL, CRAIG P.  
SABULSKY, MARY M.  
SCHULE, JOHN J.  
SCHWARTZ, HOWARD N.  
SEERY, EDWARD W.  
SENYK, GEORGE R.  
SHARP, JANE E.  
SHERMAN, IRIS S.  
SHUFELT, GORDON H.  
SPICKLER, DAVID C.  
STANDEFER, RICHARD B. (DEPUTY  
VICE CHAIRMAN)  
SULLIVAN, LAWRENCE M.  
SULLIVAN, ROBERT E.  
SYMANSKI, CHARLES W.  
TOBIN, LEO W., III  
TUTERA, ALBERT D.  
WARNER, SAMUEL W.  
WILKINS, STEPHEN L.

## SELECTION OF BOARD MEMBERS

Although it is not required by law, all members of the Board are attorneys. For the first time in many years, no physicians serve as members of the Board. Board members are selected through a highly competitive process. Each must be completely familiar with the growing 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 qualified for consideration as a Board member. The selection process for the limited number of Board member openings is extremely competitive; only the best 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. As selection of Board members is based solely on merit, the political affiliation, if any, of the candidates is never a factor for consideration.

## 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 Board 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, Court decisions in the cases of *Gilbert v. Derwinski*, *Colvin v. Derwinski*, and *Hatlestad v. Derwinski* have 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. Shortly thereafter, in *Colvin*, the Court held that the Board must consider only independent medical evidence to support its findings rather than provide its own medical judgment as 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 utilizes 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. Their terms expired in July 1994.

After *Colvin*, BVA physicians were increasingly utilized in the capacity of medical advisers. They provided expert medical opinions "on the record" in appeals in which such guidance was required. However, the Court in *Austin v. Brown* raised serious questions concerning the fairness and impartiality of the Board's procedures for utilizing Board medical adviser opinions. Since announcement of *Austin*, the Board has not utilized opinions from its medical advisers in adjudicating appeals. At the present time, the Department is considering a regulatory change which will expressly authorize the Board, under certain circumstances, to obtain opinions on the record from Department medical personnel.

*Colvin*, *Austin*, 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 by requiring them 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. In addition, the role of the BVA staff physician in the quality review process has also been expanded.

The Board continues to seek advisory medical opinions from VA sources, including the Under Secretary for Health, from the Armed Forces Institute of Pathology, and from independent medical experts who usually serve on the faculties of leading medical schools. In FY 1994, the Board requested 159 opinions from independent medical experts under 38 U.S.C. § 7109.

The Board and the Veterans Health Administration (VHA) have entered into an agreement whereby BVA may obtain advisory medical opinion services on a reimbursable basis from VHA. While BVA has requested approximately 20 opinions from VHA annually over the past two years, we anticipate that as many as 2,000 opinions could be requested under the contemplated arrangements.

## **REVIEW OF ATTORNEYS' AND AGENTS' FEE AGREEMENTS**

The VJRA required attorneys and agents to file with BVA their 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 1994, the Board received approximately 280 fee agreements for filing. Most of the perceived problems concerning fee agreements were handled by correspondence. The Board issued eleven motions for review of fee agreements for insufficiency in FY 1994. At the end of the fiscal year, five motions were pending. Three motions had been withdrawn upon payment to the client of the disputed fee. In three instances, the Board issued a decision that the attorney could not charge a fee because there had not been a final decision of the Board concerning the matter for which the attorney was attempting to charge a fee.

Almost all of the Board's decisions concerning fee agreements involve agreements referred by VA regional offices for a determination of whether an attorney is eligible for payment directly by VA under 38 U.S.C. § 5904(d). In FY 1994, 56 cases were referred for such decisions. Fifty-five such cases were completed during the fiscal year: 21 ordered payment to the attorney, 25 held that the attorney could not be paid, 1 was returned to the regional office, and 8 were withdrawn by the parties.

## **REPRESENTATION BEFORE THE BOARD**

In FY 1994, 87.0 percent of appellants were represented by one of the accredited service organizations, 4.0 percent were represented by an attorney or agent, and 9.0 percent were not represented. In FY 1993, 87.1 percent were represented by an accredited service organization, 3.1 percent were represented by an attorney or agent, and 9.8 percent were not represented. (See table on page 38, Part III.)

## **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 5,855 written responses to Congressional inquiries in FY 1994. In addition, the Chairman responded to correspondence from claimants and other interested parties addressed to the President, the Secretary, and other government officials.

The continuing increase in decision processing time has resulted in a corresponding increase in the number of telephone calls and letters from Members of Congress, appellants, and others. 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 some instances, cases must be withdrawn from active appellate consideration while a response to the inquiry is being prepared. The rapidly evolving body of veterans' law requires continual retraining of Administrative Service employees who respond to these inquiries.

### *Liaison with Veterans' Service Organizations*

Veterans' service organizations (VSOs) provide representation for 87 percent of those filing appeals with the Board. VSOs are critical to the Board's operations.

Throughout the year, the Chairman made presentations to representatives of numerous veterans' service organizations, both at the Board's offices and at various conventions and training conferences. In early February, for example, he held individual meetings with senior officials of The American Legion, the Disabled American Veterans, the Veterans of Foreign Wars of the United States, and the Paralyzed Veterans of America to discuss the steadily increasing appeal processing time and the Board's efforts to improve productivity and timeliness through the series of administrative and legislative actions previously described in this report. In addition, the Chairman addressed or participated in 15 conventions and seminars held by VSOs (both national and state) across the country.

### *Other Liaison Activities*

Throughout the year, the Chairman made presentations to the staffs of the Committees on Veterans' Affairs of the Senate and House of Representatives; the Subcommittee on VA, HUD, and Independent Agencies of the Senate Committee on Appropriations; and individual members of Congress concerning the backlog of appeals and the Board's initiatives to increase productivity and improve decision timeliness. Similar presentations were made to representatives of many veterans' service organizations. One of the key elements of these presentations was the proposal to amend title 38 of the United States Code to permit single Board member decisions. As previously noted, this proposal was incorporated in Pub. L. No. 103-271, signed by the President on July 1, 1994.

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 November 1993, he testified in favor of the single Board member decision-making legislation. In February 1994, he discussed the impact of judicial review on the Board's budgetary requirements, the administrative initiatives being undertaken by the Board, and the legislation supported. In April 1994, he testified for the Department in favor of provisions which would restore the practice of pay equity between Board members and Federal administrative law judges (ALJs). As noted above, this proposal was incorporated in Pub. L. No. 103-446, signed by the President on November 2, 1994.

## **PROFESSIONAL TRAINING**

Included in the recommendations of the Select Panel on Productivity Improvement for the Board of Veterans' Appeals was a recommendation to improve the training and professional development of staff counsel and Board members. In response, the Board established a committee, headed by the Vice Chairman, to develop and implement a

comprehensive training program for all counsel and Board members. This coordinated program will provide intensive instruction in a variety of functional areas, including claims adjudication, veterans' law education, medical issues, and computer word-processing. Instruction will be provided by subject matter experts from within the Board's ranks and from outside sources. A key feature of the program will be attendance at the Veterans Benefits Administration's Adjudication Academy in Baltimore, Maryland, by all attorneys beginning their careers at the Board. As they have in the past, BVA staff physicians will continue to conduct lectures on a variety of medical topics.

