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HEALTH CARE ISSUES FOR VETERANS

*Kristina Derro**

I. INTRODUCTION

As of September 2015, there were almost twenty-two million veterans living in the United States.¹ A small percentage of these veterans have seen combat, and a much larger group have supported that combat effort. Almost all veterans, depending upon their character of discharge, qualify for education loans, home loans, and burial benefits² available through the U.S. Department of Veterans Affairs (“VA”).³

Notably, “[t]he VA is the largest provider of health care in the United States and administers the nation’s second largest federal disability program.”⁴ Many individuals are under the false assumption that all veterans are provided health care by the VA. Access to VA health benefits requires the veteran to fill out an enrollment application, and some may have to complete a financial assessment to establish whether the veteran is eligible for health care and what, if anything, the veteran will contribute financially for these benefits.⁵ Eligibility requirements for health care benefits are fairly complicated and involve

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1. U.S. Dep’t of Veterans Affairs, *Living Veterans by Age Group, Gender, 2013–2043*, DATA.GOV, <https://catalog.data.gov/dataset/living-veterans-by-age-group-gender-2013-2043> (last updated Oct. 29, 2015) (download file for data set).

2. 38 U.S.C. § 101(2) (2012).

3. *National Cemetery Administration*, U.S. DEP’T VETERANS AFF., http://www.cem.va.gov/cem/burial_benefits/index.asp (last visited Nov. 26, 2016); *Veterans Benefits Administration*, U.S. DEP’T VETERANS AFF., <http://www.benefits.va.gov/benefits> (last updated Nov. 7, 2016).

4. CONG. BUDGET OFF., VETERANS’ DISABILITY COMPENSATION: TRENDS AND POLICY OPTIONS 4 (2014); Dennis A. Fried et al., *Health and Health Care Service Utilization Among U.S. Veterans Denied VA Service-Connected Disability Compensation: A Review of the Literature*, 180 MIL. MED. 1034, 1034 (2015).

5. 38 C.F.R. § 17.36 (2015).

character of discharge, periods of service, income level, potential chemical exposures during service, awards and commendations, and service-connected disabilities.⁶ Not every veteran is eligible for the VA health care benefits, and many of those who are eligible are required to contribute financially for these health care benefits.⁷

The VA disability program is enormous in scope. In 2015, the VA delivered \$63.5 billion in compensation and pension benefits to over four million veterans.⁸ The VA offers veterans two types of disability benefits: nonservice-connected pension benefits and service-connected disability compensation benefits. Nonservice-connected pension benefits are monthly payments made to veterans who served during a congressionally defined period of war, who are permanently and totally disabled or over the age of sixty-five, and who meet a certain income threshold.⁹ These disabilities do not have to be related to the veteran's period of service.¹⁰

Service-connected disability benefits are paid to veterans with disabilities incurred or aggravated during a period of military service or that arose as a result of fault by a VA medical facility.¹¹ To become service-connected for a disability or injury, the veteran must show (1) evidence of incurrence or aggravation of a disease or injury in service, (2) a medical diagnosis of a current disability, and (3) a medical nexus between the in-service injury or disease and the current disability.¹²

The VA's intent is to compensate a veteran for the average impact that his or her service-connected disability has on earning capacity.¹³ These benefits are similar to Social Security disability benefits. However, Social Security benefits require total disability while veterans are rated by the VA at percentages ranging from 0 to 100 depending upon the severity of the service-connected disability. When a veteran becomes service-connected for a particular injury or disability, he or she receives free health care from the VA for that specific disability.¹⁴ After the VA adds together all of the veteran's service-

6. *Health Benefits*, U.S. DEP'T VETERANS AFF., <http://www.va.gov/healthbenefits/apply/veterans.asp> (last updated Oct. 5, 2016).

7. *Health Benefit Copays*, U.S. DEP'T VETERANS AFF., <http://www.va.gov/healthbenefits/cost/copays.asp> (last updated Dec. 31, 2015).

8. *Veterans Benefits Administration Reports*, U.S. DEP'T VETERANS AFF., http://benefits.va.gov/reports/detailed_claims_data.asp (last updated Nov. 7, 2016).

