NEW YORK CITY BAR

RECOMMENDATIONS RESPECTFULLY SUBMITTED TO THE TRUMP ADMINISTRATION REGARDING WAYS TO IMPROVE THE DEPARTMENT OF VETERANS AFFAIRS CLAIMS AND ADJUDICATION PROCESS

"To care for him who shall have borne the battle and for his widow, and his orphan."

-Abraham Lincoln, 1865, Upon the Occasion of his Second Inaugural Address

The treatment of the nation's veterans by its federal government is a recurring theme in our national news. It can be argued that treatment of the nation's veterans has been a controversial topic as long as the country has been fighting wars, dating to the founding of the republic. Greater attention to veterans' issues in the United States has, throughout our history, typically come after a tumultuous period in which service and sacrifice in the U.S. Armed Forces is felt, at least by some, to be underappreciated by civilian society. The adoption and creation of the All-Volunteer Force in 1973 has led to: high approval ratings currently for the men and women who volunteer to serve in the Armed Forces of the United States, consternation about a military-civilian divide, and varying levels of concern as to the treatment of veterans once their military service has concluded.

These recommendations offer suggestions on ways the U.S. Department of Veterans Affairs (hereinafter "VA") could improve its benefit claims and adjudication process. The VA is the nation's second largest federal agency in terms of both its size and budget with over 300,000 employees. Approximately 90% of VA employees work for the VA's Veterans Health Administration (hereinafter "VHA") which operates the nation's largest healthcare system.[1] As the title of this report suggests, these recommendations do not touch upon the VHA but address the VA's second largest administration, the Veterans Benefits Administration (hereinafter "VBA") charged with administering over $100 billion dollars of VA benefits to veterans every year.[2]

Lawyers have been able to play a meaningful role in the adjudication of veterans' benefits since Congress passed the Veterans Judicial Review Act of 1988.[3] Prior to the Veterans Judicial Review Act, decisions by the VA were final and not subject to court challenge. By its

[1] *See* http://www.va.gov/health/ (last accessed Dec. 5, 2016).

[2] See http://www.benefits.va.gov/benefits/ (last accessed Dec. 5, 2016).

[3] Pub. L. No. 100-687, 102 Stat. 493 (1988).

own admission, the VA, which receives over a million claims a year, incorrectly adjudicates over 10% of those claims, or over 100,000 claims every year.[4] Outside observers and most Veterans Service Organizations, put the VA's error rate in processing claims well above the VA's self-reported 10% estimated annual figure.[5] Claims for benefits are processed by employees at the 56 regional Veterans Benefits Administration offices around the country. Claim adjudicators at the 56 offices are expected to adjudicate multiple claims a day and to do so utilizing various sections of a VA Manual. The law that governs veterans benefits is designed to protect veterans while, at the same time, prevent unjust enrichment at taxpayer expense. These competing interests lead to a legally complex regulatory scheme. VA claims adjudicators are not lawyers, let alone attorneys that specialize in administrative law practice, yet they perform what can be a complex adjudicatory task. As a result, mistakes in processing VA claims are, sadly, not uncommon nor should they be unexpected. For example, the portion of the VA's "M21" Manual series pertinent to the processing of VA Disability Compensation benefit claims for wounded veterans, updated on an almost daily basis by the VA, would, alone, if printed, easily exceed 10,000 pages in length. The paperwork contained within the file that a claim adjudicator must review before issuing a decision on a claim can consist of hundreds and, sometimes, thousands of pages of medical and personnel records. Nevertheless, out of staffing necessity, the VA relies upon non-attorneys to, more or less, act as experts and accurately interpret and apply the law when processing disability compensation claims.

When a veteran believes a benefit claim is incorrectly denied, the veteran can ask that the claim be "reopened" at a later date with "new and material evidence" or appeal the denial within one-year of the agency's denial to preserve the claim's effective date for benefits. As the VA worked to decrease the delay in processing initial claims from veterans (notoriously referred to as the "VA Backlog") an underreported corresponding spike in the number of appeals filed by veterans due to errors in the rushed processing of claims began.[6] Notably, the VA Appeals process at the VBA is now deluged with hundreds of thousands of appeals, which appeals are taking an average of 2-10 years to work their way through the VA's clogged appellate process.

Despite the lack of sufficiently trained employees to accurately process benefit claims, ideas on the necessity and appropriateness of reforming the VA's claims process have tended to fall into one of two camps. In one camp, the reformers have fixated upon a proposed solution of amending legal protections of VA civil service employees to, in theory, allow VA supervisors greater flexibility in suspending or terminating their low-performing employees. Poor or illegal job performance by VA employees sometimes receives media attention, and, in an agency with over 300,000 employees, it will likely always be the case, even if civil service rules are reformed, that a few "bad apples" will work at the VA. Reforming the civil service rules however, in and by itself, will do little to address the problem of VBA employees who are not

[4] *See* Testimony of Ian C. de Planque, American Legion, Deputy Director, Veterans Affairs and Rehabilitation Commission before the House Committee on Veterans Affairs *available at* https://veterans.house.gov/witness-testimony/ian-c-de-planque-3 (last accessed Dec. 5, 2016).

