



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

November 19, 1992

Hon. Anthony J. Principi
Acting Secretary of Veterans Affairs
Department of Veterans Affairs
Washington, DC

Dear Mr. Secretary:

I respectfully submit for your submission to Congress the Annual Report of the Chairman, Board of Veterans' Appeals, for Fiscal Year 1992. Part I of this report is intended to provide an overview of the Board and its activities during Fiscal Year (FY) 1992 and the projected activities of the Board for FY 1993, as is mandated by 38 U.S.C. § 7101(d)(1). The specific information required by 38 U.S.C. § 7101(d)(2) and (3) is contained in Part II of this report.

As you well know, this past Fiscal Year has been one of extraordinary change at the Department as a result of the dramatic changes in the law of veterans benefits, as interpreted by the United States Court of Veterans Appeals. While judicial review has had a profound impact on the adjudication process, I believe that the organizational components involved in benefits determinations and in representation before the Court have responded cooperatively to successfully meet these challenges.

May I take this opportunity to express my appreciation for your commitment and invaluable assistance in enabling the Board to meet its changing responsibilities as the Department entered the era of judicial review.

I hope that the enclosed report provides you, the Congress and the veterans that we serve with a comprehensive picture of the Board and its mission and activities.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Charles L. Cragin".

Charles L. Cragin

Enclosure

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PART I

THE BOARD OF VETERANS' APPEALS

AN OVERVIEW

The Board of Veterans' Appeals (BVA or Board) is the component of the Department of Veterans Affairs that is responsible for entering the Secretary's final decision in each of the many thousands of claims for entitlement to veterans' benefits that are presented annually for appellate review. The subject matter for adjudication encompasses the range of veterans' benefits, including claims for entitlement to service connection, increased disability ratings, total disability ratings, pensions, insurance benefits, educational benefits, home loan guarantees, vocational rehabilitation, dependency and indemnity compensation, and many more. About 90 percent of the claims before the Board involve medical subject matter. The mission of the Board is to issue timely, consistent, quality decisions on appellate matters presented to the Secretary for final decision. Its activities are directed by a Chairman appointed for a six year term by the President and confirmed by the Senate. The Chairman is "directly responsible to the Secretary," as provided by 38 U.S.C. § 7101(a).

HISTORY

By Executive Order 6090, effective March 31, 1933, Veterans Regulation No. 2, Part II, President Franklin D. Roosevelt established the Veterans Administration as the organization responsible for administering all veterans' programs and benefits. The previous patchwork system of appellate adjudication of claims for veterans' benefits was eliminated and all questions of entitlement to benefits were subject to a single appeal to the Administrator of Veterans' Affairs. On July 28, 1933, President Roosevelt created the Board of Veterans' Appeals by Executive Order 6230, Veterans Regulation No. 2(a). The Board was delegated the authority to render the final decision of appeal for the Administrator and, organizationally, was directly responsible to the Administrator. The Board was charged "to provide every possible assistance" to claimants and to take final action which would "be fair to the veteran as well as the Government." Initially, the Board was composed of a Chairman, Vice Chairman, and no more than 15 associate members. In the 1930's, the Board established procedures, guidelines, and precedents, many of which eventually were codified as regulations.

In the 1940's, procedures were established for affording appellants hearings, including recorded hearings conducted in the field by traveling Board members. The Board's workload was greatly increased in the aftermath of World War II. For example, in 1949 the Board rendered almost 70,000 decisions. These decisions generally were simple,

short, and concise. The 1950's were characterized by the implementation of organizational and operational programs to achieve more efficient case management.

During the 1960's, the Board was enlarged to 14 sections of three members and the scope of the travel Board hearing program also was expanded. The Board's role in the promulgation of claims adjudication policy was terminated, because it was felt that this was inconsistent with the Board's primary function as an independent, quasi-judicial agency within VA. Appellate policy also was significantly altered with the enactment of Public Law 87-666, effective January 1, 1963, which required the agency of original jurisdiction to furnish an appellant a "Statement of the Case," a decisional document containing a detailed recitation of the evidence, applicable laws and regulations, and explanation of the rationale underlying the denial of the claim. Also in 1963, the Board was granted statutory authority to obtain an advisory opinion from one or more medical experts who are independent of VA in cases involving complex or controversial medical issues. The Board's Rules of Practice were extensively revised and were first published in the Code of Federal Regulations in 1964. Currently, BVA's appellate regulations are contained in Part 19 and the Board's Rules of Practice are found in Part 20 of title 38 of the Code of Federal Regulations.

The 1970's were characterized by a significant increase in the number of appeals as part of the aftermath of the Vietnam War. In 1977, the number of new appeals exceeded 60,000. In 1982, 68,000 new appeals were filed. The average appellate processing time, measured from the date of filing of the Notice of Disagreement until the date of issuance of a final BVA decision, increased significantly. At the end of Fiscal Year (FY) 1982, the average appellate processing time was 483 days, up from 443 days the preceding year. To help with the increased workload, the President approved an increase in Board members to form 19 three-member sections in 1984. The maximum number of authorized Board members subsequently was increased to 67 and 21 sections were formed.

The Veterans' Judicial Review Act (VJRA), Pub. L. 100-687 (Nov. 18, 1988), which established the U.S. Court of Veterans Appeals, has had a profound impact on the Board and the entire process by which claims for veterans' benefits are adjudicated. Clearly, the enactment of the VJRA has been the most revolutionary change in the adjudication system since the inception of the Board in 1933.

ORGANIZATION

The statutory authority for the establishment of the Board is contained in Chapter 71 of title 38 of the United States Code. The mission of the Board is "to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner." The Board is authorized to have "sufficient" professional, administrative, clerical, and stenographic personnel as are necessary to accomplish this mission. 38 U.S.C. § 7101(a). Also as provided by 38 U.S.C. § 7101(a), in FY 1992, the Board reached its maximum strength of 67 members, including the Chairman, Vice Chairman, and Deputy Vice Chairman. The Chairman, who serves for a term of six years, is appointed by the President of the United States with the advice and consent of the Senate. The remaining

Board members serve for a term of nine years; however, the initial appointments to the Board, as provided by the VJRA, are for equal numbers of appointments to terms of three, six, and nine years. All the initial appointments to the Board have been made. Board members are appointed by the Secretary, with approval of the President, based upon the recommendations of the Chairman. It is noteworthy that prior to the VJRA, which first imposed this condition of employment, Board appointments were not subject to a term of years. All Board members occupy GS-15 positions, with the exception of the Chairman, who holds an Executive level position, and the Vice Chairman and Deputy Vice Chairman, who are members of the Senior Executive Service. Board members are the only federal employees at the GM or GS-15 level that require Presidential approval for appointment.

BVA is organized into Professional and Administrative Services. The Professional Service consists of the sections of the Board, Staff Medical Advisers, and the Chairman's staff. The decisions of the Board are rendered by a majority of a Board section composed of three members. 38 U.S.C. § 7103(a). Currently, there are 21 Board sections. Each section is composed of at least two attorney Board members, one of whom is designated Chief, and bears the supervisory responsibility for the Section. In the past, the third Board member was almost always a physician. However, as is explained below, recent changes in the law, as interpreted by the United States Court of Veterans Appeals (the Court) have altered the role of the physician in the VA adjudicatory scheme. After their initial term of appointment expires in July 1994, no further appointments of physicians as members of the Board will be made. At such time, all three members of the Board section will be attorneys.

