



# Shinseki's Surge: Can it Work?

*By Carol Wild Scott*

Not since Gen. Omar Bradley, “the soldiers’ general,” took command of the Veterans Administration after World War II has anyone assuming the reins of leadership of the Department of Veterans Affairs (VA) faced the kinds of challenges that confront Gen. Eric K. Shinseki. A combat veteran of the Vietnam War, in which he was wounded in action, Gen. Shinseki inherited an agency in near total disarray. Even though his predecessors assumed that position with determination, the results of their efforts could hardly be called successful. Therefore, the question facing Secretary Shinseki is whether he can become “the veterans’ general.”

Never one to shy away from a challenge, Shinseki has vowed to turn the department around and to demolish the backlog that consists of a million claims. As part of that effort he has hired 4,200 new employees within the Veterans Benefits Administration to battle a backlog that has become a hydra—it is tenacious and difficult to destroy because of its many heads. Although additional personnel are sorely needed, nearly as many institutional problems must be solved before the surge of 4,200 new employees becomes effective.

To understand the institutional challenges that Secretary Shinseki faces, a brief overview of the VA’s compensation and pension benefits system is necessary. As far as the number of veterans involved, the influx of casualties from Southwest Asia continues to soar as do the still insufficiently addressed compensation issues and resultant claims filed by Vietnam veterans. To deal with this workload, the secretary inherited an intractable and aging bureaucracy that is limited by rules and attitudes created in the past. Indeed, no matter what previous appointees would do in an effort to rectify the situation, the bureaucracy resisted and changes could not gather momentum.

Against this background, it must be remembered that the VA is the only agency responsible for providing benefits to veterans as well as their survivors and dependents. The VA was, and is, supposed to be nonadversarial, pro-veteran, and paternalistic. The process by which a veteran pursues a claim for compensation is deceptively simple and a simple outline of the process is set out below.

## The Regional Office

The regional office is the VA agency of original jurisdiction. Claims are submitted to one of 57 regional offices on a VA form. The claimant may have representation before the regional office by a veterans' service organization<sup>1</sup>, an agent, or an attorney (the latter must provide services pro bono at the initial stage of the claim).<sup>2</sup> The claim is then developed by a veterans service representative (VSR)—a VA employee who does *not* represent the veteran—through the accumulation of supporting evidence, including the claimant's military personnel and medical records, VA records, private records, and lay evidence.

A claimant who requests compensation for an injury or disorder arising from military service must demonstrate that the problem was present while he or she was in the service or that an event during service resulted in the condition; that there is a current diagnosis; and that there is a causative, medical connection (nexus) between the two. The standard of proof is "more likely than not." The VA has a duty to assist the veteran in perfecting the claim by scheduling medical exams, sending for records of which they are made aware, and advising the claimant to some extent about what is needed.<sup>3</sup> Claimants are encouraged to submit any evidence in their possession relevant to the claim or information that is not in their possession but of which there may be a record. This is a time-consuming process that greatly contributes to the backlog, because it takes time to obtain the records from other agencies and private physicians.

When the claim is fully developed, it is passed to a rating veterans service representative—also a VA employee with no representative relationship to the claimant—who determines whether or not the claim should be granted or denied. If the claim is granted, this employee determines the level of disability, using a very complicated and—to a great extent—outmoded rating table of diagnostic codes.

It should be noted that rating is not an easy or consistent process. For instance, if there is no diagnostic code addressing the medical issue, the rating must be analogous to "similar" disabilities. To achieve an accurate rating, the process requires not only considerable training but also current understanding of a wide range of departmental letters and medical developments as well as case law and regulatory changes. If the evidence accumulated is insufficient or incorrect, the resulting decision is flawed and the resulting remand for correction or further development adds to the backlog.

## Appellate Status

If the claim is denied, the claimant has one year in which to file a notice of disagreement specific to the claim. This notice places the matter in appellate status and allows the claimant to be represented by an attorney from that point forward. The regional office must prepare a statement of the case, which is designed in a way that apprises the veteran of the legal basis for the denial. However, the statement has developed into a multipage disgorgement of regulatory language, often largely irrelevant to the claim, along with any change in the rating decision that may have

been made if the claimant submitted more evidence along with his or her notice of disagreement. The claimant has 60 days from the date of the statement of the case to submit a Form 9 or a written statement notifying the agency of his or her desire to appeal.