[5] *Id*.

[6] For a discussion of this issue, see e.g. Alan Zarembo, *VA is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. Times, dtd Nov. 23, 2015, *at* http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html (last accessed Dec. 5, 2016).

adequately trained or appropriately supervised. Little evidence exists to suggest that malfeasance by VA employees, by itself, can explain the hundreds of thousands of adjudication errors the VA makes in processing benefit claims every year. Firing one poorly trained VA employee, and replacing that individual with another poorly trained VA employee, will likely do little to improve the VA's accuracy rate in processing benefit claims.

In the other camp, by contrast, non-reformers suggest little can or should be done to appropriately reform the VBA's claims and adjudication process. For a veteran or veteran's qualified survivor who has waited years or, in many cases, decades for the VA to adequately or correctly award benefits, the position of non-reformers, understandably, feels akin to a slap in the face. The acquiescence of non-reformers to the idea that nothing can or should be done to reform the claims and appeals process becomes an implicit acceptance of the current system. Non-reformers find themselves in the unenviable position of having to defend a system in which veterans can wait, if they are ever successful, years or decades to receive benefits they earned as a result of their military service.

The full cost of war is not, and never has been, cheap. When the bill comes due to care for the nation's veterans and portions of that bill remain unpaid, it translates into long waits for veterans and mistakes in the processing of their claims for benefits. So long as Congress and the VA attempt to address the problem of veterans' claims inexpensively, gaps in caring for the nation's veterans will continue. To that end, we make the following recommendations below:

Recommendation 1: The VA must first become aware, and then admit, that it has a problem, at the Regional Office level, adequately processing veterans' claims due to the inadequate training and qualification levels of its claims adjudicators. The VA's own Inspector General rejects the agency's claim that it is accurately processing 90% of the claims it receives. Multiple reputable Veterans Service Organizations suggest the number is closer to 50%. While it may be politically difficult for a cabinet level secretary of the VA to acknowledge the extent of the problem, so long as the VA mistakenly processes and denies 100,000s of claims every year without any such acknowledgment, there is no realistic hope that veterans' experience with the claims process will change. It is unacceptable that, in FY 2015, a veteran waited 1,029 days after filing an appeal with the VA until a VA attorney at the Board of Veterans Appeals could consider the appeal.

Recommendation 2: In relation to Recommendation 1, the VA should employ a significant number of new, skilled, trained attorneys at the Regional Office level who would review appeals, as a supplement to, and gradual replacement of, the current Decision Review Officer process. Currently, a veteran that is denied benefits can file a Notice of Disagreement within one-year of their denial of benefits if they disagree with the agency's denial. In the Notice, a veteran is asked whether to elect the traditional appellate process (in which the appeal is transmitted to be reviewed by a lawyer at the Board of Veterans Appeals located in Washington D.C.) or to elect to have the appeal first be reviewed by a "senior" member of the Regional Office's appeals team- the Decision Review Officer who is not an attorney. Electing the Decision Review Officer (hereinafter "DRO") can shave years off the time of an appeal, and there are many excellent DROs, but too often DROs find themselves equally overwhelmed by their workload and unable to dedicate the necessary, appropriate time to constructively consider

a veteran's argument in fact or in law that really should be considered by an attorney.

Recommendation 3: Create a statutory right to qualified counsel for veterans seeking benefits. Due to the complex regulatory scheme, veterans are currently permitted to file a reopened claim for benefits an unlimited number of times if it has been denied. Owing to the legal complexity of the regulatory scheme, and because the VA cannot be counted upon to have correctly processed a veteran's initial claim, Congress, historically, has seen fit to allow veterans to file for benefits an unlimited number of times so as not to unfairly deprive veterans of benefits they earned. The effect of that policy is a bottleneck of VA Appeals that includes both meritorious appeals of veterans that earned benefits serving the country and non-meritorious appeals of veterans not entitled to benefits. The simple – but incorrect - answer to this problem would be to limit the number of times a veteran can file for a benefit under the current system (as the VA has proposed). Congress and veterans advocates alike should be very skeptical of the VA's own plan to allow the VA to limit the number of times a veteran can file, reducing its own administrative burden at the potential expense of veterans with meritorious claims, unless and until significant reform is adopted that guarantees a veteran's claim has received the necessary, careful consideration it is due. Critics of a right to counsel recommendation may point to the fact that veterans currently have a right to be represented during the claims and appeals process by a Veterans Service Officer. The right to a Veterans Service Officer is a legacy of the claims system as it existed prior to 1988 for over a century when lawyers had no meaningful role and there existed no right to judicial review. While we believe there are many knowledgeable, experienced, excellent Veterans Service Officers who do and have done an excellent job for the veterans they represent, there is simply no substitute for having a lawyer represent a veteran if the risk of being denied would also entail the veteran losing her ability to file and receive benefits in the future. Implementing a right to counsel by a qualified, accredited attorney would be a way of assuring all necessary and appropriate avenues for legal and equitable relief had been considered in light of attorneys' ethical and competency requirements as members of their profession.

