



Board of Veterans' Appeals REPORT OF THE CHAIRMAN Fiscal Year 2007





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

February 8, 2008

The Honorable James B. Peake, M.D.
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 2007 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 2007 and the projected activities of the Board for Fiscal Years 2008 and 2009, as required by 38 U.S.C. § 7101(d)(1), are provided in Parts I and II.

Fiscal Year 2007 saw the Board increase productivity, despite limited resources, 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 2007.

Very respectfully,

A handwritten signature in black ink, 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 2007 and projected activities for Fiscal Year 2008. Part II provides statistical information related to BVA activities during Fiscal Year 2007 and projected activities for Fiscal Years 2008 and 2009.

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, as set forth in 38 U.S.C. § 7101(a), is "to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner." The Board's goal is to issue quality decisions in compliance with the requirements of the law, including the precedential decisions of the United States Court of Appeals for Veterans Claims (CAVC) and other federal courts.



**DEPARTMENT OF VETERANS' AFFAIRS
FISCAL YEAR 2007
VETERANS LAW JUDGES**

PART I

ACTIVITIES OF THE BOARD OF VETERANS' APPEALS

FISCAL YEAR 2007

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, Senior Deputy Vice Chairman, 56 Veterans Law Judges (VLJs), 8 Senior Counsel, 250 staff counsel, and other administrative and clerical staff. The Board is comprised of four Decision Teams with jurisdiction over appeals arising from the VA Regional Offices (RO) and Medical Centers in four geographical regions: Northeast, Southeast, Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, 2 Chief VLJs, 11 line VLJ's, 2 Senior Counsel, and approximately 60 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 (about 95 percent) 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, and insurance benefits.

In Fiscal Year 2007, the Board issued 40,401 decisions and conducted 9,971 hearings with a cycle time of 136 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 Board physically received 39,817 appeals in Fiscal Year 2007 and expects to receive up to 43,000 new appeals in Fiscal Year 2008.

During the past fiscal year, the Board hired 56 attorneys and law clerks to fill vacant staff counsel positions and to replace departing staff counsel. In addition, four new VLJs and four Senior Counsel were selected through competitive processes. Senior Counsel serve as Acting Veterans Law Judges, draft decisions, mentor and train other attorneys, and assist in management.

Successes

The Board issued 40,401 decisions in Fiscal Year 2007, an increase of 1,325 over the 39,076 decisions issued in Fiscal Year 2006. The Board's productivity in Fiscal Year 2007 represents the greatest number of decisions issued by the BVA in any year since 1997, with a significantly smaller staff than in 1997. VLJs conducted 9,971 hearings, which is an increase of 813 hearings held over Fiscal Year 2006 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. The number of cases pending before the Board at the end of Fiscal Year 2007 was 39,031, which is a 1,234 case decrease from the 40,265 appeals that were pending at the end of Fiscal Year 2006. This decrease occurred because of the extraordinary efforts of the VLJs, Board counsel, and administrative support staff.

In addition to dispatching the 40,401 decisions issued by the Board in Fiscal Year 2007, the Board's administrative support staff reviewed 39,144 items of mail, determined the nature of the correspondence, and associated them with claims files. The administrative staff also answered over 91,000 inquiries from veterans or their representatives.

In Fiscal Year 2007, 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 the 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 2007. The 93.8% accuracy rate for the fiscal year was slightly higher than the 93.3% accuracy rate for Fiscal Year 2006. The accuracy rate quantifies those substantive 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.

The Board's Goals for Fiscal Years 2008 and 2009

The two most significant challenges for Fiscal Year 2008 and 2009 are to continue to eliminate avoidable remands and to reduce the backlog of pending appeals.

1. Eliminate Avoidable Remands

Veterans deserve timely and correct decisions on claims for benefits. The record must contain all evidence necessary to decide the claim and show that all necessary due process has been provided. If the record does not meet these requirements, and the benefits sought cannot be granted, a remand for further development is necessary. However, remands from the Board to the Agency of Original Jurisdiction (AOJ) significantly increase the time it takes for a veteran to receive a final decision. A remand typically adds more than a year to the appellate process. Furthermore, about 75% of cases remanded are subsequently returned to the Board, which increases the Board's workload and further degrades timeliness. Eliminating avoidable remands is a goal that will provide better service to veterans and their families and, ultimately, help diminish the growing backlog. The Board has made significant progress toward this goal. BVA's remand rate was 35.4% in Fiscal Year 2007, which is down from a high of 56.8% in Fiscal Year 2004.

In Fiscal Year 2008 and 2009, the Board will focus on the following:

- ❑ ***Data Collection:*** The Board and the Veterans Benefits Administration (VBA) will continue to collect data that tracks the reasons for remand so that training can be planned and corrective action taken.
- ❑ ***Training:*** The Board and VBA will continue to conduct training to address the most common reasons for remand, including training on obtaining Social Security Administration Records, the Veterans Claims Assistance Act of 2000 (VCAA) notice, duty to assist requirements, and determining when a medical examination is required.

- ❑ **Concise Explanations of the Reasons for Remanding a Case:** The Board will continue to provide a concise explanation of the reasons for remand in individual decisions in order to reduce ambiguity and to improve field processing. Better understanding of and compliance with remand directives decreases the risk of a second remand in a particular case and may help avoid future remands because of the same deficiency.