## **AUTOMATION INITIATIVES**

The Board's on-going automation activities are 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 1994, the Board completed office automation training and the installation of personal computers for all professional and administrative staff. Prior to this automation project, there was only one Wang terminal in each of the 21 Board sections. Now all Board counsel have word processing and electronic reference material available to assist them in producing high quality decisions in a more efficient manner.

This year saw the BVA computer network grow to over 400 users in Washington, DC, and the entire staff of 40 employees in the Wilkes-Barre, Pennsylvania, transcription unit. In addition to hearing transcripts and rating decisions, the Wilkes-Barre office also transcribes tapes for nine regional offices and electronically transmits the completed work directly to the regional offices.

In March 1994, all Board decisions issued in calendar years 1992 and 1993 were compiled on a single CD-ROM (Compact Disc - Read Only Memory). The entire text of all decisions issued in those years, along with an index to those decisions, was included on the CD-ROM. This product allows researchers to search all 1992 and 1993 decisions, separately or simultaneously, for specific topics and to display or print the text of decisions matching the search criteria. This capability represents an enormous potential reduction of research time for attorneys preparing decision recommendations, appeal representatives, and others.

The Board also designed and made available another important computer research tool, the Veterans' Benefits Law Index. This index was created to facilitate legal research and assist with the preparation of Board decisions. The index includes references to precedent decisions and opinions of the U.S. Court of Veterans Appeals, U.S. Court of Appeals for the Federal Circuit, U.S. Supreme Court, and VA Office of the General Counsel. It is available not only to Board employees and veterans' service organization representatives connected through the Board's computer network, but has been distributed by the Veterans Benefits Administration's Compensation and Pension Service to adjudicators in all 58 VA regional offices. This asset allows Board counsel, members,

and others to keep abreast of the rapidly expanding and changing body of veterans' benefit law.

During FY 1994, several research tools were installed on the BVA computer network to assist staff counsel and Board members in conducting their increasingly complex research. These tools include an electronic version of title 38 of the Code of Federal Regulations and an index of changes to these regulations, which essentially lists sections affected by proposed and final rules printed in the *Federal Register*. In addition, an index of precedent opinions of the office of the VA General Counsel has been installed. Computer access has also been made available, on a

limited basis at the present time, to WESTLAW, which affords access to the complete texts of opinions of the U.S. Court of Veterans Appeals, the U.S. Courts of Appeal, and the U.S. Supreme Court. The Board plans to make WESTLAW available to all staff counsel and Board members in FY 1995.

Another important development has been a broadened exchange of information between the Board, the Veterans Benefit Administration (VBA), and other VA operating elements. Of particular note is the Board's computer access to VBA's policy and procedures directives, critical tools used throughout the VA claims adjudication system. The Board, along with VBA, the Veterans Health Administration, and the National Cemetery System, is also participating in the Master Veterans' Record Project. This pilot program allows computer searches of VA facility data bases to determine certain information, such as periods of hospitalization or treatment, critical to adjudicating claims.

Direct access to the Board's computerized case tracking system was made available to VSOs and VA Congressional liaison staffs via telecommunications links in a continuing effort to provide information access to those who need it. The successor system to the case tracking system is projected to become fully operational during the second quarter of FY 1995. Also in FY 1995, the Board anticipates posting information, such as that contained on the decision CD-ROM, on computer facilities accessible via Internet.

Preparation of tentative BVA decisions and recurring administrative documents has been facilitated by the expanded use of customized word processing templates.



*The text of all calendar year 1992 and 1993 decisions are available on a single CD-ROM.*

Administrative efficiency and timeliness have been improved through the use of these templates by allowing users to concentrate on document substance rather than form.

Basic word processing training, begun in FY 1993 for the Board's administrative, professional, and transcription services personnel (located in Wilkes-Barre, Pennsylvania), was completed during FY 1994. In addition to basic word processing classes, instruction on BVA-specific document preparation procedures was conducted. Training of hearing-impaired employees was facilitated by two non-VA interpreters hired by the Board to translate lessons through the use of sign language.

The Board also initiated a word processing and CD-ROM (Compact Disc - Read Only Memory) data search training program for VSO appeals representatives. In May 1994, twelve Disabled American Veterans (DAV) service officers and secretaries took part in the inaugural class, which was tailored to meet the specific computer literacy requirements identified by DAV. Instruction included basic word processing techniques as well as procedures for the use of a BVA-designed template that facilitates brief preparation by VSO service officers. Direct access to the Board's 1992 and 1993 decisions stored on CD-ROM was established via a shared computer network. Instruction on CD-ROM data search and retrieval methods, as well as on the use of other on-line research materials, was also provided to the VSO representatives.

The Board will continue to offer custom-tailored training to all VSOs having compatible computer hardware whose service representatives are co-located with the Board in the Board's Washington, DC, office building.

## **CUSTOMER SERVICE**

The Board has been an active participant in the Department's aggressive efforts to improve the quality of its service to customers. In March 1994, the first of two focus group meetings was held with representatives from major veterans' service organizations. The four primary areas of concern identified by the VSO participants were: decision timeliness and quality, courteous treatment of appellants, and communications. Decision timeliness and quality have long been the criteria by which the Board measured its performance and are areas that received intense scrutiny throughout the fiscal year. The legislative and administrative initiatives discussed elsewhere in this report focus mainly on these two areas. Courteous and respectful treatment of appellants is the cornerstone of the Board's customer service program. In keeping with the department's emphasis on courtesy and caring, heightened awareness of this basic requirement has been incorporated into all facets of the Board's operations. The VSO representatives' emphasis on the need to improve and expand the Board's communications activities provided a new customer service avenue for the Board to pursue.

At the recommendation of the customer service focus group, the Board surveyed more than 1,000 appellants who had received Board decisions within the preceding three

months. Survey responses echoed the focus group's emphasis on timeliness, communications, courtesy, and quality as the major areas of concern affecting customer satisfaction. The Board then developed customer satisfaction standards based on the results of the survey and the focus group's initial meeting.

A second meeting of the Board's customer service focus group refined the Board's customer service standards and identified specific areas where improved communication between the Board and appellants was needed most. An immediate result of these focus group meetings was the initiation of a project to revise much of the Board's written communications with appellants. The revisions make the Board's routine correspondence less formal, less legalistic, and more "customer friendly."

In September 1994, the Board published a BVA Customer Service Standards brochure. This brochure not only fulfills the requirements of the President's Executive Order 12862, "Setting Customer Service Standards," but provides appellants with a clear statement of the Board's commitment to improve customer service. Also in September, the Board began an on-going customer service training program. In addition to introducing the Board's customer service standards to front-line employees, the initial training sessions focused on improved customer relations in direct contact situations, particularly telephonic contact between employees and appellants.

A comprehensive brochure explaining the entire appeal process was nearly complete at the end of FY 1994. When distributed in FY 1995, this guide will provide, for the first time, a single-document source of information on how to file an appeal, what the appeals process involves, procedural options available to appellants, how the Board operates, and what kind of communication and product appellants can expect from the Board.

In FY 1995, after publishing the new guide for appellants and allowing sufficient time to permit a meaningful assessment of the Board's other customer satisfaction improvement initiatives, the Board will again survey its customers to evaluate progress to date and to determine appropriate efforts to further improve customer satisfaction. The Board is committed to providing service equal to or better than the best available from comparable organizations inside and outside of government.

