

VA



U.S. Department of Veterans Affairs

Board of Veterans' Appeals



REPORT OF THE CHAIRMAN

Fiscal Year 2012



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

February 04, 2013

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

Dear Mr. Secretary:

I am pleased to present the Fiscal Year 2012 Annual Report of the Board of Veterans' Appeals (Board or BVA) for inclusion in your submission to Congress. Information on the activities of the Board during Fiscal Year 2012 and the projected activities of the Board for Fiscal Years 2013 and 2014, as required by 38 U.S.C. § 7101(d)(1), are provided in Parts I and II.

During Fiscal Year 2012, the Board produced over 44,000 decisions and conducted over 12,000 personal hearings. Although Veterans benefits law continued to evolve, the Board's employees 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, and to approach each appeal with integrity, commitment, advocacy, respect, and excellence.

I offer the enclosed report to provide you, Congress, and the Veterans we serve with an accurate and meaningful perspective on the Board's activities of Fiscal Year 2012.

Very respectfully,

A handwritten signature in black ink that reads "Steven L. Keller".

Steven L. Keller
Acting Chairman

Enclosure

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INTRODUCTION

The law requires the Chairman to report the activities of the Board at the conclusion of each fiscal year. As Acting Chairman, Mr. Keller presents this Annual Report, which includes two parts: Part I provides a discussion of BVA activities during Fiscal Year 2012 and projected activities for Fiscal Years 2013 and 2014; Part II provides statistical information related to BVA activities during Fiscal Year 2012 and projected activities for Fiscal Years 2013 and 2014.

The Board renders final decisions on behalf of the Secretary on appeals from decisions of local Department of Veterans Affairs (VA) offices. The Board reviews all appeals for entitlement to Veterans' benefits, including claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, health care delivery, and fiduciary matters.

The Board's mission is to conduct hearings and issue timely, understandable, and quality decisions for Veterans and other Appellants in compliance with the requirements of law.



**Department of Veterans Affairs
Fiscal Year 2012
Veterans Law Judges**

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PART I

ACTIVITIES OF THE BOARD OF VETERANS' APPEALS FISCAL YEAR 2012

The Board was established in 1933 and operates by authority of, and functions pursuant to, Chapter 71 of Title 38, United States Code. The Board consists of a Chairman, Vice Chairman, Principal Deputy Vice Chairman, 64 Veterans Law Judges (VLJs) (including 12 VLJ managers), twelve Senior Counsel, a Medical Advisor, more than 300 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the VA Secretary. The Board has jurisdiction over appeals arising from various Agencies of Original Jurisdiction (AOJs), to include the VA Regional Offices (ROs), VA Medical Centers (VAMCs), the National Cemetery Administration (NCA), and the Office of General Counsel (OGC). The vast majority (approximately 96 percent) of appeals considered involve claims for disability compensation or survivor benefits. Examples of other types of appeals that are addressed by the Board include fee basis medical care, waiver of recovery of overpayments, reimbursement for emergency medical treatment expenses, education assistance benefits, vocational rehabilitation training, burial benefits, and insurance benefits.

The Board consists of an Office of the Chairman; the Appellate Group; an Office of Management, Planning and Analysis (MPA); and four Decision Teams. The Office of the Chairman consists of a Chairman and his Executive Assistant, a Vice Chairman (Senior Executive Service (SES)/VLJ), and his Special Assistant, and other legal support staff. The Board's Appellate Group consists of the Principal Deputy Vice Chairman (SES/VLJ), the Chief Counsel for Policy and Procedure (Senior Level (SL)), the Chief Counsel for Operations (SL), the Chief of Litigation Support, the Chief of Quality Review, the Chief of the Office of Learning and Knowledge Management (Training Office), a Medical Advisor, a Counsel for Labor Relations, several Special Counsel covering a variety of legal specialty areas, and numerous legal support personnel. MPA is the administrative directorate of the Board, consisting of the Director (SES), the Deputy Director, the Administrative Support Division, the Decision Team Support Division, the Financial Management Division, and Office of Outside Medical Opinions. Each Decision Team consists of a Deputy Vice Chairman (VLJ), two Chief VLJs, 13 VLJs, two Senior Counsel, and approximately 75 staff counsel. Staff counsel review the record on appeal, research the applicable law, and prepare comprehensive draft decisions or remand orders for consideration by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal.

The Board always strives to improve its operations, quality, and efficiency, while remaining aligned with the Secretary's strategic goals. Pursuant to this objective, in order to enhance integration and efficiency within the Board, effective Fiscal Year 2013, BVA plans to implement enhancements to the management structure of the VLJ and attorney staff. The flattened, tighter configuration will consist of two Deputy Vice Chairmen (instead of four) who will have broader strategic functions within BVA, ten Chief VLJs (instead of eight) who will have a tighter span of control, and ten Senior Counsel (instead of eight) to assist the Chief VLJs and Deputy Vice Chairmen.

In Fiscal Year 2012, the Board issued 44,300 decisions and conducted 12,334 hearings. The Board's cycle time, which 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 co-located Veterans Service Organization (VSO) representative for review and preparation of written argument) was 117 days, down from 119 days in Fiscal Year 2011. The Board physically received 49,611 appeals in Fiscal Year 2012. Based on trends in case receipts developed jointly by BVA and VA's Office of Management, the Board expects to receive 54,033 appeals in Fiscal Year 2013, which includes new appeals from the Veterans Benefits Administration (VBA), remanded cases returning from VBA's Appeals Management Center (AMC) and the Court of Appeals for Veterans Claims (CAVC), and appeals from other elements of VA, to include the Veterans Health Administration (VHA), OGC, and NCA.

Successes

As noted, the Board issued 44,300 decisions in Fiscal Year 2012. While this represented a slight decrease from Fiscal Year 2011, the Board's decrease in productivity in Fiscal Year 2012 is primarily a function of a reduction in full time equivalent (FTE) employees. The Board carried an average of 510 FTE during Fiscal Year 2012, down from 535 FTE in Fiscal Year 2011. The Board effectuated this decrease through attrition, to prepare for operating in the constrained fiscal environment affecting the entire federal government in Fiscal Year 2013 and beyond.

The Board conducted 12,334 hearings in Fiscal Year 2012, 40 percent of which were held by video teleconferencing (also known as video or VTC hearings), representing the highest percentage in Board history. The Board held its first video hearings with Appellants in the remote sites of Guam and American Samoa, thereby eliminating a significant travel burden on Appellants in that region. Most VLJs exceeded their productivity goals and most traveled to at least three ROs to conduct one week of hearings at each site (known as "Travel Board" hearings). The Board's overall annual productivity was possible because of the extraordinary efforts of the VLJs, staff counsel, and administrative support staff.

