



Board of Veterans' Appeals

REPORT OF THE CHAIRMAN



Fiscal Year 2009



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

March 16, 2010

The Honorable Eric K. Shinseki
Secretary of Veterans Affairs
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420

Dear Mr. Secretary:

I am pleased to present the Fiscal Year 2009 Report of the Chairman, Board of Veterans' Appeals (Board or BVA), for inclusion in your submission to Congress. Information on the activities of the Board during Fiscal Year 2009 and the projected activities of the Board for Fiscal Years 2010 and 2011, as required by 38 U.S.C. § 7101(d)(1), are provided in Parts I and II.

Fiscal Year 2009 saw the Board increase productivity to the highest level since Judicial Review was enacted in 1988 and conduct a record number of personal hearings. Although Veterans benefits law continued to change, the employees of the Board never lost sight of the mission to produce timely, quality decisions for the Veterans we serve. Nor did they lose sight of our obligation to treat Veterans and their families with care and compassion.

I believe the enclosed report will provide you, the Congress, and the Veterans we serve with an accurate and meaningful perspective on the Board's activities of Fiscal Year 2009.

Very respectfully,

A handwritten signature in black ink, appearing to read "James P. Terry". The signature is written in a cursive style with a large initial "J" and "T".

James P. Terry
Chairman

Enclosure

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Introduction

The law requires that the Chairman of the Board of Veterans' Appeals (Board or BVA) report the activities of the Board at the conclusion of each fiscal year. This report includes two parts. Part I provides a discussion of BVA activities during Fiscal Year 2009 and projected activities for Fiscal Years 2010 and 2011. Part II provides statistical information related to BVA activities during Fiscal Year 2009 and projected activities for Fiscal Years 2010 and 2011.

The Board makes final decisions on behalf of the Secretary on appeals from decisions of local Department of Veterans Affairs (VA) offices. The Board reviews all appeals for entitlement to Veterans' benefits, including claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and health care delivery.

The Board's mission is to conduct hearings and issue timely, understandable and quality decisions for Veterans and other appellants in compliance with the requirements of law.



**Department of Veterans Affairs
Fiscal Year 2009
Veterans Law Judges**

PART I

ACTIVITIES OF THE BOARD OF VETERANS' APPEALS FISCAL YEAR 2009

The Board was established in 1933 and operates by authority of, and functions pursuant to, Chapter 71 of Title 38, United States Code. The Board consists of a Chairman, Vice Chairman, Principal Deputy Vice Chairman, 60 Veterans Law Judges (VLJs), eight Senior Counsel, 312 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the Secretary of Veterans Affairs. The Board is comprised of four Decision Teams with jurisdiction over appeals arising from the Department of Veterans Affairs (VA) Regional Offices (RO) and Medical Centers in one of four geographical regions: Northeast, Southeast, Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 12 line Judges, two Senior Counsel, and 75 staff counsel. Staff counsel review the record on appeal, research the applicable law, and prepare comprehensive draft decisions or remand orders for review by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal.

The Board has jurisdiction over a wide variety of issues and matters, but the vast majority of appeals considered (95%) involve claims for disability compensation or survivor benefits. Examples of other types of claims that are addressed by the Board include fee basis medical care, waiver of recovery of overpayments, reimbursements for emergency medical treatment expenses, education assistance benefits, vocational rehabilitation training, burial benefits, and insurance benefits.

In Fiscal Year 2009, the Board issued 48,804 decisions and conducted 11,629 hearings with a cycle time of 100 days. Cycle time measures the time from the date an appeal is physically received at the Board until a decision is dispatched, excluding the time the case is with a Veterans Service Organization (VSO) representative. The cycle time of 100 days was 55 days faster than in 2008 and the lowest since 2004. The Board physically received 49,783 appeals in Fiscal Year 2009 and expects to receive at least that many appeals in Fiscal Year 2010.

During the past fiscal year, the Board hired 55 attorneys and law clerks to fill vacant staff counsel positions and to replace departing staff counsel. The Board recruited attorneys from 33 different law schools around the country. The Board attracts a very high caliber of applicant, with most newly hired attorneys having experience on Law Review or having served a Judicial clerkship prior to coming to the Board.

Successes

The Board issued 48,804 decisions in Fiscal Year 2009, an increase of 5,047 over the 43,757 decisions issued in Fiscal Year 2008. The Board's productivity in Fiscal Year 2009 represents the greatest number of decisions issued by the BVA in any year since the beginning of judicial review of Board decisions in 1990. VLJs conducted 11,629 hearings, which is an increase of 977 hearings over Fiscal

Year 2008 and the most hearings ever held by the Board in a year. All of the line VLJs exceeded their productivity goals and most traveled to at least three ROs to conduct one week of Travel Board hearings at each site. This productivity was possible because of the extraordinary efforts of the VLJs, staff counsel, and administrative support staff.

In addition to dispatching the 48,804 decisions issued by the Board in Fiscal Year 2009, the Board's administrative support staff reviewed 67,411 pieces of mail, determined the nature of the correspondence, and associated them with claims files. The administrative staff also answered over 88,000 inquiries from Veterans or their representatives.

In Fiscal Year 2009, the Board focused on methods to increase decision output and the quality of the decisions rendered. The Board continued efforts to eliminate avoidable remands and increase decision output through the use of voluntary attorney overtime, production incentives for attorneys, and issuance of clear, concise, coherent, and correct decisions. BVA will continue to challenge its employees in the upcoming fiscal year to increase decision output even further and to maintain the high level of quality that was achieved in Fiscal Year 2009. The 94.0% accuracy rate for the fiscal year was virtually the same as the 94.8% accuracy rate for Fiscal Year 2008. The accuracy rate quantifies those substantive deficiencies that would be expected to result in a reversal or a remand by the Court of Appeals for Veterans Claims (CAVC). Quality deficiencies that are identified during the quality review process are addressed through appropriate follow-up training for the VLJs and attorneys.

Succession Planning

In Fiscal Year 2008, the Board obtained approval from the Secretary and the Office of Personnel Management (OPM) to create two Senior Executive Service (SES) positions and two Senior Level (SL) positions. The two SES positions are the Principal Deputy Vice Chairman and the Director of Management, Planning and Analysis. The two SL positions are the Chief Counsel for Operations and the Chief Counsel for Policy.

These new positions allow the Board to recruit the best and the brightest to manage Board operations, and are critically important in the increasingly complex world of Veterans benefits appellate adjudication. Since the creation of the CAVC and the rapidly increasing involvement of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), the complexity of BVA decisions has increased tremendously as the Board must comply with the decisions of our reviewing Courts. The number of claims filed at regional offices and medical centers continues to increase, and the Board's workload will also increase at least proportionally to the increase of the workload of the originating agencies. In addition, the work of the Disability Benefits Commission suggests that Veterans' benefits law is likely to continue to evolve. The intensified requirements of the claims adjudication system are aligned with the responsibilities of other SES and SL level officials.