## Decision Review Officer

The claimant may also request that a decision review officer examine the denial prior to transmittal to the Board of Veterans' Appeals. This position was designed to be assumed by a VA employee who has sufficiently extensive training and experience to resolve the issues correctly and fairly as well as the authority to grant the claim. The decision review officer program was designed to provide opportunity for dialogue between claimants and VA representatives and to reduce the backlog by resolving more matters at the regional office level, precluding further review by the board. If the claim or portions of it are not granted, a supplementary statement of the case follows the decision review officer's review, after which the appeal is certified to the board and the file is sent to Washington for review by the board. If a notice of disagreement is not filed, or if the notice or the response to the statement of the case is untimely, the denial of the claim becomes final.

## The Board of Veterans' Appeals

The second major level of review within the system is the Board of Veterans' Appeals, whose jurisdiction includes all issues of law and fact arising from the denial of claims by the regional office. Created in 1933, the board is statutorily independent of the VA,<sup>4</sup> even though its members are VA employees. The claimant is allowed to be represented before the board by a service officer or an attorney. Form 9 advises the claimant of the right to a hearing, together with a choice of location in Washington, before a travel board, or by video conference. To assist with the process, veterans service organizations' appellate representatives are provided with offices and services at the board's facility as well as access to some VA information technology programs. Hearings, at which claimants, their witnesses, and their representatives may be present, are transcribed along with the parties' testimony that was taken under oath. The hearings are held before "veterans law judges"—individuals who are not administrative law judge qualified but are long-term employees of the board—and these judges make the decisions. The review of the denied claim is *de novo* and includes all evidence in the file and any evidence submitted at the hearing. A record of the proceeding may be kept open for a period of time for further evidence of which the parties may become aware during the hearing. The claimant may waive further review by the regional office and allow the board to decide the matter. (Unfortunately, the notice of the claimant's appellate rights pursuant to the statutory requirement of 38 U.S.C. § 5104(a), appears at the end of the board's written decision in confusing language and small type.)

## The Court of Appeals for Veterans Claims

Despite a strong tradition of allowing judicial review of agency decisions inherent in American government, the tradition was not applicable to the VA throughout most of the country's history, because the courts and congressional action (or inaction) rebuffed efforts to allow review.<sup>5</sup> This remained the case until 1988, when, after a decade of contention and considerable compromise, the passage of the Veterans Judicial Review Act, Pub. L. 100-687, 102 Stat. 4105 (1988) established an Article I court, the U.S. Court of Veterans Appeals (now the U.S. Court of Appeals for Veterans Claims, or CAVC). The legislation established the finality of denials of claims by the board (absent reconsideration by the chairman) and implemented judicial review of decisions on individual claims made by the Board of Veterans Appeals. 38 U.S.C. § 7252. The Veterans Judicial Review Act also provided for subsequent review by the U.S. Court of Appeals for the Federal Circuit—a review that was limited to issues of constitutional import and regulatory and statutory interpretation. 38 U.S.C. § 7292.

The Veterans Judicial Review Act also permitted, for the first time, attorney representation before the court and, if the attorney was retained within one year of a final decision by the board, representation to reopen a claim or for reconsideration of the denial. According to 38 U.S.C. § 5904, in both instances, representation would be allowed for a “reasonable fee.” Effective in 2007, fee-based representation by attorneys and agents before the VA became a reality. Implementing regulations included certification and the restriction of representation to the initiation of the appellate process. 38 U.S.C. § 5904 (c).<sup>6</sup>

A notice of appeal to the court or a request for reconsideration by the board's chairman (in order to preserve a later appeal to the court) must be made within 120 days of the date stamped on the face of the board's decision. 38 U.S.C. § 7266(a). A request for reconsideration may be made at any later date and will be considered by the board, but the court's jurisdiction will end if the claimant does not file a request for reconsideration within the 120-day time limit. It should be noted, however, that the success rate of motions for reconsideration is less than 1 percent and generally serves no purpose except to waste the appellant's time and contribute to the backlog.

Recent decisions by the CAVC and the Federal Circuit have erased the possibility of equitable tolling for veterans. However, as of this writing, the issue of equitable tolling of the 120-day rule is pending at the U.S. Supreme Court in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), cert. granted (U.S. June 28, 2010) (No. 09-1036), in which FBA's Veterans Law Section has joined the National Organization of Veterans' Advocates as amicus.