- ❑ **Prejudicial Error Analyses:** One reason for the high remand rate of 56.8% in Fiscal Year 2004 was the VCAA, which among other things, heightened VA's duty to assist and duty to notify claimants of the type of evidence needed to substantiate their claims. Following the issuance of *Pelegriani v. Principi*, 18 Vet. App. 112 (2004), in which the Veterans Court held that a VCAA notice letter must be provided to a claimant prior to an initial adverse adjudication, the Board attempted to avoid remands, when possible, by conducting an analysis to determine if any notice deficiency provided to the claimant was prejudicial. If prejudice was not found, most Board judges issued final decisions. If the deficiency was prejudicial, judges remanded the case to the RO to cure the defect. In *Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), and *Simmons v. Nicholson*, 487 F.3d 892 (Fed. Cir. 2007), the United States Court of Appeals for the Federal Circuit held that failure to provide adequate notice under the VCAA is presumed prejudicial to the veteran, but that the presumption can be overcome based on the specific facts of a particular case. In light of these decisions, the Board will continue the practice of conducting a prejudicial error analysis whenever a VCAA duty to notify defect is found in order to issue final decisions in cases where a lack of prejudice to the veteran can be found.

- ❑ **Waivers of AOJ Review:** The remand rate has trended downward since 2004, due, in part, to the restoration of a regulatory amendment that allows the Board to request a waiver of initial AOJ review of new evidence. Before February 22, 2002, if the Board accepted any evidence not previously considered by the AOJ, it was required to remand the case for review and preparation of a Supplemental Statement of the Case (SSOC), unless the appellant or representative waived, in writing, initial AOJ consideration of the evidence, or the VLJ could fully grant the benefit(s) sought on appeal. See 38 C.F.R. § 20.1304(c) (2001). Effective February 22, 2002, the Board's Appeals Regulations and Rules of Practice were amended to allow BVA to consider additional evidence without referring the evidence to the AOJ for initial consideration and without the appellant's waiver. However, in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit invalidated that portion of the Board's regulations that allowed BVA to consider additional evidence without remanding the case to the AOJ for initial consideration and without obtaining the appellant's waiver. Following this decision, the Board amended its regulations to add a substantially similar version of the prior 38 C.F.R. § 20.1304(c). See 69 Fed. Reg. 53,807 (Sep. 3, 2004). The Board can in many cases avoid unnecessary remands by soliciting waivers in those cases where an appellant or representative submits evidence without a waiver.

As a result of the above efforts, the Board's remand rate decreased from 56.8% in Fiscal Year 2004, to 35.4% for Fiscal Year 2007.

2. 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 pending before 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 2007, that number had decreased to 24,538. Additional efforts to eliminate avoidable remands should reduce the number of Board remands in the field even further.
- ❑ ***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, 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:*** The Board's full-time training coordinator organizes training evolutions for the Board's attorneys and judges. Training for new attorneys in Fiscal Year 2007 included courses on basic veterans' law and off-site training at the Adjudication Academy in Baltimore. The latter training included overview presentations of 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 Gulf War Claims, Rating Residuals of Gunshot Wounds, Adjudicating Medical Reimbursement Claims, Rating Eye Disorders, Understanding Military Records and Awards, Adjudicating Section 1151 Claims, Adjudicating Section 1318 Claims, Aggravation of Disabilities, Rating Disabilities of the Spine, Evaluation of Lay Evidence, Presumptive Service Connection, and Introduction to Medical Terminology. Continued training efforts in the new fiscal year will provide 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 VLJs and attorneys the value of writing of clear, concise, coherent, and correct decisions in Fiscal Year 2007. The benefits of this initiative became apparent as the year progressed 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 new 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. 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 the Board laptops used by flexiplace program participants, and locked

cabinets at the primary residence for the laptop and the 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. In addition, as a condition of participation in the flexiplace program, attorneys agree to an enhanced productivity requirement.

- ❑ ***Making use of overtime:*** The Board will continue to use overtime within existing resources to increase output.

- ❑ ***Increasing use of paralegals:*** The Board established a paralegal unit for support activities to free up the legal staff to draft decisions. In the second quarter of Fiscal Year 2006, the Board transferred primary responsibility to the paralegal unit for drafting certified lists of relevant evidence considered by the Board in appealed decisions to the CAVC. In Fiscal Year 2007, BVA provided 2,932 certified lists to VA's OGC. By transferring this responsibility to paralegals, the Board's attorneys were able to produce additional draft decisions and other work products for the VLJs. The VLJs continue to review and ensure the accuracy of the certified lists prepared by the paralegal staff.

- ❑ ***Drafting additional decisions:*** VLJs will draft decisions, in addition to reviewing decisions drafted by staff counsel, as time permits.

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.

3. Expedited Claims Adjudication Initiative

At the direction of the Secretary and in coordination with VBA, the Board has proposed an Expedited Claims Adjudication (ECA) initiative that will be launched as a two-year pilot program at four select RO's. In order to help accelerate the timely processing of all claims and appeals, VA will offer 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 will voluntarily waive specified procedural rights and, in return, be 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 will be offered in writing by VA as an option when a claim is received. During the pilot program, participation will extend to claims for benefits administered by VBA at four select locations for veterans who have accredited representation. Participation will be open only 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 adjudication 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 remanding the case for further development, if necessary.

During the summer of Fiscal Year 2007, the Chairman briefed the VSOs, the Senate Veterans' Affairs Committee, the Subcommittee on Disability Assistance and Memorial Affairs of the House Veterans' Affairs Committee, and the Office of Management and Budget regarding the ECA initiative.

VA is currently in the process of drafting proposed regulations to implement the ECA pilot program. The Department is very excited about this program and the positive impact it is expected to have in speeding up the adjudication of claims and appeals before VA.

