

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

VIETNAM VETERANS OF AMERICA	:	
	:	
and	:	
	:	
VETERANS OF MODERN WARFARE	:	
	:	
Plaintiffs,	:	Civil Action No.:
	:	
v.	:	
JAMES B. PEAKE, M.D., in his official	:	
capacity as SECRETARY OF THE	:	
DEPARTMENT OF VETERANS AFFAIRS	:	
	:	
Defendant.	:	

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

For many years, the United States Department of Veterans Affairs (“VA”) has failed to award disability benefits promptly to veterans who earned them. By the VA’s own estimates, it typically takes six months to reach even an initial decision on a disability claim; the actual delay is probably at least a year.<sup>1</sup> Over half the time, the VA’s initial decision, when appealed, is deemed wrong.<sup>2</sup> Appeals of those initial decisions take, *on average*, more than four years.<sup>3</sup> In a telling comparison, the private health care and services industries – which together process about 30 billion claims per year – typically process claims in under three months, *including* appeals.<sup>4</sup>

These unconscionable delays long ago became a national embarrassment. For example, Congress’s Government Accountability Office (“GAO”) has found the VA’s system dysfunctional on *four* separate occasions. 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.<sup>5</sup> In 2003, the GAO examined the VA’s claims processing system and found that it could not possibly resolve claims promptly without fundamental changes.<sup>6</sup> The GAO reiterated this concern in 2005, noting that modernizing the VA’s disability compensation programs had

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<sup>1</sup> Declaration of John P. Dorrity (hereinafter “Dorrity Dec.”) at ¶ 17.

<sup>2</sup> *Veterans for Common Sense, et al. v. Peake, et al.*, 563 F. Supp.2d 1049, 1075 (N.D. Cal. 2008).

<sup>3</sup> *Id.* at 1074.

<sup>4</sup> Linda Bilmes, *Soldiers Returning From Iraq and Afghanistan: The Long Term Costs of Providing Veterans Medical Care and Disability Benefits*, Harvard University John F. Kennedy School of Government, Faculty Research Working Paper RWP07-01 (Jan. 2007) at 7.

<sup>5</sup> Cynthia A. Bascetta, *Veterans’ Benefits: Promising Claims-Processing Practices Need to Be Evaluated*, GAO-HEHS-00-65, April 7, 2000, at 3.

<sup>6</sup> Cynthia A. Bascetta, *Veterans’ Benefits: Improvements Needed in the Reporting and Use of Data on the Accuracy of Disability Claims Decisions*, GAO-03-1045, Sept. 30, 2003, at 11.

become a high priority because of “large numbers of pending claims and lengthy processing times.”<sup>7</sup> Again in 2007, the GAO found the disability-benefits program “in urgent need of attention and transformation” because it was unable, as constituted, to provide any “meaningful and timely support for [veterans] with disabilities.”<sup>8</sup>

These delays have had tragic consequences for our veterans. As another court has 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.”<sup>9</sup>

Despite the critical importance of these benefits to our veterans, the VA has failed to act. The VA’s Director of the Compensation and Pension Service admits that the VA has not even “made a concerted effort to figure out what’s causing” these delays, much less made any effort to fix them.<sup>10</sup>

In the face of the VA’s indifference, delays just get longer. The 182-day average delay that the VA acknowledges for an initial decision in 2007<sup>11</sup> is 70% longer than the delay just four years earlier, when, according to the VA’s statistics, decisions were made in an average of 111 days.<sup>12</sup> A process that begins with an initial adjudication, which typically takes a year,<sup>13</sup> goes on for years once the lengthy appeals process is added.

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<sup>7</sup> Cynthia A. Bascetta, *Veterans Disability Benefits: Claims Processing Problems Persist and Major Performance Improvements May Be Difficult*, GAO-05-749T, May 26, 2005, Introduction.

<sup>8</sup> Daniel Bertoni, *Veterans Disability Benefits: Processing of Claims Continues to Present Challenges*, GAO-07-562T, Mar. 13, 2007, at 7-8.

<sup>9</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1075 (emphasis added). It should be noted that while the critical facts found by the court in that case apply precisely the same here, the relief requested – and therefore the potential resolution – differs dramatically.

<sup>10</sup> *Id.* at 1074.

<sup>11</sup> *Id.* at 1073.

<sup>12</sup> Bertoni, GAO-07-562T, at 4.

<sup>13</sup> Dorrity Dec. at ¶ 14.

Absent court intervention, the VA's staggering systemic failures will not be addressed. Additional veterans in need of benefits – many suffering the effects of multiple tours of duty in hostile war zones – enter the system every day. There are currently about 25 million living U.S. veterans.<sup>14</sup> Between 5 and 8 million of those veterans are enrolled in the VA's system; approximately 3.4 million veterans receive benefits.<sup>15</sup> Since October 2001, over 1.6 million members of the Armed Forces have served in Iraq or Afghanistan.<sup>16</sup> As of December 31, 2007, more than 800,000 veterans of these conflicts were eligible for assistance from the VA.<sup>17</sup> That number continues to grow.

