



Board of Veterans' Appeals

REPORT OF THE CHAIRMAN



Fiscal Year 2010



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

February 22, 2011

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

Dear Mr. Secretary:

I am pleased to present the Fiscal Year 2010 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 2010 and the projected activities of the Board for Fiscal Years 2011 and 2012, as required by 38 U.S.C. § 7101(d)(1), are provided in Parts I and II.

Fiscal Year 2010 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 evolve, 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 offer the enclosed report to provide you, Congress, and the Veterans we serve with an accurate and meaningful perspective on the Board's activities of Fiscal Year 2010.

Very respectfully,

A handwritten signature in cursive script, appearing to read "James P. Terry".

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 2010 and projected activities for Fiscal Years 2011 and 2012. Part II provides statistical information related to BVA activities during Fiscal Year 2010 and projected activities for Fiscal Years 2011 and 2012.

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, health care delivery, and burial benefits.

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 2010
Veterans Law Judges**

PART I

ACTIVITIES OF THE BOARD OF VETERANS' APPEALS FISCAL YEAR 2010

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 (VLJ), eight Senior Counsel, more than 320 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the Secretary of the Department of Veterans Affairs (VA). The Board is comprised of four Decision Teams with jurisdiction over appeals arising from the VA Regional Offices (RO), Medical Centers, and the National Cemetery Administration, in one of four geographical regions: Northeast, Southeast (including Puerto Rico), Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 12 line Judges, two Senior Counsel, and approximately 80 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 also has an Appellate Group, which consists of the Chief Counsel for Policy and Procedure, the Chief Counsel for Operations, the Chief of Litigation Support, the Quality Review team, the Training office, five Special Counsel, and numerous legal support personnel. The Office of Management, Planning, and Analysis is the administrative arm of the Board, consisting of both the Case Support Division and the Decision Team Support Division.

The Board has jurisdiction over a wide variety of issues and matters, but the vast majority of appeals considered (95%) involves 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 2010, the Board issued 49,127 decisions and conducted 13,515 hearings with a cycle time of 99 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 99 days is the lowest it has been since 2004. The Board physically received 52,526 appeals in Fiscal Year 2010 and expects to receive 60,000 appeals in Fiscal Year 2011.

Successes

The Board issued 49,127 decisions in Fiscal Year 2010, an increase of 323 over the 48,804 decisions issued in Fiscal Year 2009. The Board's productivity in Fiscal Year 2010 represents the greatest number of decisions issued by the Board in any year since the beginning of judicial review of Board

decisions. Our productivity would have been greater in Fiscal Year 2010, but for two unforeseen events which dramatically affected our output. Record snow storms struck Washington, DC in February 2010, shutting down the majority of operations for nearly a week. Although the Board continued to hold hearings during this time, this period was far from fully productive. Even more seriously, in April 2010, the Board's computer system was attacked by a crippling virus that suspended virtually all operations for approximately 10 days. As the Board generally averages 1,000 appeals decided per week, these disruptions took a significant toll on productivity. The Board was able to bounce back from the effects of the inclement weather much more effectively than the computer virus, as the virus also affected the ability of our staff to telework due to the lack of a functioning computer system, the residuals of which lasted several weeks.

The Board conducted 13,515 hearings, which is an increase of 1,823 hearings over Fiscal Year 2009 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 49,127 decisions issued by the Board in Fiscal Year 2010, the Board's administrative support staff reviewed 71,821 pieces of mail, determined the nature of the correspondence, and associated them with claims files. The administrative staff, including our call center in Wilkes-Barre, also answered over 96,424 inquiries from Veterans or their representatives by phone, email, or written correspondence.

In Fiscal Year 2010, the Board focused on methods to increase the quality of the decisions rendered while maintaining the high level of decision output. Our Office of Learning and Knowledge Management (Training Office) created targeted training for all employees based, in part, on trends gleaned from our quality review process, as well as on outcomes in cases heard before the Court of Appeals for Veterans Claims (CAVC) and the United States Court of Appeals for the Federal Circuit (Federal Circuit). The Board anticipates a long term positive impact from this successful training program, including better quality decision writing and improved timeliness.

The Board continued efforts to eliminate avoidable remands by engaging other VA stakeholders in the appeals process, such as the Veterans Benefits Administration (VBA), Veterans Health Administration (VHA), National Cemetery Administration (NCA), and the Office of the General Counsel (OGC). We cultivated stronger relationships with leadership at each of these organizations to open lines of communications and partner on methods to improve the overall system for the benefit of the Veterans that we serve.

The Board worked closely with other VA partners to help transform VA into a 21st century Department. Specifically, the Board contributed to the efforts to develop a new paperless claims and appeals system for VA by providing valuable input to software developers regarding the governing laws of the system and the particular requirements for adjudication of appeals. BVA also met our goal of establishing a web-based tracking system for appeals, by linking the Board to eBenefits – a joint venture of VA and the Department of Defense (DOD), which provides Veterans the opportunity to check the status of their claims and appeals securely online. This system has promoted transparency and improved customer service.

During this fiscal year, Board leadership continued to strongly promote legislative proposals that if passed into law will implement systemic changes aimed at increasing efficiency in the appeals process. Many of these concepts have been incorporated into a draft Senate bill.

In the upcoming fiscal year, the Board will continue to challenge its employees to maintain high productivity while increasing the high level of quality that was achieved in Fiscal Year 2010. The Board's decisions reached a 94.0% accuracy rate for the fiscal year, which quantifies substantive deficiencies in all decisions, whether an allowance, a remand, or a denial, including those deficiencies that would be expected to result in a reversal or a remand by the 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

The Board has three Senior Executive Service (SES) positions and two Senior Level (SL) positions. The three SES positions are the Vice Chairman, the Principal Deputy Vice Chairman, and the Director of Management, Planning, and Analysis. The two SL positions are the Chief Counsel for Policy and Procedure and the Chief Counsel for Operations. These positions continue to 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 Federal Circuit, the complexity and length of BVA decisions has increased tremendously. Additionally, the number of claims filed at Regional Offices and Medical Centers continues to increase significantly. The Board's workload, therefore, will also increase at least proportionally to the increase in workload at the originating agencies. Because of the dynamic leadership of our SES and SL leaders, the Board stands ready to meet the intensified requirements of the claims adjudication and appeals system.