9. DAVID F. ADDLESTONE ET AL., NAT'L VETERANS LEGAL SERVS. PROGRAM, VETERANS BENEFITS MANUAL 12-13 (Barton F. Stichman et al. eds., 2014 ed. 2014).

10. *Id.*

11. *Id.*

12. 38 U.S.C. § 1110 (2012).

13. 38 C.F.R. § 4.1 (2015).

14. 38 U.S.C. § 1710(a)(1)(A).

connected disabilities, a combined rating of thirty percent or more qualifies the veteran to receive extra money each month for dependents.¹⁵ An additional benefit is that at a combined rating of fifty percent, the veteran receives free health care from the VA for all medical conditions, regardless of whether the disability is service-connected.¹⁶

II. PROCESS

The VA disability benefits process has a long history of being pro-claimant¹⁷ and a lower burden of proof¹⁸ than traditional civil litigation. Through the entire adjudication, a veteran can proceed *pro se*. The VA system was originally structured so veterans could be assisted free of charge while at the VA regional office or the Board of Veterans' Appeals ("BVA") by veteran service organizations such as the American Legion, Disabled American Veterans, or Veterans of Foreign Wars.¹⁹ Now, lawyers regularly assist veterans with their claims both at VA regional offices and the BVA, but attorneys must be accredited by the VA to practice before the agency.²⁰ This was not always the case—prior to 2006, lawyers were not able to charge a fee greater than ten dollars to represent veterans unless a final BVA decision was issued.²¹ However, in 2006, Congress permitted attorneys to charge a fee after filing an appeal with the initial rating decision, and this has allowed more attorneys to become involved in the process.²² Concerning claims at the U.S. Court of Appeals for Veterans Claims ("CAVC"), attorneys have consistently been involved in the process since its inception, as fees are garnered under the Equal Access to Justice Act.²³

Initially, the veteran may make a claim for disability benefits at his or her local VA regional office.²⁴ There is at least one regional office in every state, and veterans living in foreign countries file claims at certain regional offices to which foreign claims are funneled.²⁵ When a claim

15. Christian Losciale, *Military Disability Compensation Rate Tables*, VETERANS UNITED NETWORK (Jan. 3, 2015), <http://www.veteransunited.com/network/military-disability-compensation-rate-tables>.

16. 38 U.S.C. § 1710.

17. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

18. 38 U.S.C. § 5107(b).

19. 38 C.F.R. §§ 14.626–14.628 (2015).

20. *Id.* § 14.629.

21. Act of July 4, 1864, §§ 12–13, 13 Stat. 387, 389.

22. 38 U.S.C. § 5904(c).

23. 28 U.S.C. § 2412(d)(1)(a) (2012).

24. 38 U.S.C. § 7105(b)(1), (d)(1).

25. *Veterans Benefits Administration Regional Benefit Office Website*, U.S. DEP'T VETERANS AFF., <http://www.benefits.va.gov/benefits/offices.asp> (last updated Oct. 7, 2015).

has been filed, the veteran can submit evidence in support of his or her position. This can occur throughout the initial claim and appellate process; the deadline for the submission of evidence does not arise until almost the very end of the appellate process.²⁶

Once the veteran's local regional office issues a rating decision, the veteran has one year²⁷ to disagree with any aspect of it—such as the denial of service-connection for a disability, the rating assigned if a disability was service-connected, or the effective date of the award of benefits—and request another review by the regional office.²⁸ After further review, the VA regional office issues a statement of the case and any disagreement the veteran has with that decision can be advanced to the BVA in Washington, D.C.²⁹ Comprised of veterans law judges, the BVA reviews the facts, evidence, and law and issues a new decision.³⁰

Any disagreement with the BVA's determination can be appealed by the veteran to the CAVC in Washington, D.C., a specialty court established under the Veterans' Judicial Review Act pursuant to Article I of the U.S. Constitution.³¹ The agency itself is not permitted to appeal a decision of the BVA to the CAVC. If there is an issue of law remaining with the CAVC's determination, a veteran has two additional opportunities to appeal the decision: to the U.S. Court of Appeals for the Federal Circuit and to the U.S. Supreme Court.³²

At any point in the process the claim can be remanded to the immediately lower level of adjudication for a more thorough review and additional development by the agency.³³ As a result, cases can remain in this process for years while being adjudicated, bounced back-and-forth between the regional office and the BVA, with occasional deviations to the CAVC.³⁴

III. INITIAL CLAIMS

After a veteran files the paperwork initiating his or her claim, it is advisable to submit evidence to prove the veteran has a current disability that either arose or was aggravated during his or her period of service,

26. 38 U.S.C. § 7105(e)(1); *Board of Veterans Appeals*, U.S. DEP'T VETERANS AFF., <http://www.bva.va.gov> (last updated June 21, 2016).

