

Military-Veterans Advocacy Written Comments On Appellate Reform Proposals

Presented to the House Veterans Affairs Committee

May 2, 2017

Introduction

Distinguished Committee Chairman Phil Roe, Ranking Member Tim Walz and other members of the Committee, thank you for the opportunity to present Military-Veterans Advocacy's views on the pending discussion draft entitled "Veterans Appeals Improvement and Modernization Act of 2017."

About Military-Veterans Advocacy

Military-Veterans Advocacy Inc. (MVA) is a tax exempt IRC 501[c][3] organization based in Slidell, Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for various legislation on the State and Federal levels as well as engaging in targeted litigation to assist those who have served.

As well as legislative advocacy, Military-Veterans Advocacy represents veterans in all facets of the veterans law system. MVA is admitted to practice before the Department of Veterans Affairs, the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court of the United States.

Military-Veterans Advocacy's Executive Director Commander John B. Wells USN (Ret.)

MVA's Executive Director, Commander John B. Wells, USN (Retired) is a 22 year veteran of the Navy. Commander Wells served as a Surface Warfare Officer on six different ships, with over ten years at sea.

Since retirement, Commander Wells has become a practicing attorney with an emphasis on military and veterans law. He is counsel on several pending cases at various levels in the veterans legal system. He is very familiar with the veterans law rules and presents Continuing Legal Education on this subject to other attorneys. Commander Wells, on behalf of MVA routinely brings cases before the Board of Veterans Appeals and is familiar with the deficiencies in the appellate system.

"Veterans Appeals Improvement and Modernization Act of 2017."

MVA does not support the "Veterans Appeals Improvement and Modernization Act of 2017" as currently written.

General Comments

MVA notes the improvement in the discussion draft over HR 457 and the appellate provisions of HR 611, in that it no longer requires the veteran, at the Notice of Disagreement stage, to provide a listing of every factual and legal issue that would act as the basis for the appeal. Deficiencies remain, however, in that it continues to strip the duty to assist from the veteran after the initial decision. As attorneys are not able to provide paid representation until after the initial decision, this measure effectively eliminates any ability to supplement the record.

Given the woeful inadequacy of many Veterans Service Officers, most attorneys have to do a baseline review of the claims file and often use the duty to assist to obtain critical records to support the appeal. While inadequate at best, the duty to assist allows the attorney some latitude to obtain records to prepare the case. Without the duty to assist, the attorney will be required to rely upon the Freedom of Information Act. This will not only result in costs being attributed to the veteran but result in undue delay.

The duty to assist is a matter of due process and is consistent with *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). In *Cushman*, the Federal Circuit joined seven of its sister Circuits in finding that there was a property interest, for due process purposes, in disability benefits. *Cushman*, 476 at 1297. Specifically *Cushman* recognizes a Constitutional right to due process in veterans benefits. In the event that the duty to assist provisions are enacted, Military-Veterans Advocacy will initiate litigation to stop its implementation.

The discussion draft retains the requirement that the veteran indicate in the Notice of Disagreement whether he or she desires a hearing or whether they wish to submit additional evidence. This effectively sets up three separate dockets. As discussed below, this is not necessary should a scheduling conference/order be required as routinely occurs in other federal adjudication systems. More importantly, there is no ability to amend or supplement the request. In order to change the Notice of Disagreement, the veteran would have to withdraw and resubmit it, assuming that it was not outside the one year statute of limitations.

MVA feels that this provision is unconscionable. Attorneys are not required to provide that level of specificity when filing a notice of appeal in a federal appellate court. To expect a disabled veteran to meet this high standard is ludicrous.

It is my understanding that the Federal Bar Association, the Vietnam Veterans of America and National Organization of Veterans Advocates also have voiced concerns with the process outlined in the discussion draft. Attorneys, on the other hand, are less enthusiastic. I note that the supporting VSOs normally do not use attorneys to adjudicate appeals.

The proposed legislation does nothing to fix the systemic problems within the VA Appellate system. Instead it seems to make the process easier for the VA, at the expense of the veteran. The proposed legislation flies in the face of the non-adversarial, pro-veteran system

envisioned by Congress. Currently the VA takes an adversarial anti-veteran approach designed to provide the illusion of efficiency while denying veterans their earned benefits.

Areas of Concern Not Addressed in the Proposed Legislation

The Veterans Appeals Improvement and Modernization Act of 2017 does not address the pending inventory of over 450,000 appeals. Currently, the Chairman has the power to appoint temporary Board members from VA employees. This needs to be changed legislatively to remove the qualification that the temporary board member be a VA employee. MVA recommends that retired Military Judges be appointed to adjudicate the backlog near their local residence. While that would require some training in VA law, the retired Military Judges are conversant with the hazards of military service. Additionally, they are trained to make decisions in an equitable and efficient manner.

The proposed legislation does address the Board of Veterans Appeals but it does not speak to the crux of the problem. The key to solving the appellate backlog is addressing the systemic problems of the Board. Initially, and as a matter of priority, the President must appoint a qualified chairman of the Board. Secondly, MVA recommends that all members of the Board, acting or permanent, be certified as Administrative Law Judges. The lack of training and learned reasoning in the opinions of the Board members is frankly striking.