4. Succession Planning

In Fiscal Year 2007, four new VLJs were appointed to the Board, and four new Senior Counsel were selected through competitive selection processes. The newly appointed VLJs each had twelve or more years of veterans' law experience prior to their appointment as VLJs. One of the newly appointed VLJ's is a veteran of the United States Navy.

The Board's business plan contemplates that the Senior Counsel positions 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 recruits some of the best and the brightest attorneys and administrative personnel available. In Fiscal Year 2007, the Board hired 56 new attorneys and law clerks, as well as 10 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 2007, the Board hired 14 summer 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 encourage the summer law clerks to apply for permanent employment with the Board after graduation.

Fiscal Year 2007 Congressional Hearings and Other Briefings

The Chairman testified before the Senate Veterans' Affairs Committee on March 7, 2007. He addressed the Board's productivity and its primary challenges—eliminating avoidable remands to VA regional offices and increasing productivity to contain and reduce the backlog.

On May 22, 2007, the Chairman testified before the Subcommittee on Disability Assistance and Memorial Affairs of the House Veterans' Affairs Committee regarding the challenges facing the CAVC. In June 2007, the Chairman participated in a panel discussion on issues in veterans' law at the Federal Circuit Bar Association Ninth Bench and Bar Conference. In August 2007, the Chairman addressed VBA's Annual Leadership Conference and discussed the ECA initiative.

On September 25, 2007, the Chairman testified before the Subcommittee on Disability Assistance and Memorial Affairs of the House Veterans' Affairs Committee regarding operations of the Board and the Appeals Management Center.

During the fiscal year, the Chairman or his representatives also discussed the Board's successes, challenges, and general activities at the National Symposium for the Needs of Young Veterans, the American Legion's 84th Annual Veterans Affairs and Rehabilitation Conference, the National Association of County Veterans Service Officers Convention, the Disabled American Veterans 86th National Convention and Legislative Seminar, the Georgia Department of Veterans Service Conference, and the North Carolina Department of Veterans Affairs Training Conference.

Significant Judicial Precedent and Its Effect on the Board

1. ***Informal Claims:*** In *Ingram v. Nicholson*, 21 Vet. App. 232 (2007) (*Ingram II*), the CAVC reconsidered its earlier decision in *Ingram v. Nicholson*, 20 Vet. App. 156 (2006) (*Ingram I*), in light of the Federal Circuit's decision in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006).

Previously, in *Ingram I*, the CAVC had held that the Board erred by imposing a strict pleading requirement and by failing to take a sympathetic reading of the *pro se* claimant's filings. The CAVC held that a reasonably raised claim remains "pending" until there is an explicit adjudication of the claim or an explicit adjudication of a subsequent claim for the same disability.

In *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006), however, the Federal Circuit had held that where the veteran files more than one claim with the RO at the same time, and the RO's decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run. The Federal Circuit rejected the theory that an implied claim remains pending and unadjudicated.

Upon reconsideration sought by the Secretary in *Ingram II*, the CAVC rejected the Secretary's argument that *Deshotel* controlled and found that, if strictly applied, the general holding in *Deshotel* would produce nonsensical results. The CAVC reasoned that if a claim could be denied *sub silentio* by failing to be addressed by VA when deciding other contemporaneous claims, the veteran would have no reason to know that the claim had been decided. As such, the CAVC interpreted *Deshotel* to mean that an RO decision may only constitute an adjudication of a claim where the RO decision addresses the claim "in a manner sufficient for a claimant to deduce that the claim was adjudicated."

Consequently, the CAVC held that a reasonably raised claim remains pending "until there is either recognition of the substance of the claim in an RO decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent "claim" for the same disability."

2. ***Haas v. Nicholson*, 20 Vet. App. 207 (2006):** The CAVC reversed a Board decision that denied claims for service connection for various disabilities as a result of exposure to herbicides. The Board determined that, although the appellant had served in the waters off the shores of the Republic of Vietnam, such service did not warrant application of the presumption of herbicide exposure because the appellant never set foot on land in that country. The CAVC reversed the Board's decision, holding that a VA Adjudication Procedure Manual provision created a presumption of herbicide exposure based on receipt of the Vietnam Service Medal for purposes of service connection for diseases associated with herbicide exposure. The CAVC also found that neither the statute nor the regulation governing herbicide exposure claims precludes application of the presumption of herbicide exposure to persons who served aboard ship in close proximity to the Republic of Vietnam. For purposes of applying the presumption of exposure

to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), the CAVC held that “service in the Republic of Vietnam” will, in the absence of contradictory evidence, be presumed based upon the veteran’s receipt of a Vietnam Service Medal, without any additional proof required that a veteran who served in waters offshore of the Republic of Vietnam actually set foot on land. Since there were potentially a large number of cases on appeal that might be affected by *Haas* while an appeal is being sought to the Federal Circuit, the Secretary of Veterans Affairs issued a memorandum on September 21, 2006, directing the Board to stay action on and refrain from remanding all claims for service connection based on exposure to herbicides in which the only evidence of exposure is the receipt of the Vietnam Service Medal or service on a vessel off the shores of Vietnam. The purpose of this stay action is to avoid burdens on the adjudication system, delays in the adjudication of other claims, and unnecessary expenditure of resources through remand or final adjudication of claims based on judicial precedent that may ultimately be overturned on appeal. Oral argument in *Haas* was held before the Federal Circuit on November 7, 2007.