The Board has eight Senior Counsel positions on the Decision Teams, three specialized Senior Counsel positions in the Appellate Group, and one in the Office of the Chairman. These positions provide the necessary flexibility to maintain productivity despite short-term personnel shortages and also allow the Board's current leaders to train and mentor future leaders. Senior Counsel perform as Acting VLJs as authorized by 38 U.S.C. § 7101(c)(1)(A). They also function as Team Leaders and attorneys drafting some of the most complex decisions. In addition, Senior Counsel mentor and evaluate newly hired attorneys and supervise more experienced attorneys in need of special attention or assistance.

The Board also has a rigorous recruitment program and is able to hire some of the best qualified attorneys and administrative personnel available. To that end, the Board has devised an in-house program for all employees on matters of diversity and inclusion that illuminates the goals in place for sustaining a diverse workforce. In Fiscal Year 2010, the Board hired 20 new attorneys and law clerks from diverse law schools throughout the country. During the summer of Fiscal Year 2010, the Board also hired 12 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 Board views this internship program as a recruitment tool, with the aim of having the law clerks apply for permanent employment with the Board after graduation. Additionally, the Board hired 18 administrative professionals, to include ten individuals through the Wounded Warrior Program, aimed at hiring disabled Veterans, and five

through the Student Temporary Employment Program. The Board is able to attract high caliber law clerks, attorneys, and administrative personnel because the mission to serve Veterans is one that is particularly desirable to those seeking a career in public service.

The Board's Goals for Fiscal Years 2011 and 2012

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

1. Reduce the Backlog

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

- ***Eliminating avoidable remands:*** Fewer remands mean fewer appeals returned to the Board and, thus, more timely decisions for our Veterans and other Appellants. The Board continues to closely track the reasons for remands, and that data is accessible by all VA components in the adjudication system for training purposes. Additionally, the Board's Quality Review Office has engaged in extensive liaison efforts with VBA's Appeals Management Center (AMC) during Fiscal Year 2010 and will continue to do so in the future. Through this line of communication, the Board and the AMC addressed and resolved identified issues pertaining to the proper processing of remands, to include identifying when an appeal is ready to be returned to the Board for a final decision. Further, for purposes of reducing remands based on new evidence submitted directly to the Board, the Board has a process in place to solicit a waiver of initial Agency of Original Jurisdiction (AOJ) review of such submissions. 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:*** As in previous years, BVA continues to meet with representatives from VBA, VHA, NCA, and OGC on a monthly basis to discuss and resolve issues of mutual concern that adversely affect the quality of service to Veterans. The Board will continue to contribute to this partnership and play an active role in the VA community.
- ***Training:*** In Fiscal Year 2010, the Board's Office of Learning and Knowledge Management was fully operational with a new supervisory attorney training coordinator and requisite support staff. The Board expanded training to include VBA, VHA, NCA, and OGC, as well as Veterans Service Organizations (VSO) to ensure that all segments of the benefits system make consistent and accurate decisions in Veterans' cases. Training for new Board attorneys in Fiscal Year 2010 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 AMC, and the VA Medical Centers. Throughout the past year, the VLJs and attorneys attended courses on topics such as Traumatic Brain Injury & PTSD; CAVC

trends in Joint Motions for Remand; Evaluating Lay Evidence; Anatomy for Lawyers; Eye Disorders; Adjudicating Dental Claims; Navigating Service Records; Communicating with Tact; and Efficiency in Decision Writing. 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 2010. The benefits of this initiative continued to be apparent, and the Board issued a record number of decisions. In the long term, it is expected that this initiative will enable VLJs and attorneys to continue to improve the quality of Board decisions.
- ***Utilizing employee incentive, mentoring, and training programs:*** A number of programs remain in use to increase employee motivation and satisfaction, as well as to increase decision quality and productivity. Two of the most popular programs are the student loan repayment program and the flexiplace program. The student loan repayment program provides 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 enables the Board to retain attorneys who might otherwise have resigned due to the location of their primary residence, other personal reasons, or because another employer would allow more extensive telecommuting. In connection with this program, the Board has successfully implemented a number of information 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 information. 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 information security rules. In Fiscal Year 2010, the Board had over 130 employees telecommuting in some capacity, which was an increase from the prior fiscal year.
- ***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. Promote a Modified 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 a two-year pilot program at four select ROs, effective in December 2008. In order to help accelerate the timely processing of all claims and appeals, VA offered represented claimants the option of participating in the ECA initiative for expedited processing of claims and appeals. A claimant who elected to participate in the ECA voluntarily

waived specified procedural rights and, in return, was placed on a fast track for adjudication. In addition to expedited claims at a participating RO, any claims appealed to the Board under the ECA initiative were to be screened upon arrival at the Board to ensure that the record was adequate for decisional purposes when the appeal reached its place on the Board's docket. If the record was inadequate, the Board would take prompt action under existing regulations, such as soliciting a waiver of RO consideration of additional evidence, or if necessary, remand the case for further development.

Due to lower than anticipated participation, the initial pilot program was allowed to expire in December 2010. However, the Board remains committed to the core principles of the initiative. In fact, several of the key time-savings provisions set forth in the ECA have been adopted in pending legislation introduced by then Senate Veterans Affairs Committee Chairman Daniel Akaka. Additionally, BVA and VBA are continuing to work collaboratively to reduce appeals processing times by introducing a modified version of the ECA in early 2011, which incorporates strategic targets set to improve VA's timeliness in adjudicating appeals.