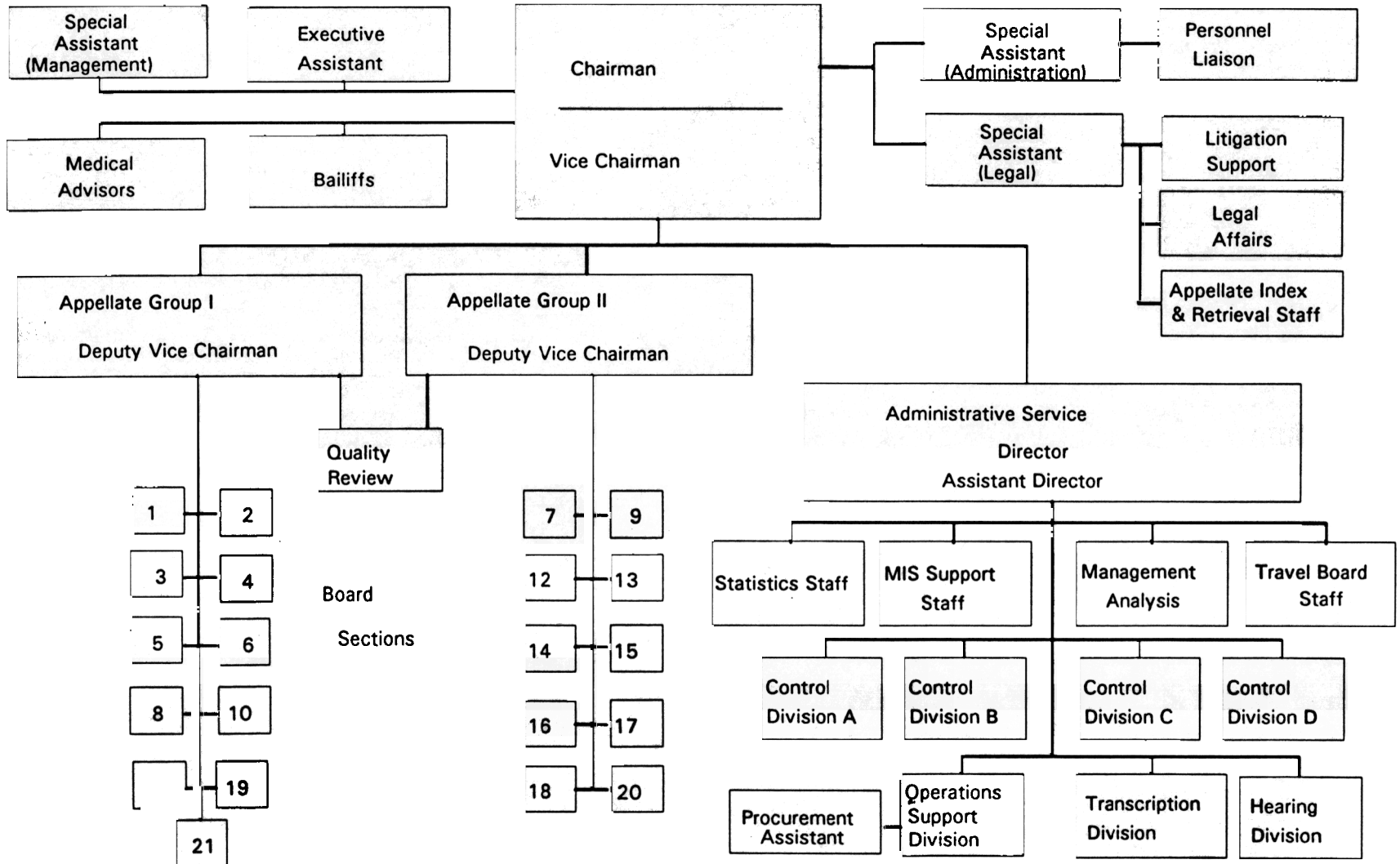
A professional staff of six or seven attorneys, referred to as staff counsel, are assigned to each Board section. Staff counsel are graded from GS-9 through GS-14. The Chief member of the section reviews the section's caseload and assigns individual appeals to each staff counsel for the preparation of a written tentative decision. The counsel submit the completed tentative decision to the Board section for review. The Board section typically will review the record and revise the submission itself or return it to counsel for revision. When a decision that is acceptable to the Board is finalized, the decision is processed through the Board's Quality Review section and then forwarded to the Administrative Service for dispatch. If the Board's decision is not unanimous or if the rationale for the decision is not agreed upon by all the Board members, a dissenting or concurring opinion will be prepared. The Chairman reviews less than unanimous decisions. Assisting the Board members in their consideration of an appeal is a staff of Medical Advisers, who provide medical research and training. In addition, a medical evaluation of a case may be obtained from the VA Chief Medical Director, the Armed Forces Institute of Pathology, or an independent medical expert, usually a member of the faculty of a leading medical school.

The Board's Administrative Service is charged with supporting the system which permits the efficient processing of appeals. These services include case management and tracking, secretarial services, transcription services and liaison activities with veterans, veterans service organizations, Members of Congress and their staffs, and other interested parties. The Board's transcription unit is located in Wilkes-Barre, Pennsylvania. Draft decisions,

hearing transcripts, and other documents are electronically communicated from the transcription unit to the Board's offices in Washington, DC.

In FY 1993, it is planned to reorganize the Board's Administrative Service and the Office of the Special Assistant for Management into a combined Office of Analysis, Planning and Management Operations. Responsibilities of this Office would include the management planning, support and analysis functions, administrative support operations, ADP activities, and operations and program liaison activities, including implementation of the Board's Total Quality Management (TQM) program. In addition, the Board plans to establish in FY 1993 an Office of Professional Training, which will have the responsibility for providing training to both new and experienced attorneys at the Board in substantive legal and medical areas, as well as training in keyboarding and the use of computer software.

BOARD OF VETERANS' APPEALS



MERIT SELECTION OF BOARD MEMBERS

Under the provisions of 38 U.S.C. § 7101(b)(2)(A), members of the Board, other than the Chairman, are appointed by the Secretary of Veterans Affairs, with the approval of the President of the United States, based upon recommendations of the Chairman of the Board of Veterans' Appeals. Board members are unique among federal employees at the GS or GM-15 level in that theirs are the only such appointments that require Presidential approval.

Although it is not required by law, all members of the Board are attorneys or physicians. As will be discussed at length below, the Chairman will not recommend physicians to be members of the Board in the future. The attorney members of the Board are selected through a highly competitive process. Almost exclusively, they have been and will continue to be drawn from the ranks of staff counsel to the Board, because the particular expertise necessary to adjudicate appeals for veterans' benefits in an expeditious manner is rarely found outside BVA. A Board member must have complete familiarity with the body of statutory, regulatory, and judicial authority applicable to the cases before it. In addition, a Board member must acquire a solid background in the medical and other areas of subject matter expertise necessary to adjudicate the wide variety of claims within the Board's jurisdiction. In this manner, Board members are able simultaneously to produce quality decisions in a timely fashion and in the requisite numbers. Without this expertise, which only can be gained with years of experience on the job, the Board would be unable to accomplish its mission satisfactorily. Staff counsel generally require from 7 to 10 years experience before they are considered for selection as a Board member. The selection process for the limited number of Board member openings is extremely competitive and only the best and the brightest are selected. As selection of Board members is based solely on merit, the political affiliation, if any, of the candidates is never a factor for consideration.