The standard and scope of CAVC review preclude de novo review of findings of fact by the secretary of veterans affairs and limits review of the factual determinations by the secretary to the “clearly erroneous” standard of review. 38 U.S.C. § 7261. Only the record before the board may be reviewed. Disposition by the CAVC is limited to the power to affirm, modify, or reverse a decision of the board, remanding as appropriate. 38 U.S.C. § 7252(a). The CAVC

does not retain jurisdiction, and enforcement of rulings has been limited to use of the All Writs Act. Absent those cases in which the court affirms the board's decision, there is no final disposition of the case. A decision that favors the claimant remands the issues back to the board and back into the “hamster wheel,” contributing further to the backlog, albeit retaining the effective date of the claim.

In addition to compensation issues related to the Vietnam War that remain unresolved, the Veterans Benefits Administration (VBA) has seen a constant increase in claims coming into the system since the Gulf War and continuing with the significant number of casualties and wounded veterans who served in Afghanistan and Iraq. The causes of the current backlog, which is estimated at one million claims,<sup>7</sup> have been variously attributed to technological difficulties in bringing the claims processing systems into the wireless age,<sup>8</sup> inefficient processing methods and workload management,<sup>9</sup> training issues,<sup>10</sup> and workforce morale.<sup>11</sup>

By passing the Veterans Benefits Improvement Act of 2008, Congress required the VA to do the following:

- evaluate the VA's training for processors of disability claims (§ 225(b)),
- assess the VBA's employee work credit and work management systems for improving disability claims processing performance (§ 226), and
- review the current technology for processing claims, including reducing the time required to process claims. (§ 227).

The results of these reviews were frightening.

### **Lack of Finality**

One of the results of the way the claims system is structured is that, to some extent, there is never finality. Conditions that qualify for compensation worsen, and others develop that are causally related to the original condition. Toxic exposures result in disorders years after the fact. In the case of Agent Orange, birth defects are now appearing among the second generation. The overwhelming challenge to the VA as an agency is to minimize the error ratio and to reduce the workload of the personnel responsible for rating the case without penalizing the veteran.

### **Training (or Lack Thereof)**

Training issues were addressed in the study by the U.S. Government Accountability Office, “Veterans Disability Benefits; Expanded Oversight Would Improve Training for Experienced Claims Processors,” which was released in April 2010. The GAO determined that the VBA delegates a considerable amount of control to the individual regional offices, while providing a fairly standardized curriculum for about half of the 80 hours of training processors are required to undergo each year. According to the study, a majority of the experienced personnel (those with more than two years of experience) had difficulty meeting the 80 hours of required training in light of their workload

requirements. Because of the uniform level of subject matter addressed in the training, many of the rating personnel felt either that they did not need the training or that it did not meet their specific needs. Personnel cited the lack of specific areas of training: case management and special monthly compensation.<sup>12</sup> The conclusion was that VBA lacked controls to ensure the content and quality of the 80 hours of instruction required annually and thus did not meet the standards cited.

The statistics coming out of the Board of Veterans' Appeals and the CAVC are telling when it comes to this issue. The court routinely remands 70–80 percent of the cases it decides to the board for further proceedings; decisions on another 5 percent of the cases are reversals. The board's decision is affirmed in only 20–25 percent of the cases brought to the CVAC.<sup>13</sup> Even if one attributes a portion of the cases that are remanded to philosophical differences between the board and the court, a 70–80 percent remand rate is strongly indicative of a significant level of error in the proceedings that took place earlier—a factor addressed by Judge Kasold in his remarks before Congress in May 2009. In FY 2009, the board rendered 48,800 decisions;<sup>14</sup> of these, 61 percent of the cases either were remanded or the decision was allowed to stand. In effect, the decisions upheld the regional offices' decisions only 39 percent of the time. The inescapable conclusion is that there are a number of unresolved training issues.

### **Workload Management**

In FY 2008, the VBA received more than 1.6 million claims: 888,000 rating claims and 755,000 nonrating claims.<sup>15</sup> Thus, it is understandable that training in case management would be an area of concern to leadership and staff as well as to the veterans filing claims. The pre-determination or case development segment of the compensation rating process includes many different activities, some of which occur simultaneously and some sequentially. Delay or mismanagement of one segment can have a domino effect, extending the average days for completion until the delay or mismanagement issue is resolved. Each regional office has six sets of processing functions that are assigned to a range of personnel—from mail clerks to “coaches,” who are the senior supervisory personnel. Once received, the claim traverses all of these functions, accumulating evidence and information as it progresses.