3. *Veterans Claims Assistance Act of 2000 (VCAA)*:

□ *Mayfield v. Nicholson*, 499 F.3d 1317 (Fed. Cir. 2007) (Mayfield IV):

The appellant filed a claim for Dependency and Indemnity Compensation (DIC), claiming that her husband’s death was related to his service in the military. In a May 2002 decision the Board denied DIC. With respect to the VCAA, the Board found that the duty to notify had been satisfied by the combined contents of three documents that had been sent to the appellant, including a December 1999 rating decision, a June 2000 Statement of the Case (SOC), and a January 2002 SSOC. Although a notice letter had been sent by the regional office in March 2001, the Board made no reference to this letter.

In *Mayfield I* (*Mayfield v. Nicholson*, 19 Vet. App. 103 (2005)), the CAVC affirmed the Board’s May 2002 decision by looking at the March 2001 letter (which the Board had not discussed in its May 2002 decision) and concluding that VA had fulfilled its obligations under the statutory notice requirements by sending this letter.

In *Mayfield II* (*Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006)), the Federal Circuit reversed and remanded, noting that the CAVC’s decision in *Mayfield I* violated the longstanding principle of administrative law that a court reviewing an agency decision generally may not sustain the agency’s ruling on a ground different from that invoked by the agency (the “*Chenery*” doctrine). By sustaining the Board’s determination that the notification requirement had been satisfied, but basing its ruling on an entirely different ground—i.e., the adequacy of the March 2001 notice letter versus the cobbled together notice relied upon by the Board—the court violated these principles. The Federal Circuit remanded the case for a determination by the Board in the first instance whether the March 2001 letter satisfied the notice requirements of the VCAA. In December 2006 the Board issued another decision concluding that the March 2001 letter fulfilled VA’s notice obligations under the VCAA. In *Mayfield III* (*Mayfield v. Nicholson*, 20 Vet. App. 537 (2006)) the CAVC affirmed the Board’s decision noting that: (1) the March 2001 letter provided adequate notice under the VCAA; (2) the January 2002 SSOC was a “subsequent decision on her case;” and (3) harmless error was a basis for finding that the notice was adequate.

On appeal for a second time the Federal Circuit affirmed the decision in *Mayfield III*. The Federal Circuit found, in pertinent part, in *Mayfield IV* that because the March 2001 letter served as adequate notice under the VCAA, and the January 2002 SSOC served to readjudicate the appellant’s claim, there was no deficiency in notice and a harmless error analysis was not necessary.

- ***Sanders v. Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), and *Simmons v. Nicholson*, 487 F.3d 892 (Fed. Cir. 2007):**

Both of these decisions addressed the issue of application of the prejudicial error rule in the context of the VCAA, including who has the burden of proving before the CAVC that any error committed by VA in providing notice of the information and evidence necessary to substantiate a claim for benefits under 38 U.S.C. § 5103(a) was prejudicial.

In *Sanders*, the United States Court of Appeals for the Federal Circuit held that any error by VA in providing the notice required by 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b)(1) is presumed prejudicial, and that once an error is identified by the CAVC as to any of the four notice elements the burden shifts to VA to demonstrate that the error was not prejudicial to the appellant. The Federal Circuit stated that requiring an appellant to demonstrate prejudice as a result of any notice error is inconsistent with the purposes of both the VCAA and VA's uniquely pro-claimant benefits system.

Instead, the Federal Circuit held in *Sanders* that all VCAA notice errors are presumed prejudicial and require reversal unless VA can show that the error did not affect the essential fairness of the adjudication. To do this, VA must show that the purpose of the notice was not frustrated, such as by demonstrating that any defect was cured by actual knowledge on the part of the claimant, or that a reasonable person could be expected to understand from the notice what was needed, or that benefits could not have been awarded as a matter of law.

In *Simmons*, the Federal Circuit, in applying the holdings in the concurrently issued decision in *Sanders*, affirmed the CAVC holding that an error by VA in providing notice of the information and evidence necessary to substantiate a claim under 38 U.S.C. § 5103(a) is presumptively prejudicial, and that in such a case the burden shifts to VA to demonstrate that the error was not prejudicial to the appellant.

- ***Hupp v. Nicholson*, 20 Vet. App. 1 (2006):**

In this significant case, the CAVC addressed VA's section 5103(a) notice obligations in the context of a claim for DIC benefits. In the context of DIC claims, the CAVC held that section 5103(a) notice must include: (1) a statement of the conditions, if any, for which a veteran was service-connected at the time of his or her death; (2) an explanation of the evidence and information required to substantiate a DIC claim based on a previously service-connected condition; and (3) an explanation of the evidence and information required to substantiate a DIC claim based on a condition not yet service-connected. In addition, the content of the section 5103(a) notice letter will depend upon the information provided in the claimant's application. While VA is not required to assess the weight, sufficiency, credibility, or probative value of any assertion made in the claimant's application for benefits, the CAVC noted that VCAA notice letters for DIC claims should be "tailored," and must respond to the particulars of the application submitted.

Assistance to VBA Regional Offices and VHA

During the past year the Board continued its efforts to help 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. An average of more than 40 hearings per judge is scheduled each week. During the course of the week the attorneys usually have time to provide various types of assistance and training to the RO staff.

In Fiscal Year 2007, 137 attorneys provided assistance to 55 ROs. The attorneys conducted training for adjudication personnel at 49 of the ROs visited. Additionally, the attorneys, on request, provided non-binding legal advice to adjudicators in 587 cases that were informally reviewed.

