

General Operating Expenses

The Department of Veterans Affairs (VA) administers veterans' benefit programs through its central office in Washington, DC, and a nationwide system of regional and benefit offices. Responsibility for the various benefit programs is divided among five different services within the Veterans Benefits Administration (VBA): Compensation and Pension (C&P), Vocational Rehabilitation and Employment (VR&E), Education, Loan Guaranty, and Insurance. Under the direction and control of the Under Secretary for Benefits and various deputies, the program directors set policy and oversee their programs from VA's Central Office. The field offices receive benefit applications, determine entitlement, and authorize benefit payments and awards.

The Office of the Secretary of Veterans Affairs and the assistant secretaries provide departmental management and administrative support. These offices along with the Office of General Counsel and the Board of Veterans' Appeals are the major activities under the General Administration portion of the General Operating Expenses (GOE) appropriation. The GOE appropriation funds the benefits delivery system—VBA and its constituent line, staff, and support functions—and the functions under General Administration.

The IBSVOs make the following recommendations for improving VA performance and service to veterans.

General Operating Expense Issues

VETERANS BENEFITS ADMINISTRATION

VBA Management

Line Authority over Field Offices:

VA program directors should have line authority over benefits' administration in the field offices.

The Veterans Benefits Administration (VBA) has introduced several new initiatives to improve its claims processes. Besides fundamental reorganization of claims processing methods to achieve increased efficiencies, the initiatives include several measures to improve quality in claims decisions. Among these measures are better quality assurance and accountability for technically correct decisions.

VBA's current management structure presents a serious obstacle to enforcement of accountability, however, because program directors lack line authority over those who make claims decisions. Of VBA management, program directors have the most hands-on experience with, and intimate knowledge of, their benefit lines and have the most direct involvement in day-to-day monitoring of field office compliance. Program directors are therefore in the best position to enforce quality standards and program policies within their respective benefit programs. While higher level VBA managers are properly positioned to direct operational aspects of field offices, they are indirectly involved in the substantive elements of the benefit programs. To enforce accountability for technical accuracy and to ensure uniformity in claims decisions, program directors logically should have authority over the decision-making process and should be able to order remedial measures when variances are identified.

In its August 1997 report to Congress, the National Academy of Public Administration (NAPA) attributed

much of VBA's problems to unclear lines of accountability. NAPA found that a sense of powerlessness to take action permeates the VBA. In turn, field personnel perceived VBA's Central Office staff as incapable of taking firm action. NAPA said that a number of executives interviewed by its study team indicated VBA executives have difficulty giving each other bad news or disciplining one another. NAPA concluded that until the VBA is willing to deal with this conflict and modify its decentralized management style it will not be able to effectively analyze the variations in performance and operations existing among its regional offices. Neither will it be able to achieve a more uniform level of performance. Regarding Compensation and Pension Service (C&P) especially, NAPA concluded that the C&P director's lack of influence or authority over its field office employees would greatly hamper any efforts to implement reforms and real accountability. NAPA recommended that the Under Secretary for Benefits strengthen C&P influence over field operations and close the gaps in accountability.

Recommendation:

To make the management structure in the VBA more effective for purposes of enforcing program standards and accountability for quality, VA's Under Secretary for Benefits should give VBA's program directors line authority over VA field office directors.



Departmental Policy for Veterans' Programs

Improvements in Rulemaking:

Today's Department of Veterans Affairs is misusing its rulemaking authority for self-serving purposes and to orchestrate an insidious erosion of veterans' rights.

From America's beginnings, our citizens recognized that our Nation's very existence and future depended on a strong army and navy. They appreciated the fundamental necessity and exceptional value of military service. On the principle that those who devote part of their youth and risk their lives and health to defend their Country deserve special treatment and advantages over those who do not, our people have, through Congress, accorded veterans special honors and provided for generous benefits. Consistent with our indebtedness to veterans and our deep appreciation for their contributions and sacrifices, our citizens have charged VA with providing veterans seeking benefits with the highest level of personal service and assistance in obtaining those benefits. Every effort is to be made to help veterans apply for, and establish entitlement to, the benefits they claim; within the law, VA must endeavor to grant them the benefits they seek. For VA to create procedural impediments or substantive rules to limit veterans' rights offends the very essence and spirit of benefits for veterans and is antithetical to the intent of our grateful nation as expressed in the laws of Congress.