In studying the issue of workload management, the VA's Office of the Inspector General audited 11 regional offices to determine the causes of delay in cases in which the processing time exceeded 365 days. In January 2005, the VA had set a target completion time for claims at 125 days. In FY 2008, the processing time ranged from 95 to 415 days throughout the agency.<sup>16</sup> The inspector general identified 10 factors that contributed to the lack of timeliness:

- inadequate identification of stalled claims,
- partial or untimely requests for evidence,
- untimely follow-up on requests for evidence,
- delaying action on newer claims in order to process older claims,

- untimely processing of brokered claims (claims sent to another regional office for processing),
- delayed processing by original VA regional offices of jurisdiction,
- untimely supervision of inexperienced raters,
- interruption in processing claims in order to process those that have a higher priority claims,
- delay in processing claims until the date of suspension, and
- misplacement of claims folders.

The audit report made it clear that the VA is not a cohesive department; rather, it is a collection of 57 individual agencies that have varying procedures. Moreover, agencies with required procedures have varying degrees of compliance, which is indicative of the absence of a clear-cut vertical chain of command. The VA's review found significant delays in ordering medical examinations and follow-ups on requests for records from other agencies. Files were not sufficiently reviewed internally for timeliness. Quality review was found to take so long that the delay in counseling an employee concerning corrective measures prompted additional errors in the interim.<sup>17</sup>

### **People**

In 2009, according to the GAO, the VBA had a total rating workforce of 7,500 veterans service representatives and rating veterans service representatives.<sup>18</sup> Since 2007, the VBA has hired 4,200 new representatives, all of whom required extensive training over a two-year period to become proficient. At the same time, the most experienced rating personnel are reaching retirement age, resulting in significant pressure for adequate training and oversight of those who replace them. It is this graying workforce that is responsible for processing the current backlog of claims, many of which are not only those left over from the Vietnam conflict but also complex claims for compensation for multisystem injuries and conditions, such as massive burns, traumatic brain injuries, multiple amputations—conditions that are the signature of Operation Enduring Freedom and Operation Iraqi Freedom—as well as the lingering results of toxic exposure and neurological issues that came from Vietnam and the Gulf War in the early 1990s. It is clear that, even with expanded budgetary support from Congress, the situation and the available resources have reached critical mass.

Morale issues are at the heart of all others. The result of the overwhelming workload and a shortage of highly trained, knowledgeable personnel has taken its toll. The voices of the rating personnel who operate within the system day to day are eloquent in communicating the problems they see from the inside. The VA has countless dedicated employees who generally try to provide our veterans with the compensation and assistance that they have earned through service to their country. Many of the 4,200 new hires are veterans themselves who recognize the need to cultivate an environment in which the mantra becomes: “Do it right the first time.”<sup>19</sup> The VA's employees know that the key is adequate training and appropriate credit for the work that they are required to perform.

Regardless of the level of dedication to the country's veterans found among the majority of VA employees, it is inescapable that the process can and does become toxic over time. Despite the best of intentions, a faceless claimant represented only by a file many inches thick as well as multiple and redundant submissions has a tendency to be considered the "enemy." All too frequently the claimant—either self-represented or with representation—files several claims, and not all of them may have merit. Absent the training and oversight the backlog of claims demands, those that do have merit may not receive the attention they require. The result has been the insidious belief among veterans that the VA waits for them to die and that the VA is anything but pro-veteran.

### ***Techno-No Go***

The VA's review also found that the use of technology varied from regional office to regional office, despite the relative uniformity of the available programs, many of which have specific applications, such as the program used for ordering outsourced medical exams.<sup>20</sup> First, the rating process operates with paper files, many of which consist of several volumes many inches thick (the result of repeated submissions, numerous remands, and requests to reopen previously denied and final claims). File storage areas were found to be choke points and the hazard of misplacing a file is everpresent. Indeed, the fact that the entire paper file must be transmitted to the site of each medical examination adds to the difficulty in managing paper files, information, and evidence and also introduces the risk of compromising the claimant's privacy. In response, all that can be said is that one more pilot project for conversion to a paperless universe is currently under way in the regional office in Baltimore.<sup>21</sup>

Communication has been an increasingly complex problem and contributes to the backlog in no small measure. This is true of the internal communication problems among personnel conducting the various functions and externally with the claimant. The same uneven oversight that plagues training also affects the rate and effectiveness of the implementation of legal, regulatory, and medical developments that are critical to accuracy in the rating process. Quality control is equally affected, because the time differential between reviewing each veterans service representative's files, recording errors, and providing feedback is so slow that, as noted previously, errors are self-perpetuating. Nor does it encourage self-reporting or a concentrated approach to solving the issues that need to be solved.<sup>22</sup>