27. 38 C.F.R. § 20.302(a) (2015).

28. *Id.*; see also ADDLESTONE ET AL., *supra* note 9, at 927-28.

29. ADDLESTONE ET AL., *supra* note 9, at 978-80; *Board of Veterans Appeals*, *supra* note 26.

30. ADDLESTONE ET AL., *supra* note 9, at 1021-22.

31. 38 U.S.C. §§ 7251-7252.

32. *Id.* § 7292; ADDLESTONE ET AL., *supra* note 9, at 1036.

33. See *Board of Veterans Appeals*, *supra* note 26.

34. See, e.g., U.S. DEP'T OF VETERANS AFFAIRS, THE VETERANS APPEALS PROCESS (2016).

that the disability is the result of malpractice or negligence on the part of a VA medical facility, or that the disability has worsened and a higher rating is warranted.³⁵ Medical records, medical opinions from treating physicians, medical treatise, lay testimony from the veteran or family members and friends about the veteran's level of functioning, statements from individuals who served with the veteran, and employment records can all be used in support of a claim.³⁶

The VA does have a "Duty to Assist"³⁷ the veteran in developing the claim. Notwithstanding that duty, the VA often fails to properly develop claims and the veteran is then hindered by the lack of development. The VA is required to obtain any federal records, unless it is futile (for example, the VA must obtain the veteran's Social Security disability records unless the Social Security Administration has informed the VA that the records are destroyed).³⁸ The VA must attempt to obtain identified private medical records, although ultimately it is the veteran's responsibility to see that they are associated with the file.³⁹ The VA is also required to gather service-related records, such as medical records, personnel records, and identified U.S. Department of Defense records, unless futile.⁴⁰ In most instances, the VA is even required to provide the veteran with a medical examination to determine the etiology of his or her medical condition.⁴¹

The VA is also required to sympathetically develop a claim.⁴² Obviously, the majority of veterans are not legal or medical professionals and do not clearly and explicitly state what service-connected disability benefits they are seeking when a claim is filed. A veteran may claim entitlement for, for example, "leg pain," when in actuality the leg pain is radiculopathy caused by nerve impingement in the veteran's back from an in-service accident. Due to the duty to sympathetically develop, the VA must recognize and adjudicate such implied claims.⁴³

Two of the biggest problems facing veterans are the lack of evidence of treatment for a disability during service and the lack of

35. See U.S. DEP'T OF VETERANS AFFAIRS, VA FORM 21-526EZ (2016).

36. ADDLESTONE ET AL., *supra* note 9, at 71-72; *Claims and Evidence, FDC Checklist for Disability Compensation*, U.S. DEP'T VETERANS AFF., <http://www.benefits.va.gov/fdc/checklist.asp> (last updated Oct. 22, 2013).

37. 38 U.S.C. § 5103A(a)(1).

38. 38 C.F.R. § 3.159(c)(2) (2015).

39. *Id.* § 3.159(c)(1).

40. *Id.* § 3.159(c)(2).

41. 38 U.S.C. § 5103(d); *McLendon v. Nicholson*, 20 Vet. App. 79, 85-86 (2006).

42. 38 C.F.R. § 3103(a); *Roberson v. Principi*, 251 F.3d 1378, 1383-84 (Fed. Cir. 2001).