HEARINGS BEFORE BVA

In the past, the Board conducted approximately 2,000 hearings per year, about 600 of which were held at VA regional offices by traveling sections of the Board. The remainder were held in the Board's offices in Washington, DC. These hearings are nonadversarial in nature, pursuant to the Department's statutory duty to assist the appellant in developing his or her claim, including claims which may be inferred or intertwined with those currently on appeal but which have not been raised by the claimant. At the hearing, testimony is taken under oath or affirmation and evidence or argument in support of the claim is adduced. Under the Board's Rules of Practice, cross-examination of witnesses is not permitted. However, as will be discussed below, the law as interpreted by the Court requires the Board to weigh the credibility and probative value of all evidence on the record, including testimony, in explaining the "reasons or bases" for its decision.

The VJRA imposed a statutory requirement on the Board to provide hearings at regional offices before a "traveling section of the Board." 38 U.S.C. § 7110. Previously, the Board had provided such hearings on an *ad hoc* and discretionary basis. As of

September 30, 1991, there were 1,548 pending requests for hearings before a traveling section of the Board. During FY 1991, the number of such hearings increased from the past average of about 600 to 873. Requests for personal hearings before the Board continued to grow in FY 1992. For example, in FY 1991, appellants requesting a BVA hearing at a regional office could expect a wait of almost three years at some locations. In response, the Board has acted to meet the increased demand for hearings and, at the same time, address the challenge of providing hearings in a timely manner.

Single member hearings

In order to ameliorate this situation and to make the most effective use of the Board's available resources, in January 1992, the Chairman directed that all BVA hearings, whether held at regional offices or in Washington, DC, will be conducted by a single member of the Board section deciding the appeal. A transcript of each hearing is prepared for the record. The members of the section who were not present at the hearing necessarily will defer to the assessment of the Board member conducting the hearing as to the demeanor of witnesses at the hearing. Otherwise, as required by law, the Board's decision will be rendered by a section of three members. Claimants who have been afforded a single member hearing generally have reported that this format is less intimidating and enables the claimant to have the complete, individual attention of the presiding Board member. This procedural change also has reduced the wait for a BVA hearing at regional offices.

This procedural change from the use of three member hearing panels, effectuated pursuant to the Chairman's authority under 38 U.S.C. § 7102(b), also has enabled the Board to schedule more frequent hearings at VA regional offices. BVA held 1394 hearings in Washington, DC, and 1258 hearings in 52 VA regional offices in FY 1992, a significant increase from the 1108 hearings held in Washington, DC and the 880 hearings held in VA regional offices in FY 1991. During FY 1992, BVA revised its forms and a form letter to more clearly demarcate hearings held by the Board and those held by regional office personnel. The impact of these form revisions will begin to be felt in FY 1993. It is anticipated that the demand for hearings by Board members at regional offices will increase. It is projected that, in FY 1993, the Board will schedule 2,964 BVA hearings at regional offices and 3,450 hearings in Washington, DC.

REPRESENTATION BEFORE THE BOARD

In cases in which a formal hearing is not practicable, argument may be submitted to the Board. In FY 1992, 27,916 written briefs on appeal were filed, primarily by representatives affiliated with veterans service organizations. This reflects the continued high level of appellate representation provided by veterans service organizations. There was, however, a slight increase in representation by attorneys. For decisions entered in FY 1992, 87 percent had representation by one of the accredited service organizations, 2.4 percent had representation by an attorney or agent and 10.6 percent had no representation. For decisions entered in FY 1991, 89.2 percent had representation by an accredited

service organization, 1.6 percent had representation by an attorney or agent, and 9.2 percent had no representation.

IMPACT OF JUDICIAL REVIEW ON BVA APPEALS ADJUDICATION

Although the Court was initially established in November 1988 by the VJRA, the effects of judicial review began to impact the system only in the last quarter of calendar year 1990. The impact of judicial review has been and will continue to be widespread and profound. In short, judicial review has dramatically changed the VA claims adjudication process. Because the interpretation of the law is changing on almost a daily basis with each new precedent decision of the Court, the Board is required to carefully and continually monitor the state of the law. The Court's decisions, rules, and procedures have resulted in significant changes in the duties and functions of the Board and its members. They have fundamentally altered the structure and content of BVA decisions and the process by which those decisions are made. Court decisions have changed the composition of the Board section responsible for rendering the decision, virtually eliminating the role of the physician-adjudicator. Moreover, Court decisions have greatly expanded the BVA's workload, both because of the need to comply with the legal and factual analysis mandated by the Court and the increase in case volume resulting from the readjudication of cases remanded by the Court to BVA and those remanded by BVA to the Veterans Benefits Administration (VBA) to comply with the Court's requirements, which are later returned to the Board for readjudication.

Adjudication prior to the VJRA

In the past, BVA decision making tended to be result-oriented and informal in approach, tone, and content. The process was viewed as entirely benevolent and non-adversarial in nature. Board members relied on their own expertise, which was gained from many years of evaluating benefits cases, as well as the particular expertise of the physician Board member of the panel. This enabled the Board, on the whole, to reach compassionate and fair determinations with the degree of expediency necessary to issue over 45,000 individual dispositions in FY 1991.

Prior to the institution of judicial review, all that was required by law was a decision containing findings of fact and conclusions of law. While the decision almost always included a discussion of the rationale for the determination, such explanations were usually brief, seldom contained potentially embarrassing commentary that might reflect on an appellant's or witness' credibility, and, except in the more medically complex cases, did not cite specific medical texts or treatises in support of the conclusions on medical issues. "Generally accepted medical principles" was a frequently used phrase to explain the denial of a requested benefit. Attorney Board members often were guided in their analyses of the medical aspects of a case by the expertise of the physician member of a Board section. Generally, the Board's emphasis was on reaching a just and correct result, rather than providing a comprehensive explanation of the basis for that decision or a discussion of the

relative probative value of each item of evidence. This approach is no longer permissible in the era of judicial review.

Some landmark decisions of the Court

Judicial review has resulted in lengthier and more complex BVA decisions. While a comprehensive analysis of the spectrum of the Court's decisions will not be attempted herein, a discussion of several important precedent decisions will provide some appreciation of the Court's impact. The Court's landmark decisions include: *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990), which interpreted the amendment of 38 U.S.C. § 7104(d)(1) by the VJRA, to require the Board to include the "reasons or bases" for its findings and conclusions in its decisions, in such a way as to render the Board's previous decision format inadequate under the new statutory standard; *Littke v. Derwinski*, 1 Vet.App. 90 (1990), which required the Board to remand cases for evidentiary development under the Department's duty to assist the claimant in developing the facts pertinent to the claim under 38 U.S.C. § 5107(a) when the appellate record is deemed inadequate; *Manio v. Derwinski*, 1 Vet.App. 140 (1991), which interpreted 38 U.S.C. § 5108, to require a different standard of review than that formerly used in consideration of claims which had previously been denied; and *Colvin v. Derwinski*, 1 Vet.App. 171 (1991), which held that the Board may consider only independent medical evidence to support its findings.