External communication with claimants and veterans is also a source of delay. A recent audit by the VA's Office of the Inspector General found that, at the department's nine national call centers, there was an average 49 percent chance that the caller reached an agent and received correct information—but that percentage holds only if the caller got past the 24 percent rate of busy signals. One of the consequences that were discovered was the loss of the opportunity to record a contact that might have initiated a claim, thereby affecting the effective date of a formal

claim filed later. In addition, a question or call that was not answered had a negative effect on the processing of a claim—for example, a call to reschedule a medical exam might result in a failed claim of reduced rating because the claimant failed to report.<sup>23</sup>

External communication with entities such as the Social Security Administration, the National Personnel Record Center, and other agencies is similarly affected. Because of the delays in transmitting requests, when the entity fails to respond, follow-up requests are deficient or delayed. The inadequate response that is not noted in time and supplemented by needed information frequently results in an inaccurate rating and a later remand for further development.<sup>24</sup>

### ***One Solution: A Really Big Band-Aid***

Certainly, the secretary of veterans affairs has the impetus to continue to implement changes in the system's design process, to enhance intensive training of front-line supervisors, and to advance a plan for a uniform paperless process by which the backlog may be reduced if not eliminated. However, the testimony provided by representatives of the Association of Federal Government Employees to the House Committee on Veterans Affairs provides a litany of frustration with superiors, the slow progress toward a paperless environment, and unrealistic and counterproductive production requirements.<sup>25</sup>

The strongest expression of frustration originated from the removal from the work credit list all but five of 63 weighted activities for which work credit was given and the re-characterization of those five activities as "outputs." The activities that were eliminated included such actions as scheduling medical exams, answering congressional inquiries and requests related to the Freedom of Information Act, acquiring requests for records, and other tasks that are essential to the rating process and, in most instances, time-consuming. The rationale for changing the work credit was that the old system had provided too much opportunity to "game the system."<sup>26</sup>

From the employees' point of view, the strongest rationale for intensive, appropriately "tailored" training is the increasing complexity of the medical issues involved in current disabilities for which compensation is sought. Recent injuries are so severe and involve so many body systems that they would not have survived the medevacs used in Vietnam. Many physical conditions must be rated for special monthly compensation, which, under the current regulations, is confusing to the point of being confounding. If employees are not included in the process of simplifying these codes and in the training development process, there is no guarantee that the necessary skills will be taught, or that the testing regimen will address those skills.

Education and testing for leadership skills to develop a well-trained, qualified cadre of supervisory and executive personnel is another factor that affects employees' morale. Inadequate training has apparently led to the early dismissal of some newly hired employees, thus reducing the "surge" relief numbers when the real problem was lack

of adequate training.<sup>27</sup> Another study has recommended that training be more intensive and that training programs be evaluated.<sup>28</sup> Uniformity in the programs across all the regional offices is critical, and performance objectives and outcomes must be standardized. Innovations in the field of adult education and the use of outside consultants as advisers in the development and evaluation of educational and training programs should also be included in the improved system.<sup>29</sup>

### ***The Need to Turn on Computers***

The common denominator throughout the discussions is the need to bring the VA into the wireless age. A wireless environment will be the single most important factor in reducing the backlog; until that environment becomes a reality, the claims process will continue to be plagued by delays. Indeed, § 227 of the Veterans Benefits Improvement Act of 2008 requires the VA to use wireless technology for a wide variety of functions. The department has acknowledged that the “Holy Grail” of a wholly interactive paperless system is nowhere near a reality. Anecdotal evidence indicates that part of the problem can be attributed to the VA’s nearly 80 different proprietary systems, only two of which are Web-based. Whether it is eight or 80, until the integration and accessibility of all the systems is achieved, it is unlikely that the backlog of claims will be cleared up any time soon.

Claims need to be filed electronically and reviewed by the claimants and their representatives; evidence must be accumulated and submitted the same way. Each step in the pre-disposition stages should be similarly accomplished, including medical examinations (completed and transmitted in response to transmitted instructions), records acquisition from other government entities, and anything else required to provide the rating entity with accurate information in timely manner and ready for inclusion in the decision process. Training and quality review with timely dissemination of the content of case law, regulatory and statutory changes, fast letters, and the like would diminish the opportunities for misapplication of pertinent rulings. The ultimate goal is, after all, doing the job right and fairly the first time and providing appellate entities with complete and accurate records that can lead to legally viable and equitable decisions.