These positions were filled in late 2008 and early 2009 and the dynamic leadership our employees brought to these positions was critical in propelling the Board to a very productive year. The Board's new director of Management, Planning, and Analysis reorganized the Board's administrative staff in order to remove the stovepipe effect and create a flatter structure to better facilitate oversight, coaching, mentoring, empowerment, and accountability. A key component of his organizational reengineering was the inclusion of a viable succession plan. The old structure provided little opportunity for career growth. By reducing the span of control, he placed all managers in a better

position to monitor the work of their subordinates and provide the coaching and mentoring to assist them in becoming more efficient and effective.

The Board has eight Senior Counsel positions which function as a training ground for future VLJs. The creation, in Fiscal Year 2003, of two Senior Counsel positions on each decision team provides the necessary flexibility to maintain productivity despite short-term personnel shortages. Senior Counsel perform as Acting VLJs, Team Leaders, and attorneys drafting decisions. In addition, Senior Counsel mentor and evaluate newly hired attorneys and supervise more experienced attorneys in need of special attention or assistance. The creation of the Senior Counsel positions has allowed the Board's current leaders to train and mentor future leaders and has provided significant advancement opportunities for our staff attorneys.

The Board also has a rigorous recruitment program and is able to hire some of the best qualified attorneys and administrative personnel available. In Fiscal Year 2009 the Board hired 55 new attorneys and law clerks, as well as 27 administrative professionals. The Board attracts high caliber law clerks, attorneys, and administrative personnel because the mission to serve Veterans is one that is particularly attractive to those seeking a career in public service. During the summer of Fiscal Year 2009, the Board hired 10 law clerks to work with attorneys and VLJs to draft decisions and other work products. In addition to completing challenging writing assignments, the summer law clerks also participated in training activities and were mentored by BVA attorneys. The goal is to have them apply for permanent employment with the Board after graduation.

The Board's Goals for Fiscal Years 2010 and 2011

The Board's challenge is to transform into a 21st century organization that will strive to reduce the backlog of appeals, increase efficiency, and leverage technology to better serve Veterans. These goals will be achieved by being people-centric, results-driven, and forward-looking while planning new initiatives.

1. Eliminate the Backlog

The Board will continue to focus in the coming year on eliminating the backlog, within existing resources, by concentrating on the following:

- ***Eliminating avoidable remands:*** Fewer remands mean fewer appeals returned to the Board and, thus, a reduced backlog. At the end of Fiscal Year 2004, there were 31,645 remands pending at VBA. By the end of Fiscal Year 2009, that number had decreased to 27,251. The Board tracks the reasons for remand and shares those reasons with the Agency of Original Jurisdiction (AOJ) for training purposes. The Board also will request a waiver of initial AOJ review of new evidence submitted directly to the Board. By soliciting waivers in those cases where an appellant or representative submits evidence without a waiver, the Board can in many cases avoid unnecessary remands.
- ***Strengthening BVA's intra-agency partnerships:*** Joint training efforts with VBA, the Office of the General Counsel (OGC), and the Veterans Health Administration (VHA) will improve case development and decision quality and reduce remands. In addition, BVA meets with representatives from VHA, VBA and OGC on a monthly basis to discuss and resolve issues of mutual concern that adversely impact the quality of case output.

- **Training:** In 2009 the Board decided to upgrade its training office with additional staff. A new senior counsel training coordinator will reorganize training evolutions for the Board's attorneys and judges. The Board will also expand training to include VBA, OGC, and VHA as well, to ensure that all segments of the benefits system will make consistent and accurate decisions for Veterans. Training for new attorneys in Fiscal Year 2009 included courses on basic Veterans' law and off-site training at the Adjudication Academy in Baltimore. The latter training included overview presentations on the functions of the ROs, OGC, VSOs, the U.S. Army and Joint Services Records Research Center (JSRRC), the Appeals Management Center, and the VA Medical Centers. Throughout the past year, the Board's professional staff attended courses on topics such as Adjudicating Dental Claims, Introduction to Medical Terminology, The Cardiovascular System, Evidence Verification, Common Medical Questions in BVA Adjudications, Efficiency in Decision Writing, and Evaluation of Lay Evidence. Continued training efforts in the new fiscal year will provide the VLJs and attorneys with the latest information on a variety of legal and medical topics.
- **Writing clear, concise, coherent, and correct decisions:** The Board's leadership continued to stress to the VLJs and attorneys the value of writing clear, concise, coherent, and correct decisions in Fiscal Year 2009. The benefits of this initiative continued to be apparent, and the Board issued more decisions than anticipated. In the long term, it is expected that this initiative will enable VLJs and attorneys to continue to produce more and better quality Board decisions.
- **Utilizing employee incentive, mentoring, and training programs:** A number of programs have been introduced to increase employee motivation and satisfaction as well as to increase productivity and decision quality. Two of the most popular programs are the student loan repayment program and the flexiplace program. The student loan repayment program provides for loan assistance for up to eight highly qualified attorneys per year. Attorneys selected for this program are required to remain with the Board for at least three years and maintain exceptional levels of achievement in all critical areas of performance. Effective November 1, 2005, the Chairman authorized a permanent flexiplace program to permit a limited number of attorneys to prepare draft decisions and other work products at their primary residence (a pilot flexiplace program had been in effect since 1999). This program enabled the Board to retain attorneys who might otherwise have resigned due to the location of the primary residence, other personal reasons, or because another agency would allow more extensive telecommuting. In connection with this program, the Board successfully implemented a number of data security safeguards, such as encryption software for Board laptops used by flexiplace program participants, and locked cabinets at the primary residence for the laptop and original claims folders. Each flexiplace participant agrees to abide by the rules of the program, which include strict safeguards to protect sensitive data. Participants are not permitted to use their own personal computers for drafting decisions, and the home work sites are periodically inspected to ensure continued compliance with the Board's rules.
- **Making use of overtime:** The Board will continue to use overtime within existing resources to enhance output.

These measures will work to reduce the backlog and to shorten the time it takes for a Veteran to receive a fair, well-reasoned Board decision.

2. Expedited Claims Adjudication Initiative

At the direction of the Secretary and in coordination with VBA, the Board proposed an Expedited Claims Adjudication (ECA) initiative that was launched in February 2009 as a two-year pilot program at four select ROs. In order to help accelerate the timely processing of all claims and appeals, VA offers represented claimants the option of participating in the ECA initiative for expedited processing of claims and appeals. A claimant who elects to participate in the ECA voluntarily waives specified procedural rights and, in return, is placed on a fast track for adjudication. The expected rapid disposition of these claims should reduce the backlog and thereby ultimately improve the overall timeliness of claims processing.

