

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

VIETNAM VETERANS OF AMERICA	:	
8605 Cameron Street, Suite 400	:	
Silver Spring, MD 20910	:	
	:	
and	:	
	:	
VETERANS OF MODERN WARFARE	:	
#33107 PO Box 96503	:	
Washington, D.C. 20090	:	
	:	
Plaintiffs,	:	Civil Action No.:
	:	
v.	:	
JAMES B. PEAKE, M.D., in his official	:	
capacity as SECRETARY OF THE	:	
DEPARTMENT OF VETERANS AFFAIRS	:	
810 Vermont Avenue, N.W.	:	
Washington, D.C. 20420	:	
	:	
	:	
Defendant.	:	

COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiffs bring this action for declaratory and injunctive relief to compel the United States Department of Veterans Affairs (“VA”) to make timely determinations on requests for disability benefits by veterans of the Armed Forces. Disability benefits are monthly cash payments paid by the VA to veterans who suffer from service-connected disabilities resulting from injuries or diseases incurred or aggravated while on active military duty. The injuries or diseases can be physical (such as traumatic brain injuries) or emotional (such as Post Traumatic Stress Disorder or depression). The VA is, and long has been, failing to decide claims for veteran’s benefits and to resolve appeals of those claims on anything even approaching a timely basis.

2. Service-connected injuries can seriously interfere with the quality of life and preclude a veteran from obtaining employment upon returning to civilian life. During the lengthy time that a veteran's claim for disability benefits is pending, however, the veteran does not receive support, even on a partial or interim basis, from the VA. Many claimants are incapacitated, and without independent means for financial support or private medical assistance. As one court has already noted, it is "beyond doubt that disability benefits are critical to many veterans and *any delay* in receiving these benefits can result in substantial and severe adverse consequences[.]" Thousands of veterans die each year before the VA reaches final decisions on their claims. The VA's failure to provide timely benefits decisions often leads to financial crises, homelessness, addiction, and suicide. As one judge has already noted, "given the dire consequences many of these veterans face without timely receipt of benefits . . . these injuries are anything but conjectural or hypothetical. All of these tragedies represent preventable and irreparable harms." Although the VA is required by law to award benefits retroactively upon final adjudication, that provides no comfort to those who have lost their jobs, their home, their family or their life during the time that their claim has been languishing in the VA's system.

3. The time that the VA takes to adjudicate claims is staggering. For example, while the VA itself concedes that it takes at least 182 days to process initial claims – in itself an unacceptably long delay – the actual time necessary to process the average claim is, on information and belief, probably over a year. In addition, it takes almost four and one-half *more* years, on average, for a veteran to appeal an incorrect decision (which is found to be the case in 60 percent of the appealed decisions). By any measure, these delays cannot possibly be considered "timely" actions by the VA.

4. The VA's failure to meet its obligations to our veterans is a longstanding and steadily worsening problem. Multiple reports by the Government Accountability Office ("GAO") have repeatedly called upon the VA to eliminate the unacceptable delays in its benefits system. The VA has not only ignored those mandates and failed to reduce the delays, but has allowed the delays to grow.

5. Moreover, based on current projections, the situation is likely to worsen if the VA's current practices are not changed. The VA will face a significant increase in the volume of new claims in the next few years, as more servicemembers leave the Armed Forces following overseas deployments. Absent a fundamental change in the VA's system, the expected surge in demand will only exacerbate the system's shortcomings.

6. The VA's extensive delays in acting on requests for benefits are not due to lack of congressional funding. The VA's Chief Financial Officer recently testified that the VA is not currently facing a budget crisis and has adequate funds to "meet the mission requirements." At least \$500 million was carried over from the FY 2006 VA budget to the FY 2007 budget, and at the end of FY 2007, \$1.3 billion was carried over to the FY 2008 budget.

7. The VA has publicly acknowledged that its benefits processes have failed veterans and must be improved. The failures are systemic and pervasive: The VA has ignored Congress's statutory mandate that the VA resolve appeals in a timely manner. *See* 38 U.S.C. § 5109B. The VA has failed to implement Congress's order, contained in the Veteran's Disability Improvement Act of 1994, to speed up the appeals process. The VA has violated the Administrative Procedure Act requirement that all federal administrative agencies act without "unreasonable delay." The VA has not taken corrective action necessary to fix this problem, despite acknowledging the deficiencies of its current system. The VA has failed to implement

the specific reorganizations that the GAO has recommended to streamline the VA's claims system.