The Board participated in conference calls with the VHA employees across the country who handle appeals to discuss issues of concern relating 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 VSOs and attorneys who represent appellants before the Board to quarterly VSO Forums. 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.

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, Korean Conflict, Operation Iraqi Freedom, female veterans and POWs. The Board also facilitates the collection and donation of comfort items for distribution to veterans at the Washington, D.C., 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

- 1. 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 2007 included programs where Senior Counsel shared their insights and experiences with regard to career development, a book discussion focusing on leadership, networking breakfasts, and a service event to provide comfort items for active duty personnel stationed in Iraq and Afghanistan.
- 2. 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 the Office of Personnel Management (OPM) Federal Executive Institute (FEI) and the 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 the Department. 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, provide 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 FEI. 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 six employees to OPM’s 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 training courses are an integral part of the Board’s plan to develop its future leaders.

3. ***Facilities:*** The Board has been advised that a building move will not occur during Fiscal Year 2008 or 2009. The Board continues to work with GSA and VA Facilities Management to upgrade the current location at the Lafayette Building at 811 Vermont Ave, NW, as well as to seek to obtain additional office space within the building.

BOARD MEMBERS

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Steven L. Keller, Senior Deputy Vice Chairman

Charles E. Hogeboom, Deputy Vice Chairman, Decision Team 1

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PART II

STATISTICAL DATA

FISCAL YEAR 2007

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 2007: **39,817**
 Number of cases added to docket by filing appeal during FY 2007: **44,337**

38 U.S.C. § 7101(d)(2)(B)

Cases pending before the Board at the start of FY 2007: **40,265***
 Cases pending before the Board at the end of FY 2007: **39,031***

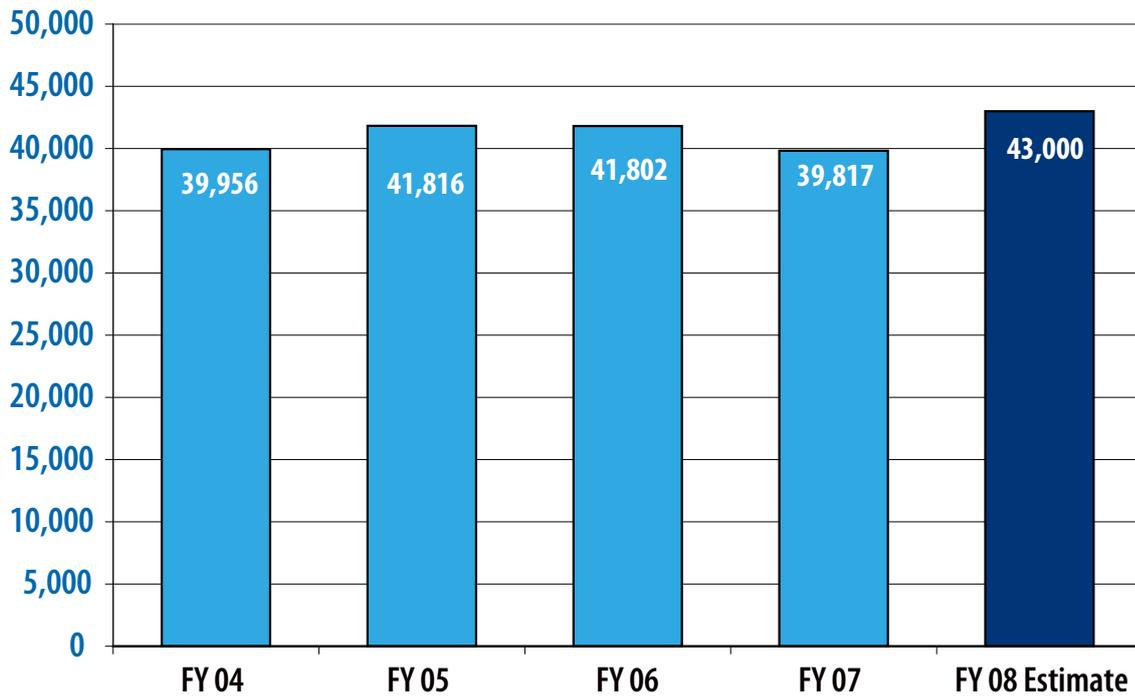
*Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