### **TOTAL QUALITY MANAGEMENT (TQM)**

Numerous recommendations of the Board's TQM team were implemented during FY 1994, including the installation of telefacsimile machines in each of the five Control Divisions. This action alone has greatly increased the efficiency with which administrative services personnel and VA field offices communicate. Access to the Board's computerized case tracking system, provided to VSO appeals representatives and field office personnel during FY 1994, is also an example of how the Board's grassroots TQM effort has benefited the Board and the Board's ability to serve its customers better.

## WORLD WAR II 50th ANNIVERSARY COMMEMORATIONS

In January 1994, the United States 50th Anniversary of World War II Commemoration Committee designated BVA as an official World War II Commemorative Organization. Eighteen Board employees volunteered to form and serve on a committee to plan and conduct activities to honor and thank America's World War II veterans and to increase Board employees' understanding of the sacrifices and accomplishments of those veterans.

To maintain a continuous awareness of the magnitude and intensity of America's involvement in the war, the Board established a "This Week in World War II" display on each floor of the Board's Washington, DC, offices. This display has provided a week-by-week chronicle of significant campaigns, battles, and home front activities.

From September 7 through the end of the fiscal year, the Board exhibited the "BVA World War II Hall of Fame" in the Board's Lafayette Building lobby and in BVA common areas. The exhibit included World War II era photographs of several current BVA employees taken during their WW II military service. Photographs of employees' family members who served in uniform during World War II or who served on the home front were also featured. The exhibit provided fact sheets and book marks describing World War II campaigns, battles, and home front programs for visitors to collect.

The Hall of Fame Exhibit represented a grassroots effort by Board employees to demonstrate in a very personal way that every claims folder handled by Board employees is a representation of the life of a real person, not just a collection of paper. The display also served as a reminder that World War II, like all wars, was fought by everyday people who are now the Board's customers.



*The BVA "WW II Hall of Fame" was one of several activities conducted during FY 1994 to honor veterans of World War II.*

**PART II**

**REMARKS OF THE CHAIRMAN  
AT THE THIRD JUDICIAL CONFERENCE  
OF THE UNITED STATES COURT OF VETERANS APPEALS  
OCTOBER 1994**

The Chairman was invited by the Court to address the Third Judicial Conference of the United States Court of Veterans Appeals on October 17, 1994. During his address to conference participants, the Chairman discussed recent changes that have taken place at the Board, particularly those that occurred during fiscal year 1994. Portions of the Chairman's remarks are discussed in greater detail elsewhere in this report, but the full text of the Chairman's presentation, entitled "The Endless Becoming," is presented below. It provides a useful summary of the dynamic events that characterized fiscal year 1994, *vis à vis* significant judicial decisions, legislative accomplishments, and Board-initiated administrative actions.

**INTRODUCTION**

Thank you, Chief Judge Nebeker and Judges of the Court of Veterans Appeals. I have chosen as my theme a quotation from Justice Benjamin Cardozo that, in my opinion, aptly describes the condition of the Board of Veterans' Appeals since the enactment of the Veterans' Judicial Review Act in 1988: "Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.' "

As you know, the enactment of the Veterans' Judicial Review Act (VJRA) of 1988 changed the static, almost unchanging world in which the Board formerly existed into a fluid, changeable environment in which there is the "endless becoming" of which Justice Cardozo wrote. As Secretary Brown noted today, this new environment is markedly better than the old in many ways. As Congress intended, the checks and balances of independent external judicial review of the Board's decisions have provided greater integrity and accountability to the VA adjudication system by insuring that VA conforms to its own rules. It has forced VA to more thoroughly explain its decisions. It has made VA abandon old practices and replace them with new and unfamiliar ones. As Judge Kramer succinctly put it in *Stillwell v. Brown*, "[T]he evolution of VA benefits law since the creation of this Court . . . has often resulted in new, different, or more stringent requirements for adjudication." The nascent body of veterans' law that this court is in the process of creating daily has, at the same time, precipitated the Board's "endless becoming."



## SHORT-TERM BOARD INITIATIVES

Unfortunately, while appellants are benefiting from more detailed, well-reasoned, and consistent decisions, the process of arriving at those decisions has become much more complex, legalistic, and, necessarily, more time-consuming. Nevertheless, the Board's statutory duty to render decisions in a timely manner remains unchanged. To meet the challenge, in January 1994, I presented to Secretary Brown short- and long-term procedural and administrative measures to improve the Board's productivity and timeliness. The measures, which were implemented this year, have also contributed to the Board's "endless becoming."

### *Limited Certified List Preparation*

For example, in February 1994, the Secretary approved my suggestion to limit the preparation of the "Certified List" of the evidence considered in a BVA decision only to those decisions that have been appealed to the Court, rather than to continue to require the Board to prepare a "Certified List" for every final decision of the Board, whether it was appealed or not. We worked out a cooperative arrangement with the Office of the General Counsel that allows us to create this "Certified List" in a timely manner for use when a BVA decision is appealed, thus meeting the needs of the Court and the Secretary while providing better service to veterans.

### *Advance Docketing*

Beginning on the first of February this year, the Board established a new procedure for docketing appeals. We were able to implement the new procedure with the cooperation of the Veterans Benefits Administration and the agencies of original jurisdiction within the Department. The new docketing procedure permits the Board to enter an appeal on our docket while the veteran's claims file remains at the originating agency. This system has several advantages for veterans.

Before February 1994, the Board's docketing procedure was based upon the physical receipt of the veteran's claims file by the Board. The originating agency transferred the file to the Board when it had completed its action in the appeal. This worked well when a veteran's records would be at the Board for a relatively short period, most of which was used in the active review and processing of the appeal.

It was no longer a good system when a veteran's records would be shelved for many months or even years in case storage waiting for the Board to consider and decide the appeal. It was also not a good system once the Board's practice of conducting some hearings at VA regional offices was made statutory by the VJRA, because, logically, the veteran's file remained at the regional office until after the Board's hearing was held there. This gave these appellants later docket numbers because the veteran who asked for a hearing before the Board at a regional office, rather than in Washington, DC, did not take his or her place on the Board's docket until after the hearing was held. In contrast, the

appeals in which veterans had not requested a BVA hearing at a regional office were placed on the Board's docket without delay when the originating agency finished its action on the appeal. The significance of the docket number of the appeal rests in the statutory requirement that the Board consider and decide each case in regular order according to its place on the docket. As the Board's backlog grew, the disadvantage of the old docketing system for veterans requesting a BVA hearing at a regional office was obvious.

We now docket appeals after the appellant has completed his or her appeal by filing a VA Form 9, or its equivalent, in response to the statement of the case. Each VA regional office photocopies the appeal when it is received and sends a batch of appeals to the Board for docketing approximately once per week.

This improved docketing procedure permits the originating agency to continue to have access to the file, and permits appellants to obtain a place on the Board's docket at the earliest opportunity, which, in turn, permits an individual to have his or her appeal considered and decided by the Board at the earliest possible opportunity.

#### *Temporary Suspension of Hearings*

Another initiative implemented this year is the delay, beginning May 1, 1994, in the scheduling of new hearings until a time proximate to when the Board will decide the claim. As many of you remember, once appellants became aware of their new statutory right to have a BVA hearing at a regional office, many of them chose to avail themselves of this opportunity rather than travel to Washington, at their own expense, to attend a BVA hearing. In fiscal year 1990, the Board held 440 hearings in the field and 1,244 hearings in Washington. In fiscal year 1993, the Board held 3,533 hearings in the field and 1,172 hearings in Washington.