3. Advocate for 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 of evidence submitted to VA after the filing of a Substantive Appeal. Appellants who do not want to waive AOJ consideration 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. Also included in draft legislation is a provision that will allow the Board to determine what the most expeditious avenue for a hearing is. The goal is to promote the use of video conference technology for hearings, as this type of hearing can often be scheduled and held more quickly than the traditional in-person hearing. These provisions, along with others proposed by the Board, are designed to streamline the appellate process and improve efficiencies across the system.

4. Expand Use of Video Hearings

Related to one of the Board's legislative proposals outlined above, the Board will leverage video conference technology to increase the capability of, and access to, video hearings. The Board is working with VA's Office of Information and Technology (OIT) to upgrade the current video conference 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 8 to 13. The Board is also working with VBA and VHA to allow video hearings to be held from more locations in the field (beyond ROs), which will be 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, and will allow VLJs to recapture travel days as decision-generating workdays.

5. Efficiently Adjudicate Paperless Appeals

In Fiscal Year 2010, the Board held 14 hearings with a paperless record and completed 53 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 in Winston-Salem, North Carolina. As more of these unique appeals reach the Board, we are refining the processes put in place to adjudicate them. The Board has worked within the constraints of the current system and has cataloged lessons learned along the way. We are working to have these valuable insights incorporated into the development of the upgraded paperless system that the Department is currently creating, the Veterans Benefits Management System (VBMS).

The Board remains committed to making a paperless claims and appeals system work, as it provides many benefits to Veterans and to VA. Electronic files are secure from loss or damage and are securely backed up. 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 a claim. The Board anticipates a significant increase in paperless appeals in the coming years.

Significant Judicial Precedent and Its Effect on the Board

- ***Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009), cert. granted, 130 S. Ct. 3502 (2010):** The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) affirmed a Court of Appeals for Veterans Claims (CAVC) decision that dismissed the Appellant's appeal of a Board decision, as his Notice of Appeal was received more than 120 days after the mailing of the Board decision, and therefore was untimely. The CAVC relied on its interpretation of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), which held that in civil cases, statutory time periods limiting the time for filing a Notice of Appeal are jurisdictional requirements, and further that courts have no authority to create equitable exceptions to jurisdictional requirements. For that reason, the CAVC held that there was no equitable tolling of the 120 day appeal period for Board decisions.

In its decision, the Federal Circuit found that 38 U.S.C. § 7266(a), which sets forth the period for filing a notice of appeal with the CAVC, is a "time of review" provision, as it specifies the time limit for review in a civil case. Also citing the *Bowles* decision, the Federal Circuit stated that because time of review provisions are mandatory and jurisdictional, they are not subject to equitable tolling unless Congress so provides. After reviewing the statutory language and its legislative history, the Federal Circuit found that Congress has not provided that the CAVC's statutory appeal period is non-jurisdictional; therefore, the Federal Circuit found that the 120 day period is not subject to equitable tolling. This decision overturned the Federal Circuit's prior cases *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) and *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) which found that 38 U.S.C. § 7266(a) was subject to equitable tolling. The U.S. Supreme Court held oral argument on this case on December 6, 2010 and as such, this important aspect of Veterans law is set to be clarified.

➤ ***Tyrues v. Shinseki*, 23 Vet. App. 166 (2009):**

In this significant case, the CAVC addressed the scope of its jurisdiction in relation to “inextricably intertwined” issues. The Veteran had filed a claim for service connection for a lung disorder, both on a direct and presumptive basis as due to an undiagnosed illness. In 1998, the Board issued a decision that denied service connection for this disorder on a direct basis, but, in the same decision, it remanded the matter of entitlement to service connection for the lung malady on a presumptive basis for additional development. In 2004, the case returned to the Board, and it issued a decision that denied service connection for the lung disorder on a presumptive basis. The Veteran timely appealed the 2004 denial to the CAVC.

On appeal, the Veteran urged that the CAVC had jurisdiction to review the Board’s 1998 denial of direct service connection in addition to the 2004 denial on a presumptive basis, as the two matters were “inextricably intertwined.” The CAVC was called upon to determine whether the 1998 *remand* rendered nonfinal the 1998 *denial* of service connection on a direct basis. The CAVC rejected the Veteran’s argument and held that the remand did not render the 1998 denial nonfinal, despite the fact that the matters were closely related. In this regard, the CAVC made clear that its “*jurisdiction* to review a Board decision denying a claim is not controlled by whether the claim denied by the Board is ‘inextricably intertwined’ with another claim that was either remanded or referred by the Board . . . because the facts underlying the two claims are so closely tied together.” Instead, the CAVC highlighted that its jurisdiction is determined by whether the Board issued a decision that denied the requested relief and provided notice of appellate rights. The CAVC also made clear that once its jurisdiction is established, it retains the discretion to determine whether the matter on appeal is so closely tied to other matters still pending at VA that it should remand the issue to await disposition of those other intricately related matters by the Agency.

➤ ***Bryant v. Shinseki*, 23 Vet. App. 488 (2010):**

This decision addressed the responsibilities of Veterans Law Judges while conducting hearings on appeal. The CAVC held that 38 C.F.R. § 3.103(c)(2) imposed two distinct duties on a “Board hearing officer:” (1) to fully explain the issues still outstanding that are relevant and material to substantiating the claim; and (2) to suggest the submission of evidence on any issue material to substantiating the claim when the record is missing evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record. The CAVC indicated that these duties did not require preadjudication of the claim. The CAVC specifically noted that VA’s issuance of a notice letter compliant with 38 U.S.C. § 5103(a), which explains to the claimant what is necessary to substantiate the claim, had no bearing on the “Board hearing officer’s” obligation to suggest the submission of evidence that might have been overlooked. This case is significant because it applies 38 C.F.R. 3.103(c)(2) to the Board, without addressing the regulations set forth in 38 C.F.R. Part 20, Subpart H, which govern Board hearings.