Congress has repeatedly stated its intent that the ultimate goal of VA's unique process is to ensure veterans receive every benefit to which they are entitled. That goal overrides agency convenience and expedience, and toward that end, the VA system must afford veterans advantages not afforded to claimants in other agencies. When enacting legislation to improve the process, Congress has frequently sought to preempt any misinterpretation of its intent that would formalize or make VA claims procedures burdensome for veterans. On these occasions, Congress has gone to great lengths to emphasize and reaffirm its intent to preserve the "pro-claimant bias," informality, and helpful nature of the process. Congress expressly stated it intends that no changes be made to the existing system except to further the goals, informality, accuracy, and fairness.

The Federal Courts have reaffirmed on many occasions the principle that laws governing veterans'

benefits are to be liberally construed in favor of veterans. It is a well-settled rule of statutory construction that ambiguities in such statutes are to be resolved in favor of veterans.

Historically, VA's regulations were drafted to reflect these benevolent goals and the special treatment and considerations to be accorded veterans seeking benefits. For example, a longstanding VA regulation begins with this declaration: "It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation." 38 C.F.R. § 3.102 (2003). In another regulation, the essence of VA policy is articulated with this statement: "Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103 (2003).

Regrettably, with its decisions immune to judicial review and VA operating in what has been described as a state of "splendid isolation" for most of the 20th century, VA adjudicators often ignored the liberal provisions of VA regulations. With the advent of judicial review, the courts began enforcing the letter and spirit of the law and these regulations. In reaction, VA began to construe the statutes as narrowly as possible to limit veterans' entitlements, and it began to rewrite its rules in ways designed to diminish veterans' rights, to make the process more burdensome and formal, and to serve for VA's own advantage, convenience, and purposes rather than to serve the interests of veterans.

Although VA's Special Regulations Rewrite Task Force has initially shown signs of adhering to VA's pro-veteran mission in its rewrite of part 3 of title 38 C.F.R.—and we hope the final product will reveal good intentions—generally, when VA writes new regulations, they no longer have the traditional pro-veteran tone. They often have a negative, restrictive focus. They appear calculated to give VA the upper hand against claimants and to impair veterans' due process

rights or access to an open claims process and benefits. Today's VA regulations are too often self-serving: They are designed for VA expedience and to incorporate VA's resistance to liberalizing legislation. Sometimes, their apparent aim is to inhibit what VA cannot prohibit. VA exploits opportunities to reinterpret statutory provisions to remove from its longstanding regulations provisions that are favorable to veterans. With aloofness, VA pays little real attention to public comments and offers flimsy rationales for brushing them aside. VA's justifications in response to public comments sometimes suggest pretext and are tenuous, specious, shallow, or as arbitrary as the text of the rules themselves. VA vigorously defends narrow or restrictive judicial interpretations of its regulations that are adverse to veterans but actively seeks to overturn judicial constructions that are more favorable to veterans than VA desires.

Outraged veterans' organizations have begun to challenge more frequently VA's regulations, but, consistent with courts' tendency to indulge Federal agencies, the results have been mixed, despite special canons of statutory construction intended to favor veterans. While veterans' organizations have had some successes in getting the most objectionable regulations invalidated, the courts have sometimes strained to defer to VA rules, and veterans' organizations have sometimes not prevailed even in exceptionally meritorious challenges. As one court noted, this practice of judicial deference "all too often is taken to mean simply that administrative agencies win any dispute involving statutory construction." *Mid-America Care Foundation v. National Labor Relations Board*, 148 F.3d 638, 642 (6th Cir. 1998). VA's awareness of these circumstances appears to embolden it in its arbitrary rulemaking.

In matters of veterans' rights, this type of agency behavior must not be tolerated. If the Secretary of Veterans Affairs is unwilling to rein in those who write

his regulations and if the courts continue to permit such behavior, Congress should act to impose special constraints and requirements upon VA's rulemaking to ensure VA carries out the will of the people to treat veterans as a special class; to ensure that VA does not deal with veterans grudgingly, indifferently, or at arm's length as if they were ordinary litigants or claimants for Federal benefits; and certainly to ensure that VA does not treat veterans like adversaries.