8. The lengthy and burdensome delays in the VA's claims system, combined with the lack of support to each veteran during the period when that veteran's claim for disability is pending, deprives veterans of their constitutional due process rights.

9. Plaintiffs bring this action seeking declaratory and injunctive relief to require the VA to provide, in a timely manner, the disability benefits to which this country's veterans are entitled, and, if the VA continues to fail to ensure timely action even in the face of a court injunction, to impose additional equitable injunctive relief in the form of interim benefits to those veterans facing unacceptably long delays.

JURISDICTION

10. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, which provides for original jurisdiction of all civil actions arising under the laws of the United States. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et. seq.*; under 38 U.S.C. §§ 5109B and 7112; and under the Fifth Amendment of the U.S. Constitution.

11. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure.

PARTIES

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Defendant performs a significant amount of his official duties in, and therefore resides in, the District of Columbia.

13. The Vietnam Veterans of America ("VVA") was federally chartered by Congress in 1986. The VVA is a non-profit organization dedicated to "promot[ing] the social welfare (including educational, economic, social, physical, and cultural improvement) of Vietnam-era

veterans and other veterans in the United States by encouraging their growth, development, readjustment, self-respect, self-confidence and usefulness.” The VVA supports, in addition to veterans of the Vietnam War, veterans of all U.S. wars and conflicts. It has more than 58,000 members in 686 chapters.

14. The Veterans of Modern Warfare (“VMW”) is a non-profit organization dedicated to serving veterans of all wars since the First Gulf War. The VMW helps veterans obtain benefits and provides information and education regarding benefits. VMW’s membership includes current active duty, National Guard, reserve and Coast Guard servicemembers. Any veteran of the U.S. Armed Forces who has served since August 2, 1990, is eligible for membership in the VMW. VMW has nearly 2,000 members.

15. The VVA and VMW bring this action on their own behalf and as representatives of their members and constituencies. Because of the nature of the claims alleged in this Complaint and the nature of the relief sought, the individual participation of each affected member or constituent of the VVA and VMW is not indispensable to the proper resolution of this lawsuit. The VVA and the VMW are collectively referred to as the “Plaintiffs” throughout this Complaint.

16. To the extent any of the facts presented herein apply to individuals rather than to veterans as a whole, they are intended for illustrative purposes only. Nothing in this Complaint is intended as, nor should it be construed as, an attempt to obtain review of an individual determination by the VA or its appellate system. Moreover, nothing in this Complaint is intended as, nor should it be construed as, an attempt to obtain review of any decision relating to benefits sought by any veteran, nor to challenge the validity of any benefits decision of the Secretary of the VA.

17. Nothing herein is intended as, nor should it be construed as, a prayer or request for money damages. Plaintiffs seek only declaratory and injunctive relief.

18. Defendant James B. Peake, M.D., is the Secretary of the Department of Veterans Affairs. He is named solely in his official capacity as head of the VA. The VA is comprised of three major organizations: the Veterans Health Administration (“VHA”), the Veterans Benefits Administration (“VBA”), and the National Cemetery Administration (“NCA”). Only the VHA and the VBA are relevant to this lawsuit. The Department of Veterans Affairs, the VHA, and the VBA are referred to collectively in this Complaint as the VA for the sake of clarity and simplicity.

FACTUAL ALLEGATIONS

A. The VA’s Claims System Has Failed To Manage Benefits Claims Properly For Years

19. For many years, Congress and veterans service organizations have expressed grave concern over the VA’s disability claims process, and in particular the delays in the award of benefits. Indeed, since 2000, the GAO has found four times that the VA’s claims process was dysfunctional.

20. In 2000—before the current global war on terrorism had even commenced—the GAO had already identified unacceptably long processing times for initial disability claims and large backlogs of pending claims as systemic problems at the VA.

21. In 2003, the GAO found that fundamental changes in the VA’s disability claims processing system were necessary for the VA to resolve disability claims promptly.

22. The GAO reiterated this concern in 2005, noting that modernizing the VA’s disability compensation programs was a high priority because of “long-standing problems with lengthy claims processing times.”