Once we had implemented our new docketing procedures so that appellants could obtain a place on the Board's docket before their BVA hearing was held in the field, it no longer made sense to take Board members away from considering and deciding appeals in their offices to travel to hold hearings in appeals that would not be considered and decided for many months or years. In any appeal, it is preferable to hold the hearing as close as possible to the time of the actual decision in the appeal. The demeanor of the witnesses is much fresher in the Board member's memory. The evidence presented at the hearing is the most up-to-date. The Board member who held the hearing, and who is required by statute to participate in the decision, is most likely still a Board member. This last consideration has become even more important lately, as so many of our Board members, who have left the Board for better pay and conditions of employment as Administrative Law Judges, may, by the time the case is ready to be decided, no longer be available to participate in the decision, even though they conducted the hearing in that case.

Consequently, we decided to restructure our process of scheduling hearings, both in Washington and at the regional offices, to emphasize scheduling hearings proximate to the decision-making in the appeal. We stopped scheduling hearings after April 30, 1994, until the appeals are ready for the Board's review. We have held a few hearings in Washington in appeals that were ready for the Board's review, and we anticipate that we will begin to hold hearings at regional offices early in calendar year 1995.

#### *Fewer Collateral Assignments*

In addition, we have reduced some of the collateral duties of Board members to maximize the time they spend in consideration of appeals. After meeting our labor-management obligations, I have implemented a revised performance appraisal system for staff counsel to encourage improved productivity. I have altered the format of our decisions to make them less time-consuming to produce by reducing the detailed procedural history of the appeal in the decisions and simplifying the preparation of remand decisions. I have limited the quality review process solely to substantive matters, to permit decisions that are substantively correct to be released sooner. I am continuing to review staffing effectiveness to apply the most resources possible to direct decision production without impairing the infrastructure of the Board. I am continuing to seek innovations in case assignment procedures to make the most efficient use of our attorney and Board member time. And I am continuing to seek incentive awards for BVA employees to encourage innovation and resourcefulness wherever possible.

### **LONG-TERM BOARD INITIATIVES**

In February 1994, I advised the Secretary that, while the administrative initiatives implemented by BVA, in the aggregate, will help improve productivity and response time, they would not restore these traditional measures of organizational effectiveness to historic levels. Long-term measures must be developed that would, to the extent possible within this new legal environment, address the underlying causes of the backlog.

#### *The Select Panel on Productivity Improvement*

Accordingly, I suggested that the Secretary establish a Select Panel charged with exploring new approaches that would enable us to fundamentally redefine the way BVA operates and develop and consider any and all changes that may enable the Board to more effectively meet the challenges posed by the current adjudication and appellate environment. Given the experience of the Blue Ribbon Panel, which was convened last year to deal with a similar problem in the Veterans Benefits Administration, I thought that such intensive, concentrated effort would provide significant insight into what the Board should be "becoming."

In response, in March 1994, the Secretary chartered the Select Panel on Productivity Improvement at the Board of Veterans' Appeals. The Panel was chaired by Mr. Guy

McMichael, the Chairman of the Board of Contract Appeals, and included the Under Secretary for Benefits and representatives from the leading veterans' service organizations, the General Counsel's office and the Board. It was charged with "conduct[ing] a systematic review of the Board of Veterans' Appeals and its relationship with other Departmental elements, and mak[ing] recommendations regarding the mission, structure and operations of the Board that will result in more timely processing of claimants' appeals."

The Panel explored a variety of approaches and presented 12 specific recommendations to the Secretary in June 1994. The recommendations, which were subsequently approved by the Secretary, reflected a consensus, if not unanimity, of the group. At least in part, the recommendations involved not only the Board, but other elements of the Department. We at the Board are now in the process of implementing each of these recommendations.

First, the Panel recommended that the Department revise its timeliness measurement system to address the claimants' real concern -- the total time from the filing of a claim to the receipt of a final VA decision. The Board has begun to implement such a new timeliness measure, in addition to others that address budgetary and future planning needs.

The Panel also advised that the Veterans Benefits Administration (VBA) continue its aggressive efforts to implement the recommendations of the Blue Ribbon Panel that, in 1993, examined the problems causing delay in the adjudication process at the Regional Office (RO) level. The Panel stressed that VBA should continue to give a high priority to its efforts to improve the development of evidence at the RO, which would ultimately reduce the number of cases remanded to the RO by the Board for needed development. In addition, the Panel counseled that expedited treatment be afforded to cases that have been remanded to the RO by the Board. The Under Secretary for Benefits directed that this latter measure be implemented immediately.

The Panel also recommended that the Board be granted the authority to perform an initial review or "prescreening" of appeals in advance of the time when that case would ordinarily be considered and decided in docket order. This procedure would enable the Board to discern any deficiencies in the record to be identified and corrected at the earliest possible time when the case was still awaiting final consideration on the merits based on its place on the docket. Language amending 38 U.S.C. § 7107 to specifically authorize such prescreening procedures is included in legislation which has been enacted by Congress and is currently being considered by the President. *[Note: On November 2, 1994, the President signed this legislation into law as Pub. L. No. 103-446, the "Veterans' Benefits Improvements Act of 1994."]*

The Panel's recommendations also included providing better and more comprehensive training and performance measurement for BVA staff counsel; modifying the Form 9 to encourage appellant consultation with a service representative; seeking legislation to

increase hearing options by authorizing the conduct of BVA hearings, at the claimant's option, by a RO official acting as an agent for the Board; exploring the possibility of expanding the geographic locations at which hearings may be held by use of teleconferencing; improving the training and methods of evaluating performance of staff counsel; increased use of technology, including a pilot project employing document imaging, as well as the expanded use of CD-ROM and other on-line technology; and resolving attrition problems at the Board resulting from the loss of pay equity between ALJs and Board members and the imposition of terms on the Board member position.

In my opinion, the most interesting recommendations of the Panel focused on redefining the Board's role in the VA benefits adjudication system. The Panel concluded that the Department should increase individual accountability in the appellate adjudication process to insure the highest quality consideration of a claim's merit and to improve timeliness. It recommended that the Secretary promulgate regulations granting the Board complete authority to develop, consider and dispose of an appeal once the substantive appeal (or "Form 9") is filed. This represents a significant change from the current procedure for dealing with cases in which the record is insufficient for appellate adjudication on the merits, which generally requires that the Board must remand such cases to the agency of original jurisdiction, which is charged with developing the record and then re-adjudicating the claim.

The Panel suggested that the new procedure, which would permit the Board to directly obtain evidence or otherwise develop the claim without the necessity of remanding the case to the RO for needed development and re-adjudication, be perfected in a trial or pilot program. Claimants would have the ability to "opt out" of the revised system and continue to have their appeals processed in the current manner.

While the Panel's recommendation is a good one - one which merits and will receive thorough exploration in a pilot project - it only partially addresses the larger question of what the Board is or should be "becoming."

### **A JUDICIAL HYBRID**

The Board is now a judicial hybrid -- in part, a tribunal of original jurisdiction, which develops the record and affords a case *de novo* review, and, in part, an appellate body, charged with reviewing the correctness of the decision of the agency of original jurisdiction based on the application of the law to the facts, as contained in the record on appeal. The broader question, one which I will return to later, is what should the Board become in the era of judicial review?

Recent legislation has helped address this issue.