38 U.S.C. § 7101(d)(2)(C)

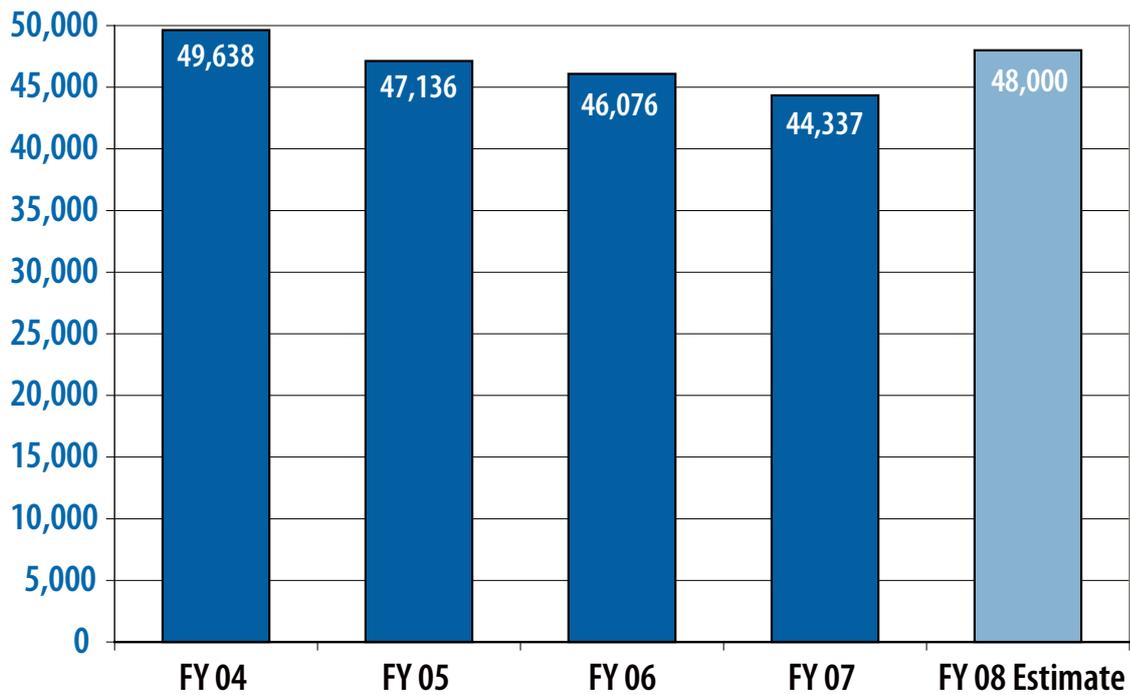
Number of cases received at BVA and new appeals filed during each of the 36 months preceding FY 2007.

Cases Received at BVA					New Appeals (VA Form 9) Filed			
Month	FY04	FY05	FY06	FY07	FY04	FY05	FY06	FY07
October	1,572	2,664	3,750	3,206	3,855	3,566	3,700	3,341
November	1,152	2,171	3,610	2,754	2,932	3,708	3,631	3,321
December	1,583	3,264	3,182	3,275	3,341	3,695	3,559	3,196
January	2,616	3,202	4,142	2,949	3,632	3,543	3,899	3,615
February	3,519	3,562	3,886	3,404	4,380	3,786	3,871	3,519
March	3,996	4,124	4,293	3,498	5,291	4,552	4,357	4,085
April	2,975	3,055	2,575	2,854	4,920	3,461	3,615	3,694
May	4,856	3,104	3,093	3,532	4,397	4,331	4,115	4,170
June	4,359	4,730	3,341	3,190	4,881	4,334	4,381	3,963
July	5,371	4,655	2,941	3,695	4,264	3,445	3,531	3,855
August	4,637	3,890	3,313	4,281	3,909	4,378	3,920	3,993
September	3,320	3,395	3,676	3,179	3,836	4,337	3,497	3,585
FY Total	39,956	41,816	41,802	39,817	49,638	47,136	46,076	44,337

Cases Received at BVA FY 04 - FY 07



New Appeals (VA Form 9) Filed FY 04 - FY 07



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	213 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	44 days
Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	531 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	273 days
Average Remand Time Factor	Field Station	152 days

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2007: **56 members**

The number of professional, administrative, clerical, and other personnel employed by the Board at the end of FY 2007: **423 employees not including 56 members above.**

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2007: **72**

Number of cases in which such members participated: **5,757**

38 U.S.C. § 7101(c)(2)

Number of acting members of the Board in terms of full-time employee equivalents: **7.7**

PROJECTIONS FOR FISCAL YEARS 2008 AND 2009

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 2008:	Cases received at BVA:	43,000
	Cases added to BVA Docket:	48,000
Fiscal Year 2009:	Cases received at BVA:	43,000
	Cases added to BVA Docket:	48,000

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:

$$\frac{\text{FY 2007 decisions (40,401) (divided by)}}{260 \text{ Work Days}} = 155.39 \text{ Decisions per Work Day}$$

$$\begin{aligned} &\text{Cases Pending end of FY 2007 (39,031)} \\ &+ \text{New Cases expected in FY 2008 (43,000)} \end{aligned} = 82,031 \text{ Total Workload in FY 2008}$$

$$\frac{\text{Total Workload (82,031) (divided by)}}{\text{Decisions per Work Day (155.39)}} = 528 \text{ Work Days}$$

$$\frac{\text{Work Days (528) (divided by)}}{260 \text{ Work Days}} = 2.0 \text{ Years}$$

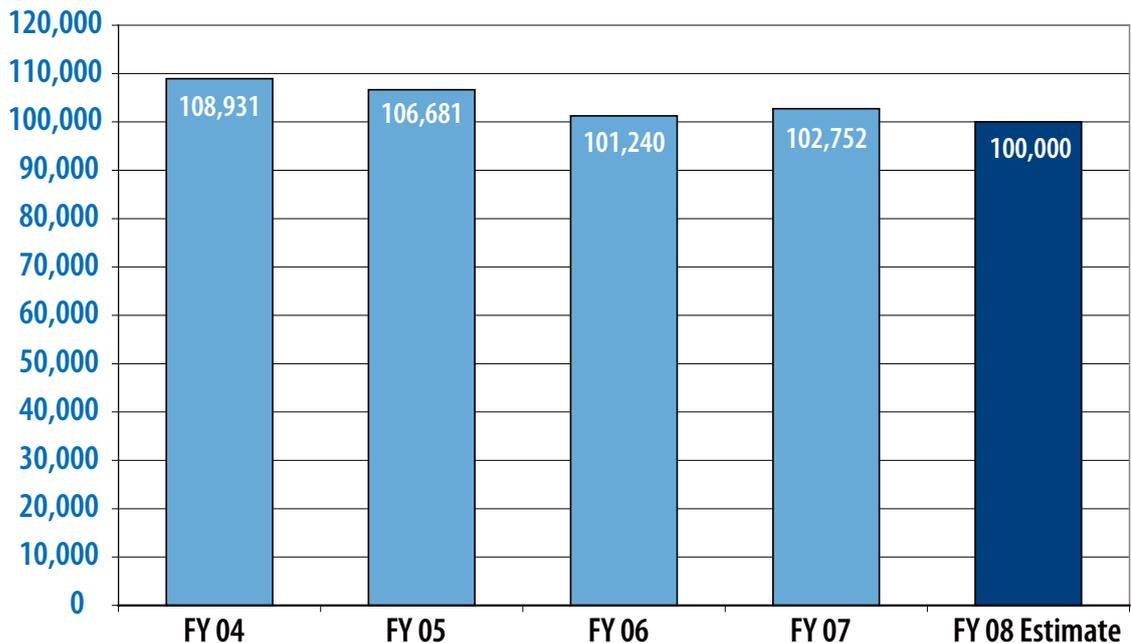
$$\text{Work Years (2.0) x 12 (Months)} = 24 \text{ Months}$$