In addition to dispatching 44,300 decisions in Fiscal Year 2012, the Board's administrative support staff reviewed and processed 54,216 pieces of mail, which represents an increase of more than 10,000 pieces above the Fiscal Year 2011 level. The administrative staff, including the Board's call center in Wilkes-Barre, Pennsylvania, also answered 103,046 inquiries from Veterans or their representatives by phone, email, or written correspondence, up from 95,626 in Fiscal Year 2011.

In Fiscal Year 2012, the Board continued to focus on methods to increase the quality of the decisions rendered while maintaining a high level of decision output. The Board's Training Office created targeted training for all employees based, in part, on trends gleaned from the Board's quality review process, as well as based on outcomes in cases heard before the CAVC and the Court of Appeals for the Federal Circuit (Federal Circuit). In addition, the Board continued to offer medical training for its staff to address the increasing complexity of disability compensation appeals. The Board anticipates a long term positive impact from its successful training program, including better quality decision writing and improved timeliness.

The Board continued efforts to eliminate avoidable remands by engaging other VA stakeholders in the appeals process, such as VBA, VHA, NCA, and OGC. Partnership was strengthened with leadership

at each of these organizations by opening lines of communication and coordinating methods to improve the overall system for the benefit of the Veterans that we serve. The Board also devoted extensive efforts in assisting the Office of Disability and Medical Assessment (DMA) in working to improve the compensation and pension examination process in order to improve the quality of examination reports.

Further, the Board worked closely with other VA partners to help transform VA into a 21st century organization. Specifically, the Board contributed to efforts to develop a new paperless claims and appeals system for VA by providing valuable input to software developers regarding the laws governing the system, workflow process, and the particular requirements for adjudicating appeals. BVA also expanded its presence on eBenefits – a joint venture of VA and the Department of Defense (DoD), which provides Veterans the opportunity to check the status of their claims and appeals securely online or from their mobile device. This system has promoted transparency and improved customer service.

Board leadership also continued to strongly promote a variety of legislative proposals aimed at implementing systemic changes that seek to increase efficiency in the appeals process in a way that is both fair and beneficial to Veterans. One such BVA legislative proposal was signed into law in August 2012 as part of the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012. Among other things, this law includes a provision that allows the Board, in the first instance, to consider additional evidence submitted by a claimant (or his/her representative) simultaneously with or after the filing of a substantive appeal (VA Form 9), unless the claimant (or his/her representative) requests in writing that the Agency of Original Jurisdiction (AOJ) initially review such evidence. This provision will improve the efficiency of appeals processing at the AOJ level and reduce the number of remands, while still protecting Veterans' rights.

In the upcoming fiscal year, the Board will continue to challenge its employees to maintain high productivity while increasing the high level of quality that was achieved in Fiscal Year 2012. The Board's decisions achieved over a 91 percent accuracy rate, which quantifies substantive factual and legal deficiencies in all decisions, whether an allowance, a remand, or a denial. Quality deficiencies that are identified during the quality review process are addressed through appropriate follow-up training for the VLJs and attorneys.

Succession Planning

In addition to 64 VLJs (which includes 12 VLJs who serve in a management capacity), the Board has three SES positions and two SL positions. The three SES positions are the Vice Chairman, the Principal Deputy Vice Chairman, and the Director of MPA. Notably, in addition to their SES duties, the Vice Chairman and Principal Deputy Vice Chairman also serve as VLJs, although this VLJ status is separate and apart from the 64 authorized VLJs. The two SL positions are the Chief Counsel for Policy and Procedure and the Chief Counsel for Operations. These positions continue to allow the Board to recruit the best and the brightest to manage Board operations and are critically important in the increasingly complex world of Veterans' benefits appellate adjudication. Since the implementation of judicial review, the complexity and length of BVA decisions has increased tremendously. Additionally, the number of claims filed at ROs and VAMCs continues to increase significantly. The Board's workload is also projected to increase proportionally to the anticipated increase in workload at AOJs in future fiscal years. The Board stands ready to meet the intensified requirements of the claims adjudication and appeals system.

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

Additionally, in Fiscal Year 2012 the Board redesigned an internal leadership program known as the "Shadow Program," which aims to develop the leadership skills of junior attorney and administrative staff by providing a more global view of BVA and its role within the Department. A week-long session is offered to staff who are competitively selected to participate, and each selectee gains exposure to the daily management and operations of the Board. Many components of BVA are involved in the program, including the Chairman's Office, MPA, and all parts of the Appellate Group, to include the Office of Quality Review, the Medical Advisor, Litigation Support, the Training Office, the Hearing Branch and others.

In matters of recruitment and retention, the Board continues to maintain an in-house program for all employees regarding issues of diversity and inclusion that illuminates the goals in place for sustaining a diverse workforce. Because of anticipated fiscal constraints, the pace of the Board's normal rigorous recruitment program was slowed. However, during the summer of Fiscal Year 2012, the Board hired eight interns, which included seven law clerks from diverse law schools throughout the country and one Presidential Management Fellow (PMF). These interns worked with attorneys and VLJs to draft decisions and other work products. In addition to completing challenging writing assignments, they also participated in training activities and were mentored by BVA attorneys. The Board views this internship program as a recruitment tool, with the aim of creating future interest in a career at VA. BVA also participated in the VA for Vets hiring expo in January 2012 with great success; the Board interviewed 56 Veterans seeking employment and hired 23 Veterans through the program in Fiscal Year 2012. The Board remains able to attract high caliber law clerks, attorneys, and administrative personnel because the mission to serve Veterans is one that is particularly desirable to those seeking a career in public service.

The Board's Goals for Fiscal Years 2013 and 2014

The Board stands ready to meet the challenge of transforming into a 21st century organization that will reduce the backlog, increase efficiency in the appeals system, and leverage technology to better serve Veterans. These goals will be achieved through the coordinated efforts of all of our employees, each of whom maintains the core values of integrity, commitment, advocacy, respect and excellence in everything we do.

1. Reduce the Backlog

In the coming year, the Board will continue to focus on reducing the backlog using existing resources by concentrating on the following:

- ***Eliminating avoidable remands:*** Fewer remands mean fewer appeals returned to the originating agency and to the Board and, thus, more timely decisions for Veterans and other Appellants. In Fiscal Year 2012, the Board continued to work closely with VBA to assist with the shared goal of resolving appeals at the earliest stages of the appeals process, including the period when appeals have not yet reached the Board. Specifically, the Board and VBA conducted four joint supplemental training sessions, which were designed to address complex and difficult legal areas in the adjudication process. Additionally, the Quality Review staffs of each organization continued to work together to identify trends and target training to common issues. The Board also worked with VHA to train the clinicians who provide examinations in conjunction with compensation claims on the legal requirements of such exams. Combined, these efforts should help ensure that claims are developed properly at the local level in the first instance, and ultimately reduce remands.