Each of these landmark decisions has been followed by later decisions refining these opinions, which have required both the readjudication of additional Board decisions and the continued revision of the Board's decision making process. For example, in FY 1992, the Court extended the application of its analysis in *Manio* to a gamut of other types of cases where VA had not previously been required to readjudicate the claim based on the entire record. In *Fluharty v. Derwinski*, 2 Vet.App. 409 (1992), the Court held that, once a claim for a total rating based on individual unemployability has been reopened, the Board must evaluate the claim in light of all the evidence, both new and old.

In *Douglas v. Derwinski*, 2 Vet.App. 103 (1992), the Court held that, pursuant to the Department's duty to assist the claimant, BVA must consider all statutory provisions or regulations that may be potentially applicable to a claim, even though such legal authority was not raised by or on behalf of the appellant. This decision requires not only that the Board be intimately familiar with the full range of VA laws and regulations, but that the Board, in its decision, explore every "blind alley" in order to explain why a potentially applicable authority does not apply in a given case. The *Douglas* decision also suggested that the procedural requirements of 38 C.F.R. Part 3, which previously were considered applicable only to VBA, applied to BVA.

In *Tobin v. Derwinski*, 2 Vet.App. 34 (1991), the Court altered VA's interpretation of the concept of secondary service connection. Prior to this decision, VA had limited a grant of secondary service connection to cases in which it was shown that a service connected disability caused the disability for which service connection was being sought. In *Tobin*, the Court concluded that, where a service connected disability merely aggravated, but did

not cause, a preexisting disorder, secondary service connection may be established for that disorder. This decision adds additional complexity to the Board's analysis of these generally complex cases.

Several decisions also have added significantly to the scope and depth of analysis the Board must apply and explain in its decisions. For example, in *Roberts v. Derwinski*, 2 Vet.App. 387 (1992) and *Brown v. Derwinski*, 2 Vet.App. 444 (1992), the Court markedly expanded the analysis that BVA must apply in appeals involving entitlement to non-service connected pension benefits. In the past, the Board was limited to the ultimate question of whether or not an eligible claimant was permanently and totally disabled. Under *Roberts* and *Brown*, BVA is now required to consider the propriety of the rating assigned to each of the appellant's disabilities and consider his or her degree of permanent and total disability under both a subjective and an objective standard.

Several decisions in FY 1992 continued to enlarge the scope of VA's burden in its duty to assist a claimant in the development of a claim. In *Ivey v. Derwinski*, 2 Vet.App. 320 (1992), the Court held that, even if the evidence submitted is insufficient to reopen a previously denied claim, if it shows that the claim is well grounded, i.e., facially plausible, the Department must then assist the claimant in obtaining evidence that may potentially provide support for his or her claim. Thus, BVA must now require the development and eventual adjudication of a claim which previously would have been subject to dismissal. In *Murincsak v. Derwinski*, 2 Vet.App. 363 (1992), the Court placed additional obligations on the Board to obtain and consider the records pertaining to the veteran's claim for Social Security Administration benefits. In addition, BVA must attempt to obtain all current treatment records where the evidence reflects that the appellant is receiving ongoing medical care. The line of decisions typified by these cases will require additional review and action to develop the claim by BVA before the record is deemed sufficient to render a "final" decision in an appeal.

In a decision entered on October 6, 1992, *Russell v. Principi*, No. 90-396 (U.S. Vet. App. Oct. 6, 1992)(consolidated with *Collins v. Principi*, No. 90-416) an *en banc* panel held that the United States Court of Veterans Appeals may review prior decisions of the Board for "clear and unmistakable error" provided that: (1) there is a Notice of Disagreement filed after November 18, 1988; (2) the claim is asserted at the Board level; (3) there was no prior unappealed rating action by the agency of original jurisdiction or a decision of the Board that denied a claim of "clear and unmistakable error"; and (4) a timely Notice of Appeal to the Court is of record. This decision promises to be far ranging in its impact, although there remain many aspects of review by the Court of such claims that will require clarification. As the Court has stayed in excess of forty cases pending resolution of this consolidated case, further elaboration of the doctrine created by *Russell* and *Collins* may be forthcoming soon.

It appears that the Court has created a vehicle by which an appellant or the accredited representative may achieve judicial review, with appropriate pleadings, of virtually any adjudication entered by an agency of original jurisdiction at any time in the past without presenting new and material evidence. This will enormously expand the universe of Departmental decisions potentially subject to review by the Court. Moreover, the

adjudication of such claims will be extremely demanding on resources. The first step of a review of a prior adjudication for "clear and unmistakable error" is to ascertain the state of the evidence of record and the state of the law at the time the challenged decision was entered. While determining the state of the record should not present excessive difficulties in most cases, determining the state of the law and regulations at the time of old adjudications will demand the investment of considerable additional time for legal research. Where there are multiple prior adjudications which are alleged as erroneous, the investment of time will be multiplied many times. These claims will also generate many additional determinations that will be subject to judicial review on the state of the law, and potentially the intent of prior provisions of the law and regulations, that otherwise would be beyond the scope of review of the Court. A reversal of the prior adjudication on the basis of "clear and unmistakable error" will also create the potential for large retroactive awards of benefits that will create a powerful incentive for the raising of this question in many, if not all, cases appealed to the Board.

In summary, the statutory requirement that the Board section provide the "reasons or bases" for its decision necessitates that the Board articulate a clear and complete analysis of its determinations on all material aspects of a case, including evaluations of the credibility and probative value of each item of evidence. The Board must deal with a series of legal analyses that have been imposed by changes in the law as interpreted by the Court. These include the fulfillment of the Department's statutory duty to assist the appellant; the new technical analysis and broadened range of evidentiary consideration in cases where the same benefit sought on appeal was previously denied by VA; and the necessity of affording appellate consideration to new and additional issues, such as ancillary, "inferred," and "inextricably intertwined" issues. In addition, the Court has required that the Board provide the "reasons or bases" for each of its determinations as to subissues, including the relative weight of items of evidence, evaluation of credibility, and questions concerning the burden of proof.

***Colvin* and the Role of the BVA Physician**

The Court has held that the Board can no longer base its decision on its own medical expertise, including that of a physician serving as a BVA member, but must rely upon "independent" medical evidence *on the record* in support of the determination reached. This requires that Board members provide a thorough explanation of all medical principles relied on, with discussion of and citation to independent authority, such as medical treatises, texts, journals, and epidemiological studies. In addition, the Board increasingly has been required to obtain additional medical information and/or expert opinion on the record from sources within and outside the Department. Furthermore, this line of cases has altered the manner in which BVA physicians are employed in the decision making process. In the course of his confirmation hearing in February 1991, the Chairman stated that he questioned whether the particular expertise of BVA physicians would be more effectively utilized in the role of an evaluator and analyst, rather than as an adjudicator. He further indicated that he would examine the issue in depth if he were confirmed and appointed Chairman. Later, in *Colvin*, the Court held that the Board must consider only independent medical evidence to support their findings rather than provide their own

medical judgment in the guise of a Board opinion. The Court has held that the traditional use of physicians as adjudicators, deciding cases on their own medical expertise, is inappropriate. As a result, BVA is required to use its physician staff in other capacities, such as providing advice, research, training, and internal quality review. To provide the maximum flexibility, and in anticipation of *Colvin* and its progeny, three year terms of office were recommended for each of the physician Board members appointed in the initial round of appointments in FY 1991.