As has often been observed, veterans have unique needs, the nation has an extraordinary obligation to meet those needs, and the VA system is therefore a unique system with an extraordinary mission. The procedures, rules, and remedies of other forums or agencies are frequently improperly suited or inadequate for the administration of veterans' programs. In view of the hardening of VA's regulations and its departure from the benevolent role assigned to it by Congress, specially tailored laws may become necessary to bring VA's rulemaking back in line with its unique mission as the nation's patron and benefactor for veterans.

Recommendations:

The Secretary of Veterans Affairs should act decisively to put an end to VA's self-serving rulemaking; if the Secretary does not, Congress should

- (1) scrutinize VA's rulemaking more closely as part of its oversight role,
- (2) intervene to override VA rules that run counter to Congressional intent, and
- (3) enact special provisions to control VA rulemaking if the Secretary of Veterans Affairs fails to bring VA's rulemaking back in line with Congressional intent and VA's benevolent mission.



Compensation and Pension Service

Improvements in Claims Processing Accuracy:

To reduce the error rate and to avoid unacceptably large case backlogs and protracted processing times in veterans' compensation and pension claims, the Veterans Benefits Administration (VBA) must address the root causes of its quality problems.

The inability of the VBA to process and decide veterans' compensation and pension (C&P) claims accurately and timely is widely recognized as one of the most serious and persisting problems affecting VA and veterans. This problem has seriously degraded VA's ability to fulfill its mission of assistance to veterans and its corresponding responsibilities to them under the law. It has prevented disabled veterans from receiving, within a reasonable time, the compensation or pension they often urgently need to relieve the economic effects of disability. Although this problem plagued VA for several years, VA's various initiatives and plans have failed to solve the problem. Rather, while the number of C&P claims decreased substantially over the past decade, the claims backlog continued to grow larger because production declined and because high error rates necessitated rework of large numbers of cases, thereby adding to the workload of an already overburdened system.

The historical dynamics of this intolerable situation include flawed policies. In a climate of immunity from outside review over several decades, a culture and mind-set developed within VA whereby adjudicators began making decisions based on their own personal beliefs, attitudes, and predilections. Unwritten rules evolved, and arbitrary practices became ingrained. The decisions were based more on these unwritten rules and practices than the law. As a result, angry veterans demanded, and eventually received, the right to have judicial review of VA decisions.

The courts found fundamental departure from the law in numerous areas. For a while VA attempted to resist the precedents of courts. Then VA found that its adjudicators were poorly equipped to interpret and apply case law. Other factors, such as budget reductions and inadequate resources, intervened to compound the predicament. Rather than address the problems directly, VA management went through a period of denial and blamed its problems on judicial review.

The claims backlog grew. VA management began to press for increased production. VA further compromised quality for quantity. Alarming claims backlogs, and consequent pressure from Congress and the veterans community, eventually forced VA to devote more meaningful attention to this serious problem. By that time, poor quality pervaded the claims processing system and the backlog was enormous. VA's own internal study revealed poor quality as the major cause of its inefficiency, but the poor quality was rooted in other factors, such as inadequate training and resources. Poor quality was a precipitating cause of the backlog and then, with the focus on production, also became an effect of the backlog.

To break this vicious cycle, VA needed a technically sound strategy and effective implementation. In its business process reengineering (BPR) plan, it had a well-designed and technically sound strategy to address the root causes, but VA management failed to take the decisive action necessary to implement the plan. In addition, while the BPR plan correctly identified the root causes in process and set out appropriate remedies, it did not address the paramount need to change the negative institutional culture and strengthen management within VA. These flaws seriously hindered progress in implementing the plan's reforms. Today, VA still struggles with the same enormous problem.

Studies by various panels, commissions, and other bodies have failed to produce effective solutions because they have either recommended reducing veterans' rights and benefits to reduce VA's workload and thus accommodate its inefficiency or they have lost focus and strayed away from the root causes to various incidental and contributing factors. Reducing veterans' rights and benefits to allow VA to remain inefficient is indefensible, and any viable and effective solution will necessarily require that VA first address the root causes.