With regard to those appeals that are remanded, the Board continued to closely track the reasons for remand, and that data is accessible by all VA components in the adjudication system for management and training purposes. In addition, the Board's Quality Review Office continued to engage in extensive liaison efforts with VBA's AMC during Fiscal Year 2012 and will continue to do so in the future. Through this line of communication, the Board and the AMC addressed and resolved issues pertaining to the proper processing of remands, to include identifying when an appeal is ready to be returned to the Board for a final decision.

- ***Increasing efficiencies through video teleconference technology:*** The Board has instituted efficiencies in its operations, and particularly, in its hearings process. In Fiscal Year 2013 and beyond, the Board will continue to shift its focus toward utilizing more video teleconference technology to conduct hearings. The state-of-the-art video equipment provides a crisp, high-definition picture with clear sound, despite the distance between locations. In Fiscal Year 2012, all systems were upgraded to a digital audio recording system (DARS), thereby eliminating the use of traditional cassette tape recordings, and BVA successfully piloted its new Virtual Docket, which provides electronic tracking and scheduling of all Board hearings. The Board also created an informational pamphlet that advertises the advantages of video hearings – this pamphlet is available online and in VBA mailings. While the Board will continue to travel to field stations each year, those trips will be more limited in number to reduce travel costs. Relying more on video teleconference technology will reduce the time that Veterans have to wait for hearings, and will allow VLJs to gain more time in the office to issue decisions. On average, in Fiscal Year 2012, only 74 percent of Appellants who were scheduled for a Travel Board hearing reported to the appointment, which results in significant down time for judges when they are in the field. By contrast, when conducting hearings by video teleconference, VLJs can easily return to adjudicating other appeals in the office if Appellants do not report.
- ***Strengthening BVA's intra-agency partnerships:*** As in previous years, BVA continues to meet with representatives from VBA, VHA, NCA, and OGC on a monthly basis to discuss and resolve issues of mutual concern that adversely affect the quality of service provided to Veterans. The Board will continue to contribute to this partnership and play an active role in the VA community. Additionally, Board leadership will continue to contribute monthly to the Executive Synchronization Committee, led by VA's Chief of Staff, which aims to bring the top leaders from each organization together to evaluate the benefits process and ensure cooperative solutions to cross cutting issues.

- **Internal training:** In Fiscal Year 2012, the Board’s Office of Learning and Knowledge Management coordinated comprehensive training for Board attorneys and VLJs. Throughout the past year, the VLJs and attorneys attended courses on topics such as: Traumatic Brain Injury; Posttraumatic Stress Disorder (PTSD); Medical Reimbursement; Death Pension & Countable Income; Education Benefits & Vocational Rehabilitation; Court Trends; and Seven Habits of Highly Effective People. Continued training efforts in the new Fiscal Year will provide the VLJs and attorneys with the latest information on a variety of legal and medical topics.
- **Writing clear, concise, coherent, and correct decisions:** The Board’s leadership continued to stress the value of writing clear, concise, coherent, and correct decisions to the VLJs and attorneys in Fiscal Year 2012, as evidenced by our 91 percent accuracy rate. The benefits of this initiative continued to be apparent, as demonstrated by the high volume of decisions the Board was able to produce, despite a loss in FTE. In the long term, it is expected that this initiative will enable VLJs and attorneys to continue to improve the quality of Board decisions.
- **Utilizing a robust Flexiplace Program for employees:** The Board’s flexiplace program enhances employee motivation and satisfaction, as well as decision quality and productivity. Seven years ago, the Chairman authorized a permanent flexiplace program to permit eligible attorneys to prepare draft decisions and other work products at their primary residence (a pilot flexiplace program had been in effect since 1999), and BVA has since served as a telecommuting model for other offices within the Department. This program enables the Board to attract and retain attorneys as an employer of choice. In connection with this program, the Board has successfully implemented a number of data security safeguards, such as encryption software for Board laptops used by flexiplace program participants and locked cabinets at the primary residence for the laptop and original claims folders. Each flexiplace participant agrees to abide by the rules of the program, which include strict safeguards to protect sensitive data. Participants are not permitted to use their own personal computers for drafting decisions. In Fiscal Year 2012, over 175 of the Board’s employees (approximately 34 percent) telecommuted in some capacity.

These measures will work to reduce the appeals backlog and to shorten the time it takes for a Veteran to receive a fair, well-reasoned Board decision.

2. Advocate for Legislative Initiatives

In Fiscal Year 2012, the Secretary submitted a number of legislative proposals advanced by the Board to Congress, which seek to streamline and improve timeliness in the processing of Veterans’ benefits appeals. These proposals included: (1) reducing the time period for initiating an appeal from one year to 180 days; (2) allowing the Board more flexibility in scheduling video teleconference hearings in order to reduce the wait time for Veterans and to minimize travel time and expenses related to conducting in-person Travel Board hearings; (3) amending the statute to make it clear that the filing of a substantive appeal within 60 days from the date of the mailing of the statement of the case is a requirement for Board jurisdiction over an appeal; (4) amending the definition of “prevailing party” for purposes of establishing eligibility to receive fees under the Equal Access to Justice Act (EAJA) in order to provide an incentive for increased, continuing attorney representation before the Board; and (5) amending the definition of “reasons and bases” to mean a plausible statement of the reasons for the Board’s ultimate findings of fact and conclusions of law. The Board intends to submit similar

proposals in Fiscal Year 2013, and collectively, such proposals, if passed into law, will result in improved timeliness and efficiency of VA's adjudication of claims and appeals, both at the local level and at the Board level.

3. Increase Use of Video Teleconference Hearings

Related to one of the Board's legislative proposals outlined above, the Board will leverage technology to increase the use of video teleconference hearings. The Board and ROs have state-of-the-art equipment, and the Board's facility houses 13 video hearing rooms, which can accommodate increased video hearing requests. It is the Board's hope that increased outreach about the benefits of video teleconference technology will draw more Appellants to the video hearing option. Video teleconference hearings can be scheduled more quickly than in-person hearings, thus reducing wait times for Appellants who elect this option.

4. Efficiently Adjudicate Paperless Appeals

In Fiscal Year 2012, the Board held 85 hearings with a paperless record, a significant increase from 66 in Fiscal Year 2011, and completed 84 paperless appeals. Since 2008, VA has been processing Benefits Delivery at Discharge (BDD) claims for separating Servicemembers by using a paperless claims processing system at ROs in Salt Lake City, Utah, and Winston-Salem, North Carolina. As more of these unique appeals reach the Board, and as VBA expands the use of the current paperless system beyond the BDD program, the Board continues to further refine the processes currently in place to adjudicate these virtual appeals. The Board has worked within the constraints of the current system and has cataloged the lessons learned along the way. BVA is working with partners at VBA and Office of Information Technology (OIT) to incorporate its business needs into the development of the new and upgraded paperless system known as the Veterans Benefits Management System (VBMS).