Participation in the ECA initiative is offered in writing by VA as an option when a claim is received. During the pilot program, participation extends to claims for benefits administered by VBA at four select locations (Philadelphia, Nashville, Lincoln, and Seattle) for claimants who are represented. Participation is open to claims for disability compensation benefits under 38 C.F.R. Parts 3 and 4, excluding a narrow class of claims including pension benefits, survivor benefits, and simultaneously contested claims.

In addition to expedited claims at a participating RO, any claims appealed to the Board under the ECA initiative will be screened upon arrival at the Board to ensure that the record is adequate for decisional purposes when the appeal reaches its place on the Board's docket. If the record is inadequate, the Board will take prompt action under existing regulations, such as soliciting a waiver of RO consideration of additional evidence, and remand the case for further development, if necessary.

By the middle of November 2009 there had been 755 claims adjudicated under the ECA with an average days to complete of 131.3 compared with 156.7 for all claims nationwide. The Board held hearings in October 2009 for the first two ECA appeals that have come to the Board. These appeals arrived at BVA less than nine months after the initial claim was filed at an RO. These statistics suggest that the ECA can be very effective at increasing efficiency of the claims and appeals process. The Department is very excited about this program and the positive impact expected in speeding up the adjudication of claims and appeals before VA.

3. Paperless Appeals

In Fiscal Year 2009 the Board held one hearing with a paperless record and completed three paperless appeals. For some time now, VA has been processing Benefit Delivery at Discharge (BDD) claims for separating servicemembers by using a paperless claims processing system at ROs in Salt Lake City, Utah and Winston-Salem, North Carolina. The appeals of these claims have begun to reach the Board and have allowed the Board the opportunity to begin planning how to handle the expected growing caseload of paperless appeals. The Board has found several areas of improvement while working on these appeals and those will be implemented to make other appeals proceed as expeditiously as possible. Paperless claims and appeals provide many benefits to Veterans and to VA. Electronic files are secure from loss or damage and are backed up daily. In addition, electronic files are not subject to mailing delays between offices, and allow multiple offices to work on parts of the file simultaneously, preventing the need for down-time while another office works on the claim. The Board fully supports VA's goal of increasing the use of paperless claims and appeals processing and expects a significant increase in paperless appeals in the coming years.

4. Expand Use of Video Hearings

The Board will leverage video conferencing technology to increase the capability and access to video hearings. The Board will work with the Office of Information and Technology (OI&T) to upgrade the current video conferencing technology both at BVA and at ROs. When the Board moves to a new location in 2011, the number of video hearing rooms will increase from 5 to 13. The Board also is working with VBA and VHA to allow video hearings to be held from more locations in the field (other than just ROs) which will make it more convenient for Veterans and make the video option more appealing. Initially, BVA will use the expanded video capability to reduce the backlog of hearings. Updating and expanding the Board's video capability will reduce the time Veterans currently wait for their hearing, will reduce the Veteran's travel time to reach a video site, and will allow VLJs to recapture travel days as decision-generating workdays.

5. Create Web-Based Tracking System

The Board will work with VBA and other VA offices to create an on-line tracking system that will allow Veterans to check the status of their claims and appeals. This system will provide up-to-date information to Veterans and will promote transparency and improve customer service. The Board expects a significant reduction in Congressional, telephone, and written inquiries as soon as the status and location of claims and appeals is available to Veterans and their representatives on line. This will allow staff to spend less time responding to inquiries and more time processing appeals.

6. Legislative Initiatives

In October 2009, the Chairman testified before the House Subcommittee on Disability Assistance and Memorial Affairs in support of parts of a draft bill. VA, as represented by the Chairman, supported a section of the bill that would provide for an automatic waiver of AOJ consideration for evidence submitted to VA after the filing of a Substantive Appeal. If an appellant wished to not waive AOJ consideration, he or she would be free to specifically request non-waiver, but the default position would be to send the evidence directly to the Board. This would have the effect of streamlining the appellate process and improving efficiency while still ensuring that appellants' rights are protected. VA is in the process of advancing several other legislative proposals also aimed at increasing efficiency and streamlining the appellate process.

Fiscal Year 2009 Congressional Testimony and Other Briefings

During the fiscal year, the Chairman testified before the Senate Veterans Affairs Committee and the House Subcommittee on Disability Assistance and Memorial Affairs regarding the appellate process. The Chairman also testified before the House Subcommittee regarding draft legislation addressing the CAVC and the appellate process. In addition, the Chairman, or his representatives, discussed the Board's successes, challenges, and general activities at the New Jersey Association of Veterans Service Officers Annual Training, the National Association of County Veterans Service Officers Convention, the Disabled American Veterans 88th National Convention and Legislative Seminar, and the Ohio Association of County Veterans Service Officers Conference.

In addition, the Chairman briefed both majority and minority staff of the Senate and House Veterans Affairs Committees on the "State of the Board".

Significant Judicial Precedent and Its Effect on the Board

➤ ***Shinseki v. Sanders*, 129 S.Ct. 1696 (2009):**

In *Shinseki v. Sanders* the Supreme Court (Court) overturned the decisions of the Federal Circuit in *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007) and *Simmons v. Nicholson*, 487 F.3d 892 (Fed. Cir. 2007). The question presented in this case concerned which party (i.e. the appellant or VA) bears the burden of proof in the context of a prejudicial error analysis when the appellant alleges that the agency provided defective notice under the Veterans Claims Assistance Act (VCAA). Specifically, the Court addressed the validity of the Federal Circuit's holding that when VA provides a deficient VCAA notice letter in any respect, that deficiency must be presumed prejudicial, requiring reversal unless VA can rebut the presumption by showing that the error did not affect the essential fairness of the adjudication.

The Court rejected the Federal Circuit's framework as conflicting with established law, and in particular, the statutory requirement that the CAVC "take due account of the rule of prejudicial error." It determined that the framework was too complex and rigid, that the presumption set forth by the Federal Circuit imposed unreasonable evidentiary burdens upon VA, and noted that the framework would often require the CAVC to treat as harmful those errors that in fact were harmless. Accordingly, the Court held that where an appellant seeks to have a judgment set aside because of a defective VCAA notification letter, he or she carries the burden of showing that prejudice resulted. The implication of this case is vast, as it relieves VA of satisfying a heavy evidentiary burden that ultimately would not alter the outcome of the appeal, and prevents unnecessary reversals where a VCAA notice letter error would not have impacted the substantive rights of the appellant.

➤ ***Cushman v. Shinseki*, 576 F.3d. 1290 (Fed. Cir. 2009):**

In this case, the Federal Circuit addressed a matter of first impression, namely, whether an individual applying for VA benefits is entitled to the protections guaranteed by the Due Process Clause of the Fifth Amendment. Such protections include fair adjudication of a claim, appropriate notice, and the opportunity for a hearing.