In its October 2001 report, the VA Claims Processing Task Force made beneficial recommendations, but implementation of these recommendations has not resulted in the kind of systemwide and sustained improvements necessary to overcome the problem. Although VA has gained ground in reducing its large backlog of pending claims for disability benefits, these gains appear more the result of targeting of resources and stop-gap measures than systematic improvements in quality and accountability for accuracy. Indeed, in 2001, despite large numbers of inexperienced adjudicators and complex new procedural requirements in the Veterans Claims Assistance Act of 2000, which would be expected to both slow claims dispositions and result in increased errors, VA shifted its emphasis to increased production to meet goals of reducing the claims backlog. Under this emphasis on production, VA regional office directors became accountable for production targets; some were required to develop plans to increase production but not quality; and performance awards were based primarily on production. VA awarded bonuses for production to some regional offices that had not met VA accuracy standards. Quality again took a back seat to quantity. During fiscal year 2002, VA increased its number of claims decisions by two-thirds. Thus, there were three factors that each would be expected to have a negative effect on accuracy: increased production with a corresponding lack of emphasis on quality, inexperienced staff, and new complex procedural requirements. Together, these three factors could be expected to have a compounding effect. According to the United States General Accounting Office (GAO) in its September 2003 report, *Veterans' Benefits: Improvements Needed in the Reporting and Use of Data on the Accuracy of Disability Claims Decisions*, GAO-03-1045, VA's accuracy in compensation and pension claims decisions declined from 89% to 81% during fiscal years 2001 to 2002. The GAO also found that VA has not made the best use of the accuracy data it collects to evaluate regional office performance, to correct errors, to identify needed training, and to hold regional offices accountable for accuracy.

At the end of fiscal year 2003, VA had reduced its pending caseload to 253,000 claims, coming close to meeting its goal of reducing pending disability claims to 250,000. VA reported that it had increased its monthly claims decisions by more than 70% above its 2001 level, despite an inexperienced workforce and

increased procedural burdens on VA. VA also surprisingly reported that its accuracy improved to 85% in fiscal year 2003. With its continued net decline in accuracy over the past 3 years, the number of claims needing additional work to correct errors is likely to rise. Accordingly, while the unmanageable claims backlog would appear on the surface to have been largely overcome for the present, the true amount of claims work awaiting VA may be greater than indicated by the inventory of currently pending claims. The backlog of pending claims may very well again begin to quickly grow, repeating the familiar vicious cycle in which poor quality necessitates rework and results in increased workloads, increased backlogs, decline in timeliness, and greater pressure to increase production at the expense of quality. Gains on the claims backlog through increased production at the expense of quality are merely cosmetic and temporary. The only way to break this vicious cycle is quality first. This requires management discipline and dogged persistence in improving quality even if timeliness and VA's pending claims statistics suffer in the short term. VA must focus primarily on the root cause of this problem to overcome it.

Clearly, VA's adjudicators make erroneous decisions because they are poorly trained in the law, they operate in a culture of indifference to the law, and they are not accountable for their poor proficiency and performance. Accordingly, in conjunction with the deployment of better training, VA must take bold steps to change its institutional culture, and it must make its decisionmakers and managers accountable. With its primary focus on these fundamental defects, VA should intensify its efforts to make other essential process improvements, such as better disability examinations and data exchange between the VBA and its health-care facilities. With well-informed, well-reasoned claims decisions will come fairness and efficiency. Stable reductions in claims backlogs and consistent timeliness will eventually follow.

Recommendations:

To improve quality in VA claims decisions and stabilize the inventory of pending claims to avoid the return of an enormous claims backlog and consequent long delays in the delivery of compensation and pension benefits, VA must address the root causes of the problem by:

- 1) improving the substance, implementation, and measurement of the effectiveness of its training for compensation and pension adjudicators;
- (2) taking decisive and immediate steps to change its negative institutional culture to instill in its decisionmakers and line management more positive attitudes and fidelity to the law; and

- (3) imposing from top to bottom real accountability for proficiency and a quality product.

In addition to these root causes of inefficiency, VA must address other substantial contributing problems, such as the inadequacy of VA disability examinations and its technology for information exchange between the VBA and its medical facilities.