The Board remains committed to supporting the development of a new, vibrant, and effective paperless claims and appeals system, as it provides many benefits to Veterans and to VA. In Fiscal Year 2012, BVA began to review claims files in a hybrid environment consisting of electronic files housed in VA's current database, Virtual VA, in conjunction with paper documents. Electronic files are protected from loss or damage and are securely backed up. In addition, electronic files are not subject to mailing delays between offices and allow multiple offices to work on the same file simultaneously, preventing the need for down-time while another office works on a claim. The Board anticipates a significant increase in paperless appeals in the coming years.

Significant Judicial Precedent and Its Effect on the Board

Throughout Fiscal Year 2012, the CAVC and the Federal Circuit issued many significant decisions. Among them are the following:

- ***Bond v. Shinseki, 659 F.3d 1362 (Fed. Cir. 2011)***: In this case, the Appellant filed a claim for service connection in October 1996, which was granted by the RO in a May 1997 rating decision. In February 1998, within the one-year appeal period of that decision, he submitted a document indicating that he was seeking an increased rating and attached medical evidence. The RO interpreted this submission as a new claim for an increased

rating, rather than new and material evidence pertaining to the May 1997 RO decision. The Board similarly concluded that this submission constituted a new claim rather than new and material evidence, and the Appellant appealed to the CAVC. The CAVC determined that because the RO treated the February 1998 submission as a new claim for an increased rating, it did not fail to consider whether it constituted new and material evidence for the purposes of 38 C.F.R. § 3.156(b).

The Federal Circuit vacated and remanded the CAVC decision, holding that § 3.156(b) requires VA to evaluate submissions received during the pertinent appeal period to determine whether the submissions contain new and material evidence pertinent to a pending claim, even if the new submission may support a new claim. Specifically, the Federal Circuit concluded that VA must determine: (1) whether the submission contains new and material evidence relating to a pending claim; *and* (2) whether it should be treated as a new claim. The Federal Circuit further held that, in light of the Board's obligation to provide adequate reasons and bases for findings and conclusions, and because the record did not contain *any* analysis regarding whether the February 1998 submission contained new and material evidence, it could not be presumed that VA considered, but rejected, the possibility that the Appellant's February 1998 submission contained new and material evidence. This case is significant because it clearly sets forth the analysis required for VA to comply with § 3.156(b).

- ***Chandler v. Shinseki*, 676 F.3d 1045 (Fed. Cir. 2012):** In this significant case, the Federal Circuit held that an Appellant is required to show that he or she had a single permanent disability rated at 100 percent under the schedule for disability ratings in order to receive special monthly pension, thus overruling *Hartness v. Nicholson*, 20 Vet. App. 216 (2006). Here, the Appellant applied for enhanced pension under a special monthly rate, but the Board denied the claim because he had received a pension under 38 U.S.C. § 1521 before turning 65, noting that he could not rely on 38 U.S.C. § 1513(a) to remove the pension eligibility requirement of 38 U.S.C. § 1521(e). The CAVC reversed and remanded the Board's decision, primarily relying on *Hartness*.

In *Hartness*, the CAVC had considered the interplay between § 1513 and § 1521, but in a slightly different context from the situation in *Chandler*. In *Hartness*, the Veteran had argued that he was entitled to the higher rate for a pension under § 1521(e) even though he did not have a single disability rated at 100 percent. Mr. Hartness's pension was one he sought under § 1513. In other words, he applied for a pension *after he was 65*, unlike Mr. Chandler who already had a pension in place under § 1521 based on disability alone. The *Hartness* Court held that § 1513(a)'s exclusion of the requirement that a Veteran establish that he or she had a "permanent and total disability" meant that a Veteran with wartime service seeking a pension based on age did not have to establish that he or she had "a disability rated as permanent and total" to obtain an increased pension, as would otherwise be required under § 1521(e). The Federal Circuit held that the two statutory sections (i.e., §§ 1513 and 1521) could be read together, and stated that the reference in § 1513 to excluding the requirement of "permanent and total disability" referred only to that phrase in the initial qualifying section in § 1521(a); it did not alter the separate requirement under § 1521(e) that a Veteran needed to show "a disability rated as permanent and total" for an increased (enhanced) pension amount. This case is significant because it overruled a precedential opinion of the CAVC and clarifies the interaction between § 1513 and § 1521 in enhanced pension cases.

- ***Horn v. Shinseki*, 25 Vet. App. 231 (2012):** The Appellant in this case appealed a decision that denied service connection for a left hip disorder. The Board determined that the Veteran’s induction examination report noted no hip condition and applied the presumption of soundness. However, the Board determined that there was clear and unmistakable evidence that the Veteran’s left hip disorder preexisted service without any evidence of having been aggravated therein.

The CAVC explained that when the presumption of soundness applies under 38 U.S.C. § 1111, as in this case, the burden of proof then shifts to VA to establish by clear and unmistakable evidence *both* that a disease preexisted service (preexisting prong) and was not aggravated by service (aggravation prong). To rebut the aggravation prong of the presumption of soundness, the burden is not on the Appellant to produce any evidence of aggravation. Rather VA must establish by clear and unmistakable evidence that either the preexisting disease did not increase in severity during service or that any increase was due to the natural progress of the disease. The CAVC then offered several means for VA to affirmatively show a lack of aggravation in these circumstances, such as: (1) obtaining an opinion from a VA physician when a Veteran is discharged from service for medical reasons; (2) subpoenaing pre-service medical records and interviewing people who were familiar with the Veteran’s condition prior to service; or (3) soliciting a post-service medical opinion that discusses “the character of the particular injury or disease.” This case is significant because it clearly sets forth the legal standard and burden of proof when the presumption of soundness under § 1111 is applicable.

- ***Young v. Shinseki*, 25 Vet. App. 201 (2012):** In the underlying decision, the Appellant appealed a Board decision that denied service connection for PTSD and referred the matter of entitlement to service connection for a generalized anxiety disorder. The CAVC subsequently issued a memorandum decision modifying the Board’s decision to reflect a remand to the AOJ, rather than a referral, of that part of the claim seeking entitlement to service connection for a mental condition other than PTSD and, as modified, affirmed the decision. Subsequently, the Appellant applied for an award of attorney’s fees and expenses pursuant to the EAJA. During the course of the proceedings for the attorney’s fees, a majority of the panel questioned the CAVC’s underlying jurisdiction over the Board’s decision to refer a part of the Veteran’s claim for VA benefits for a mental disability.