In addressing this issue, the Federal Circuit examined the Supreme Court's treatment of administrative proceedings before the Social Security Administration, and observed that the Court had strongly implied that certain due process rights attach to those proceedings. Analogizing claims for Social Security benefits to claims for benefits administered by VA, and citing to other supportive precedent, the Federal Circuit concluded that the Due Process Clause attaches to an individual's claim of entitlement to VA disability benefits. This significant holding establishes that claimants seeking VA benefits will have the right to fair adjudication, notice, and the opportunity for a hearing on a constitutional basis distinct from any other statutory or regulatory provisions setting forth similar protections.

➤ ***Vazquez-Flores v. Shinseki*, 580 F.3d. 1270 (Fed. Cir. 2009):**

The Federal Circuit vacated and remanded the decision of the CAVC in *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008). In that decision the CAVC held that proper notice under the VCAA for an increased compensation claim required notice tailored to the specific disability of a particular Veteran, to include information such as alternative diagnostic code criteria that would not be satisfied by evidence generally showing that a disability had worsened or increased in severity. The CAVC also held that VCAA notice must inform the Veteran that he or she should submit evidence describing the effects on daily life.

The Federal Circuit vacated and remanded the CAVC decision, holding that VA is not required to give Veteran-specific notice, nor must evidence pertaining to the Veteran's daily life necessarily be obtained prior to adjudication. In so finding, the Federal Circuit relied on past precedent of the VCAA requiring only generic notice based on a particular type of claim, and held that such Veteran-specific notice as required by the CAVC's decision cannot be considered generic notice. Further, it held that the statutory authority for the schedule of ratings is based entirely on the average impairment of earning capacity, and therefore it is not a breach of duty if VA does not specifically request evidence related to effect on daily life.

➤ ***Rice v. Shinseki*, 22 Vet. App. 447 (2009):**

In this decision, the CAVC held that a request for a total disability rating based on individual unemployability (TDIU) is not a separate, freestanding claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities. Therefore, entitlement to TDIU should properly be considered, for effective date purposes, as either a part of the underlying determination of the appropriate initial disability rating to be assigned following the grant of service connection or, if a disability upon which entitlement to TDIU is based has already been found to be service-connected, as part of a claim for increased compensation. Establishing the effective date of TDIU will depend on this distinction, particularly as different statutory and regulatory provisions apply depending on whether the claim is an initial disability claim or one for increased compensation.

➤ ***Percy v. Shinseki*, 23 Vet. App. 37 (2009):**

This appeal presented the issue of whether the requirement that a claimant file a timely Substantive Appeal under 38 U.S.C. § 7105(d)(3) is a jurisdictional predicate to the Board's adjudication of a matter, particularly in light of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), which held that jurisdictional time periods for taking an appeal may not be extended for equitable reasons.

In distinguishing *Bowles*, the CAVC held that section 7105(d)(3) does not operate as a jurisdictional bar that precludes the Board's consideration of an appeal where the Substantive Appeal is untimely. The CAVC specifically noted that, while section 7105(d)(3) provides that the agency of original jurisdiction "may" close a case if a Substantive Appeal is not timely filed, such action is discretionary, not mandatory. Given the permissive nature of section 7105(d)(3), including the express authority to grant indeterminate extensions of time, the CAVC held that VA may waive its objection to an untimely Substantive Appeal, and that the Board may properly adjudicate a matter where there has been such waiver because the 60-day filing period is not jurisdictional in nature. While the Board's regulations refer to the timely filing of a Substantive Appeal as constituting a jurisdictional question, the CAVC stated that it need not provide any deference to this interpretation given that the statute is clear on its face.

➤ ***Clemons v. Shinseki*, 23 Vet. App. 1 (2009) (per curiam):**

This decision addressed the scope of a claim for service connection where the diagnoses of record differ from the specific condition claimed by the appellant. The Board denied the Veteran service connection for posttraumatic stress disorder (PTSD) on the basis that he did not have the condition. The Board's decision focused solely on PTSD, and did not discuss the possibility of service connection for other psychiatric diagnoses of record, including an anxiety disorder and a schizoid disorder.

The CAVC held that an appellant is generally not competent to diagnose his or her mental condition and is only competent to identify and explain the symptoms that he or she observes and experiences. Therefore, the Board should not confine its consideration of a claim to an appellant's belief, as indicated on an application form, that he or she suffers from a particular disorder, such as PTSD. The CAVC instead held that a claim for a specific diagnosis must be considered a claim for any disability that may reasonably be encompassed by several factors including: (1) the claimant's description of the claim; (2) the symptoms the claimant describes; and (3) the information the claimant submits or VA obtains in support of the claim. Thus, the CAVC found that the Board erred in this case by failing to weigh and assess the nature of the current condition the appellant suffered when determining the breadth of the claim before it.

Assistance to VBA Regional Offices and VHA

During the past year the Board continued its efforts to help the ROs reduce their backlog of cases on appeal through the Travel Board program. For most Travel Boards, an attorney travels with a VLJ to an RO to assist in preparing for scheduled hearings. Generally, 43 hearings per judge are scheduled each week. During the course of the week, the attorneys often provide various types of assistance and training to the RO staff.

In Fiscal Year 2009, 161 attorneys provided assistance to 57 ROs. The attorneys conducted training for adjudication personnel at 44 of the ROs visited. With respect to appeals originating from VA hospitals, the Board participated in conference calls with the VHA staff across the country that handle appeals to the Board to discuss issues of concern related to the processing of claims and appeals. In addition, the Board provided training on medical center appeals at several locations.

Veterans Service Organization (VSO) Forums and Global Training

The Chairman invites the VSOs and attorneys who represent appellants before the Board to VSO Forums on a quarterly basis. These meetings address questions that are raised by representatives and also facilitate the exchange of ideas and information. An update on the Board's activities is provided, and matters of general interest are addressed.

The Board also provides global training to VSO representatives who are co-located with the Board to familiarize them with our processes and procedures and with the various functions of the administrative personnel, attorneys, and VLJs. VSOs are also invited to provide training to attorneys and judges and to participate in the in house training that is provided to BVA staff.

Veterans Law Review

During Fiscal Year 2009, the Board published the first edition of the Veterans Law Review. This new journal provides a scholarly look at Veterans benefits law and other issues facing the Board and VA. The Veterans Law Review offers the opportunity for attorneys at the Board, in the Office of General Counsel, and in the private bar to write on topics critical to the rights of Veterans and the legal obligations of those who serve them. The Veterans Law Review also reviews books addressing Veterans benefits and includes case notes as well. Articles in the first edition were authored by both VA and non-VA employees. The second annual issue will be published in early 2010.