Colvin and other Court decisions have resulted in a significant increase in time spent by BVA professional staff in performing legal and medical research. There is a constant need to keep abreast of the almost daily changes in veterans' benefits law that are established by decisions of the Court. The professional staff also must be cognizant of the pertinent caselaw of those courts that have appellate jurisdiction of the United States Court of Veterans Appeals, the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court. This requires Board members and staff counsel to engage in legal research to an extent not previously required. Accordingly, the resources of the Board's Research Center have been greatly expanded. The absence of Medical members within Board sections has increased the responsibility of the Attorney Board members to analyze the medical evidence with increased frequency and sophistication. In addition, the attorney staff must independently recognize when additional development of the record is warranted, particularly the need for expert medical opinion.

In addition, the Board has begun to utilize staff medical advisers to furnish advisory medical opinions "on the record." The Board also continues to seek advisory medical opinions from VA sources, including the Chief Medical Director, as well as from the Armed Forces Institute of Pathology and independent medical experts, who usually serve on the faculties of leading medical schools. In FY 1992, the Board requested 170 opinions from independent medical experts under 38 U.S.C. § 7109.

IMPACT OF JUDICIAL REVIEW ON TIMELINESS AND PRODUCTIVITY

The Board is required to alter its product continually in response to the Court's decisions. BVA decisions continue to evolve toward increasing complexity and comprehensiveness. In addition, both the need for independent medical evidence on the record and the duty to assist the appellant have resulted in a substantial increase in the number of decisions remanded to regional offices by the BVA for further development or referred to independent medical experts. While the extent of the change is not completely quantifiable, it is clear that BVA decisions have taken and will continue to take appreciably longer to prepare and process. Response time and decision productivity have been degraded by the impact of changes in the law, as interpreted by the Court. Compliance with the law necessitates achieving and maintaining standards of decision quality at a level not contemplated prior to the enactment of the Act. As a result, BVA decisions have become lengthier and more complex. Factors affecting the timeliness of appellate processing include the development of the evidence as required by the Department's "duty to assist" the claimant; compliance with the directives of the Court in an increasing number of important decisions; the procurement of a greater number of

medical opinions and increased medical research by the Board and its staff; an increased number of formal hearings before the Board, as well as increased time required for travel for hearings at VA regional offices; and the requirements imposed by more formal Rules of Practice. The average BVA processing time was reduced from 186 days in FY 1990 to 160 days in FY 1991. In FY 1992, however, it increased to 179 days. BVA response time increased from 152 days in FY 1991 to 158 days in FY 1992. The total VA appellate system average processing time increased from 498 days in FY 1991 to 519 days in FY 1992. It is projected that response time will increase to 287 days in FY 1993 (see *Part II*, below).

Court decisions which have significantly affected timeliness and productivity

No decision of the Court has yet resulted in an improvement in decision productivity or timeliness in the entire VA adjudication system. The Court is in the process of constructing a body of veterans' common law. This has added to the complexity and preparation time required for a BVA decision. For example, in *Tobler v. Derwinski*, 2 Vet.App. 8 (1991), the Court on reconsideration held that the applicable rulings, interpretations, or conclusions of law contained in any of its decisions are binding on and to be followed by the Department as of the date the Court's decision is issued. With the repeal in August 1991 of the provision of 38 U.S.C. § 7267 which provided that the Court's decisions would become final 30 days after their issuance, and with the Court's decision in *Tobler*, the Board now has no lag time in effectuating the decisions of the Court. The Board must readjudicate cases currently in process in light of the decisions of the Court beginning on the day each Court decision is issued. In instances of landmark decisions of the Court, which have a broad impact upon the Board's daily decision making process, this requires the Board to stop the flow of cases, identify those cases that are affected by the Court's decision, cease adjudication of any cases affected by the Court's decision until an analysis of the implications of the Court's decision is completed, and readjudicate any affected cases at the Board in light of the Court's decision. This process is particularly disruptive to the orderly administration of the Department's appellate adjudication system.

Two examples of this impact on the process are *Rowe v. Derwinski*, 2 Vet.App. 176 (1992), and *Schafrath v. Derwinski*, 1 Vet.App. 589 (1991). Decided in November 1991, these cases altered the Board's decision-making process concerning appeals involving increased ratings for service-connected disabilities. In response to these two decisions of the Court, a Chairman's Memorandum was issued instructing all Board sections in new procedures to be followed in pertinent appeals. Approximately 1,000 cases were identified, at various stages of BVA out-processing, which had to be readjudicated. There were also a substantial number of additional cases at earlier stages of BVA adjudication which also had to be reworked under the new analytical requirements of *Schafrath* and *Rowe*. The November *Rowe* decision was vacated in early January 1992, which again required the Board to identify and rework cases in light of the Court's decision to vacate its earlier decision. The Court, in *Bethea v. Derwinski*, 2 Vet.App. 252 (1992), established, *inter alia*, that decisions rendered by a single judge are binding on VA in that case, but carry no precedential weight. Only a panel or *en banc* decision of the Court is

precedential in nature. Because single judge decisions (such as *Rowe*) are no longer precedential, the Board is now not required to identify and rework a large number of cases to comport with the analysis presented in such a decision. The *Bethea* decision, of course, does not change the necessity for reprocessing cases affected by precedential decisions of the Court (such as *Schafraht*).

An early trend in the Court's decisions remanding cases to the Board for readjudication in light of decisional law promulgated after the issuance of the BVA decision on appeal to the Court was the inclusion of a deadline for the issuance of a supplemental Board decision. The Court from time to time has included specific orders to the Board to complete an adjudicatory function within a specified number of days, regardless of its complexity. Such deadlines result in unheralded time pressures on the entire BVA staff to complete these decisions, including all necessary evidentiary development, within the time prescribed by the Court. Additionally, the professional staff must attempt to compensate for the effect of this disruption on the timely processing and administration of the many other docketed cases awaiting appellate consideration. While the Court continues to retain jurisdiction in a number of cases remanded to the Board, specific time deadlines for the completion of administrative processing have become a rarity in recent months.

Another area in which the decisions of the Court have expanded both the complexity and workload of the Board is in the reconsideration of prior BVA decisions. In the past, the legal standard for reconsideration was whether the decision being reconsidered contained "obvious error" of law or fact, correction of which would require a different determination. In *Boyer v. Derwinski*, 1 Vet.App. 531 (1991), the Court held that, on reconsideration, the Board must entirely readjudicate the case on a *de novo* basis, as if the prior decision had never been entered.

The Board is assiduously attempting to comply with the decisions and instructions of the Court. However, it is only able to apply the Court's decisions prospectively. Because of the length of time between the initial decision of the regional office and a case arising on appeal at the Court, the Court is reviewing decisions of the Board which were decided *before* the Court issued many of the opinions which constitute the body of decisional law which now binds the Department. This "retroactivity" standard has resulted in an increased caseload because many BVA decisions are returned to BVA for readjudication as the result of consensual or Court dictated remands. Furthermore, most of the cases remanded by BVA to the field in compliance with the precedent decisions of the Court will be returned to the Board with an expanded evidentiary record for review and consideration in reaching the final determination. Both the decisions remanded by the Court to BVA and those returned from the regional offices require readjudication by the Board and result in an increased workload for BVA personnel and, necessarily, have increased the already great pressures to maintain productivity and timeliness.