The CAVC held that it had jurisdiction over an appeal of a decision of the Board that denies a part of a claim for benefits and decides to refer, rather than remand, for adjudication another part (or condition) or theory in support of that same claim, noting that its jurisdiction extended not only to the denied part of the claim, but also to the referral decision. In reaching this conclusion, the majority explained that it is “well settled that the Court has jurisdiction to determine whether the Board had jurisdiction to take the action it takes in a decision,” and that “[o]nce the Board has jurisdiction over a claim, . . . it has the authority to address *all issues* related to that claim, even those not previously decided by the RO.” This case is important because it demonstrates that the CAVC has jurisdiction to consider the Board’s decision to refer an issue to the RO.

Coordination with VBA Regional Offices, VHA, NCA and OGC

During the past year, the Board actively partnered with VA elements across the corporate enterprise in order to better serve Veterans and their families. In particular, the Board continued its efforts to conduct as many hearings as possible within FTE levels in order to reduce the number of cases on appeal awaiting Board hearings. In addition, Board personnel conducted extensive training for over 500 VBA Decision Review Officers (DROs) as part of the Joint Training Initiative between VBA and BVA. Topics covered included recent trends in Veterans' law, top reasons for remand, the Board hearing process, and an organizational overview of the Board. BVA also had the pleasure of welcoming several DROs from the Los Angeles, California, and Providence, Rhode Island, ROs to its facility to provide an overview of Board operations. Members of BVA's Executive Leadership Team, administrative personnel, VLJs, and attorney staff participated in question and answer sessions and provided a tour of BVA's facility. BVA also provided a tour and an informational briefing to a VBA leadership development group. In Fiscal Year 2013, the Board will continue coordination with VBA with joint training efforts and plans to leverage video conferencing technology to allow attorneys to provide trainings virtually to RO staff on topics of interest identified by VBA.

The Board also played an integral role in many intra-agency working groups during Fiscal Year 2012. Of note, the Board had active representation on VBA's Appeals Design Team (ADT), a group established to generate and implement innovative ideas to help decrease lengthy appellate processing times and increase appellate processing quality. One ADT proposal spawned a successful pilot program at the Houston, Texas RO wherein claimants who disagreed with a benefits decision were asked to use Notices of Disagreement (NODs) on a standardized form. BVA has worked closely with VBA and OGC to craft regulatory changes that would codify use of this standardized form to help improve efficiencies in appeals processing.

The Board also enjoyed the opportunity to participate in the Veterans Lifetime Electronic Record (VLER) working group. In this capacity, Board representatives provided guidance on requirements for VA claims adjudication and assisted with use case development. In addition, the Board assisted in drafting the VLER Concept of Operations document.

Additionally, the Board collaborated with VBA and OGC staff to help develop rulemakings to implement the compensation and pension provisions of the Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Public Law Number 112-154, and further worked with OGC to suggest improvements to VBA's Simplified Notification Letters.

BVA continued to partner with DMA in an effort to improve the compensation and pension examination process in order to enhance the quality of examination reports. The Board welcomed representatives from DMA to BVA's facility on numerous occasions during Fiscal Year 2012 to discuss matters relating to VA examinations. In addition, BVA worked collaboratively with representatives from VBA, VHA, and OGC to conduct a line-by-line review of each of the Disability Benefits Questionnaires (DBQs) for legal accuracy. As part of this process, the Board also assisted with the implementation of a major VHA initiative - the use of Acceptable Clinical Evidence (ACE) in completing a request for a medical evaluation and/or opinion.

The Board continued to coordinate closely with NCA on appeals processing and tracking. Board representatives participated in a working group focused on establishing an appellate administrative office within NCA, and provided legal guidance on an as needed basis on issues such as the legal requirements for NODs, substantive appeals, and submission of new and material evidence for previously denied claims. The Board also provided guidance to NCA on the information that must be included in the file in order to enable appellate review.

Finally, the Board engaged in the Department-wide task force charged with capturing the functions, tasks, and capabilities of each branch of VA, as well as the areas in which these functions, tasks, and capabilities overlap and can be leveraged. These cumulative intra-agency efforts will lead to greater synchronization across all aspects of the enterprise.

Veterans Service Organization (VSO) Forums and Training

The Chairman invites VSOs and attorneys who represent Appellants before the Board to VSO Forums on a quarterly basis. These meetings address appeals issues 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 BVA 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 VLJs, and to participate in the in-house training that is provided to BVA staff. In addition, Board staff provided substantive training on behalf of the Acting Chairman to the Veterans of Foreign Wars.

Volunteer Activities

The Board proudly supports Veterans and their families. In Fiscal Year 2012, BVA continued to facilitate the collection and donation of comfort items for distribution to Veterans at the Washington, DC VAMC, the Fisher House, and the United States Armed Forces Retirement Home (U.S.A.F.R.H.). Staff members also participated in the Toys for Tots campaign organized by the United States Marine Corps Reserve, and helped to collect calendars and valentines for Veterans to distribute at the U.S.A.F.R.H. Numerous Board employees participated in the Honor Flight Network, greeting WWII Veterans who have been flown, free of charge, to Washington, DC, to view the memorials; the Winterhaven Homeless Veterans Stand Down; the Veterans Day Ceremony at Arlington National Cemetery; and other outreach events at the VAMC in Washington, DC. The Board also participated actively in the Combined Federal Campaign and the Feds Feed Families food drive. The Board published the fourth volume of the *Veterans Law Review*, which is edited and managed by an all-volunteer staff; no duty time is used for writing or editing activities.

Planning for the Future

- ***Leadership Initiative:*** The Leadership Initiative (LI) provides opportunities for all Board employees to improve their leadership skills through training, mentoring, and networking. Events during Fiscal Year 2012 included a networking meet and greet; a school-supply drive for Operation Homefront; a group of employees volunteering at Honor Flight events at Reagan National airport; presentations on career development at the Board; a luncheon for Administrative Professionals Day; and a reception for the Excellence in Leadership Award.
- ***Non-BVA Training Initiatives:*** The Board seeks to send high-quality, high-producing attorneys, VLJs, and administrative professionals to Leadership VA, as well as leadership seminars and programs offered through the Office of Personnel Management's Federal Executive Institute and its Management Development Centers. During the past Fiscal Year, five employees were competitively selected to attend Leadership VA, a corporate leadership development program that cultivates high-performing leaders for a 21st century VA. Through a series of experiences, Leadership VA participants leave the program with a shared leadership framework, skill-set, and tool-set to drive excellence in their organizations and accomplish VA strategic goals. Leadership VA and other training courses are an integral part of the Board's plan to develop its future leaders.