Since its inception more than 60 years ago, the Board has made decisions through three-member panels composed of lawyers and physicians--panels which have reflected

the make-up of the rating boards at the Regional Offices. As we know, VJRA has fundamentally altered the way we can make decisions at the Board. Not only did the 1988 law require articulation of the "reasons and bases" for our decisions, but our reviewing courts are requiring decisions that look more like judicial opinions than before. With the *Colvin* decision in 1991, it became clear that we could no longer employ our physician members to do what they had historically done: apply their own knowledge of and experience in medicine to the appeals before us.

Recognizing this change, Secretary Brown, in concert with the Board and the Congressional Veterans' Committees, worked diligently and effectively for legislation which has fundamentally altered the decision-making process at the Board. On July 1, the President signed Pub. L. No. 103-271, which has, for our purposes, two key features: it empowers the Chairman to assign cases to individual Board members and it removes the ceiling on the number of Board members.

### **BOARD OF VETERANS' APPEALS ADMINISTRATIVE PROCEDURES IMPROVEMENT ACT**

This new law speaks to two key issues of "becoming" at the Board.

First, in authorizing single-member decisions, the new law recognizes the judicial nature of the Board's decisions. Once again, the question as to the precise judicial nature of the Board arises-- is it a trial court, an appellate court, or some new admixture? -- but there can no longer be a question that what we do is render judicial decisions. We examine the record. We may look at more than the original decision-makers looked at. But we will make our decisions in classic judicial manner: applying the law as we understand it as lawyers to the facts which are before us.

For good or ill, the days--if there were in fact such days--of "rough justice" at the Board are gone. The justice we render will be supported by legal decisions of skilled individuals unafraid to subject their judicial skills to the scrutiny of the Veterans Court, the Federal Circuit and the Supreme Court. It is a result which is unconditionally good for veterans and their families.

Second, by removing the limit on the number of Board members--67, counting the Chairman and Vice Chairman--the Congress has given the Secretary the flexibility to deal with potential reorganization at the Board. As I speak to you today, we do not know what, if any, reorganization may be needed. We are, after all, still "becoming." But, in my view, the Congress has acted wisely in leaving that option to those who manage this crucial part of the veterans' system.

## **ADMINISTRATIVE LAW JUDGE PAY COMPARABILITY**

In addition to the changed nature of the Board's decision-making process, the Board has been facing, for the past several years, a mounting crisis: at the time when we need experienced decision-makers most, we were losing them to the ranks of administrative law judges, primarily at the Social Security Administration.

As many of you know, the work of a Board member and the work of an ALJ at Social Security are similar in many ways. Until 1988, the security and compensation of the two positions were about the same. In 1988, the VJRA established, for the first time, nine-year terms for Board members, while ALJs remained "career absolute." Then, in 1991, Congress created, for the first time, a substantial gap between the compensation of Board members and ALJs. And as the Social Security Administration knew, Board members were extraordinarily well qualified for ALJ positions that required strong backgrounds in law and medicine.

The result was predictable. In July 1993, there were 55 lawyer-members at the Board. Over the next 15 months, the Board lost nine of them to the Social Security Administration. The vast majority of the remainder were either on the register to become ALJs or were in the process of completing their applications. We faced a "brain drain" of enormous proportion.

Once again, however, the Secretary, in concert with the Board, the BVA Professional Association, the veterans' services organizations and the Congressional Veterans' Committees, worked with extraordinary dedication to produce a pay equity bill which will, we think, help us retain the best and the brightest for the Board.

The pay gap is closed. Terms are extinct. A reasonable system of performance evaluation will soon be in place.

We were in danger of "becoming" the farm team for Social Security. I think that now the Board will not only inspire the loyalty that made the losses to Social Security so painful, but it will become a career goal for a new generation of bright, caring lawyers. That is a result unconditionally good for veterans and their families.

## **A JUDICIAL BECOMING**

The Board is also "becoming" in the judicial arena.

Several years ago, when the Court was still in its nascent state, Chief Judge Nebeker addressed the Board at one of its quarterly luncheons. He presciently noted that in the first few years of its operation, the Court would establish its "footprints in the sand," those series of landmark decisions that would provide the pathways of its future jurisprudence. While the Court's trailblazing is hardly concluded, its "footprints" in many

important areas are now well established. At times, the Court has "walked the cat backwards," to borrow a phrase from Judge Holdaway, on its own volition and redefined its direction. On other occasions, the Court of Appeals for the Federal Circuit's "footprints" have changed the course, as, for example, in *Smith* and *Mayer*. The United States Supreme Court will directly enter the new judicial environment in its consideration of the *Gardner* case this term. In short, we see that the judicial review process established by the VJRA is working and is continuing to evolve. It too is "becoming."

In the past year, the Court has changed the Board's course in several respects. In *Grivois*, this Court suggested that VA should be more attentive to the threshold issue of whether a claim is well-grounded and thereby avoid adjudicating implausible claims at the expense of delaying well-grounded claims. In *Similes*, the Court adopted a more expansive view of the Board's jurisdiction to review certain determinations of the Veterans Health Administration than historically had been the Board's view. In *Trammell*, the Court examined the Board's long-standing practice of forwarding copies of Board decisions to the veterans' service organizations by "flat mail" -- i.e., internal mail -- and concluded that the practice did not conform to the statutory requirement that decisions be "mailed" -- i.e., by U.S. Mail -- to the representative. Each of these decisions has resulted in changes in the Board's adjudicative and administrative practices.

### **MEDICAL OPINIONS, *AUSTIN V. BROWN***

The Court's decision in *Austin v. Brown* has had the greatest impact on the Board's "becoming" in the past year. Prior to enactment of the Veterans' Judicial Review Act, there were relatively few constraints on how BVA utilized the expertise of its staff physicians. Physicians were used interchangeably as both decision-makers and providers of expert advisory opinions, as well as sources of medical training for BVA legal staff. The Court's decisions in *Gilbert*, *Murphy*, and *Colvin* significantly altered the role of the BVA physician. Prior to these decisions, Board medical adviser opinions were not incorporated into appellate decisions. In June 1991, I issued Chairman's Memorandum 01-91-21 which directed, in pertinent part, that all opinions from any physician at the Board be reduced to writing and added to the record and that Board physician opinions must be appropriately discussed in the decision, to the same extent as any other item of relevant evidence. However, the Court in *Austin* raised serious questions concerning the fairness and impartiality of the Board's procedures for utilizing Board medical adviser opinions. At this time, the Department is considering a regulatory change which will expressly authorize the Board to obtain opinions on the record from its own staff medical advisers. The Board is also looking to sources outside BVA to meet its needs for expert medical opinions.

Traditionally, the Board turned to the Veterans Health Administration, the Armed Forces Institute of Pathology and selected medical schools as our sources of such opinions. Of these three sources, selected medical schools have been used to obtain the vast majority of BVA's outside expert medical opinions. Unfortunately, the Board has



been unable to consistently obtain timely and responsive advisory opinions from this group of providers.

BVA and the Veterans Health Administration (VHA) have entered into an agreement whereby BVA may obtain advisory medical opinion services on a reimbursable basis from VHA. While BVA has requested approximately 20 opinions from VHA annually over the past two years, we anticipate that as many as 2,000 opinions could be requested under the contemplated arrangements. These opinions will be prepared by physicians employed by or under the direction of VHA. We believe that such an arrangement will provide a timely alternative to the principal option currently available when a medical question arises in the course of the BVA appeal adjudication process, i.e., remanding an appeal to the AOJ in order to schedule a medical exam at a nearby VA medical center to obtain a medical opinion on an issue in question.