New productivity measurement standards for staff counsel

At present, there are insufficient data to establish new standards. Moreover, the situation is not sufficiently static to attempt a meaningful study of productivity and timeliness at the Board due to the continuous issuance of precedential Court decisions which significantly alter the way in which VA adjudicates appeals. Nevertheless, in the second quarter of FY 1992, a Special Task Force, headed by the Vice Chairman and composed of staff counsel, Board members, and members of the Chairman's staff was formed to study alternative methods for measuring staff counsel performance, particularly in the element of productivity. The Task Force has proposed a productivity measurement plan which will enable the Board to rapidly adjust performance measurement to reflect changes in the law resulting from decisions of the Court. The proposed system is currently being tracked parallel to the current evaluation system. It is expected that the proposed system will be sufficiently refined that it may be implemented at the start of the yearly performance evaluation period in April 1993. A review of the Board's productivity and timeliness measurement standards and procedures will be instituted as soon as matters reach a point where meaningful parameters can be established.

Revised standards for the measurement of decision timeliness and productivity

Currently, the measurement standards in effect yield statistics which do not present the most accurate reflection of the Board's real productivity and timeliness. The current system of statistics does not draw distinctions between classes of cases which have a meaningful impact on timeliness and productivity. For example, cases in which the appellant is represented by a veterans' service organization require additional time for the veterans' service organization representative to prepare written argument to be presented to the Board. This averaged approximately 42 days in early FY 1992 and can vary significantly from case to case. In contrast, cases in which no additional written argument is submitted to the Board might be decided more quickly. Additionally, in cases in which a travel Board hearing is requested, time is expended waiting for a place on the regional office's travel Board hearing schedule, but the time is not included in the Board's timeliness statistics. In cases in which a hearing is requested before the Board in Washington, DC, the timeliness statistics do include time spent waiting for a place on the hearing schedule.

Nonetheless, until more accurate measurements are devised, the statistics reported below and in the following tables indicate, to the extent possible, the timeliness and productivity of the Board. In particular, it should be noted that the General Accounting Office formula used to measure the elapsed time for remands does not provide a true measurement of the elapsed time required in these cases.

FY 1992 Statistics

During FY 1992 BVA produced a total of 33,483 decisions. This represents a significant reduction from FY 1991, when 45,308 appellate decisions were produced. The reduction is directly attributable to the Board's implementation of the precedent decisions of the Court. In particular, decisions of the Court in FY 1992 concerning claims for increased disability ratings and for non-service-connected pension benefits have required a substantial increase in the time needed to produce a decision in these areas. These categories of cases constitute a significant portion of the Board's caseload. Moreover, the Court's decisions concerning the VA's "duty to assist" the claimant under 38 U.S.C. § 5907 and the necessity of applying each Court decision from the date of its issuance to all other cases in the process of adjudicative or appellate review have led to a marked increase in the percentage of cases returned to regional offices. For example, in FY 1991, 29.7 percent of the cases were remanded to VA regional offices. In FY 1992, 50.5 percent of the cases were remanded for further action. A breakdown of the disposition of the Board's decisions by category of appeal is provided below.

Category	Total	Allowed	Remanded	Denied	Other
Disability compensation	27339	4467	14031	8586	255
Disability pension	1597	162	950	465	20
Medical	441	35	180	208	18
Insurance	48	3	7	37	1
Death	1893	189	775	901	28
Training	424	27	163	221	13
Waivers	652	111	341	184	16
Loan guaranty	529	138	250	136	5
Reconsideration	221	71	110	39	1
Character of discharge	69	8	17	42	2
Miscellaneous	<u>270</u>	<u>37</u>	<u>93</u>	<u>127</u>	<u>13</u>
Totals	33483	5248	16917	10946	372

<u>Appellate Processing Categories</u>	DAYS	
	FY 1991	FY 1992
Notice of Disagreement to Statement of the Case	58	57
Statement of the Case to Substantive Appeal	59	59
Substantive Appeal to the BVA	185	194
Processing Time through the BVA	160	179
Average Remand Time Factor	<u>36</u>	<u>30</u>
Total Processing Time All Categories	498	519

Errata Sheet to Replace page 20

Overall Representation

<u>Representation</u>	Total Decisions		Allowed		Remanded		Denied		Other	
	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>	<u>no.</u>	<u>%</u>
The American Legion	54		86		70		94			
AMVETS	73		250		932		77		28	
American Red Cross			46				09			
Disabled American Veterans			2							
Jewish War Veterans	48						56			
Military Order of the Purple Heart			69		156		20		26	
Paralyzed Veterans of America					87		44		22	
of Foreign Wars	07		44				48			
Veterans of America	76		22		28					
State Service Organizations			20		125		45		28	
Attorneys	163		46		43		60			
Agents	26								38	
Other Representation					20					
No Representation	54				97		50		50	
	33,483	100.0	5,248		6,9		0,946		372	

Overall Representation

<u>Representation</u>	<u>Total Decisions</u> no. %	<u>Allowed</u> no. %	<u>Denied</u> no. %	<u>Remanded</u> no. %	<u>Other</u> no. %
The American Legion	5,541 16.5	867 15.6	2,670 48.2	1,945 35.	59 1.1
AMVETS	1,673 5.0	250 14.9	932 55.7	477 28.5	14 0.8
American Red Cross	311 0.9	46 14.8	155 49.8	109 35.0	1 0.3
Disabled American Veterans	12,839 38.3	2,141 16.7	6,853 53.4	3,711 28.9	134 1.0
Jewish War Veterans	48 0.	5 10.4	27 56.3	15 31.3	1 2.1
Military Order of the Purple Heart	450 1.3	69 15.3	256 56.9	120 26.7	5 1.1
Paralyzed Veterans of America	1,636 4.9	291 17.8	875 53.5	448 27.4	22 .3
Veterans of Foreign Wars	3,107 9.3	445 14.3	1,515 48.8	1,113 35.8	34 1.
Vietnam Veterans of America	76 0.2	22 28.9	47 61.8	4 5.3	3 3.9
State Service Organizations	3,018 9.0	420 13.9	1,425 47.2	1,145 37.9	28 0.9
Attorneys	763 2.3	146 19.1	443 58.1	160 21.0	14 1.8
Agents	26 0.1	3 11.5	12 46.2	10 38.5	1 3.8
Other Representation	446 1.3	91 20.4	210 47.1	139 31.2	6 1.3
No Representation	3,549 10.6	452 12.7	1,497 42.2	1,550 43.7	50 4
	33,483 100.0	15.7	16,917	10,946 32.7	372 1.1

BVA'S NEW RULES OF PRACTICE AND ATTORNEY FEE ISSUES

As a result of changes in the law, Court decisions, and the promulgation of the Board's revised Rules of Practice in early 1992, Board members and members of the Chairman's staff increasingly have become involved in ruling on motions before the Board, including those involving attorney fee agreements and the payment of attorney fees from accrued past due benefits. Currently, the Rules of Practice provide for 17 different motions or "requests." This will result in a considerable expansion of the responsibilities of both the Board members and the Chairman's staff.