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Laura H. Eskenazi

Principal Deputy Vice Chairman

Deputy Vice Chairmen

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Chief Veterans Law Judges

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¹ Pursuant to 38 C.F.R. § 19.2(b), a member of the Board may also be known as a Veterans Law Judge (VLJ).

PART II
STATISTICAL DATA
Fiscal Year (FY) 2012 Information

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

38 U.S.C. § 7101(d)(2)(A)

Number of appeals filed at the Agency of Original Jurisdiction (AOJ) during FY 2012:	37,326
Number of appeals physically received at the Board and docketed during FY 2012:	49,611

38 U.S.C. § 7101(d)(2)(B)

Cases pending before the Board at the start of FY 2012:	41,005*
Cases pending before the Board at the end of FY 2012:	45,959*
Cases physically at the Board at the end of FY 2012:	36,625

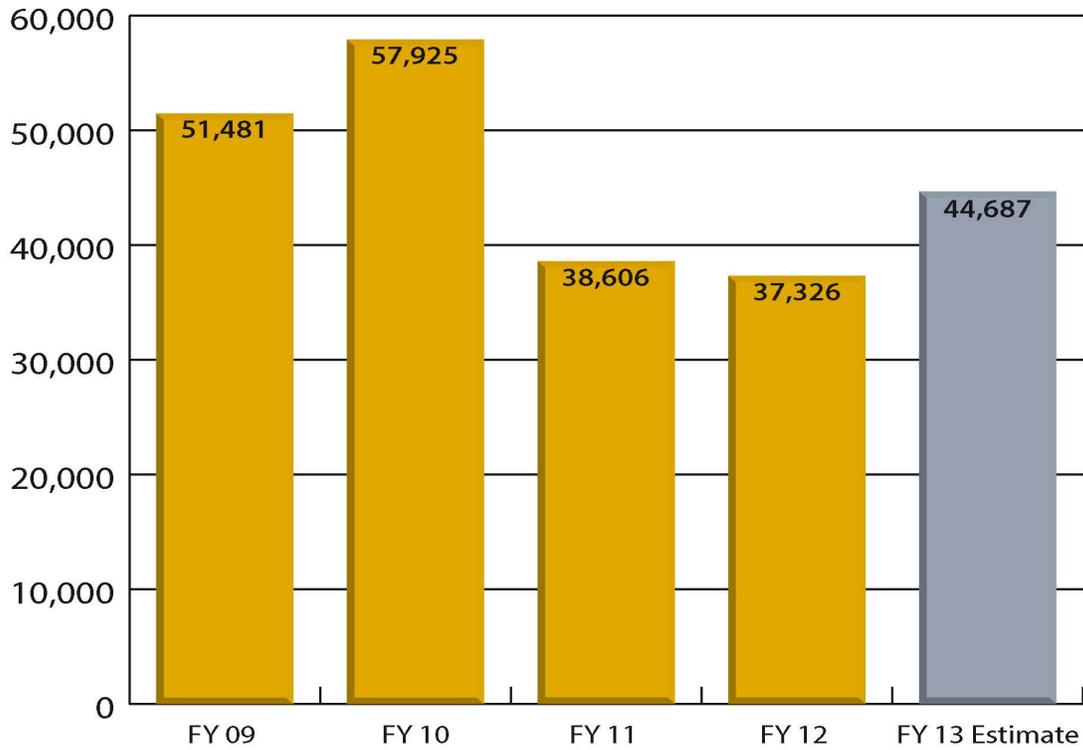
* Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

38 U.S.C. § 7101(d)(2)(C)

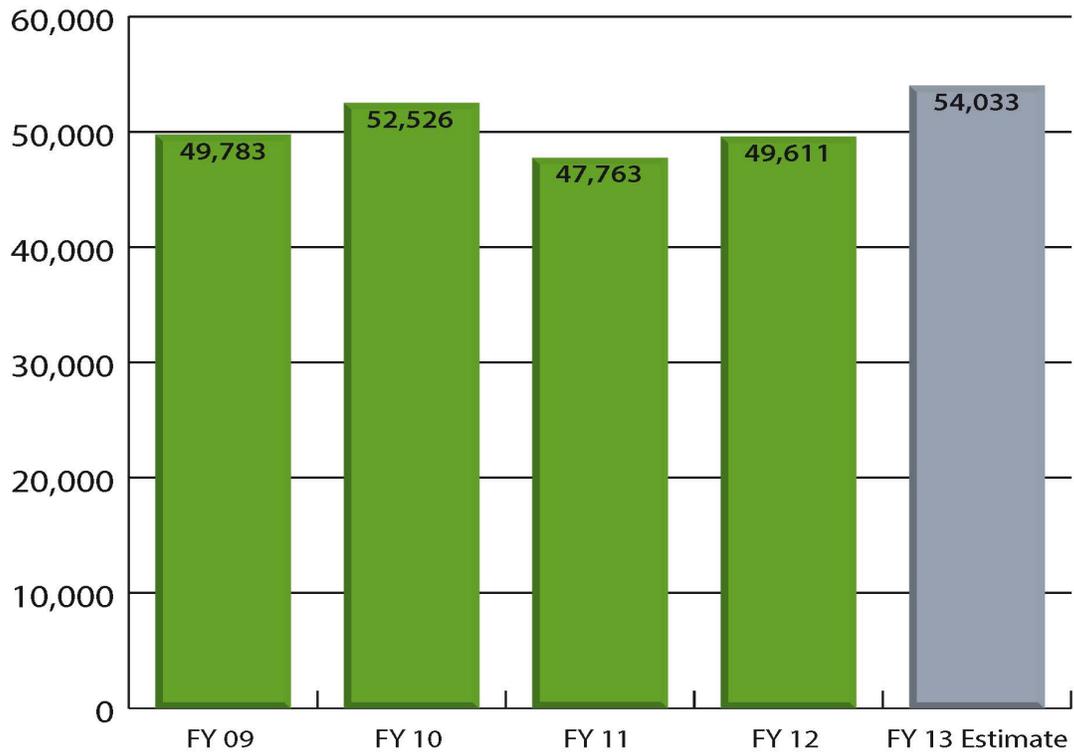
Number of new appeals filed at the AOJ and cases received at BVA during each of the 36 months preceding FY 2012.