We have explored what the Board is becoming through changes in administrative procedure, legislation, and judicial precedent. I think we can all agree that the entire veterans' benefits adjudication system is now fundamentally different than it was prior to judicial review and continues to change on almost a daily basis. Although these systemic changes have resulted in better decisions, a lengthier processing time appears to be an unwanted consequence of the profound alteration in the way VA must do business. However, it must be remembered that this is a new era for which realistic expectations, not only of timeliness, but of the role of the Board of Veterans' Appeals in the veterans' benefits adjudication process, have yet to be defined.

### **THE BOARD'S ROLE IN THE JUDICIAL REVIEW ERA**

Once again, I direct your attention to the larger question that remains unanswered -- what is the proper role of the Board of Veterans' Appeals in the era of judicial review? The VJRA and the decisions of the Court have greatly changed the Board's legal analysis and decisional product. Nevertheless, the current role of the Board appears to have remained relatively unchanged from the time that BVA was the "court of last resort" for a veteran's appeal.

At this point in time, in terms most familiar to lawyers, the Board remains a curious hybrid. It is, in part, an appellate tribunal, reviewing the adequacy of the decision of the originating agency, and at the same time, in part, a trial court, providing a form of *de novo* review of the original claim. This construct served the Board well at a time when it was the "court of last resort" in the system for adjudication of entitlement to veterans' benefits. It served to provide the veteran with an additional opportunity to develop evidence that would support his or her claim, as well as another opportunity for the adjudication of the case by a panel of experts that had not previously considered the claim.

However, under this system, the Board also functions as an appellate body -- the development of the record is left to the agency of original jurisdiction and, absent a specific waiver of consideration by the originating agency, the claim generally must be re-adjudicated by the originating agency before it can be considered on appeal by the Board. This adds considerable delay to the appellate process. For example, a single remand, on the average, adds almost two years to the total time it takes to finally decide an appeal.

This hybrid also results in some uncertainty as to the respective obligations of the Board and the originating agencies, the VA, the Courts, and the veterans we serve. Moreover, while its procedural requirements provide an individual veteran the opportunity to have "another bite of the apple," by having his or her claim re-reviewed by the agency of original jurisdiction, the aggregate effect is to directly compromise the timeliness with which all veterans receive a final decision in their claims. I note that in the past fiscal year, we have dismissed the claims of 403 veterans who have died while waiting for a final decision on their claim. I believe we all agree that this is intolerable and that, at some point, justice delayed becomes justice denied. I believe that we are certainly close to that point.

Will veterans be better served by a fundamental change, by making the Board either purely a tribunal of original jurisdiction or purely an appellate body? The recommendation of the Select Panel to test on a pilot basis the development of the record directly by the Board provides us the opportunity to experiment with one of these modalities, at least in the development of evidence. It does not clearly answer the basic question of the proper role of the Board in the new age of judicial review. This is a question which, in my judgment, has and will continue to recur in the legislative and judicial arenas.

In order to make the system work, we must, at some time soon, decide what we want the Board to become:

Should the Board remain as it was envisioned prior to judicial review? Should the Board serve as a pure administrative appellate body, deciding cases (for the most part) solely on the record received from the agency of original jurisdiction? Or should the Board be structured as a true intermediate administrative tribunal, affording the veteran *de novo* consideration of fact and law and directing development for its own independent review, without referral back to the originating agency? Would changing the Board to either a pure appellate tribunal or a true intermediate level trial court result in a more efficient, more timely appellate adjudication process without curtailment of a claimant's access to the system or to entitlements?

How can we continue to be fair to veterans, provide an adequate record for judicial review, and still cut down on the administrative overhead and further stem the increase in the amount of time involved in decision-making? Can we expedite the process without any real compromise of a veteran's rights?

These are difficult challenges. But they will be met, because they must be met. Because, despite our endless becoming, our goal remains unchanged -- to provide justice to our nation's veterans and their families, and in the timely manner that the law and fundamental notions of fairness require. Let me assure you, we at the Board and the Department of Veterans Affairs are resilient. As one author observed,

Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat. Rather must we recall the sound advice given by General Jan Smuts to the students at Oxford: "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop."

If you are very, very quiet, you may hear them coming. Thank you very much.

## PART III

### FY 1994 STATISTICAL DATA

During FY 1994 BVA produced a total of 22,045 decisions. This represents a 16.5 percent reduction from FY 1993, when 26,400 appellate decisions were produced. The reduction is largely attributable to the Board's implementation of precedent decisions of the Court. For example, in FY 1994, 48 percent of the cases were remanded to VA regional offices, compared with 44 percent in FY 1993. 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	18380	3394	9051	4979	956
Disability pension	963	80	532	240	111
Medical	278	33	93	103	49
Insurance	29	0	9	18	2
Death	1094	113	415	441	125
Training	240	7	109	91	33
Waivers	409	70	201	104	34
Loan guaranty	210	63	76	68	3
Reconsiderations	197	68	74	49	6
Character of discharge	34	2	13	16	3
Miscellaneous	211	32	69	85	25
<b>Totals</b>	<b>22045</b>	<b>3862</b>	<b>10642</b>	<b>6194</b>	<b>1347</b>

<u>Appellate Processing Categories</u>	Days	
	FY 1993	FY 1994
Notice of Disagreement to Statement of the Case	66	70
Statement of the Case to Substantive Appeal	62	59
Substantive Appeal to the BVA	215	244
Processing Time through the BVA	246	359
Average Remand Time Factor	<u>70</u>	<u>107</u>
<b>Total Processing Time All Categories</b>	<b>659</b>	<b>839</b>

**BOARD OF VETERANS' APPEALS  
OVERALL REPRESENTATION  
FY 1994**

Representation	Total Decisions		Allowed		Remanded		Denied		Other	
	No.	%	No.	%	No.	%	No.	%	No.	%
The American Legion	3,901	17.7%	656	16.8%	1773	45.4%	1208	31.0%	264	6.8%
AMVETS	797	3.6%	123	15.4%	448	56.2%	186	23.3%	40	5.0%
American Red Cross	182	0.8%	32	17.6%	89	48.9%	45	24.7%	16	8.8%
Disabled American Veterans	8,710	39.5%	1629	18.7%	4237	48.6%	2378	27.3%	466	5.4%
Jewish War Veterans	36	0.2%	4	11.1%	19	52.8%	12	33.3%		2.8%
Military Order of the Purple Heart	303	1.4%	62	20.5%	140	46.2%	84	27.7%	17	5.6%
Paralyzed Veterans of America	792	3.6%	165	20.8%	415	52.4%	175	22.1%	37	4.7%
Veterans of Foreign Wars	2,310	10.5%	371	16.1%	1115	48.3%	670	29.0%	154	6.7%
Vietnam Veterans of America	115	0.5%	24	20.9%	71	61.7%	13	11.3%	7	6.1%
State Service Organizations	1,737	7.9%	295	17.0%	808	46.5%	512	29.5%	122	7.0%
Attorneys	861	3.9%	146	17.0%	508	59.0%	166	19.3%	41	4.8%
Agents	12	0.1%	1	8.3%	9	75.0%	1	8.3%		8.3%
Other Representation	305	1.4%	63	20.7%	142	46.6%	75	24.6%	25	8.2%
No Representation	1,984	9.0%	291	14.7%	868	43.8%	669	33.7%	156	7.9%
<b>TOTALS</b>	<b>22,045</b>	<b>100.0%</b>	<b>3,862</b>	<b>7.5%</b>	<b>10,642</b>	<b>48.3%</b>	<b>6,194</b>	<b>28.1%</b>	<b>1347</b>	<b>6.1%</b>