Nagler v. Derwinski, 1 Vet.App. 297 (1991) and *Matter of Smith v. Derwinski*, 1 Vet.App. 492 (1991), in essence, invalidated many of the Board's procedures and some of its Rules of Practice regarding the adjudication of the reasonableness of attorney fees and related matters. BVA has been required to establish alternative procedures and to amend its Rules of Practice. At present, both BVA and the Veterans Benefits Administration (VBA) have procedures in place for the processing and adjudication of the issues of the reasonableness of attorney fee agreements under 38 U.S.C. § 5904(c) and whether VA may make payment of attorney fees directly from accrued past due benefits under 38 U.S.C. § 5904(d). The Board is currently in the process of reviewing its forms, procedures, and regulations to comply with the amendment of 38 U.S.C. § 5904 (c) by Pub. L. 102-405, effective October 9, 1992. This amendment creates a different set of criteria for eligibility to charge fees in connection with any proceeding before VA in a case arising out of a loan made, guaranteed, or insured under title 38, chapter 37 of the United States Code.

The Board's Rules of Practice are undergoing extensive revision in light of the precedent decisions of the Court and the Board's experience in implementing its new Rules of Practice. It is planned that substantial revisions of the Rules will be promulgated over the next few years.

AUTOMATION INITIATIVES

The Board's on-going automation project is intended to increase the efficiency of its operations and thereby offset, to the extent practicable, the adverse effects of judicial review on BVA productivity and timeliness. In FY 1992, over 80 personal computers were installed for use by the Board's Professional and Administrative Services. Office automation was introduced into two additional Board sections for a total of four automated Board sections. Automation of at least six additional Board sections is slated for FY 93. A computer training room was designed and outfitted and became operational in late FY 1992. It provides a forum for training the Board's professional, technical, and administrative employees. In addition, the Board developed a detailed design of an enhanced system to replace BVA's Veterans Appeals Control and Locator System (VACOLS). The new system, destined for the NOAVA computer environment, will greatly improve the efficiency of case tracking and information management at the Board.

TRAINING

The ultimate effect of judicial review on BVA, as well as on the entire VA benefits adjudication system, is not yet quantifiable. However, it is clear that the Board's work product has already become increasingly detailed, thorough, and complex. In the era of judicial review, the focus of the Court's decision is on BVA's decision making process at least as much as on the ultimate determination reached by the Board. It is safe to say that, as a result of the Court, the responsibilities of the Board and its professional and administrative staff have been magnified enormously.

In response, the Board has introduced a new approach to the training and professional development of staff counsel. A centralized training program providing intensive program education and computer training has been established for attorneys beginning their careers at the Board. The training program includes medical lectures, computer and wordprocessing courses, and attendance at the Veterans Benefits Administration's Adjudication Academy, located in the Baltimore, Maryland area.

TOTAL QUALITY MANAGEMENT (TQM) INITIATIVES

The Board's Total Quality Management activities in FY 1992 continued to support the Chairman's Standing Order to "Accomplish the Mission" (Decide all cases appealed to the Secretary with timeliness, consistency and quality), and "Take care of our people."

Cross-functional teams have been established to deal with the ongoing process of finding better ways of accomplishing the Board's mission. Teams have worked on "computer-assisted" decision writing; developing a glossary of frequently used language; ensuring consistency in citations; preparing Congressional correspondence; expanding the Board's offices to the sixth floor of the Lafayette building; measuring staff counsel production and quality; and revising performance standards for employees in the Administrative Service.

Realizing the importance of two-way communication, informal meetings are held on a regular basis to encourage feedback from everyone at the Board. Regular meetings with the Chairman's staff, the Chief members of the Board, Convocations of all Board members, and meetings with all staff counsel are held on a periodic basis. The Kenneth E. Eaton Board Room, which was established in 1991, provides the Board with an ideal location for such professional interaction. An employee newsletter is published quarterly to announce promotions, awards, and other employee achievements and to highlight events. Employees are encouraged to network among themselves by getting involved in one of the Board's softball leagues or by attending quarterly luncheons with scheduled speakers. Award ceremonies are held throughout the year to recognize the efforts of the Board's employees.

To support the Department's TQM effort, the Board's TQM Coordinator served for three months on the Secretary's Examination Board for the Robert W. Carey Award and has also been on several VA-wide TQM committees. In February 1992, a presentation was

made to the Deputy Secretary and VA's TQM coordinators on the Board's TQM accomplishments.

The training and development of the Board's most important resource, its employees, is an ongoing TQM process. A series of nine refresher seminars was conducted for different procedures within Administrative Service. Medical lecture seminars are held on a regular basis, and other subject matter briefings are conducted periodically. The Board was fortunate to have two of its employees attend the Quality Leadership for Managers Course at Wright-Patterson Air Force Base. Employees of the Board also attended the Federal Quality Institute's National Conference and the Federal Executive Institute.

As mentioned earlier, the Board has developed a state-of-the-art training room to conduct automation training. Classes will be held for attorneys and staff on the various NOAVA Microsoft products as well as keyboarding skills. Since WANG training is no longer supported by the VAC Training Center, the Board will provide training in-house rather than go through the expensive process of sending employees out for training.

In FY 1992, the Board had the opportunity to brief many of its "customers." The Board was visited by both the Judges and law clerks of the U.S. Court of Veterans Appeals, as well as representatives of the Office of the General Counsel, the Majority and Minority Staffs of the Senate and House Committees on Veterans' Affairs, veterans' service organizations, and other VA agencies. The "Triad," consisting of members of the Office of the General Counsel, Veterans Benefits Administration (VBA), and the Board, continues to meet regularly to ensure proper communications and organizational response to Court decisions. The Board also regularly participates in VBA's "hotline" telephone link with adjudication personnel in the VA regional offices. "VSO Forums" continue to be held quarterly where veterans' service organization representatives meet with the Chairman and Senior Staff to discuss issues applicable to the appellate review process.

CORRESPONDENCE AND CONGRESSIONAL LIAISON ACTIVITIES

The Board responds directly to requests for information and assistance from veterans, their representatives, and Members of Congress and their staffs. Most of these requests are handled by the Board's Administrative Service and the Office of the Chairman. Administrative Service answers approximately 27,600 telephone inquiries per year from Members of Congress, their staffs, and others. The Office of the Chairman answers about 3,000 telephone inquiries annually. The Chairman provided 4,430 written responses to Congressional inquiries in FY 1992. In addition to the above noted correspondence, the Chairman responds to letters written by claimants and other interested parties to the President, the Secretary, and other government officials.

The increase in decision processing time has resulted in an increase in the number of telephone calls and letters from Members of Congress, appellants, and other interested parties. Because of the increasing complexity of the law, as interpreted by the Court, responses to such inquiries have become far more complex and time consuming and, in many instances, require that the cases be withdrawn from active appellate consideration

while a response to the inquiry is being prepared. The rapidly evolving state of the law has created the need for continual retraining of Administrative Service employees who respond to these inquiries.