Appeals Filed at AOJ					Appeals Docketed Upon Receipt			
Month	FY 09	FY 10	FY 11	FY 12	FY 09	FY 10	FY 11	FY 12
October	4,497	5,295	3,693	2,804	3,459	5,197	3,907	2,917
November	3,392	4,853	3,392	3,033	2,879	3,611	3,949	2,891
December	3,590	4,788	3,103	2,936	3,766	3,392	3,171	3,280
January	3,730	5,246	2,957	2,617	3,462	4,926	3,359	5,648
February	3,840	3,535	2,909	2,460	3,691	3,190	3,514	3,378
March	4,593	5,697	3,670	3,371	4,467	5,069	4,538	4,198
April	4,459	4,936	3,280	3,138	5,145	4,194	4,269	4,774
May	3,801	4,462	3,464	3,545	4,278	5,289	4,555	5,000
June	4,632	5,201	3,610	3,311	5,011	4,974	3,934	4,228
July	5,003	4,526	2,833	3,361	4,653	4,462	4,010	4,478
August	4,650	4,756	2,884	3,483	4,466	3,823	4,131	4,466
September	5,294	4,630	2,811	3,267	4,506	4,399	4,426	4,353
FY Total	51,481	57,925	38,606	37,326	49,783	52,526	47,763	49,611

Appeals Filed at AOJ FY 09 - FY 12



Cases Received at BVA FY 09 - FY 12



38 U.S.C. § 7101(d)(2)(D)

The average length of time between the filing of an appeal (i.e., Substantive Appeal or VA Form 9) at the AOJ and the Board’s disposition of the appeal was 1,040 days in Fiscal Year 2012. Notably, the Board only controlled 25 percent of that time period in Fiscal Year 2012. As reflected in the chart below, the average time between the time that an appeal was physically received and docketed at the Board to disposition was only 251 days. The chart also provides the average processing time between other distinct steps within the appeals process.

Time Interval	Responsible Party	Average Elapsed Processing Time
Notice of Disagreement Receipt to Statement of the Case	AOJ	270 days
Statement of the Case Issuance to Substantive Appeal (VA Form 9) Receipt	Appellant	40 days
Substantive Appeal Receipt to Certification of Appeal to BVA	AOJ	692 days
Receipt of Certified Appeal to Issuance of BVA Decision*	BVA	251 days
Average Remand Time Factor	AOJ	445 days

* This includes the Board’s cycle time of 117 days. Cycle time measures the time from when an appeal is physically received at the Board until a decision is reached, excluding the time the case is with a VSO representative for preparation of written argument.

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2012: **64 members**

The number of professional, administrative, clerical and other personnel employed by the Board at the end of FY 2012: **460 employees, not including 64 members above**

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2012: **77**

Number of cases in which such members participated: **6,515**

38 U.S.C. § 7101(c)(2)

Number of acting members of the Board in terms of full-time employee equivalents: **7.2**

PROJECTIONS FOR FISCAL YEARS 2013 AND 2014

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 2013:	VA Form 9s Filed at the AOJ:	44,687
	Cases docketed upon receipt at BVA:	54,033
Fiscal Year 2014:	VA Form 9s Filed at the AOJ:	59,746
	Cases docketed upon receipt at BVA:	64,941

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 BVA to forecast its future timeliness of service delivery is the Board's "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 teleconference hearings.

The following categories are calculated as follows:

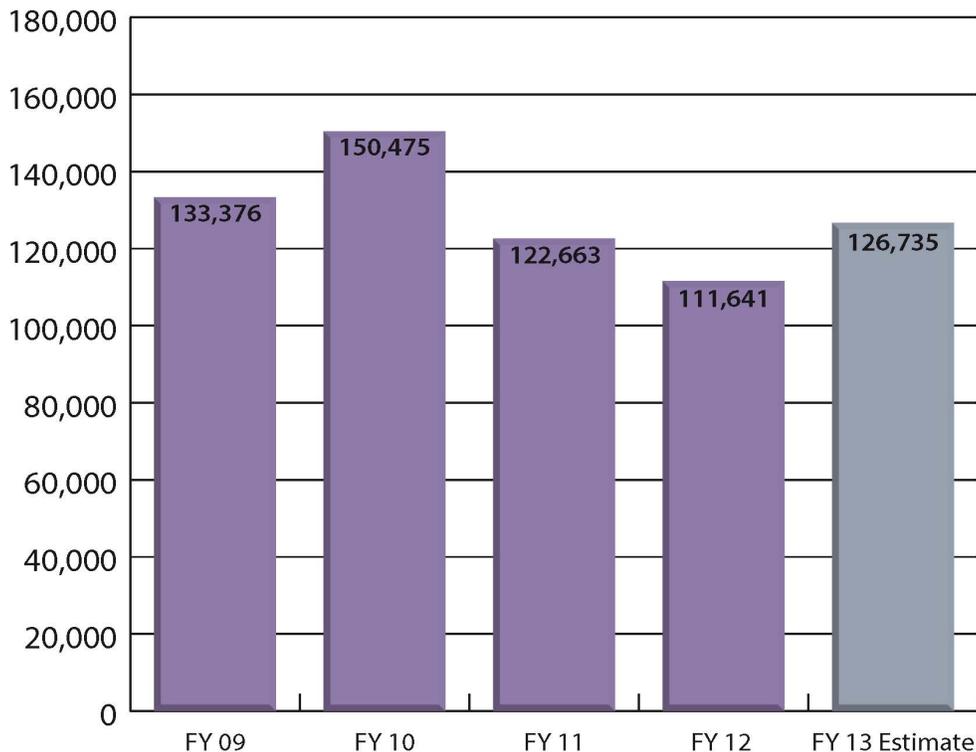
<u>FY 2012 decisions (44,300) (divided by)</u> 260 Work Days	= 170.4 Decisions per Work Day
Cases Pending at end of FY 2012 (45,959) <u>+ New Cases expected in FY 2013 (54,033)</u>	= 99,992 Total Workload in FY 2013
<u>Total Workload (99,992) (divided by)</u> Decisions per Work Day (170.4)	= 587 Work Days
<u>Work Days (587) (divided by)</u> 261 Work Days	= 2.3 Years
Work Years (2.3) x 12 (months)	= 27.6 Months

ADDITIONAL INFORMATION

Potential BVA Workload in VBA FY 09 - FY 12

Number of New Notices of Disagreement Received in the Field				
MONTH	FY 09	FY 10	FY 11	FY 12
October	12,036	12,956	12,587	9,678
November	9,530	11,079	11,248	8,563
December	10,229	11,685	9,719	8,450
January	10,627	11,710	10,130	9,490
February	10,709	12,260	9,233	9,094
March	12,226	14,885	11,041	10,208
April	11,633	13,138	9,414	9,847
May	10,767	12,045	9,829	10,101
June	11,926	13,038	10,152	9,303
July	11,813	12,416	9,513	9,131
August	11,119	13,338	10,562	10,065
September	10,761	11,925	9,235	7,711
FY TOTAL	133,376	150,475	122,663	111,641