Volunteer Activities

The Board proudly supports Veterans and their families and educates VA employees by creating educational exhibits at the Board on subjects such as the Vietnam War, the Korean conflict, Operation Enduring Freedom, Operation Iraqi Freedom, female Veterans, and Prisoners of War (POWs). The Board also facilitates the collection and donation of comfort items for distribution to Veterans at the Washington VA Medical Center and the United States Armed Forces Retirement Home (U.S.A.F.R.H.); distributes United States Department of Defense, VA POW/MIA Day and Veterans Day posters to Veterans; collects Toys for Tots for the United States Marine Corps Reserve; and facilitates the collection of calendars and valentines for Veterans to distribute at the U.S.A.F.R.H. The Board also participates actively in the Combined Federal Campaign.

Planning for the Future

- **Leadership Initiative:** The Leadership Initiative (LI) provides opportunities for all Board employees, as well as employees of other organizations within and outside of VA, to improve their leadership skills through training, mentoring, and networking. Events during Fiscal Year 2009 included a networking breakfast, a presentation on career development at the Board, a luncheon for Administrative Professionals Day, a mock hearing for Take Your Children to Work Day, a luncheon for the Excellence in Leadership Award, and a program addressing becoming a Senior Counsel.
- **Non-BVA Training Initiatives:** The Board sends high producing, high quality attorneys, VLJs, and administrative professionals to Leadership VA, as well as leadership seminars and programs offered through OPM's Federal Executive Institute and its Management Development Centers. Two employees were competitively selected to attend Leadership VA during the past year, which seeks to contribute to the development of leaders within VA. Through a series of experiences, Leadership VA strives to provide an integrated view of VA to further the goal of achieving One VA, explore the internal and external forces affecting VA, give insight into the current and predicted challenges facing the Department in its delivery of services and benefits to the Veterans' community, provide interchange between officials from various levels and organizational elements of VA, and increase leadership skills and provide opportunities for refining them through practice in group settings. The Board also selected two employees to attend Leadership for a Democratic Society at the Federal Executive Institute. This comprehensive four-week course builds the participants' knowledge and skills in personal leadership, transforming public organizations, and the policy framework in which Government leadership occurs. Finally, the Board sent 15 employees to OPM Management Development Centers to participate in courses such as the Supervisory Leadership Seminar: Learning to Lead, and to other leadership development courses. All of these various training courses are an integral part of the Board's plan to develop its future leaders.
- **Facilities:** The Board began planning for a facility move which is scheduled to take place in FY 2011. The Board is meeting on a regular basis with representatives from the General Services Administration, VA's Office of Administration, VA's Office of Information and Technology, and others to ensure that the needs of the Board, our VSO partners, Veterans, and other appellants who visit our facilities will be met. The Board's current location, the Lafayette Building at 811 Vermont Avenue, NW, is scheduled for a complete renovation starting in FY 2011. The Board's move is expected to be temporary, with a return to the Lafayette Building contemplated once renovations have been completed.

BOARD MEMBERS

James P. Terry, Chairman

Steven L. Keller, Vice Chairman

Laura H. Eskenazi, Principal Deputy Vice Chairman

Steven L. Cohn, Deputy Vice Chairman, Decision Team 1

Michelle L. Kane, Chief Member

Robert E. Sullivan, Chief Member

Joaquin Aguayo-Pereles, Deputy Vice Chairman, Decision Team 2

Kimberly E. Osborne, Chief Member

David C. Spickler, Chief Member

Nancy R. Robin, Deputy Vice Chairman, Decision Team 3

Wayne M. Braeuer, Chief Member

Cheryl L. Mason, Chief Member

Mary M. Sabulsky, Deputy Vice Chairman, Decision Team 4

Mark W. Greenstreet, Chief Member

Holly E. Moehlmann, Chief Member

VETERANS LAW JUDGES

Keith W. Allen

Marjorie A. Auer

Kathy A. Banfield

Barry F. Bohan

Derek R. Brown

Anna M. Bryant

Dennis F. Chiappetta, Jr.

Vito A. Clementi

Barbara B. Copeland

Cherry O. Crawford

John J. Crowley

Thomas J. Dannaher

Paula M. DiLorenzo

Shane A. Durkin

Frank J. Flowers

Kathleen Gallagher

Mary Gallagher

George E. Guido, Jr.

Mark F. Halsey

Milo H. Hawley

Mark D. Hindin

Linda Anne Howell

Vicky L. Jordan

Susan L. Kennedy

Michael E. Kilcoyne

Jonathan B. Kramer

Michael S. Lane

Mary Ellen Larkin

Michael D. Lyon

James L. March

James A. Markey

Joy A. McDonald

Jacqueline E. Monroe

Andrew J. Mullen

John E. Ormond, Jr.

Kalpana M. Parakkal

Alan S. Peevy

Renee M. Pelletier

Ursula R. Powell

Harvey P. Roberts

Ronald W. Scholz

Howard N. Schwartz

George R. Senyk

Deborah W. Singleton

Susan S. Toth

Claudia Trueba

Stephen L. Wilkins

Richard F. Williams

PART II

STATISTICAL DATA

Fiscal Year (FY) 2009 Information

The following information is required by 38 U.S.C. § 7101(d)(2):

38 U.S.C. § 7101(d)(2)(A)

Number of cases physically received at the Board during FY 2009: **49,783**

Number of cases added to docket by filing appeal during FY 2009: **51,481**

38 U.S.C. § 7101(d)(2)(B)

Cases pending before the Board at the start of FY 2009: **36,452***

Cases pending before the Board at the end of FY 2009: **40,688***

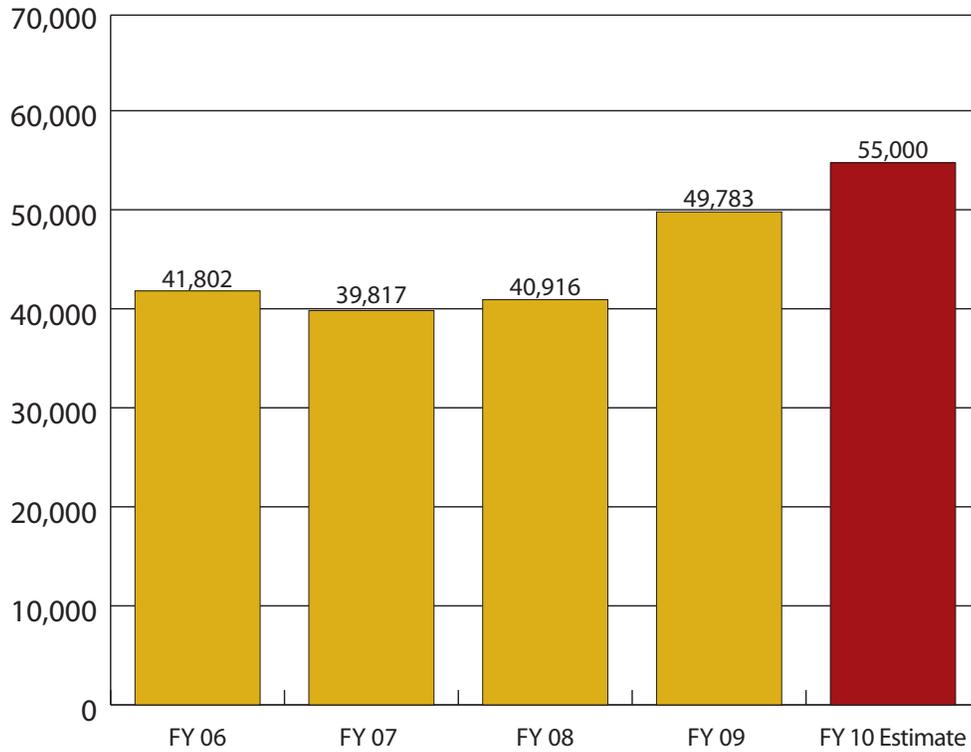
*Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