23. Finally, in 2007 the GAO again noted the need for fundamental changes to the VA's disability compensation program. In a March 13, 2007, report, the GAO stated that the VA is "poorly positioned to provide meaningful and timely support for Americans with disabilities" and that the VA disability benefits program, specifically, is "in urgent need of attention and transformation." The report emphasized the need for the VA to speed up its adjudication of claims and to reduce its lengthy backlogs.

24. Despite the GAO's admonitions, the delays in the VA's claims processing system have only grown worse. The Director of the Compensation and Pension Service within the VA, Bradley Mayes, has admitted that the VA has not "made a concerted effort to figure out what's causing" these delays.

25. Although the VA's Undersecretary has conceded in testimony that veterans' disability benefits are an "entitlement" of the nation's veterans, the VA routinely and as a matter of policy and practice fails to issue timely final decisions on veterans' requests for disability benefits. The net effect of this failure is unacceptably long delays for our veterans, and a staggering backlog of claims within the VA system. As one court has already noted, it is "beyond doubt that disability benefits are critical to many veterans and *any delay* in receiving these benefits can result in substantial and severe adverse consequences[.]"

26. The overall inadequacy of the VA's performance can be readily gauged by comparison to private health care and services industries, which typically process claims in just under three months, *including* the time necessary for appeals. These industries collectively provide this processing speed on an average volume of *thirty billion* claims per year.

27. In contrast, the VA typically takes at least six months, and, on information and belief, probably over a year, to reach even an initial decision without regard to necessary appeals. As described below, if an appeal is necessary, the delays go from unacceptable to unbelievable.

B. The Disability Claims Process

28. There are approximately 25 million veterans of the U.S. Armed Forces alive today. Of those, between 5 and 8 million are enrolled in the VA's system, and approximately 3.4 million veterans receive benefits.

29. Approximately 1.7 million members of the Armed Forces have served in Iraq or Afghanistan since October 2001. A significant number of these veterans return disabled.

30. Veterans seeking disability benefits file claims in one of the VBA's 57 Regional Offices around the country. In fiscal year 2007, the VA received 838,141 claims for veterans' benefits. The vast majority of these claims are meritorious—approximately 88 percent of VA claims ultimately result in a determination of some form of disability status.

31. When a Regional Office denies a veteran's claim for disability benefits, the veteran's first recourse is to the Board of Veterans' Appeals ("BVA"). An adverse decision by the BVA may then be appealed to the Court of Appeals for Veterans Claims ("CAVC"), which has exclusive jurisdiction to review the BVA's decisions. Adverse decisions of the CAVC may be appealed to the United States Court of Appeals for the Federal Circuit, and then to the United States Supreme Court.

C. The Delays In The VA's Disability Benefits Process Are Unacceptable And Show No Sign Of Improving

1. The Regional Office Decision (Average Time: 182-365+ days)

32. At the end of fiscal year 2007, the VA's own statistics acknowledged that it took an average of 182 days for the VA to issue a decision on an initial claim for benefits. This is a

dramatic increase over the 111 day average in fiscal year 2003, and occurs at a time when new types of combat injuries have made the need for the prompt processing of benefits decisions even more critical.

33. Even that statistic is artificially understated by the VA. The VA has admitted that its own numbers underrepresent substantially the time it actually takes to reach an initial decision on a disability claim, which is, on information and belief, over a year. For example, when a veteran commences his or her claim for disability benefits while still on active duty, the VA's statistics completely ignore the delays that occur in the VA's system prior to that veteran's actual discharge. In the hypothetical case of a veteran who had requested benefits six months prior to being discharged and had the claim pending for a year prior to receiving a determination, the VA's statistics would suggest a six month processing period, rather than the full year that it actually took to reach a determination.

2. *Appeal to the BVA (Average Time: 1419 Days)*

34. Veterans required to appeal incorrect decisions to the BVA face another series of procedural hurdles, further delaying an already unacceptably long process. The relevant stages are described below.

35. A veteran who disagrees with a Regional Office's decision must formally notify the regional office with a Notice of Disagreement. The veteran may then either pursue a secondary review with a Decision Review Officer or proceed with a traditional appeal. To pursue a traditional appeal, the veteran must first obtain from the VA a Statement of the Case, which provides a more detailed explanation of the Regional Office's decision.

36. For those veterans pursuing a traditional appeal, the VA, as of March 2008, took an average of 261 days to provide the Statement of the Case; some veterans have waited as long

as *1,000 days*—almost three years—for the Regional Offices even to issue a Statement of the Case.