PART II

ADDITIONAL INFORMATION PROVIDED PURSUANT TO 38 U.S.C. § 7101(d)(2), (3)

1. The following information pertaining to preceding fiscal year(s) is required by 38 U.S.C. § 7101(d)(2):

Number of cases appealed to BVA during FY 1992: 38,229

b. Number of cases pending before BVA at the start of FY 1992: 17,235

Number of cases pending before BVA at the end of FY 1992: 21,981

c. Number of cases filed during each of the 36 months preceding FY 1993:

<u>Month</u>	<u>Number of Appeals Received at the BVA</u>			<u>Estimated Number of New Notices of Disagreement Received in the Field</u>		
	<u>FY 92</u>	<u>FY 91</u>	<u>FY 90</u>	<u>FY 92</u>	<u>FY 91</u>	<u>FY 90</u>
October	3,665	4,327	4,156	3,694	5,787	6,113
November	3,255	3,188	3,657	6,638	5,392	5,855
December	3,233	4,488	5,280	6,210	4,795	4,821
January	3,188	3,248	2,102	6,474	5,578	5,576
February	3,360	3,231	2,958	5,777	5,254	4,770
March	3,652	3,464	4,356	6,472	5,993	5,778
April	2,870	3,524	4,189	5,978	6,289	5,115
May	2,650	3,525	3,397	5,506	5,960	5,773
June	2,857	3,302	4,398	5,900	5,483	5,510
July	3,335	3,888	2,942	5,939	5,685	5,684
August	3,451	3,599	2,847	5,525	5,755	5,948
September	<u>2,713</u>	<u>3,309</u>	<u>3,526</u>	<u>5,815</u>	<u>5,471</u>	<u>5,224</u>
FY Total	38,229	43,093	43,808	69,928	67,442	66,127

d. Average length of time a case was before the BVA between the time of the filing of an appeal and the disposition during the preceding fiscal year:

<u>Time Interval</u>	<u>Responsible Party</u>	<u>Average Elapsed Processing Time</u>
Notice of Disagreement Receipt to Statement of the Case Issuance	Field Station	57 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	59 days

Substantive Appeal Receipt to Certification of Appeal to BVA	Field Station	194 days
Receipt of Certified Appeal to Issuance of BVA Decision	BVA	179 days
Average Remand Time Factor	Field Station	30 days

e. Number of members of the Board at the end of FY 1992: 64 members

Number of professional, administrative, stenographic, clerical, and other personnel employed by the Board at the end of FY 1992: 413 employees for a total of 411 FTE.

2. The following projections pertaining to the current fiscal year and the following fiscal year (budget year) are required by 38 U.S.C. § 7101(d)(3):

a. Estimated number of cases that will be appealed to the BVA

Fiscal Year 1993: 45,000
 Fiscal Year 1994: 45,000

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. § 7103(d):

(1) Background on BVA Timeliness Projections. 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 same group of pending appeals. BVA response time is computed by first determining the BVA's average daily appeals processing rate for a recent given time period. This is determined by dividing the number of appeals decided by the calendar day time period over which those appeals were dispatched. BVA response time is then computed by dividing the number of appeals pending before the Board by the average daily appeals processing rate. As an example, BVA response time for FY 1993 is computed as follows:

Estimated 37,475 Decisions in FY 1993 ÷ 365 Days = 102.67 Decisions per Day
 29,506 Appeals Pending before the BVA (end of FY 1993) ÷ 102.67 Decisions per Day =
 287 Day Response Time on Appeals

(2) Response Time Projections: Based upon existing and projected levels of resources, the estimate of BVA response time, as given in the Board's budget submission for FY 1994, is 287 days for FY 1993 and 277 days for FY 1994. These response time projections are contingent upon the appeal receipts estimates for FY 1993 and FY 1994 shown in paragraph 2a of this part, above.

The Board anticipates that the precedent decisions of the United States Court of Veterans Appeals will continue to impose additional requirements for case analysis and development. No decision of the Court, to date, has shortened the appellate process. Because decisions of the Court are effective when issued, precedents of this type may require the Board to readjudicate a large number of cases that had already been adjudicated, but not yet dispatched from the Board. For example, in FY 1992, *Schafraht v. Derwinski*, issued in November 1991, concerned cases involving claims for increased ratings. It affected approximately 60 percent of the Board's decisions and required the expenditure of approximately 20 percent more time by the Board's staff counsel. Similarly, four decisions issued between April and June 1992 (*Talley v. Derwinski*, *Roberts v. Derwinski*, *Abernathy v. Derwinski*, and *Brown v. Derwinski*) required readjudication of cases involving claims for pension benefits. This affected approximately 5 percent of the Board's cases and significantly lengthened the required analysis and development in these decisions.

In addition, in FYs 1991 and 1992, the Board promoted 14 of the Board's senior attorney staff to fill the complement of Board membership. The Board was unable to replace these attorneys during FY 1992 due to FTEE limits. Therefore, fewer Board counsel were available to prepare tentative decisions for review by Board members. In FY 1993, additional new associate Board counsel will be added. However, they will not be able to produce tentative decisions as quickly as experienced counsel. Moreover, due to the institution of hearings by single Board members, both in Washington, DC, and at VA regional offices, and the increased number of hearings held by members of the Board at VA regional offices, Board members expended proportionally less time in case deliberation while traveling and presiding at hearings in FY 1992.

Another factor that increased BVA response time was the necessity to stay adjudication of certain classes of cases when the Department's interpretation of the law differed from a holding of the Court. For example, appeals affected by *Gardner v. Derwinski* (claims for benefits under 38 U.S.C. § 1151) have been stayed pending resolution of an appeal from this decision of the Court of Veterans Appeals (the Court). This stay is consistent with a line of decisions from the Court, beginning with *Tobler v. Derwinski* in December 1991. Cases that are held at the Board pending resolution of appeals from decisions of the Court will increase the Board's response time. Cases that are returned to the VA regional offices will not increase BVA response time.

Estimates of the Board's future timeliness and productivity can only approximate the impact of the fact that the Board's rate of remanding cases to the regional offices steadily increased through the latter part of FY 1991 and averaged 50.5% for FY 1992. The majority of these cases will eventually be returned to the Board for adjudication, but the Board cannot anticipate when the requested development will be completed. The estimates also do not include the additional cases returned annually to the Board by the Court of Veterans Appeals for readjudication. This number has also been rising.

It is anticipated that these trends of the past fiscal year will continue: (1) the directives of the Court will continue to require the Board to expend additional time, effort, and resources in producing appellate decisions; (2) increased demands for hearings will

diminish the time which Board members may dedicate to case deliberation; (3) the Board will continue to stay the adjudication of certain classes of cases pending resolution of appeals from decisions of the Court of Veterans Appeals; (4) the Board will continue to remand a large proportion of cases to the VA regional offices for further development; and (5) the Board will continue to receive cases remanded for readjudication from the Court of Veterans Appeals. In addition, the Board's depleted pool of experienced Board counsel will be replaced by inexperienced associate Board counsel, who will not be able to prepare tentative decisions for the Board's review as efficiently as the more experienced attorneys. These trends will likely continue to slow decision production, but it is unclear to what degree. In addition, unanticipated factors may arise to affect decision production. However, the estimated number of appellate decisions to be produced in FY 1993 was calculated upon the assumption that the Board can produce decisions at the same rate per FTEE as in FY 1992.

In short, the creation of the United States Court of Veterans Appeals has introduced additional variables into the calculation of estimates of the Board's timeliness and productivity. There are currently insufficient data and experience to enable accurate predictions to be made of the Board's timeliness and productivity. Initial experience, however, indicates that the Board's timeliness and productivity have been adversely affected, at least in the initial stages of the Court's existence.