➤ ***Vazquez-Flores v. Shinseki*, No. 05-0355, 2010 WL 4146124 (Vet. App. Oct. 22, 2010):**

When this case was initially before the CAVC, *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008), the CAVC held that proper notice under 38 U.S.C. § 5103(a) required notice tailored to the specific disability of a particular Veteran, and further that such notice must inform the Veteran that he or she should submit evidence describing the effects of the disability on employment and daily life. In 2009, the Federal Circuit vacated and remanded the

CAVC's decision, holding that VA is not required to provide Veteran-specific notice prior to adjudication or to request evidence pertaining to the impact of a disability on a Veteran's daily life. Rather, the notice required was generic notice based on the type of the claim. *Vazquez-Flores v. Shinseki*, 580 F.3d 1270 (Fed. Cir. 2009). In the instant case, the CAVC on remand adopted in part its initial reasoning with respect to the adequacy of the notice provided, stating that § 5103(a) notice for increased ratings requires VA to notify the claimant that he or she should submit medical or lay evidence demonstrating a worsening of the disability and the effect that worsening has on the claimant's employment.

The CAVC further held that, with respect to whether the notice error was prejudicial to the claimant, when the notice is wholly defective as to a key element needed to substantiate the claim, such that the absence of evidence on that key element will result in a denial, the natural effect is that the claimant is deprived of a meaningful opportunity to participate in the processing of his claim. Under such circumstances, namely that there was no notice on a particular key element, VA has the burden of demonstrating that the notice error was not prejudicial. The significance of this case is that it further defines what adequate notice is in the context of an increased rating claim, and how the prejudicial error analysis is to be conducted.

➤ ***Jones v. Shinseki*, 23 Vet. App. 382 (2010):**

This decision addressed the issue of when it is appropriate for the Board to rely on an examiner's statement that an opinion cannot be reached "without resort to mere speculation." The CAVC explained that while such a statement is "fraught with ambiguity," it is a medical conclusion and is not inherently inadequate. However, the CAVC held that the Board can only rely on the statement as an adequate conclusion if the examiner has explained the basis for the conclusion or the Board's review of the evidence otherwise makes the basis apparent. If the basis is unclear, then the Board must remand the claim for further development.

The CAVC explained that the basis of a statement that an opinion cannot be reached "without resort to mere speculation" will be clear if it is supported by sufficient facts or data and provides a clear rationale that it is a conclusion reached after all relevant medical information has been sought and considered. The examiner's rationale or the Board's decision must clearly show that the examiner obtained and considered all tests and records that could help illuminate any pertinent medical question. The examiner must also explain what facts he or she cannot determine and may have a duty to conduct further medical research. The CAVC noted that such research may be necessary because use of the term "without resort to speculation" should reflect limitations of knowledge in the greater medical community, not just limitations of knowledge of a single examiner. In reaching its holding, the CAVC recognized that there are limitations to medical knowledge and that VA's duty to assist does not require VA to force an examiner to provide an opinion beyond what may reasonably be concluded from available medical evidence and literature.

➤ ***Bardwell v. Shinseki*, 24 Vet. App. 36 (2010):**

This appeal presented the issue of whether lay evidence can establish an in-service injury or event for the purposes of requiring a medical examination and opinion under 38 C.F.R. § 3.159(c)(4). The Veteran contended that he was competent and credible to assert that he was exposed to gases during training exercises which satisfied the requirement of an in-service

event and therefore required VA to provide him with an examination. The Board relied on the Veteran's service records and the lack of evidence confirming such an event to find that the Veteran's assertions lacked credibility.

In affirming the Board's decision, the CAVC distinguished the Federal Circuit's decision in *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006), which held that the Board could not reject a Veteran's lay evidence about an in-service medical condition solely because that incident was not reported in the Veteran's service treatment records. In rejecting the Appellant's argument that lay evidence of any event occurred must be accepted unless affirmative documentary evidence provides otherwise, the CAVC noted that Congress has expressly provided special status to lay statements by Veterans who engaged in combat with the enemy in 38 U.S.C. § 1154(b); however, it did not do so regarding lay statements of non-combat Veterans. Rather, as in all cases, a non-combat Veteran's lay statements must be weighed against other evidence, including the absence of military records supporting the Veteran's lay assertions.

Assistance to VBA Regional Offices, VHA, and NCA

During the past year, the Board continued its efforts to reduce the backlog of cases on appeal awaiting Board hearings at ROs. For most Travel Board visits, 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 2010, 167 attorneys provided assistance to 57 ROs. The attorneys conducted training for adjudication personnel at 46 of the ROs visited and answered questions with respect to individual appeals during each trip.

With respect to appeals originating from VA hospitals, the Board participated in conference calls with VHA staff across the country that handle appeals to the Board to discuss issues of concern related to the processing of claims and appeals. As a result of these talks, the Board has altered the way these appeals are handled administratively, to better coordinate the movement of files.

The Board also worked closely with NCA to acclimate the Administration to appeals processing and tracking.

Veterans Service Organization Forums and Training

The Chairman invites 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. This year, we also provided training to VSOs on Virtual VA, the current software utilized in paperless claims and

appeals at VA. Although this system is set to be replaced in Fiscal Year 2012, in the meantime, the Board is receiving and adjudicating a relatively small number of these appeals in the prior system.

During this fiscal year, Veterans Law Judges provided substantive training on behalf of the Chairman to the New Jersey County Veterans Service Officers; Ohio County Veterans Service Officers; The National Association of County Veterans Service Officers; National Organization of Veterans Advocates; and Veterans of Foreign Wars.

Veterans Law Review

During Fiscal Year 2010, the Board published the second volume of the *Veterans Law Review*. This legal 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 both inside and outside of VA, legal scholars, and other legal professionals to write on topics critical to the rights of Veterans and the legal obligations of those who serve them. The *Veterans Law Review* also includes book reviews addressing Veterans' benefits, military history, and related current events. The *Veterans Law Review* conducted significant outreach efforts in 2010 in hopes of expanding the visibility of the publication and encouraging submissions from the legal community. The third volume will be published in early 2011.