38 U.S.C. § 7101(d)(2)(C)

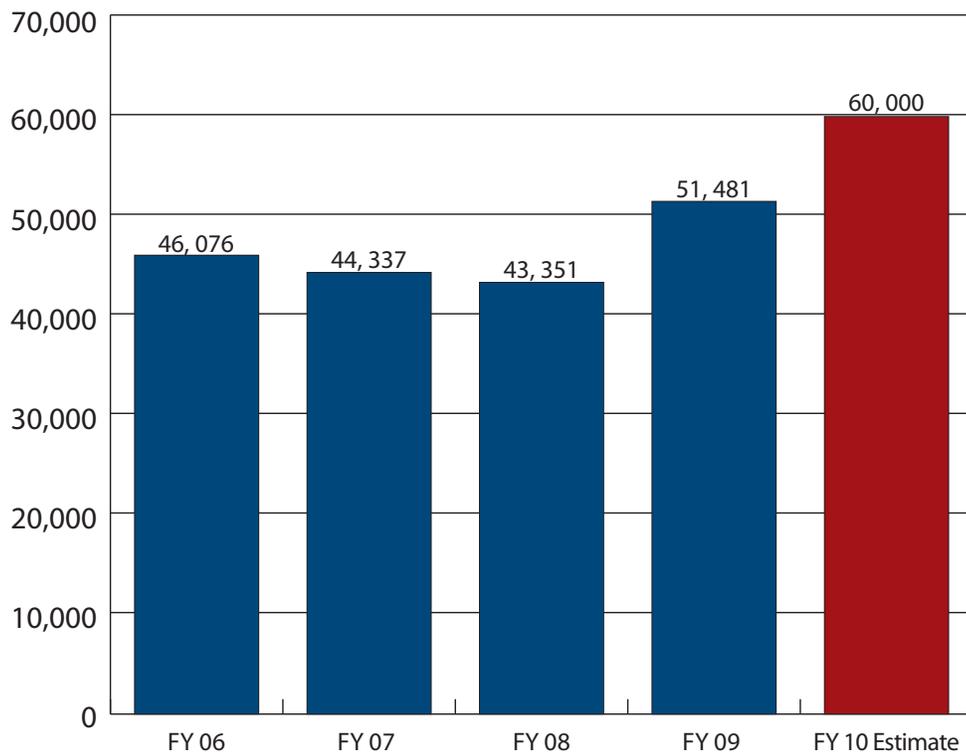
Number of cases received at BVA and new appeals filed during each of the 36 months preceding FY 2009.

Month	Cases Received at BVA				New Appeals (VA Form 9) Filed			
	FY06	FY07	FY08	FY09	FY06	FY07	FY08	FY09
October	3,750	3,206	3,713	3,459	3,700	3,341	4,133	4,497
November	3,610	2,754	3,201	2,879	3,631	3,321	3,646	3,392
December	3,182	3,275	2,767	3,766	3,559	3,196	2,956	3,590
January	4,142	2,949	3,248	3,462	3,899	3,615	3,703	3,730
February	3,886	3,404	3,701	3,691	3,871	3,519	3,579	3,840
March	4,293	3,498	4,351	4,467	4,357	4,085	3,389	4,593
April	2,575	2,854	3,337	5,145	3,615	3,694	3,651	4,459
May	3,093	3,532	3,121	4,278	4,115	4,170	3,629	3,801
June	3,341	3,190	3,279	5,011	4,381	3,963	3,559	4,632
July	2,941	3,695	3,107	4,653	3,531	3,855	3,696	5,003
August	3,313	4,281	3,443	4,466	3,920	3,993	3,517	4,650
September	3,676	3,179	3,648	4,506	3,497	3,585	3,893	5,294
FY Total	41,802	39,817	40,916	49,783	46,076	44,337	43,351	51,481

Cases Received at BVA FY 06 - FY 09



New Appeals (VA Form 9) Filed FY 06 - FY 09



38 U.S.C. § 7101(d)(2)(D)

The average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year:

Time Interval	Responsible Party	Average Elapsed Processing Time
Notice of Disagreement Receipt to Statement of the Case	Field Station	222 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	43 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	590 days
Receipt of Certified Appeal to Issuance of BVA Decision*	BVA	227 days
Average Remand Time Factor**	Field Station	535 days

* This time includes the Board’s accountable time (cycle time) of 100 days. Cycle time measures the time an appeal is physically received at the Board until a decision is reached, excluding the time the case is with a VSO representative.

** The Board changed the methodology to more accurately reflect the amount of time and effort it takes in the field to re-work remanded cases.

Historical Methodology

$\frac{8,070,831 \text{ (total days post remands in the field (until returned to BVA))}}{48,804 \text{ (divided by total number of decisions during FY 2009)}} = 165 \text{ days}$

New Methodology

$\frac{8,070,831 \text{ (total days post remands in the field (until returned to BVA))}}{15,084 \text{ (divided by total number of post remand decisions during FY 2009)}} = 535 \text{ days}$

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2009: **60 members**

The number of professional, administrative, clerical and other personnel employed by the Board at the end of FY 2009: 500 employees not including 60 members above.

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2009: **80**

Number of cases in which such members participated: **7,832**

38 U.S.C. § 7101(c)(2)

Number of acting members of the Board in terms of full-time employee equivalents: **10.4**

PROJECTIONS FOR FISCAL YEARS 2010 AND 2011

The following information is required by 38 U.S.C. § 7101(d)(3):

38 U.S.C. § 7101(d)(3)(A)

Estimated number of cases that will be appealed to BVA:

Fiscal Year 2010:	Cases received at BVA:	55,000
	Cases added to BVA Docket:	60,000
Fiscal Year 2011:	Cases received at BVA:	60,000
	Cases added to BVA Docket:	66,000

38 U.S.C. § 7101(d)(3)(B)

Evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by 38 U.S.C. § 7101(a):

The indicator used by the BVA to forecast its future timeliness of service delivery is BVA “response time” on appeals. By taking into account the Board’s most recent appeals processing rate and the number of appeals that are currently pending before the Board, BVA response time projects the average time that will be required to render decisions on that group of pending appeals. For response time computation, the term “appeals pending before the Board” includes appeals at the Board and those that have been certified for BVA review but are held in the field pending BVA Travel Board or video conference hearings.