### ***Some Specific Solutions***

The question is not whether there are solutions. Clearly, there are, and Secretary Shinseki must find them. Moreover, the decision-making process is badly flawed, as demonstrated by the universal perception that claims for compensation are adjudicated by a process and under a culture that has become burdened to the breaking point. Secretary Shinseki is, to all appearances dedicated to eliminating the backlog and bringing the VA into the 21st century. The proposals advanced below are not meant to present all elements of an eventual solution but some that can contribute to it.

1. Create a solid, integrated, vertical chain of command—

from the top level to every mail clerk at the smallest regional office. There must be the perception that one person is in charge and that every employee is and will be held accountable. Middle management positions should either be eliminated or be rearranged into a clear, vertical chain of command. Until that occurs, the changes sought will continue to be “nibbled into oblivion by the angry ducks of turf protection.”

2. Dedicate every available asset to the development of a wireless environment and the elimination of paper and the risk of error that accompanies paper files. Congress maintains that if the IRS can do it the VA should also be able to do it. After all, the IRS has vertical accountability and in all probability has not developed an array of independent, stovepiped systems.
3. Complete the Regulation Rewrite Project, which was initiated in 2002, to simplify and “modernize” the rating regulations. Reform of the diagnostic codes must be an integral part of that project. One of the more important aspects of this goal would be the simplification of the special monthly compensation regulations with the recognition that these regulations address “quality of life” issues for catastrophically wounded or ill veterans. For information about the Regulation Rewrite Project, see “Making Benefits Clear: The Regulation Rewrite Project” by William L. Pine and William F. Russo on page 38.
4. Establish training protocols that use resources and expertise external to the VA, selecting instructors through a certification process, recruiting them from the Veterans Law Bar, and designating them visiting professors. Efforts such as these ensure dissemination of information that is accurately consistent with current case law and regulatory developments.
5. Change the culture in the VA. Of all the changes suggested here and elsewhere, this modification will be the greatest challenge for the secretary of veterans affairs. Secretary Shinseki must demand that his leaders reward good, accurate workmanship in developing files and accept and implement innovative suggestions from his employees, as is being done now to some extent. The secretary must broaden the scope of this to ensure that regional offices are periodically rewarded for jobs well done. Rating and support staff in regional offices must reconnect with the veteran community by encouraging and participating to a greater extent with work credit in community events. Incentives must be created and used and the rating teams rewarded. The VA must ensure that adequate credit is given for the work that is performed, and employee input in all training and work management incentives and programs must be sought.
6. Withdraw the proposed fee-limiting legislation that would have the effect of eliminating all fee-based representation by effectively restricting attorney representation to pro bono representation before the U.S. Court of Appeals for Veterans’ Claims. Instead, reach out to the law schools to encourage them include veterans law in their curriculums, thereby assuring a future cadre of well-educated attorneys within the VA and the private bar. Support the amendment of 38 U.S.C. § 5904(c)(1) to

remove the restriction of veterans' access to fee-based legal representation so that they may retain counsel if they wish before filing their claim. Allowing veterans the unfettered right to retain counsel should they wish to do so provides for the submission of better, well-defined claims at the beginning the process.

7. Reconfigure the regional offices to fit the POD project. Arrange the offices so that claims are processed by teams that have consistently designed office space. Provide each team with a discrete area with storage facilities for files and ready access to research material through information technology networks and with adequate administrative support personnel. Teams should be composed of one or two members from each function in the rating process, including veterans service representatives and rating veterans service representatives. Assigning more than one person to either of these functions provides the opportunity for peer mentoring and onsite training following successful completion of academy training. Each team should be supervised by a decision review officer, who reports to an established chain of command within the regional office management. Cases should be assigned to the teams by balancing the complexity of the case or factors other than the last two digits of the claimant's Social Security number.<sup>30</sup>
8. Expand the function of the decision review officer to include supervisory and quality control issues, including the identification of training needs and encouragement and supplementation of mentoring of less experienced team members. Decisions prepared by teams within the decision review officer's group should be reviewed for accuracy, clarity, and completeness prior to release, thereby reducing the likelihood of errors and providing better appeals (or fewer appeals) to the board. This change will provide a direct chain of command to the manager of the service center.
9. Renovate the entire procedure for providing notice of planned agency actions, developmental and evidentiary needs, and notification of medical examinations, times of hearings, and so forth, to conform with § 504 of the Rehabilitation Act of 1973. This issue is addressed in another article in this issue (see "Hey, Department of Veterans Affairs: Notice This" by Douglas J. Rosinski on page 43).
10. Require "veterans law judges" to meet the qualifications required of administrative law judges in all other agencies within the executive branch. Decentralize the board to be included in regional offices, thus providing increased access to hearings, decreasing opportunities for misplacement or loss of files, and if not, reducing the backlog and the average days for completion.
11. Eliminate the statement of the case. The statement was originally intended to explain the rating decision to the claimant who has expressed disagreement with the decision and its regulatory or legal basis. Over the years, however, the statement has developed into a disjointment of cut-and-paste regulatory excerpts into which a comprehensible sentence giving a useful expla-

nation might occasionally be inserted. For all practical purposes, to the average veteran, the statement of the case is simply not useful and is usually very confusing.<sup>31</sup>