Recommendation 4: Veterans should be allowed to retain an attorney prior to the filing of a Notice of Disagreement provided that the attorney either represents the veteran pro bono or upon a contingency basis for past due benefits. Currently, in most instances, a veteran is unable to retain an attorney to represent her prior to having her claim denied because an accredited attorney is forbidden from charging the beneficiary a fee until a Notice of Disagreement has been filed.[7] While we strongly encourage attorneys to represent veterans pro bono when possible, *requiring* an attorney to do so in effect means almost all veterans are required to file a claim without the benefit of an attorney even if a beneficiary were willing to pay for an attorneys' services. This is particularly the case when a veteran may have filed for a benefit before, was denied, and must file a reopened claim for benefits. In such a scenario a veteran may not know, and could significantly benefit from knowing, how to revise his claim to give it a higher chance for success. Attorneys would, admittedly, have less work to do during the process of preparing an initial claim as opposed to preparing an appeal, but the contingency fee would also be commensurately smaller given the much smaller period of time during which past due benefits would accrue. Permitting attorneys to assess a fee on a contingency basis of the veterans past-

[7] 38 C.F.R. § 14.636(c).

due benefits, at the earliest possible stage of the claims process, means giving a veteran the best opportunity to be successful, as early as possible.

Recommendation 5: In a successfully reopened claim, a veteran should receive past due benefits from the date their service-connected condition began as opposed to the date of filing the reopened claim. By law, to preserve an effective date for an award of benefits, a veteran must, if denied, file a Notice of Disagreement and Intent to Appeal within one-year of the VA's decision denying her benefits. If she fails to do so the agency's decision becomes final and will not be disturbed unless the veteran can demonstrate clear, unmistakable, error on the part of the VA in denying the claim. Such a law has a clear financial motive for the taxpayers (it would be expensive to award veterans years of past due benefits in some cases) but it is impossible to reconcile such a decision with a veterans' claims system that Congress also specified is supposed to be friendly to veterans. In such cases, a veteran is told that a legal requirement - the veteran's failure to appeal its earlier, incorrect, denial to preserve the earlier effective date for the award of benefits - has cost the veteran months, years, or even decades' worth of disability compensation. To do right by our veterans, the agency we charge with doing so, the VA, should be able to award benefits from the date the veteran became eligible for the benefit, not the date the veteran became entitled to the benefit by virtue of the filing of his successful claim. Veterans, like their civilian counterparts, are disadvantaged when they are expected to know the law despite having never been counseled about their unique place in our legal system resultant from their military service and their status as veterans.

Recommendation 6: Provide financial sanctions against the VA, in favor of the veteran, when the VA takes more than a year to process a veteran's initial disability claim or when the VA fails to apply the appropriate adjudicatory standard when deciding a veteran's claim. Currently there is no penalty against the VA for its failure to process a claim in a timely fashion. When and if an award is finally made, the veteran will receive past due benefits from the date she filed her claim, without interest. Instead, absent unusual circumstances, the VA should be penalized and sanctioned for failure to complete its adjudication in a timely fashion. The federal government will sanction its own agencies in other contexts. The Equal Employment Opportunity Commission permits an agency to be sanctioned for its failure to produce a report of investigation to a federal employee who has made allegations of racial or sexual discrimination within 180 days of the complaint notwithstanding the merits of the complaint.[8] The same right to have a thorough adjudication and investigation of a claim should be extended to veterans in their disability and compensation cases. If the VBA were required to begin paying out sanction fees for failure to timely process a disability claim one suspects there would be a noticeable shuffling of the agency's metrics and its priorities.

Substantially more staff is necessary, as is making sure that staff is adequately trained, if the VA and Congress seek to fundamentally and radically improve the claims process. Attorneys can and must, in the complex regulatory framework of veterans' benefits, play a role in helping to bring that radical change about. While the full cost of war is not, and never has been, cheap- the nation can and should demand every effort is made to care for our veterans and their eligible

[8] 29 C.F.R. § 1614.108(g); See also Equal Employment Opportunity Manual Directive 110, Appendix K *available at* https://www.eeoc.gov/federal/directives/md-110_appendix_k.cfm (last accessed Dec. 5, 2016).

dependents.

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