The following categories are calculated as follows:

$$\frac{\text{FY 2009 decisions (48,804)}}{261 \text{ work days}} \text{ divided by } = 186.99 \text{ Decisions per Work Day}$$

$$\frac{\text{Cases Pending end of FY 2009 (40,688)} + \text{New Cases expected in FY 2010 (60,000)}}{1} = 100,688 = \text{Total Workload in FY 2010}$$

$$\frac{\text{Total Workload (100,688)}}{\text{Decisions per Work Day (186.99)}} \text{ (divided by)} = 538 \text{ Work Days}$$

$$\frac{\text{Work Days (538)}}{261 \text{ work days}} \text{ (divided by)} = 2.1 \text{ Years}$$

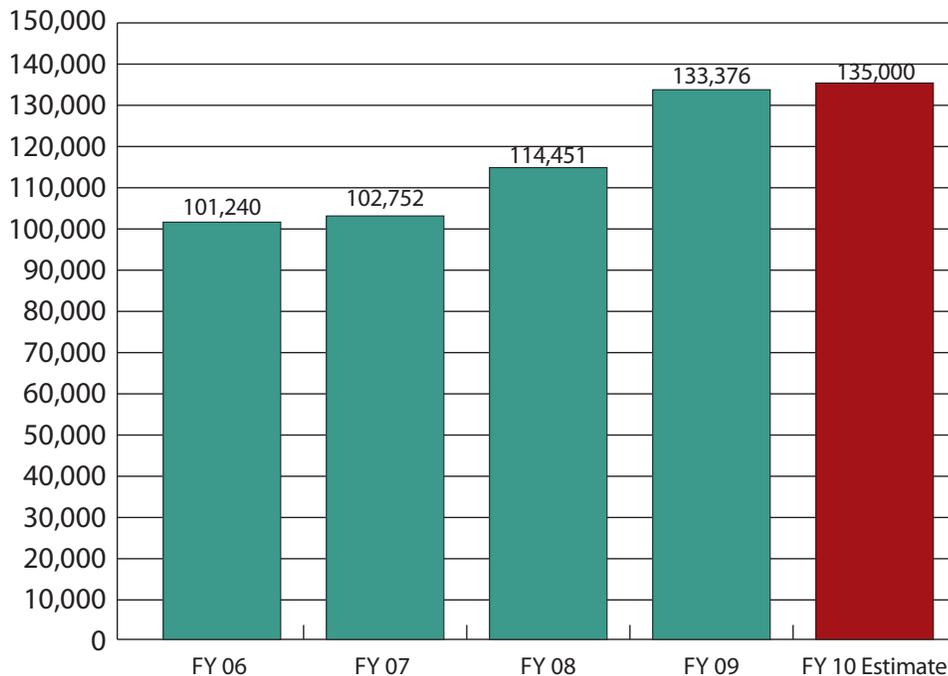
$$\text{Work years (2.1)} \times 12 \text{ (months)} = 25.2 \text{ months}$$

ADDITIONAL INFORMATION

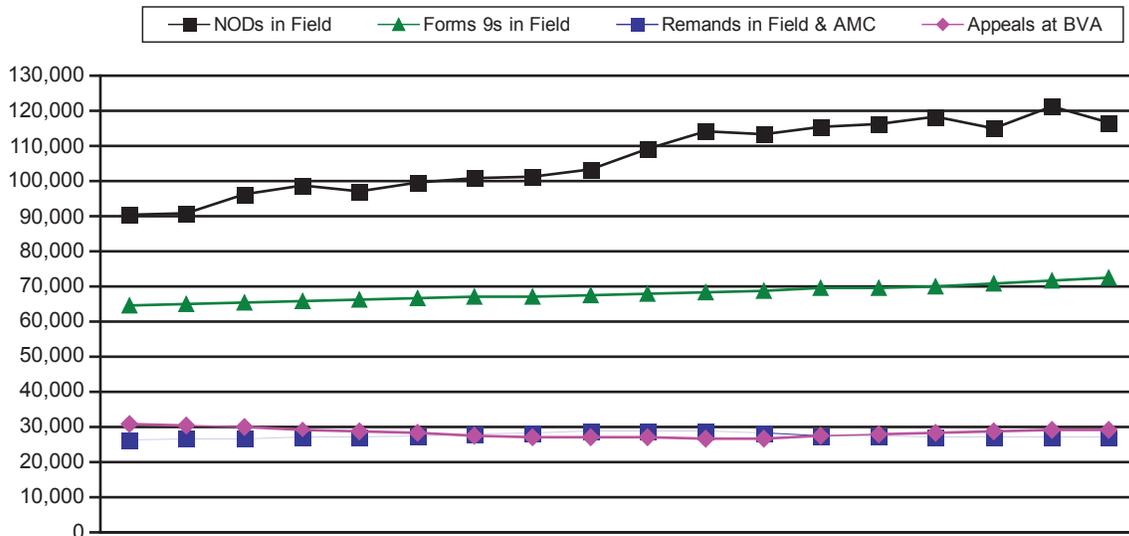
Potential BVA Workload in VBA (information)

Number of New Notices of Disagreement Received in the Field				
Month	FY06	FY07	FY08	FY09
October	8,967	9,288	10,217	12,036
November	7,989	8,131	8,781	9,530
December	7,594	7,400	7,962	10,229
January	8,715	8,701	9,552	10,627
February	8,322	8,154	9,654	10,709
March	9,815	9,551	10,020	12,226
April	8,122	8,615	10,245	11,633
May	9,093	8,836	9,745	10,767
June	8,700	8,573	9,704	11,926
July	7,630	8,627	10,230	11,813
August	8,576	9,326	9,503	11,119
September	7,717	7,550	8,838	10,761
FY Total	101,240	102,752	114,451	133,376

Notices of Disagreement Received FY 06 - FY09



Potential BVA Workload in VBA



	Apr-08	May-08	Jun-08	Jul-08	Aug-08	Sep-08	Oct-08	Nov-08	Dec-08	Jan-09	Feb-09	Mar-09	Apr-09	May-09	Jun-09	Jul-09	Aug-09	Sep-09
NODs in Field	90268	90934	96310	98730	97035	99393	100777	101267	103446	109091	114124	113388	115326	116311	118135	114953	121139	116702
Forms 9s in Field	64394	64975	65426	65908	66252	66546	67114	67255	67473	67971	68428	68819	69534	69440	69914	70773	71468	72664
Remands in Field & AMC	26455	26591	26651	27007	27090	27292	27924	28431	28609	28596	28579	28535	27562	27486	27191	27164	26926	27251
Appeals at BVA	30923	30416	30178	29162	28685	28282	27663	27178	26903	26899	26519	26529	27389	27722	28344	28818	29327	29261