12. Adopt a "treating physicians rule". Requiring deference to appropriately documented medical opinions from treating physicians would simplify the process and shorten the processing time. If an opinion requires clarification, it should be requested. If a claim is filed with sufficient medical documentation to grant the claim, there should be no necessity to request further medical evidence, which too frequently leads to a denial of the claim. When executing medical authorization for their private medical records, veterans should be advised that the treating physician may submit supporting documentation and that the claim file may be made accessible for review upon request.<sup>32</sup>

Secretary Shinseki has assured and reassured the 23 million veterans of this country that he will get rid of the backlog of claims. Gaining the trust of the veteran population is the most challenging aspect of his mission. Regaining control of a bureaucracy while enhancing the morale of his personnel is his next most compelling challenge. The best reason for finding an alternative path to solving the problem is provided every time an action is defended as being "the way it has always been done." There is no doubt that Secretary Shinseki is capable of accomplishing the mission, making his "surge" a success and thereby becoming "the veterans' general." **TFL**

---

*Carol Wild Scott has served as a deputy director of the Veterans Consortium Pro Bono Program since 1996 and is the current chair of the FBA Veterans Law Section. She was admitted to the practice of law in 1970, when she practiced military law in private practice. She subsequently practiced in the Ford Clemency Program and the Court of Military Appeals. A family tradition of military service is continued by her eldest grandchild, currently serving in the U.S. Army with two tours in Iraq. The views expressed in this article are solely those of the author.*

#### Endnotes

<sup>1</sup>These primarily include the American Legion, Disabled American Veterans, Veterans of Foreign Wars, Vietnam Veterans of America, and the National Veterans Legal Services Program. The global war on terror has introduced new groups that have increasing political influence: Veterans for Common Sense and Iraq and Afghanistan Veterans of America.

<sup>2</sup>From 1864 to 1988, attorneys' fees were limited to \$10, the purpose of which was to protect the veteran from predatory attorneys, *see Staub v. Johnson*, 171 U.S. App. D.C. 162; 519 F.2d 298 (D.C. Cir. 1975) (citing *Hines v. Lowery*, 305 U.S. 85, 90 (1938)). Free representation was provided to the veteran by any one of many veterans' service organizations, which were provided with free office space and services within the VA's regional offices. With the exception of the National Veterans Legal Services

Program, which has been at the forefront of many issues, these groups did not provide attorney representation. In 1990, a small group of private attorneys met in a motel room in Arlington, Va., and organized the National Organization of Veterans Advocates. The Federal Bar Association's Veterans Law Section originated in 1990.

<sup>3</sup>38 U.S.C. §§ 5103, 5103(a); 38 C.F.R. § 3.103(a).

<sup>4</sup>DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945* (Oxford Univ. Press, 2007); cf. HUGH ROCKOFF, *THE CHANGING ROLE OF THE AMERICAN VETERAN* (Rutgers Univ. Press, 2001).

<sup>5</sup>*Id.*

<sup>6</sup>14 C.F.R. § 14.629(b).

<sup>7</sup>*Opening Statement: Hearing, Claims Summit Before the House Committee on Veterans Affairs*, 111th Cong. (March 18, 2010) (statement of Bob Filner (D. Calif.), chairman, House Committee on Veterans Affairs).

<sup>8</sup>*Testimony: Hearing, Claims Summit Before the House Committee on Veterans Affairs*, 111th Cong. (March 18, 2010) (statement of Peter L. Levin, chief technology officer, U.S. Dept. of Veterans Affairs, and Roger W. Baker, assistant secretary for information and technology and chief information officer, U.S. Dept. of Veterans Affairs).

<sup>9</sup>*VBA C&P Claims Development Cycle Study*, BOOZ ALLEN HAMILTON (June 5, 2009).

<sup>10</sup>*Veterans Disability Benefits: Expanded Oversight Would Improve Training for Experienced Claims Processors*, U.S. GOV'T ACCOUNTABILITY OFF. (April 30, 2010).