Sufficient Staffing Levels:

To process and decide additional claims not anticipated and not considered in previous plans to reduce staffing, VA must maintain its staffing in FY 2005 at FY 2003 levels.

VA had projected that its workload would allow it to draw down its full-time employees (FTE) in FY 2005 by approximately 268 below its staffing of 7,757 FTE at the end of FY 2003. However, those projections did not take into account an additional 391,000 claims and an additional 52,869 appellate case load over the next 5 years, which VA now expects incident to legislation expanding eligibility for combat-related special compensation. Neither did it take into account workload incident to authorizing concurrent receipt of military retired pay and disability compensation for veterans with service-connected disabilities rated 50% or higher in degree. In addition, VA projects that it will have to rework approximately 48,000 claims to

meet the requirements of the decision of the Court of Appeals for the Federal Circuit in *PVA v. Secretary of Veterans Affairs*. While most of that work will be done during FY 2004, it will likely delay work of some of C&P's inventory and carry some extra caseload over into FY 2005. This additional workload requires that VA maintain its staffing levels of 7,757 FTE for C&P Service in FY 2005.

Recommendation:

Congress should authorize 7,757 FTE for C&P service in FY 2005.



Improved Claims Processing with Information Technology:

To meet its workload demands, VA must develop integrated systems to electronically transfer veterans' medical records from their source to the claims processing database and to aid adjudicators in evaluating that evidence according to the pertinent law and regulations.

To meet its workload demands, VA must take full advantage of automated information systems. These systems can facilitate case management, claims processing, and decision making in ways that increase accuracy and efficiency. To determine and implement its optimum performance in record development, disability examinations, and claims disposition, VA is undertaking a review of its claims process with the goal of developing an integrated electronic format to aid in uniform and correct application of procedures and substantive rules and to allow for the electronic transmission of data from its source into the claims database. Known as the C&P Evaluation Redesign (CAPER) initiative, this project is being undertaken by a CAPER team, working with outside experts.

VA began work on this initiative in 2001 with a goal of nationwide deployment by April 2005. VA now hopes to have this system fully in place by September 2006. To achieve that goal, VA needs approximately \$3.5 million in FY 2005 to continue development of this system.

Recommendation:

Congress should provide \$3.5 million to fund VA's Compensation and Pension Evaluation Redesign initiative.



Improved Claims Processing with Electronic Files:

To improve its business processes through reliance on more efficient modern information technology, VA needs to acquire, store, and process claims data in electronic files.

VA is moving toward more modern and efficient methods of compensation and pension claims processing by replacing its paper-based claims system with electronic imaging. VA's project, known as "Virtual VA," has been deployed at VA's pension maintenance centers and is undergoing evaluation and assessment based on experience at these three sites. With eventual full implementation, all VBA regional offices will have document-imaging capabilities, and VA medical centers will have electronic access to veterans' claims folders for review in connection with disability examinations. VA expects better timeliness and accuracy in claims decisions once the system is fully deployed.

To continue document preparation and scanning at the pension maintenance centers and development of the system for use nationwide, VA needs \$8 million in FY 2005.

Recommendation:

Congress should provide \$8 million to support continuing use of VA's Virtual VA electronic file system at its pension maintenance centers and to continue developing the system for eventual installation in all VBA regional offices.



*Education Service***Adequate Staffing:**

To sustain services at current levels and meet added workload demands consequent to liberalizations in education programs, the Education Service needs to retain its FY 2003 staffing.

As it is with its other benefit programs, VA is striving to provide more timely and efficient service to its claimants for education benefits. The Education Service has made gains in these areas during FY 2003. To continue on that course and to meet the added workload demands expected from recent expansion of training to qualify for educational benefits, VA must at least maintain its FY 2003 direct program staffing of

708 FTE (excludes information technology and management and support FTE) in its Education Service.

Recommendation:

Congress should authorize 708 direct program FTE for VA's Education Service.

*Vocational Rehabilitation and Employment***Adequate Staffing Levels:**

To meet its ongoing workload demands and to implement new initiatives recommended by the Secretary's VR&E Task Team, VR&E needs to increase its staffing.