BVA Dispositions by VA Program

FY 2009

APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	8	11.0%	15	20.5%	49	67.1%	1	1.4%	73	0.1%
Compensation	11,370	24.5%	17,405	37.5%	16,409	35.4%	1,183	2.6%	46,367	95.0%
Education	30	11.7%	65	25.3%	156	60.7%	6	2.3%	257	0.5%
Insurance	0	0.0%	2	16.7%	10	83.3%	0	0.0%	12	0.0%
Loan Guaranty	0	0.0%	2	33.3%	4	66.7%	0	0.0%	6	0.0%
Medical	91	15.9%	224	39.1%	229	40.0%	29	5.1%	573	1.2%
Pension	95	12.9%	188	25.5%	426	57.9%	27	3.7%	736	1.5%
VR&E	6	9.0%	30	44.8%	31	46.3%	0	0.0%	67	0.1%
Other Programs	4	13.3%	8	26.7%	17	56.7%	1	3.3%	30	0.1%
BVA Original Jurisdiction	5	5.4%	3	3.3%	66	71.7%	18	19.6%	92	0.2%
Multiple Program Areas	118	20.0%	260	44.0%	204	34.5%	9	1.5%	591	1.2%
GRAND TOTAL	11,727	24.0%	18,202	37.3%	17,601	36.1%	1,274	2.6%	48,804	100.0%

BVA Dispositions by Representation

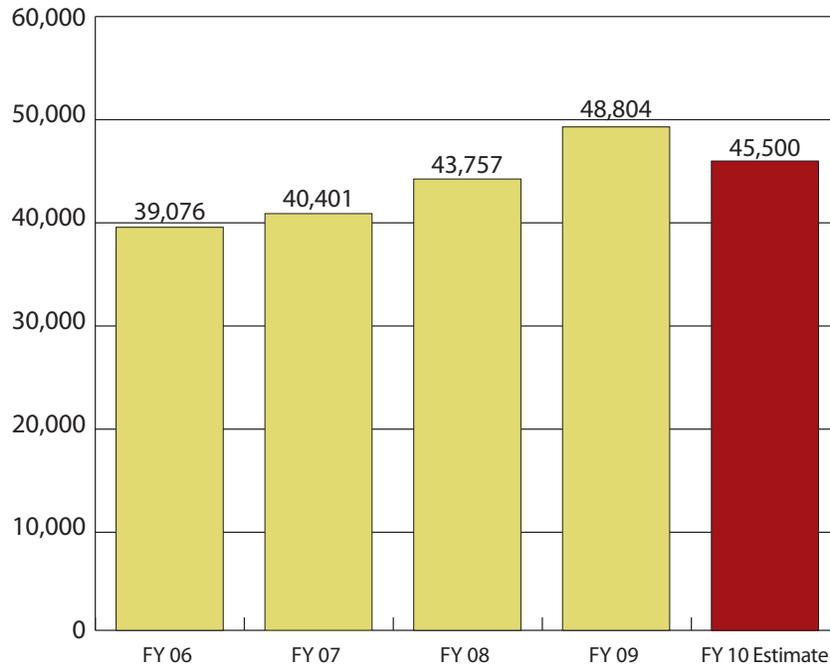
FY 2009

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	2,100	23.5%	3,469	38.8%	3,069	34.3%	297	3.3%	8,935	18.3%
AMVETS	65	25.6%	91	35.8%	94	37.0%	4	1.6%	254	0.5%
Disabled American Veterans	3,853	25.5%	5,607	37.1%	5,243	34.7%	407	2.7%	15,110	31.0%
Military Order of the Purple Heart	179	31.7%	191	33.8%	186	32.9%	9	1.6%	565	1.2%
Paralyzed Veterans of America	118	28.7%	156	38.0%	101	24.6%	36	8.8%	411	0.8%
Veterans of Foreign Wars	1,138	24.2%	1,746	37.2%	1,706	36.3%	108	2.3%	4,698	9.6%
Vietnam Veterans of America	235	23.8%	454	46.0%	261	26.4%	37	3.7%	987	2.0%
State Service Organizations	1,975	24.1%	2,802	34.2%	3,246	39.6%	164	2.0%	8,187	16.8%
Attorney	853	22.7%	1,743	46.4%	1,083	28.8%	80	2.1%	3,759	7.7%
Agents	21	23.1%	32	35.2%	36	39.6%	2	2.2%	91	0.2%
Other Representation	304	28.1%	357	33.1%	395	36.6%	24	2.2%	1,080	2.2%
No Representation	886	18.7%	1,554	32.9%	2,181	46.1%	106	2.2%	4,727	9.7%
GRAND TOTAL	11,727	24.0%	18,202	37.3%	17,601	36.1%	1,274	2.6%	48,804	100.0%

BVA DECISIONS

Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2006	39,076	19.3%	32.0%	46.3%	2.4%
2007	40,401	21.1%	35.4%	40.9%	2.6%
2008	43,757	21.9%	36.8%	38.9%	2.5%
2009	48,804	24.0%	37.3%	36.1%	2.6%

BVA Decisions FY 06 - FY 09



BVA Operating Statistics				
	FY06	FY07	FY08	FY09
Decisions	39,076	40,401	43,757	48,804
Case Receipts*				
Added to Docket	46,076	44,337	43,351	51,481
Received at BVA	41,802	39,817	40,916	49,783
Cases Pending**	40,265	39,031	36,452	40,688
Hearings - VACO	554	421	672	470
Video	2,719	2,870	2,891	3,375
Field	5,885	6,680	7,089	7,784
TOTAL	9,158	9,971	10,652	11,629
Decisions per FTE	86.4	90.3	93.2	93.0
BVA FTE	452	447	469	525
BVA Cycle Time	148	136	155	100
Cost per Case	\$1,381	\$1,337	\$1,365	\$1,407
<p>* Case Receipts composed of: (1) new cases added to BVA's docket; and (2) cases received at BVA, which consist of all cases physically received at the Board, including original appeals and cases returned to the Board's docket (i.e., cases returned following remand development, cases remanded by the Court, and cases received for reconsideration or vacate actions).</p> <p>** Pending figures include certified appeals pending in the field awaiting BVA hearings, as well as cases pending before the Board.</p>				

Department of Veterans Affairs

Board of Veterans' Appeals

Report of the Chairman

Fiscal Year 2009