ADDITIONAL INFORMATION

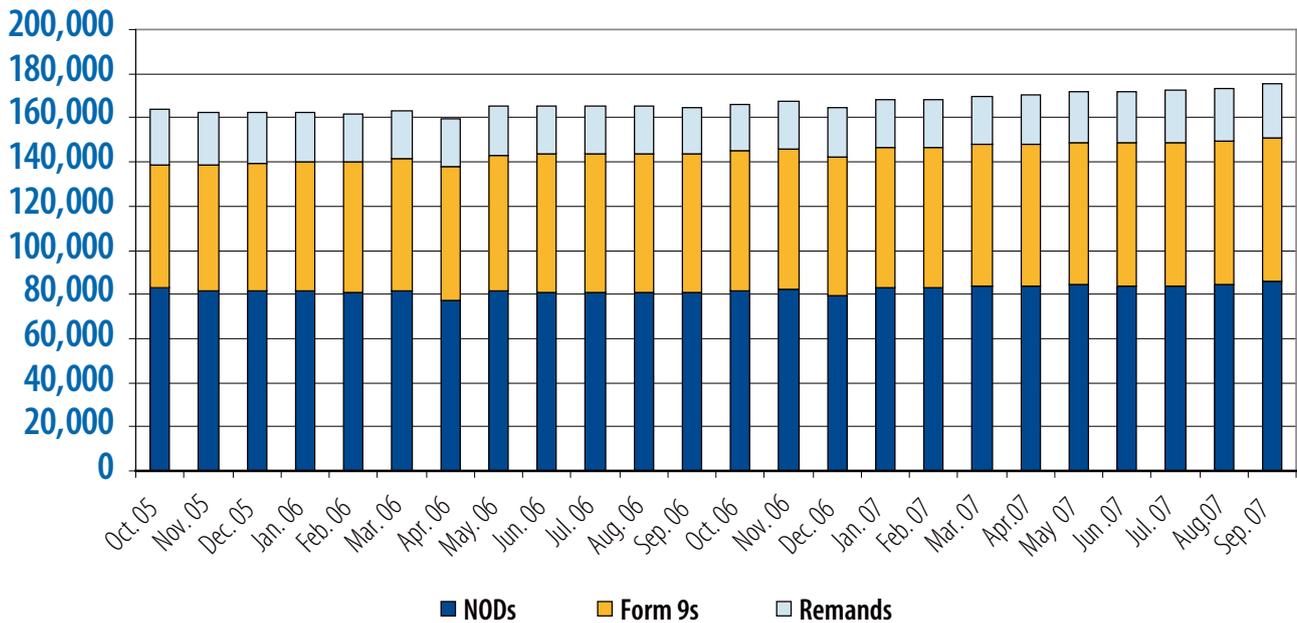
Potential BVA Workload in VBA (information)

Number of New Notices of Disagreement Received in the Field				
Month	FY04	FY05	FY06	FY07
October	9,774	8,949	8,967	9,288
November	8,621	8,293	7,989	8,131
December	6,595	8,016	7,594	7,400
January	7,717	9,048	8,715	8,701
February	8,718	9,053	8,322	8,154
March	11,698	10,265	9,815	9,551
April	9,978	9,208	8,122	8,615
May	8,574	9,390	9,093	8,836
June	9,642	9,256	8,700	8,573
July	9,005	8,428	7,630	8,627
August	9,797	9,307	8,576	9,326
September	8,812	7,468	7,717	7,550
FY Total	108,931	106,681	101,240	102,752

Notices of Disagreement Received FY 04 - FY07



Potential BVA Workload in VBA



BVA Dispositions by VA Program FY 2007

APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	6	10.3%	7	12.1%	45	77.6%	0	0.0%	58	0.1%
Compensation	8,275	21.6%	13,653	35.6%	15,481	40.4%	957	2.5%	38,366	95.0%
Education	18	9.2%	65	33.3%	107	54.9%	5	2.6%	195	0.5%
Insurance	0	0.0%	3	17.7%	13	76.5%	1	5.9%	17	0.0%
Loan Guaranty	1	14.3%	2	28.6%	4	57.1%	0	0.0%	7	0.0%
Medical	67	15.7%	162	37.9%	172	40.3%	26	6.1%	427	1.1%
Pension	45	7.8%	144	25.0%	368	63.8%	20	3.5%	577	1.4%
VR&C	2	3.4%	24	40.7%	30	50.9%	3	5.1%	59	0.1%
Other Programs	2	6.9%	7	24.1%	17	58.6%	4	10.3%	30	0.1%
BVA Original Jurisdiction	6	6.4%	0	0.0%	62	66.0%	26	27.7%	94	0.2%
Multiple Program Areas	109	19.1%	219	38.4%	232	40.6%	11	1.9%	571	1.4%
GRAND TOTAL	8,531	21.1%	14,286	35.4%	16,531	40.9%	1,053	2.6%	40,401	100.0%