<sup>11</sup>*Quality v Quantity: Examining the Veterans Benefits Administration's Employee Work Credit and Management Systems: Hearing Before the House Committee on Veterans Affairs*, 111th Cong. (testimony of Jimmy F. Sims Jr., rating veterans' service representative, Winston-Salem, N.C. Regional Office, Veterans' Benefits Administration, and shop steward, Association of Federal and Government Employees, Local 1738) (May 27, 2010).

<sup>12</sup>Special monthly compensation is compensation paid over and above the normal rating scale for severe trauma or disease and contemplates the veteran's varying degrees of inability to care for himself or herself and conditions such as blindness, paraplegia, amputations, and so forth.

<sup>13</sup>*Examining Appellate Processes and Their Impact on Veterans: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs, House Committee on Veterans Affairs*, 111th Cong. (statement of Judge Bruce E. Kasold, U.S. Court of Appeals for Veterans Claims) (May 14, 2009).

<sup>14</sup>James P. Terry, chairman, Board of Veterans' Appeals, *Annual Report to the Secretary*, at 21 (March 16, 2009). It should be noted that the chairman claims a 94 percent accuracy rate in the board's decision, which is called into question by the statistics coming out of the CAVC.

<sup>15</sup>*Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims? Hearing Before the House Committee on Veterans Affairs* (statement of Michael Walcoff, deputy undersecretary for benefits, Veterans' Benefits Administration) (June 18, 2009).

<sup>16</sup>*Audit of VA Regional Office Rating Claims Processing Exceeding 365 Days*, U.S. DEPARTMENT OF VETERANS AFFAIRS,

OFFICE OF THE INSPECTOR GENERAL 20 (Sept. 23, 2009).

<sup>17</sup>*Veterans Benefits Administration Compensation and Pension Claims: D Cycle Study, Final Report*, BOOZ ALLEN HAMILTON 25 (Nov. 30, 2009).

<sup>18</sup>*Veterans Disability Benefits, Expanded Oversight Would Improve Training for Experienced Claims Processors*, Introduction: "What GAO Found." U.S. GOV'T ACCOUNTABILITY OFF. (It should be noted that veterans service representatives do not represent veterans and are employed by the VA and engage in the preparation of a claim for rating. Similarly, rating veterans service representatives do not represent anyone and perform the rating function on claims prepared by the veterans' service representatives. These personnel should not be confused with the veterans' service officers, who do represent veterans before the agency.); see also *Veterans Benefits Administration Compensation and Pension Claims: D Cycle Study, Final Report*, *supra* note 17, at 3, 18.

<sup>19</sup>*Addressing the Backlog: Can the U.S. Department of Veterans Affairs Manage One Million Claims: Hearing Before the House Committee on Veterans Affairs*, 111th Cong. (statement of Michael Ratajczak, decision review officer, Cleveland Regional Office, Testimony on behalf of the Association of Federal and Government Employees), (June 18, 2009).

<sup>20</sup>*Veterans Benefits Administration Compensation and Pension Claims: D Cycle Study, Final Report*, *supra* note 17, at 3–4.

<sup>21</sup>*Testimony of Peter Levin*, *supra* note 8.

<sup>22</sup>*Addressing the Backlog*, *supra* note 15. *Veterans Benefits Administration Compensation and Pension Claims: D Cycle Study, Final Report*, *supra* note 17.

<sup>23</sup>*VBA Audit of National Call Centers and the Inquiry Routing Information System*, May 13, 2010.

<sup>24</sup>*Addressing the Backlog*, *supra* note 15. *Veterans Benefits Administration Compensation and Pension Claims: D Cycle Study, Final Report*, *supra* note 17.

<sup>25</sup>*Quality v Quantity: Examining the Veterans Benefits Administration's Employee Work Credit and Management Systems: Hearing Before the House Committee on Veterans Affairs*, *supra* note 11. *Addressing the Backlog*, *supra* note 19 at 11.

<sup>26</sup>*Quality vs Quantity: Examining the Veterans Benefits Administration's Employee Work Credit and Management Systems*, *supra* note 11.

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

<sup>28</sup>*Testimony: Hearing, Claims Summit Before the House Committee on Veterans Affairs*, 111th Cong. (statement of Joe Wynn, legislative liaison, National Association for Black Veterans) (March 18, 2010).

<sup>29</sup>*Id.*

<sup>30</sup>*Testimony: Hearing, Claims Summit Before the House Committee on Veterans Affairs*, 111th Cong. (written statement by Federal Bar Association, Veterans Law Section) (March 18, 2010).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*