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 DOD, 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. Several Board employees have participated in the Honor Flight Network, greeting WWII Veterans who have been flown, free of charge, to Washington, DC to view the memorials. The Board also participates actively in the Combined Federal Campaign.

As in previous years, the Board also sponsored two attorneys in the Overseas Military Services Program (OMSP) that was established between VA and DOD. Under the auspices of this program, VA provides Overseas Military Services Coordinators to military facilities in Japan, England, Germany, and Italy as part of the Operation Transition program for those military personnel separating or retiring. Our attorneys provided briefings on a full range of VA benefits, interviewed active duty military personnel, and assisted in the completion of applications for benefits.

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 2010 included a networking breakfast and Cherry Blossom walk; presentations on career development at the Board; a luncheon for Administrative Professionals Day; a mock hearing in conjunction with Take Your Children to Work Day; and a luncheon for the Excellence in Leadership Award.

- ***Non-BVA Training Initiatives:*** The Board sends high quality, high producing attorneys, VLJs, and administrative professionals to Leadership VA, as well as leadership seminars and programs offered through Office of Personnel Management (OPM) 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 current and future challenges facing the Department in its delivery of services and benefits to the Veterans' community; provide an 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 16 employees to OPM Management Development Centers to participate in courses such as the Supervisory Leadership Seminar: Learning to Lead, and 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 continued to plan for a significant physical move of its offices that is scheduled to take place beginning in Fiscal Year 2011. The Board's current location, the Lafayette Building at 811 Vermont Avenue, NW, is scheduled for a complete modernization in Fiscal Years 2011 and 2012. The Board's move to 425 Eye Street, NW, is expected to be temporary, with a return to the Lafayette Building contemplated once modernization of the Lafayette building is completed. Board representatives continue to meet regularly with representatives from the General Services Administration, VA's Office of Administration, OIT, and others to ensure that the needs of the Board, our VSO partners, Veterans, and other appellants who visit our facilities will be met and that the resulting disruption is minimized.

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PART II

STATISTICAL DATA

Fiscal Year (FY) 2010 Information

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

38 U.S.C. § 7101(d)(2)(A)

Number of appeals filed at the Agency of Original Jurisdiction (AOJ) during FY 2010:	57,925
Number of appeals docketed (i.e. cases received):	52,526

Historically, the Board has reported the number of cases physically received during a fiscal year and the number of cases added to the docket separately. Effective on October 1, 2008, a change was made to the docketing procedures to ensure fairness to every Appellant in the order of processing his or her appeal. When a Substantive Appeal (VA Form 9 or its equivalent) is received at the AOJ, the AOJ enters the date of receipt into the Board's electronic database known as the Veterans Appeals Control and Locator System (VACOLS). VACOLS automatically assigns a priority date to the appeal based on the date of receipt, which preserves the appellant's place on the Board's docket. The Board does not have control over that appeal until the AOJ certifies the appeal and the case is physically received at the Board. Until that time, the appeal remains one before the AOJ in VA's bifurcated administrative appeals process. When the case is received at the Board, the appeal is activated or reactivated and formally placed on the Board's docket. The reporting above has been updated to reflect this change and to more accurately report the number appeals filed during the fiscal year.

38 U.S.C. § 7101(d)(2)(B)

Cases pending before the Board at the start of FY 2010:	40,688*
Cases pending before the Board at the end of FY 2010:	45,722*
Cases physically at the Board at the end of FY 2010:	32,458

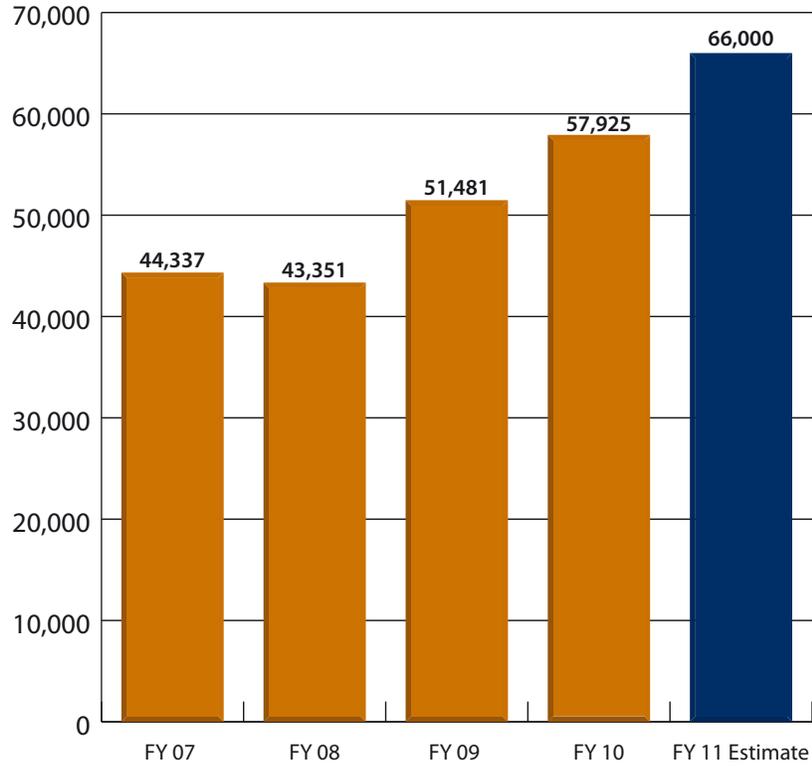
*Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