Perhaps the single step that could expedite the process would be the institution of electronic filing. Currently evidence and written arguments must be printed into hard copy and sent both to the Board and to the Evidence Intake Center in Janesville. Sometimes the information is scanned into the correct record - sometimes it is not. Electronic filing would eliminate the time required for processing and ensure that the information and evidence is appended to the correct record. All federal courts and most state courts use some form of electronic filing. Off the shelf software is available commercially at little expense. Additionally, the software would allow VSOs and attorneys access to the records of those they represent.

The controllable remand rate from the Board is definitely unsatisfactory. The veteran is often relegated to a "hamster wheel" in which his case is sent back and forth between the Board, the Regional office and the Court of Appeals for Veterans Claims. Too many cases are remanded back because the board member simply does not do his or her job. MVA proposes that if more than 30% of any Board member's decisions are remanded within a given year the Chairman should review the performance and recommend action to the Secretary including additional training, probation, suspension or termination. Remands based upon a change in law or regulation would be exempt from computing the remand percentage. Given the high level of remands, MVA recommends that this information be included in the annual report to Congress.

Although the Board members call themselves "Veterans Law Judges," no statute designate them as Judges and in reality they are not. Notably these Board members are VA career employees. They are not certified as Administrative Law Judges and seldom have any real

judicial training or experience. This is one of the main reasons for the high remand rate.

Duty to Assist

The proposed Veterans Appeals Improvement and Modernization Act of 2017 guts the existing duty to assist. While the Board normally covers up the failure of the Secretary to perform that statutory duty, this proposal virtually eliminates it subsequent to the initial decision.

The VA proposal seems to limit the entire appellate review to the original record submitted to the agency. While this is common in Administrative Procedures Act reviews, it is not appropriate here. Unlike most administrative hearings, attorneys are not able to engage in paid representation, even if the veteran so desires, until the initial denial has been received. This effectively leaves the veteran without legal representation. Secondly, the system as it currently exists (and would exist under the proposed legislation) does not allow for discovery. As a result, information and witnesses are discovered throughout the process. Attorneys and appellate level VSOs are trained to prepare a proper record which often results in the discovery and production of new evidence. MVA's comments on the legislation, attached hereto, allow for evidence to be submitted at all stages of the proceeding. It further requires the VA, as part of their duty to assist, to provide reasonable discovery. This would include contact information for decision makers and medical referrals, to allow the veteran to conduct an interview. At the discretion of the veteran the interview could be recorded or otherwise transcribed to be used at the hearing.

Removal of the restriction on attorney representation and the agency of original jurisdiction would help to relieve this matter. More importantly, basic discovery should be allowed. Once a case is docketed at the Board, the use of a scheduling order with milestones would ensure that the case proceeds efficiently. Assigning a board attorney to shepherd the process would help resolve matters. Providing the veteran and his representative with contact information would help expedite the process.

Unless the duty to assist continues into the Appellate process, the VA will be able to suppress information favorable to the veteran. Rather than eliminating the duty to assist a cutoff date can easily be included in the scheduling order MVA recommends.

A veteran should not be deprived of the right to submit additional evidence to the higher level review at the Agency of Original Jurisdiction. Once the initial denial has been made the veteran may choose to hire an attorney. At this point a significant amount of evidence may be generated. An evidence submission cutoff date should be included in the scheduling order that MVA proposes.

Summary of Recommendations

Although not addressed in the proposed legislation, MVA recommends the following to streamline the appeal process:

- Address the pending inventory by allowing for the temporary appointment, training and qualification of retired Military Judges to hold appellate hearings within 100 miles of their residence.
- Promulgate a scheduling order for each appeal with cutoff dates that can be extended for good cause shown. This would eliminate the need for the three docket system proposed in the legislation.
- Assign a board attorney to monitor the appeal and resolve disputes concerning the events in the scheduling order and to attend all hearings.
- Absent unique or special circumstances, require the decision to be issued within 30 days of the hearing.
- Require the board members to be qualified as Administrative Law Judges.
- Provide for a discovery process to streamline the preparation of the appeal.
- Provide for the review and sanction of board members who have more than 30% of their decisions remanded for reasons within the control of the board member.
- Require the Chairman of the Board to implement electronic filing and an electronic case management system as well as appropriate training.
- Require the Secretary to implement an electronic filing and case management system at the Agency of Original Jurisdiction.
- Allows for retroactive effect of a decision in the event of Clear and Unmistakable Error.
- Require a scheduling conference and scheduling order.
- Revise § 7261(a)(4) of Title 38 to change the standard of review for factual findings from “clearly erroneous” to “abuse of discretion.”
- Revise § 7261(d) of Title 38 to allow a de novo trial on the record, similar to the provisions in federal district courts and the Court of Federal Claims.
- Revise § 502 of Title 38 to vest jurisdiction in the Court of Appeals for Veterans Claims instead of the Court of Appeals for the Federal Circuit.
- Strike § 7292 and add the Court of Appeals for Veterans Claims to the general Jurisdictional statute of the Court of Appeals for the Federal Circuit.
- Modifies 38 U.S.C. § 7332[b][2] to require the VA to release the veterans record to the Court of Appeals for Veterans Claims and the veteran’s representative when a notice of appeal is filed.

Conclusion

MVA cannot in good conscience support “Veterans Appeals Improvement and Modernization Act of 2017.”

//s// John B. Wells
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 Executive Director