At the end of FY 2003, VR&E had 931 direct program FTE (excludes information technology and management and support FTE). To sustain current levels of performance with its projected workload, VR&E needs to maintain that level of staffing. In addition, the Secretary's VR&E Task Team has made a number of recommendations to improve vocational rehabilitation and employment services for veterans. It is projected that approximately 200 additional FTE

will be needed to implement these substantial reforms in the VR&E program, its organization, and its work processes.

Recommendation:

Congress should authorize 1,131 direct program FTE for the Vocational Rehabilitation and Employment Service for FY 2005.



GENERAL ADMINISTRATION

Board of Veterans' Appeals

Amendment of 38 C.F.R. § 19.5:

VA has declined to amend 38 C.F.R. § 19.5 to remove its erroneous provision that the BVA is not bound by VA manuals, circulars, and other VA directives.

In a 1995 study titled *Veterans Benefits: Effective Interaction Needed Within VA to Address Appeals Backlog*, the GAO cited as a factor contributing to the backlog of appeals the lack of uniformity between the BVA and VA's field offices in the interpretation and application of the law. The GAO noted that while both are bound by the same laws and regulations, they issue independent policy and procedural guidance and sometimes interpret legal requirements differently. Observing that "hundreds of individuals within these organizations interpret and apply laws, regulations, and guidance in adjudicating claims," the GAO said: "This legal and organizational structure makes consistent interpretation of VA's responsibilities essential to fair and efficient adjudication but difficult to achieve." The GAO noted that although "at least four studies have made recommendations" that VA coordinate its decision making to avoid these types of problems, "we found evidence that existing mechanisms do not always identify or are slow to resolve" such problems with adjudication. Assessing the effect of the lack of uniformity in interpretation and application of the law, the GAO said: "These types of differences not only contribute to inefficient adjudication, but also inhibit VA's ability to clearly define its responsibilities and the resources necessary to carry them out."

Despite good reason to do so, VA has inexplicably declined to correct § 19.5, which erroneously provides: "The Board is not bound by Department manuals, circulars, or administrative issues." Section 19.5 thus provides that the BVA will not operate under the same rules as VA field offices and therefore subjects claims decisions to different interpretations and applications of law. This provision is contrary to statute and a well-established line of case law, which holds that VA, like other Government agencies, is bound by its own internal procedures and rules.

In 38 U.S.C. § 501, Congress delegated to the Secretary the authority to prescribe rules and regulations,

and issue "guidelines, or other published interpretation[s] or order[s]" on the nature, extent, and methods of submission of proof; application forms; methods of medical examinations; and manner and form of adjudication and awards. VA manuals are official Department instructions, which are binding on adjudicators under 38 C.F.R. § 3.100 and under provisions of the manuals themselves. Many of VA's actions, such as claims decisions and other official acts, are performed by the Secretary's subordinates and do not carry the Secretary's personal signature. They are nonetheless the Secretary's acts for purposes of law. Under 38 U.S.C. § 512, Congress authorized the Secretary to subdelegate the authority it delegated to him. Under that section, the Secretary may assign functions and duties to officers and employees, and "all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary." The issuance of manuals as binding instructions must be an authorized and proper act and must be deemed instructions of the Secretary. Otherwise, they would not be legal and valid. Under 38 U.S.C. § 7104(c), the Board "shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department."

Another point makes it clear that the BVA is bound by law to follow VA manuals and circulars. Regulations and instructions of the Secretary have the force and effect of law. Because VA field offices are clearly bound by VA manuals and circulars, the failure of a field office adjudicator to follow them would constitute an error in law. Under 38 U.S.C. § 7104(a), the BVA is charged with, and legally obligated to, correct errors in law. When the BVA refuses to follow, enforce, or apply a manual provision to correct its omission by a field office, it commits legal error. This has required veterans to appeal to the Court of Appeals for Veterans Claims to obtain enforcement of rules in manuals in some cases.

VA's refusal to amend § 19.5 to require the BVA to follow and enforce VA manuals and other departmental instructions is indefensible.

manuals, circulars, and other Department directives, and absent timely action by VA, Congress should intervene to ensure this counterproductive problem is corrected.

Recommendation:

VA should amend 38 C.F.R. § 19.5 to remove its unlawful provision exempting the BVA from VA