38 U.S.C. § 7101(d)(2)(C)

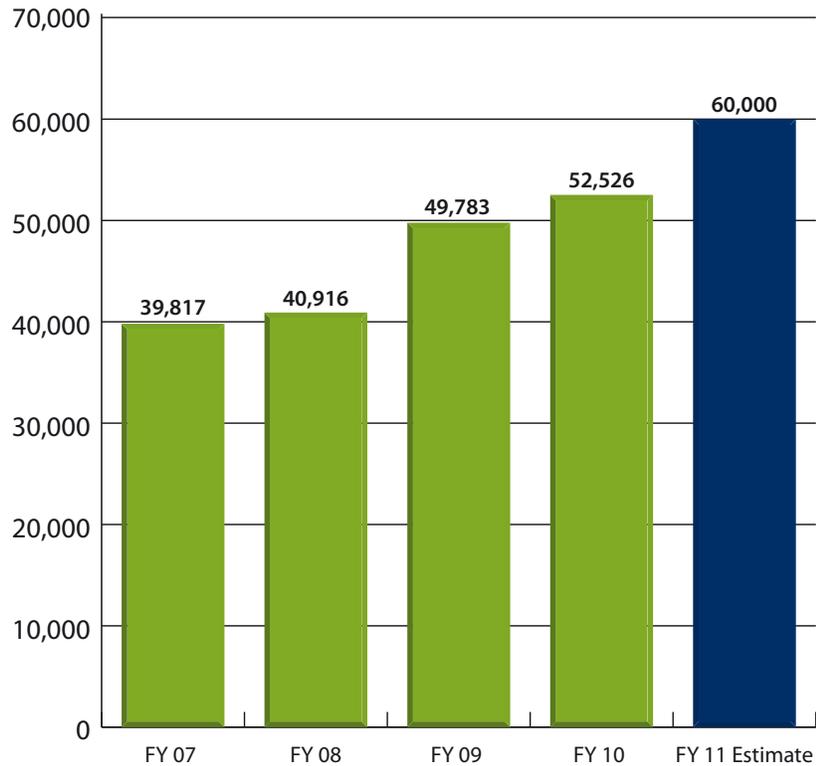
Number of new appeals filed during each of the 36 months preceding FY 2010 and cases received.

Appeals Filed at AOJ					Appelas Docketed Upon Receipt			
Month	FY 07	FY 08	FY 09	FY 10	FY 07	FY 08	FY 09	FY 10
October	3,341	4,133	4,497	5,295	3,206	3,713	3,459	5,197
November	3,321	3,646	3,392	4,853	2,754	3,201	2,879	3,611
December	3,196	2,956	3,590	4,788	3,275	2,767	3,766	3,392
January	3,615	3,703	3,730	5,246	2,949	3,248	3,462	4,926
February	3,519	3,579	3,840	3,535	3,404	3,701	3,691	3,190
March	4,085	3,389	4,593	5,697	3,498	4,351	4,467	5,069
April	3,694	3,651	4,459	4,936	2,854	3,337	5,145	4,194
May	4,170	3,629	3,801	4,462	3,532	3,121	4,278	5,289
June	3,963	3,559	4,632	5,201	3,190	3,279	5,011	4,974
July	3,855	3,696	5,003	4,526	3,695	3,107	4,653	4,462
August	3,993	3,517	4,650	4,756	4,281	3,443	4,466	3,823
September	3,585	3,893	5,294	4,630	3,179	3,648	4,506	4,399
FY Total	44,337	43,351	51,481	57,925	39,817	40,916	49,783	52,526

Appelas Filed at AOJ FY 07 - FY 10



Appelas Docketed at BVA FY 07 - FY 10



38 U.S.C. § 7101(d)(2)(D)

The average length of time between filing the appeal and the Board’s disposition was **886 days**. The following chart demonstrates the average time intervals for particular portions of the appeals process.

Time Interval	Responsible Party	Average Elapsed Processing Time
Notice of Disagreement Receipt to Statement of the Case	AOJ	243 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	42 days
Substantive Appeal Receipt to Certification of Appeal to BVA	AOJ	609 days
Receipt of Certified Appeal to Issuance of BVA Decision*	BVA	212 days
Average Remand Time Factor**	AOJ	493 days

* This time includes the Board’s cycle time of 99 days. Cycle time measures the time an appeal is physically received at the Board until a decision reached, excluding the time the case is with a VSO representative for preparation of written argument.

** The Board updated the methodology used to capture this time interval in FY 2009, calculating based on the total amount of post-remand decisions, as opposed to the total amount of all Board decisions regardless of outcome.

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2010: **60 members**

The number of professional, administrative, clerical and other personnel employed by the Board at the end of FY 2010: **489 employees not including 60 members above.**

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2010: **91**

Number of cases in which such members participated: **11,230**

38 U.S.C. § 7101(c)(2)

Number of acting members of the Board in terms of full-time employee equivalents: **12.2**

PROJECTIONS FOR FISCAL YEARS 2011 AND 2012

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 2011:	VA Form 9s Filed at the Agency of Original Jurisdiction (AOJ):	66,000
	Cases docketed upon receipt at BVA:	60,000
Fiscal Year 2012:	VA Form 9s Filed at the AOJ:	72,600
	Cases docketed upon receipt at BVA:	66,600

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:

$$\frac{\text{FY 2010 decisions (49,127) divided by}}{261 \text{ work days}} = 188.23 \text{ Decisions per Work Day}$$

$$\frac{\text{Cases Pending end of FY 2010 (45,722)}}{\text{+ New Cases expected in FY 2011 (60,000)}} = 105,722 \text{ Total Workload in FY 2011}$$

$$\frac{\text{Total Workload (105,722) (divided by)}}{\text{Decisions per Work Day (188.23)}} = 562 \text{ Work Days}$$

$$\frac{\text{Work Days (562) (divided by)}}{261 \text{ work days}} = 2.2 \text{ Years}$$