Our veterans deserve better than a claims and appeals process fraught with delay. More importantly, as a matter of law, veterans are entitled to a claims adjudication process that moves swiftly. For that to happen, this Court should order the VA to do its job, and to do it now. The Court also needs to make clear to the VA – now, and not after the VA fails to act – that if it cannot do its job by adjudicating claims swiftly, then an equitable remedy will be fashioned that accords some interim relief to veterans in desperate need of their disability benefits.

### **FACTUAL BACKGROUND**

#### **I. THE VA'S CLAIMS AND APPEAL PROCESS IS FRAUGHT WITH UNACCEPTABLE DELAY**

To help understand the systemic problems that plague the VA, we will describe the process. At virtually every step, a veteran is forced to make a Hobson's choice: accept less than what they are entitled to receive to escape from an unwieldy bureaucracy, or appeal within the

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<sup>14</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1061.

<sup>15</sup> *Id.* at 1061, 1069.

<sup>16</sup> *Id.* at 1062.

<sup>17</sup> *Id.*

VA system to attempt to get what they deserve, understanding that such appeal may take years to reach a final adjudication.

### **A. Initiating a Claim**

In order to access their VA benefits, veterans file claims in one of the VA's 57 Regional Offices around the country. In fiscal year 2007, the VA received 838,141 claims for veterans' benefits.<sup>18</sup> The VA's own (understated) figures show that it takes a Regional Office an average of 182 days to make an initial decision on a claim. While the vast majority of these claims are meritorious – approximately 88% of VA claims ultimately result in some form of disability award<sup>19</sup> – the Regional Offices have a dismal record of getting it right the first time, forcing an already desperate and frustrated veteran to appeal the wrongful denial of benefits.<sup>20</sup>

### **B. Appealing a Claim**

If a veteran decides to appeal an incorrect decision to the Board of Veterans' Appeals ("BVA"), she faces a series of procedural hurdles, all further delaying an already unacceptably long process. Additionally, veterans face numerous strict deadlines, any of which, if missed, can result in forfeiture of that veteran's appeal.<sup>21</sup> Ironically, the VA itself has no deadlines for administering the claims process, and faces no consequences if it takes an excessive amount of time to adjudicate a claim.<sup>22</sup>

When a Regional Office denies a veteran the benefits she seeks, the veteran's first recourse is to the BVA. But before she can even ask the BVA to hear her appeal, the veteran

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<sup>18</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1070.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1075.

<sup>21</sup> *Id.* at 1073.

<sup>22</sup> *Id.*

must first formally file a Notice of Disagreement.<sup>23</sup> The veteran must then wait until the Regional Office provides a Statement of the Case, which is a more detailed explanation of the incorrect decision. As of March 2008, the VA took an average of 261 days to provide the Statement of the Case. Some veterans have waited as long as *1,000 days*.<sup>24</sup>

The Regional Office must then certify the appeal to the BVA. While this should be simply a routine and ministerial step, it takes an *average of 573 days* and sometimes as long as *1,000 days* before it happens.<sup>25</sup>

After the BVA receives the appeal, it takes an average of 336 days – nearly a year – to issue a decision.<sup>26</sup> Thus, by the time the BVA issues a decision on an initial appeal, the average veteran has spent nearly *four and one-half years* in the claims process.<sup>27</sup>

These figures only reflect the delays associated with the initial appeal. On appealed matters, the BVA reverses the Regional Office outright 20% of the time, and remands 40% of appeals to the Regional Offices.<sup>28</sup> The Regional Office often gets it wrong again, forcing the veteran to start the entire appeals process all over. Because the BVA has a policy of deciding only one issue on appeal at a time, veterans' claims – which often contain several issues on appeal – may bounce between the BVA and the Regional Office many times over. Approximately 75% of cases remanded to Regional Offices subsequently return to the BVA for a

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<sup>23</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1072.

<sup>24</sup> *Id.* at 1073.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1074.

<sup>28</sup> *Id.* at 1075.

second appeal.<sup>29</sup> 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.<sup>30</sup><sup>31</sup>

### **C. Unnecessary Remands**

Much of the delay constitutes avoidable error by the Regional Offices. As previously noted, the BVA modifies 60% of the appealed Regional Office decisions: 20% percent of the veterans' requests for relief are granted outright, and 40% are remanded to the Regional Offices for correction.<sup>32</sup> Between 19% and 44% of the cases certified for appeal by the Regional Offices are "avoidable remands" – those defined by the VA as an appeal in which the Regional Office made an error prior to certifying the appeal.<sup>33</sup> This means that up to 44% of the appeals would never have occurred if the Regional Offices had exercised reasonable care in making the initial claims decision.<sup>34</sup>

The VA maintains a statistic called "Appeals Resolution Time," which measures the average time from a veteran filing an Notice of Disagreement until the resolution of the initial appeal. Between April 2005 and February 2008, that time *increased* from 599 days to 671 days.<sup>35</sup> That statistic under-reports appeal delays because it includes claims that are "resolved"

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<sup>29</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1075.

<sup>30</sup> *Id.* Cases involving PTSD claims fare even worse, taking on average, 564 days on remand.

<sup>31</sup> Veterans with enough stamina may appeal incorrect decisions by the BVA to the Court of Appeals for Veterans Claims, then to the United States Court of Appeals for the Federal Circuit, and, ultimately, to the United States Supreme Court.

<sup>32</sup> *Veterans for Common Sense*, 563 F. Supp.2d at 1075.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1074.