Notices of Disagreement Received FY 09 - FY 12



BVA Dispositions by VA Program FY 2012

APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	9	22.5%	9	22.5%	18	45.0%	4	10.0%	40	0.09%
Compensation	12,303	28.9%	19,593	46.0%	9,334	21.9%	1,344	3.2%	42,574	96.1%
Education	24	10.9%	92	41.8%	91	41.4%	13	5.9%	220	0.5%
Insurance	0	0.0%	5	71.4%	2	28.6%	0	0.0%	7	0.0%
Loan Guaranty	0	0.0%	2	40.0%	2	40.0%	1	20.0%	5	0.0%
Medical	78	20.9%	135	36.1%	129	34.5%	32	8.6%	374	0.8%
Pension	48	10.1%	177	37.1%	221	46.3%	31	6.5%	477	1.1%
VR&E	4	9.8%	17	41.5%	16	39.0%	4	9.8%	41	0.1%
Other Programs	8	18.6%	15	34.9%	17	39.5%	3	7.0%	43	0.1%
BVA Original Jurisdiction	4	6.2%	3	4.6%	45	69.2%	14	21.5%	65	0.1%
NCA Burial Benefits	0	0.0%	0	0.0%	1	100.0%	0	0.0%	1	0.0%
Multiple Program Areas	107	23.7%	251	55.5%	81	17.9%	13	2.9%	452	1.0%
GRAND TOTAL	12,585	28.4%	20,299	45.8%	9,957	22.5%	1,459	3.3%	44,300	100.0%

BVA Dispositions by Representation FY 2012

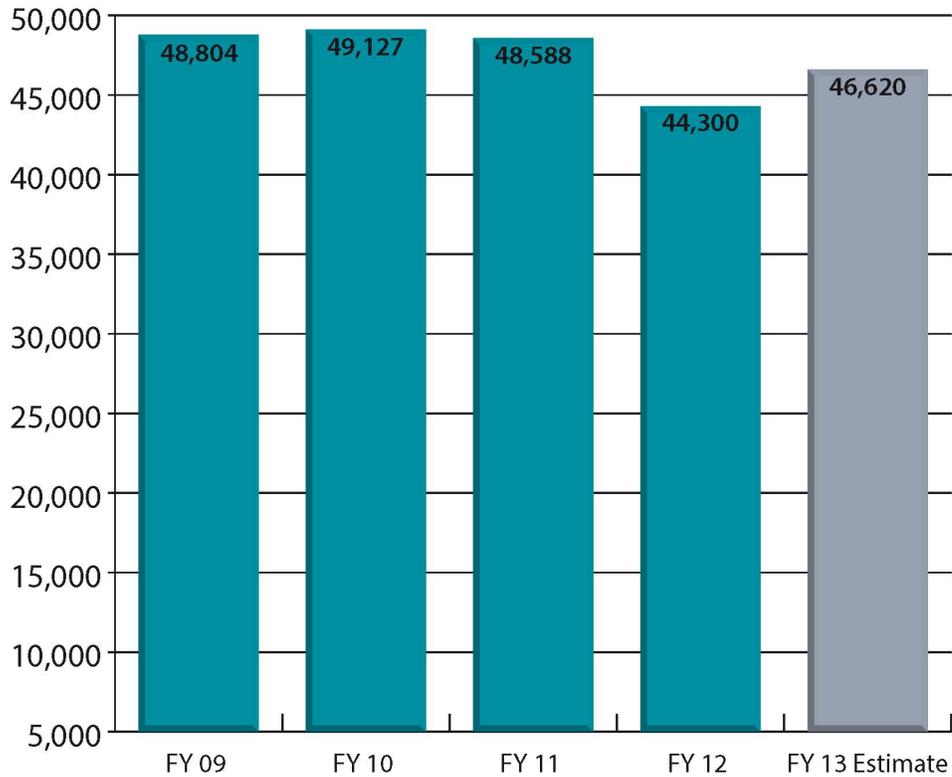
REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	2,354	27.9%	3,986	47.2%	1,830	21.7%	273	3.2%	8,443	19.06%
AMVETS	54	32.0%	66	39.1%	40	23.7%	9	5.3%	169	0.4%
Disabled American Veterans	4,056	29.4%	6,424	46.6%	2,831	20.5%	478	3.5%	13,789	31.1%
Military Order of the Purple Heart	144	34.4%	185	44.2%	74	17.7%	16	3.8%	419	0.9%
Paralyzed Veterans of America	98	29.8%	147	44.7%	65	19.8%	19	5.8%	329	0.7%
Veterans of Foreign Wars	1,267	30.7%	1,778	43.1%	939	22.7%	144	3.5%	4,128	9.3%
State Service Organizations	1,993	29.0%	2,930	42.7%	1,757	25.6%	181	2.6%	6,861	15.5%
None	817	21.4%	1,577	41.3%	1,303	34.2%	118	3.1%	3,814	8.6%
Other	191	23.8%	377	46.9%	200	24.9%	36	4.5%	804	1.8%
Attorney	1,310	30.1%	2,247	51.6%	685	15.7%	112	2.6%	4,354	9.8%
Agent	64	27.7%	122	52.8%	39	16.9%	6	2.6%	231	0.5%
Vietnam Veterans of America	237	24.7%	460	48.0%	194	20.3%	67	7.0%	958	2.2%
GRAND TOTAL	12,585	28.4%	20,299	45.8%	9,957	22.5%	1,459	3.3%	44,300	100.0%

BVA DECISIONS

Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2009	48,804	24.0%	37.3%	36.1%	2.6%
2010	49,127	26.9%	42.4%	28.1%	2.6%
2011	48,588	28.5%	44.2%	24.2%	3.1%
2012	44,300	28.4%	45.8 %	22.5%	3.3 %

The historical reporting system for Board decisions with multiple issues identifies the disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal, the “reported disposition” for BVA Statistical Reports will be categorized based on the disposition hierarchy noted above.

BVA Decisions FY 09 - FY 12



BVA Operating Statistics FY 09 - FY 12

	FY 09	FY 10	FY 11	FY 12
Decisions	48,804	49,127	48,558	44,300
Case Receipts*				
Added to Docket	51,481	57,925	38,606	37,326
Received at BVA	49,783	52,526	47,763	49,611
Cases Pending**	40,688	45,722	41,005	45,959
Hearings - VACO	470	589	625	494
Video	3,375	3,979	4,355	4,868
Field	7,784	8,947	9,747	6,972
TOTAL	11,629	13,515	14,727	12,334
Decisions per FTE	93.0	89.7	90.8	87
BVA FTE	525	549	535	510
BVA Cycle Time	100	99	119	117
Cost per Case	\$1,407	\$1,507	\$1,574	\$1,671

* 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).

** Cases Pending 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 2012