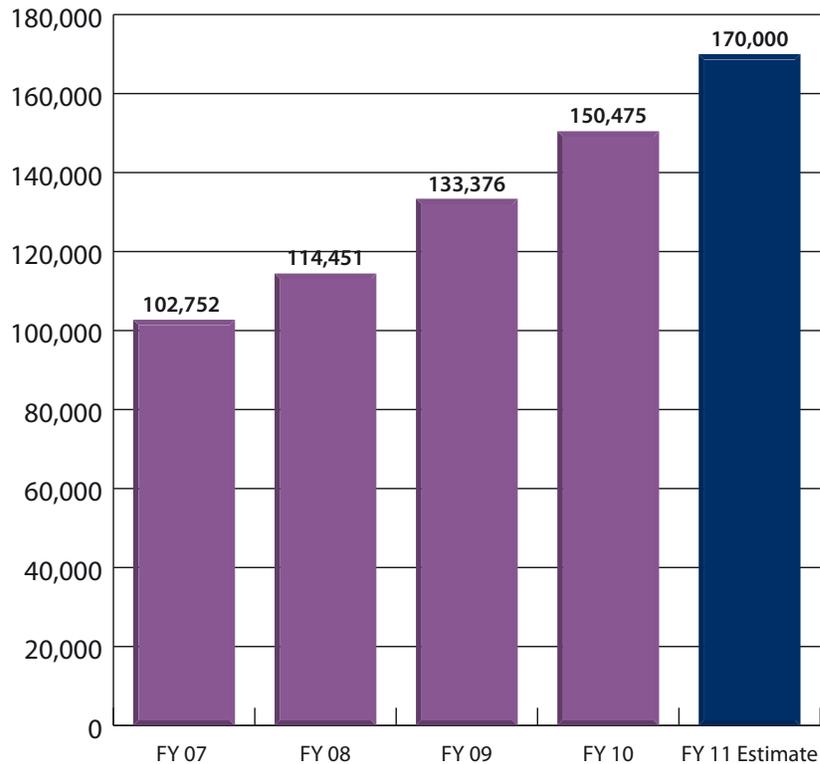
$$\text{Work years (2.2) x 12 (months)} = 26.4 \text{ months}$$

ADDITIONAL INFORMATION

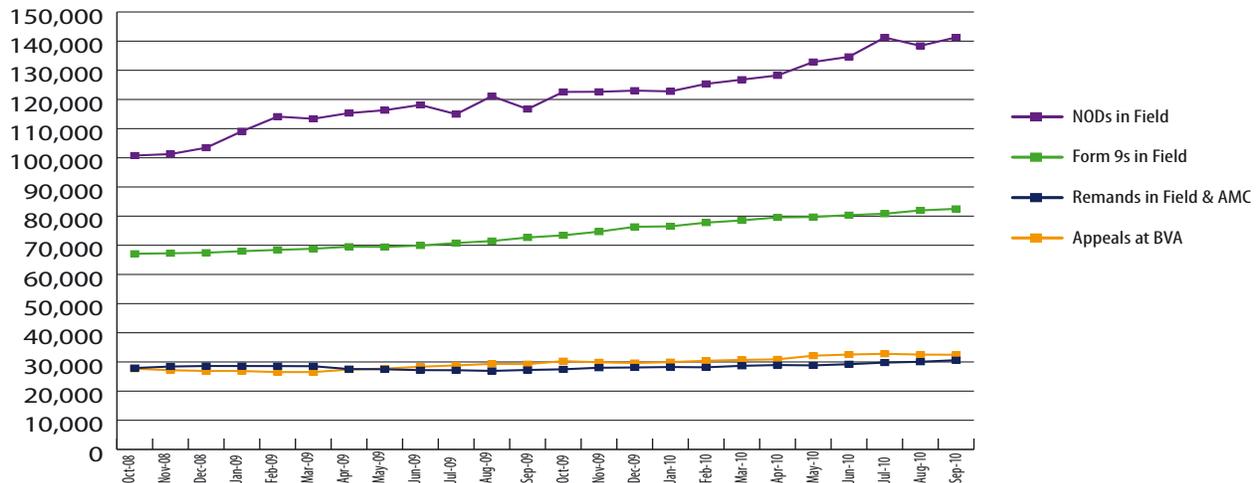
Potential BVA Workload in VBA

Number of New Notices of Disagreement Received in the Field				
MONTH	FY 07	FY 08	FY 09	FY 10
October	9,288	10,217	12,036	12,956
November	8,131	8,781	9,530	11,079
December	7,400	7,962	10,229	11,685
January	8,701	9,552	10,627	11,710
February	8,154	9,654	10,709	12,260
March	9,551	10,020	12,226	14,885
April	8,615	10,245	11,633	13,138
May	8,836	9,745	10,767	12,045
June	8,573	9,704	11,926	13,038
July	8,627	10,230	11,813	12,416
August	9,326	9,503	11,119	13,338
September	7,550	8,838	10,761	11,925
FY TOTAL	102,752	114,451	133,376	150,475

Notices of Disagreement Received FY 07 - FY 10



Potential BVA Workload in VBA



FY 2009	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	100,777	101,267	103,446	109,091	114,124	113,388	115,326	116,311	118,135	114,953	121,139	116,702
Form 9s in Field	67,114	67,255	67,473	67,971	68,428	68,819	69,534	69,440	69,914	70,773	71,468	72,664
Remands in Field & AMC	27,924	28,431	28,609	28,596	28,579	28,535	27,562	27,486	27,191	27,164	26,926	27,251
Appeals at BVA	27,663	27,178	26,903	26,899	26,519	26,529	27,389	27,722	28,344	28,818	29,327	29,261
FY 2010	Oct-09	Nov-09	Dec-09	Jan-10	Feb-10	Mar-10	Apr-10	May-10	Jun-10	Jul-10	Aug-10	Sep-10
NODs in Field	122,591	122,633	123,041	122,774	125,350	126,798	128,241	132,855	134,630	141,233	138,405	141,302
Form 9s in Field	73,413	74,666	76,334	76,503	77,764	78,531	79,560	79,700	80,344	80,808	81,965	82,499
Remands in Field & AMC	27,480	28,006	28,102	28,261	28,160	28,666	28,937	28,822	29,234	29,771	30,053	30,611
Appeals at BVA	30,283	29,898	29,650	29,952	30,391	30,700	30,904	32,133	32,538	32,788	32,525	32,458