37. After receiving a Statement of the Case, the veteran can initiate an appeal. That process typically takes 43 days. The Regional Office must then certify the appeal to the BVA. While certifying the appeal is strictly a routine, ministerial act by the Regional Office, it takes an average of 573 days. Some Regional Offices have taken as long as 1,000 days to certify an appeal to the BVA.

38. After the BVA receives an initial appeal, it takes an average of 336 days—almost a year—to issue a decision on that initial appeal. At this point, the average veteran has spent approximately *4.4 years* in the claims process before obtaining a ruling from the BVA on his or her request for disability benefits. This figure takes into account the (understated) 182-day average to obtain an initial decision from a Regional Office, as well as 1,419 combined days to secure the Statement of the Case and reach a decision after the veteran files a Notice of Disagreement with the initial Regional Office ruling.

39. These delays are staggering and unacceptable. Unfortunately, however, these figures only reflect delays associated with the initial appeal. For a large percentage of claimants, the appeal process is even longer.

3. Appeal after BVA Remand (Average Time: 648 days)

40. The BVA modifies a Regional Office's disposition of a veteran's appealed claim 60 percent of the time; 20 percent of the time the BVA grants a veteran's appeal outright, while 40 percent of the time the BVA remands appeals to the Regional Office to begin the process anew. By the VA's own account, a significant number of the veterans whose appeals have been delayed for years have meritorious claims and ultimately receive benefits.

41. For the period between January 1, 2008 through March 31, 2008, in cases remanded by the BVA the VA has determined that Regional Offices made errors in up to 44 percent of the cases *before they were certified* to the BVA for appeal. This means that up to 44 percent of the remands were avoidable, and never would have been required to be appealed if the VA had exercised reasonable care in its initial claims process.

42. These remands, often unnecessary, deeply aggravate the problems of the VA's claims system. A BVA remand to a Regional Office typically adds more than a year to the appellate process. Mr. James Terry, the Chairman of the BVA, has acknowledged that the "entire system is hurt by remands."

43. Remands frequently result in a veteran's claim bouncing back and forth between the BVA and the Regional Office multiple times. Approximately 75 percent of cases remanded to Regional Offices subsequently return to the BVA for a second appeal. More than a quarter of cases remanded by the BVA are remanded a second time after a second appeal. On average, it takes 499 days for a claim remanded by the BVA to be granted, withdrawn, or returned to the BVA for a second appeal. Cases involving post-traumatic stress disorder ("PTSD") claims – as discussed below, a common and acute problem among current veterans returning from war – take even longer.

44. The average time the BVA takes to issue a second decision on a case that has been remanded to a Regional Office and appealed a second time is 149 days. In addition, the process of repeated remand and re-appeal not only increases the backlog of cases at the first level of appeal, but it effectively prevents the veteran from receiving timely appellate review at the next appellate level, the Court of Appeals for Veterans' Claims.

45. The BVA is responding to its increasing caseload by denying more appeals. Between fiscal year 2004 and fiscal year 2007, the BVA has nearly doubled the number of veterans appeals that it denies. There is no empirical data that would support the notion that twice as many appeals lacked merit during this comparative period.

4. *Appeal of BVA Decision to Court of Appeals for Veterans' Claims*
(Average Time: 365 days)

46. If a veteran's claim is denied by the BVA, that veteran then faces yet another round of delay in any appeal to the Court of Appeals for Veterans' Claims (the "CAVC"). The CAVC receives 300 to 400 new cases every month, making it one of the busiest federal appellate courts in the United States. In 2007, the CAVC decided 4,644 cases, 3,211 of them on the merits. In 64 percent of the cases – almost two-thirds – the CAVC either remanded a claim to the BVA or reversed the BVA outright. The workload for a CAVC judge is, on average, double that of other Article III judges in the federal appellate system. As a result, the CAVC frequently lacks the time to provide meaningful guidance or to explain important matters of policy or precedent to the BVA or to the Regional Offices; instead, it typically remands cases to the BVA with only minimal guidance for further adjudication.

47. These delays make a mockery of Congress's admonition that remands by the CAVC are to be handled "expeditiously" so that veterans actually receive benefits they have earned. According to 38 U.S.C. § 7112, "[t]he Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims." Despite this statutory mandate, a remand from the CAVC to the BVA adds more than a year to the already lengthy appellate process.