## BVA Decisions

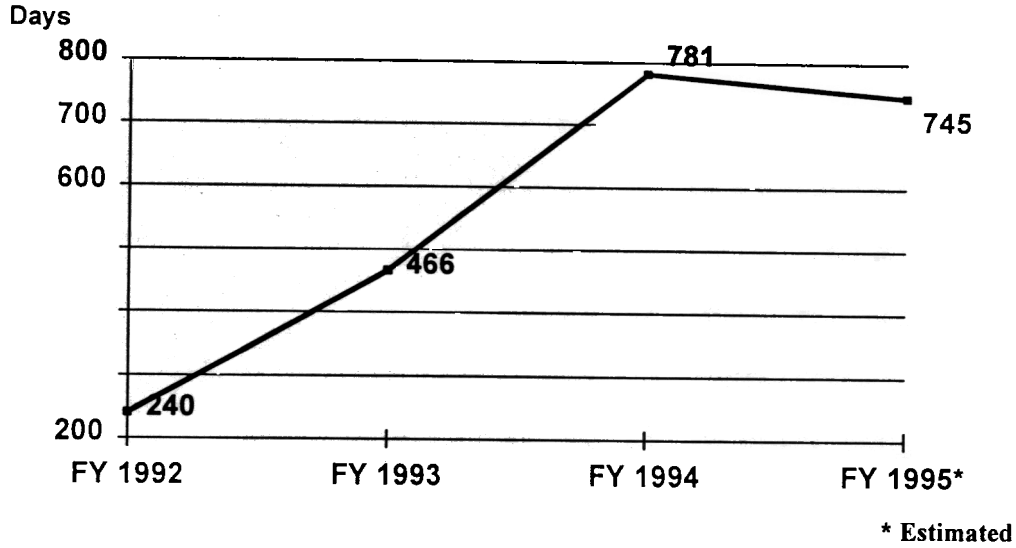
<b>FY</b>	<b>Decisions</b>	<b>Allowed</b>	<b>Remanded</b>	<b>Denied</b>	<b>Other</b>
<b>1992</b>	<b>33,483</b>	<b>15.7%</b>	<b>50.5%</b>	<b>32.7%</b>	<b>1.1%</b>
<b>1993</b>	<b>26,400</b>	<b>16.9%</b>	<b>44.0%</b>	<b>36.9%</b>	<b>2.2%</b>
<b>1994</b>	<b>22,045</b>	<b>17.5%</b>	<b>48.3%</b>	<b>28.1%</b>	<b>6.1%</b>

## BVA Operating Statistics

	<u><b>FY 1992</b></u>	<u><b>FY 1993</b></u>	<u><b>FY 1994</b></u>	<u><b>Estimated FY 1995*</b></u>
Decisions	33,483	26,400	22,045	28,000
Appeals Received	38,229	38,147	35,465	38,000
Appeals Pending	21,981	33,728	47,148	57,148
Response Time	240	466	781	745
FTE	411	441	442	449
Decisions per FTE	81.5	59.9	49.9	62.4
Cost per Decision	\$684	\$1,046	\$1,127	\$1,035 <sub>1</sub>
Hearings - VACO	1,394	1,172	689 <sup>1</sup>	
Hearings - Field	1,258	3,533	1,996 <sup>1</sup>	

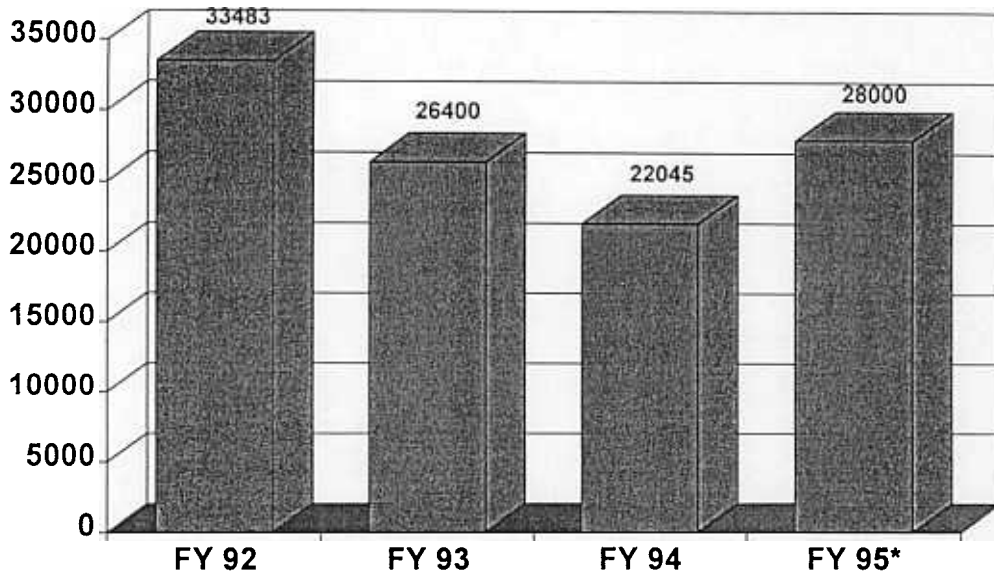
<sup>1</sup> Hearings have been suspended since May 1994 in order to conduct hearings at a time proximate to the time an appeal is actually considered by the Board. The scheduling of hearings will resume in early FY 1995.