BVA Dispositions by VA Program (FY 2010)

APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	7	10.1%	17	24.6%	45	65.2%	0	0.0%	69	0.1%
Compensation	12,739	27.3%	20,033	42.9%	12,768	27.3%	1,174	2.5%	46,714	95.1%
Education	30	12.4%	61	25.3%	145	60.2%	5	2.1%	241	0.5%
Insurance	2	14.3%	1	7.1%	11	78.6%	0	0.0%	14	0.0%
Loan Guaranty	0	0.0%	5	83.3%	1	0.0%	0	0.0%	6	0.0%
Medical	171	24.7%	224	32.4%	235	34.0%	62	9.0%	692	1.5%
Pension	98	15.2%	191	29.6%	330	51.1%	27	4.2%	646	1.3%
VR&E	7	10.1%	25	36.2%	34	49.3%	3	4.3%	69	0.1%
Other Programs	6	14.6%	7	17.1%	25	61.0%	3	7.3%	41	0.1%
BVA Original Jurisdiction	12	18.2%	1	1.5%	38	57.6%	15	22.7%	66	0.1%
Multiple Program Areas	139	24.4%	264	46.4%	156	27.4%	10	1.8%	569	1.2%
GRAND TOTAL	13,211	26.9%	20,829	42.4%	13,788	28.1%	1,299	2.6%	49,127	100.0%

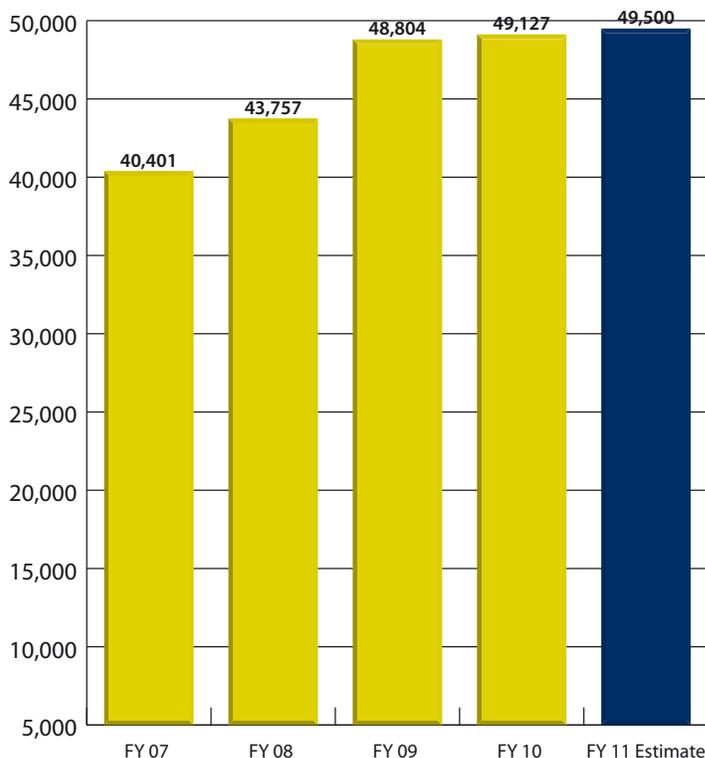
BVA Dispositions by Representation (FY 2010)

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	2,398	26.8%	3,959	44.3%	2,272	25.4%	309	3.5%	8,938	18.2%
AMVETS	81	30.6%	106	40.0%	68	25.7%	10	3.8%	265	0.5%
Disabled American Veterans	4,174	28.6%	6,150	42.1%	3,883	26.6%	387	2.7%	14,594	29.7%
Military Order of the Purple Heart	155	30.9%	189	37.7%	148	29.5%	9	1.8%	501	1.0%
Paralyzed Veterans of America	108	29.5%	161	44.0%	66	18.0%	31	8.5%	366	0.7%
Veterans of Foreign Wars	1,494	27.2%	2,300	41.8%	1,581	28.7%	126	2.3%	5,501	11.2%
Vietnam Veterans of America	220	27.6%	422	53.0%	134	16.8%	20	2.5%	796	1.6%
State Service Organizations	2,179	27.1%	3,225	40.1%	2,486	30.9%	155	1.9%	8,045	16.4%
Attorney	1,072	25.0%	2,149	50.1%	935	21.8%	130	3.0%	4,286	8.7%
Agents	45	33.8%	54	40.6%	31	23.3%	3	2.3%	133	0.3%
Other Representation	298	26.5%	446	39.6%	358	31.8%	24	2.1%	1,126	2.3%
No Representation	987	21.6%	1,668	36.5%	1,826	39.9%	95	2.1%	4,576	9.3%
GRAND TOTAL	13,211	26.9%	20,829	42.4%	13,788	28.1%	1,299	2.6%	49,127	100.0%

BVA DECISIONS

Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
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%
2010	49,127	26.9%	42.4%	28.1%	2.6%

BVA Decisions FY 07 - FY 10



BVA Operating Statistics

	FY 2007	FY 2008	FY 2009	FY 2010
Decisions	40,401	43,757	48,804	49,127
Case Receipts*	39,817	40,916	49,783	52,526
Cases Pending**	39,031	36,452	40,688	45,722
Hearings - VACO	421	672	470	589
Video	2,870	2,891	3,375	3,979
Field	6,680	7,089	7,784	8,947
TOTAL	9,971	10,652	11,629	13,515
Decisions per FTE	90.3	93.2	93.0	89.5
BVA FTE	447	469	525	549
BVA Cycle Time	136	155	100	99
Cost per Case	\$1,337	\$1,365	\$1,407	\$1,516

* 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).

** Pending figures include certified appeals pending in the field awaiting BVA hearings, as well as cases pending before the Board.

Department of Veterans Affairs

Board of Veterans' Appeals

Report of the Chairman

Fiscal Year 2010