BVA Dispositions by Representation FY 2007

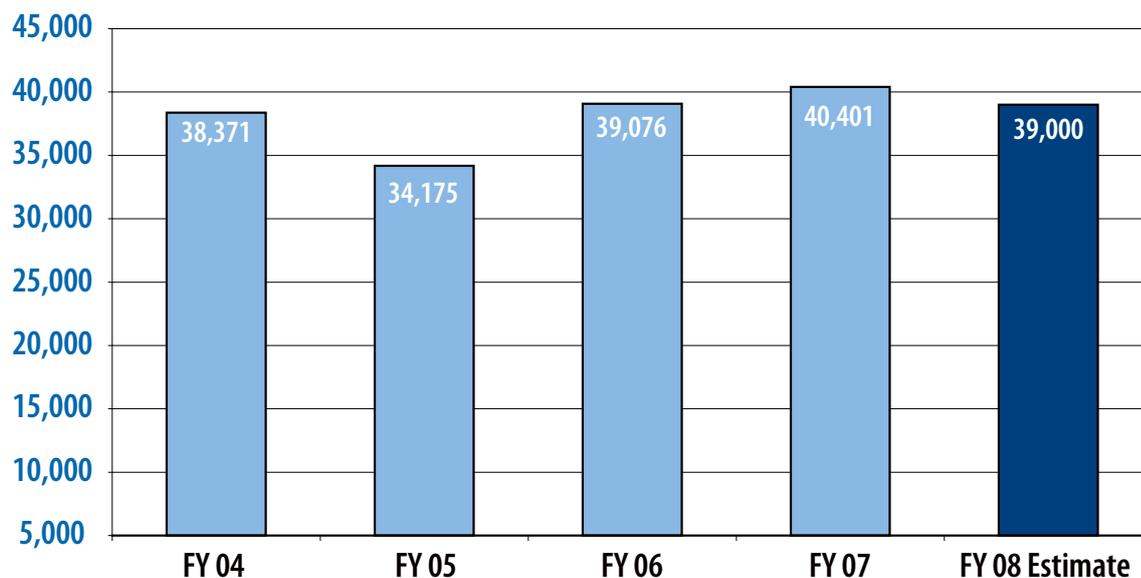
REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	1,806	22.4%	2,893	35.9%	3,124	38.7%	240	3.0%	8,063	20.0%
AMVETS	71	28.0%	67	26.4%	110	43.3%	6	2.4%	254	0.6%
Disabled American Veterans	3,187	21.9%	5,180	35.6%	5,885	40.5%	285	2.0%	14,537	36.0%
Military Order of the Purple Heart	106	23.8%	158	35.4%	170	38.1%	12	2.7%	446	1.1%
Paralyzed Veterans of America	93	24.6%	143	37.8%	114	30.2%	28	7.4%	378	0.9%
Veterans of Foreign Wars	640	20.7%	1,003	32.5%	1,363	44.2%	81	2.6%	3,087	7.6%
Vietnam Veterans of America	1,157	20.4%	1,894	33.3%	2,492	43.9%	137	2.4%	5,680	14.1%
State Service Organizations	651	16.8%	1,170	30.2%	1,944	50.2%	105	2.7%	3,870	9.6%
Attorneys	146	18.1%	306	38.0%	336	41.7%	18	2.2%	806	2.0%
Agents	503	19.9%	1,162	45.9%	748	29.6%	116	4.6%	2,529	6.3%
Other Representation	10	16.7%	20	33.3%	28	46.7%	2	3.3%	60	0.1%
No Representation	161	23.3%	290	42.0%	217	31.4%	23	3.3%	691	1.7%
GRAND TOTAL	8,531	21.1%	14,286	35.4%	16,531	40.9%	1,053	2.6%	40,401	100.0%

BVA DECISIONS

Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2004	38,371	17.1%	56.8%*	24.2%	1.9%
2005	34,175	20.8%	38.6%	38.1%	2.5%
2006	39,076	19.3%	32.0%	46.3%	2.4%
2007	40,401	21.1%	35.4%	40.9%	2.6%

* The 56.8% remand rate for FY 2004 includes former Board development cases converted to remands.

BVA Decisions FY 04 - FY 07



BVA Operating Statistics

	FY04	FY05	FY06	FY07
Decisions	38,371	34,175	39,076	40,401
Case Receipts*				
Added to Docket	49,638	47,136	46,076	44,337
Received at BVA	39,956	41,816	41,802	39,817
Cases Pending* *	28,815	37,539	40,265	39,031
Hearings - VACO	805	738	554	421
Video	2,108	2,618	2,719	2,870
Field	4,346	5,220	5,885	6,680
TOTAL	7,259	8,576	9,158	9,971
Decisions per FTE	87.8	79.1	86.4	90.3
BVA FTE	440	433	452	447
BVA Cycle Time	98	104	148	136
Cost per Case	\$1,302	\$1,453	\$1,381	\$1,337

* 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 2007