## BVA Response Time, FY 92 - FY 95



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

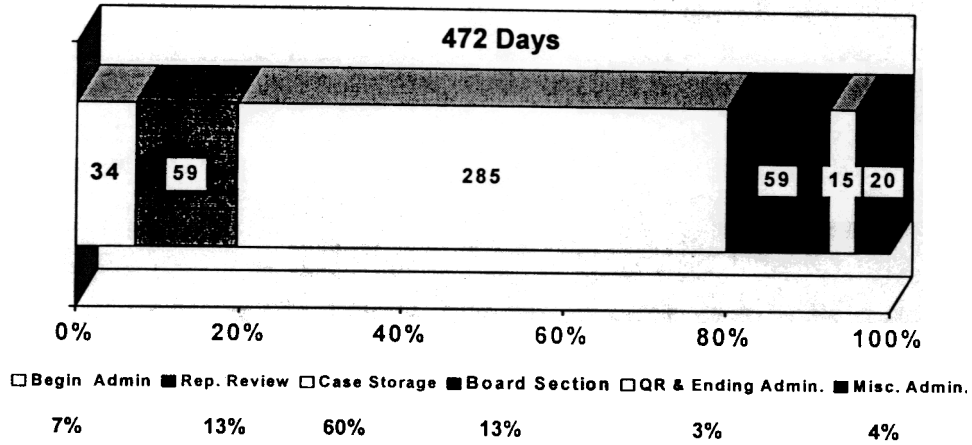
## Number of Decisions, FY 92 - FY 95



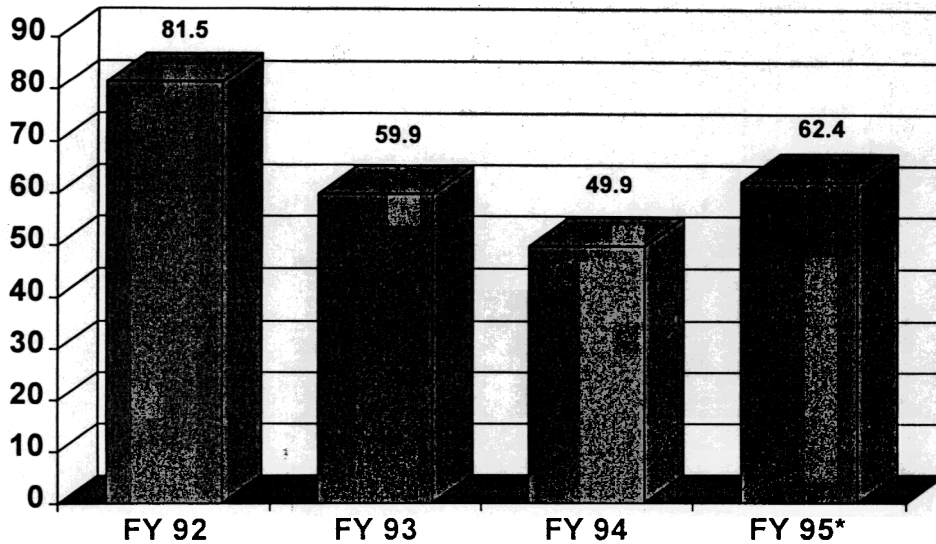
\* Estimated (FY 95 figure is based on single-member decisions implemented July 1994)

## Estimated Processing Time Breakdown

Average Processing Time for Appeals Decided in September 1994



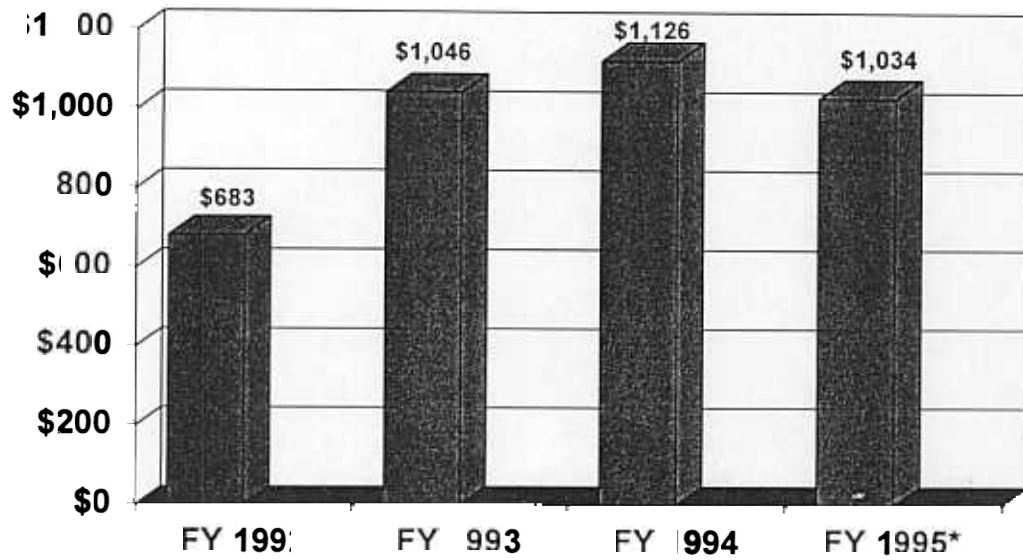
## Decisions per FTE, FY 92 - FY 95



\* Estimated (FY 95 figure is based on single-member decisions implemented July 1994)



## Cost Per Decision, FY 92 - FY 95



Estimated

## 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):

Number of cases appealed to BVA during FY 1994: 18,067\*

Number of cases pending before BVA at the start of FY 1994: 33,728

Number of cases pending before BVA at the end of FY 1994: 29,750\*

Number of cases filed during each of the 36 months preceding FY 1995:

<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 94</u>	<u>FY 93</u>	<u>FY 92</u>	<u>FY 94</u>	<u>FY 93</u>	<u>FY 92</u>
October	2,457	3,360	3,665	4,673	5,386	3,694
November	3,114	2,951	3,255	5,098	5,416	6,638
December	3,010	2,956	3,233	5,167	5,421	6,210
January	2,393	2,720	3,188	5,065	4,567	6,474
February	1,638	3,074	3,360	4,754	4,557	5,777
March	934	3,766	3,652	6,113	6,457	6,472
April	627	2,927	2,870	4,670	5,715	5,978
May	450	2,766	2,650	5,229	5,573	5,506
June	697	3,090	2,857	4,703	5,635	5,900
July	989	3,064	3,335	4,484	5,305	5,939
August	858	3,882	3,451	6,291	6,109	5,525
September	900	3,591	2,713	5,566	5,535	5,815
<b>FY Total</b>	<b>*18,067</b>	<b>38,147</b>	<b>38,229</b>	<b>61,813</b>	<b>65,676</b>	<b>69,928</b>

\*Includes only appeals physically received at the Board. Due to the large number of cases already at the Board awaiting review, claims folders other than returned remands have not been transferred from regional offices to the Board since February 1994. In the future, an appeal will be transferred to the Board when the Board is ready to begin its active review of the associated case.

(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	70 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	59 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	244 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	359 days
Average Remand Time Factor	Field Station	107 days

(E) Number of members of the Board at the end of FY 1994:	57 members
Number of professional, administrative, stenographic, clerical, and other personnel employed by the Board at the end of FY 1994:	427 employees
TOTAL:	425.4 FTE
Number of acting members of the Board during FY 1994:	11
Number of acting members between July 1 - September 30:	6
Number of cases in which each such member participated since the initiation of single-member decisions on July 1, 1994:	425 cases

## II. 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):

Estimated number of cases that will be appealed to the BVA:	
Fiscal year 1995:	38,000
Fiscal year 1996:	38,000

(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. § 7101(a):

(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. For response time computation purposes, the term "appeals pending before the Board" includes appeals that have been certified for BVA review but are being held in the field pending BVA action. 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 1995 is computed as follows:

Estimated 28,000 Decisions in FY 1995 ÷ 365 Days = 76.71 Decisions per Day

57,148 Appeals Pending before the BVA (end of FY 1995) ÷ 76.71 Decisions per Day = 745 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 1996, is 745 days for FY 1995 and 687 days for FY 1996. These response time projections are contingent upon the appeal receipts estimates for FY 1995 and FY 1996 shown in paragraph II(A), 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. Because decisions of the Court are effective immediately upon issuance, precedential decisions may require that the Board re-adjudicate a large number of cases already adjudicated, but not yet dispatched from the Board. Compared to FY 1994, when personal hearings were suspended for the last five months of the year, the amount of time Board members spend deliberating cases will, necessarily, be reduced as a result of the resumption of personal hearings in FY 1995.

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 1993. The remand rate in FY 1994 was 48 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 re-adjudication. 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) resumption of hearings, suspended since May 1994, will diminish the time that 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; and, (5) the Board will continue to receive cases remanded for re-adjudication from the Court of Veterans Appeals. 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, single Board member decision authority and other administrative and legislative initiatives will, in time, ameliorate the decline in BVA decision productivity and average response time. It is unlikely, however, that the average response time realized prior to judicial review will be regained.