43. ADDLESTONE ET AL., *supra* note 9, at 637-38.

evidence of treatment for a disability in the years following service. Veterans often fail to receive treatment for medical conditions because of their general stoic nature and the stigma attached to certain disabilities.⁴⁴ Record-keeping by the military during combat operations for veterans' medical injuries is haphazard.⁴⁵ Many times, post-service treatment records are destroyed because of the length of time that has passed since treatment or because the private physician has retired or is deceased.⁴⁶ A similar problem is that many veterans do not receive formal medical treatment for their conditions post-service for many years due to a variety of reasons (for example, lack of insurance, distrust of doctors, belief that "nothing can be done" for their injury, etc.), choosing instead to self-treat with over-the-counter pain medication.⁴⁷ Compounding the problem is the fact that in 1973, the National Personnel Records Center, where millions of veterans' service records are stored, suffered a fire, and sixteen to eighteen million veterans' service records were lost.⁴⁸ Since there is no limitation period by which a veteran must make a claim after discharge from service, missing or destroyed records are often a problem in every claim.⁴⁹

IV. APPEALS

When an initial rating decision is issued by the VA, the veteran should review it to determine what must be appealed. Of course, a denial of service-connection would be appealed, but even a favorable decision like a granted claim should be reviewed to ensure that the disability rating and effective date of the award assigned are appropriate. Once the veteran appeals a decision, and while the claim is in appellate status working its way through the system from the VA regional office to the BVA, the veteran has additional time to submit supportive evidence, evidence refuting the VA's conclusions, and legal arguments.⁵⁰ The deadline to submit additional evidence and legal argument does not toll

44. Cara-Ann M. Hamaguchi, *A Precious Balance: Managing Stigma, Confidentiality, and Command Awareness in the Mental Health Arena*, 222 MIL. L. REV. 156, 157-58, 171-72 (2014).

45. Kristina Derro, *Service-Connected Disability Claims Before the U.S. Department of Veterans Affairs*, MICH. B.J., Feb. 2015, at 26, 28.

46. *Id.*

47. *Id.*

48. *The 1973 Fire, National Personnel Records Claim*, NAT'L ARCHIVES, <http://www.archives.gov/st-louis/military-personnel/fire-1973.html> (last visited Nov. 26, 2016).

49. Derro, *supra* note 45, at 28.

50. Alan Zarembo, *VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. TIMES (Nov. 23, 2015, 4:00 AM), <http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html>.

until ninety days after the arrival of the claim at the BVA.⁵¹ Prior to that deadline, a veteran can submit as much supportive documentation as he or she desires.

While all the VA regional offices follow the same regulations, they do not give the same interpretation to statutes, regulations, or case law.⁵² A veteran with the same set of facts living in a different state as another veteran may get a different determination by the VA than a similarly-situated veteran. Ensuring that the VA follows its own regulations is an important job for the veteran or the veteran's representative.

Although the entire adjudication process with the VA is pro-claimant, it can be an increasingly confusing and complex process for the veteran—one that involves decisions and correspondence from the VA, filled with seemingly contradictory regulations and statements. These difficulties, especially when coupled with the significant delays in the adjudication process that the veteran faces, increases the veteran's overall frustration.

V. BACKLOG OF APPEALS

Right now, there is a tremendous backlog of claims at the VA, and it can take many years for a claim to work its way through the system.⁵³ It is an extremely onerous process. In recent years, the VA has focused its efforts on reducing the backlog of initial claims. Last year, the VA processed 1.3 million initial claims⁵⁴: “[f]ewer than 80,000 veterans have currently been waiting more than 125 days for an initial decision, which is down from three years ago when it reached a peak of over 600,000 two years ago.”⁵⁵ Unfortunately, the focus on reducing the backlog of initial claims has only succeeded in increasing the backlog of appeals, which the VA plans to fix in the future.⁵⁶

As of October 2015, there was a backlog of over 425,000 appealed claims and the number keeps growing.⁵⁷ The BVA only reviews about 55,000 claims each year.⁵⁸ Approximately 65,000 veterans have requested a hearing before a member of the BVA, a right that is available to any veteran with a pending claim.⁵⁹ Last year, just under

51. 38 C.F.R. § 20.1304(a) (2015).

52. Derro, *supra* note 45, at 28.

53. See *Veterans Benefits Administration Reports*, *supra* note 8.

54. Zarembo, *supra* note 50.

55. *Id.*; see also *Veterans Benefits Administration Reports*, *supra* note 8.

56. Zarembo, *supra* note 50.

57. *Id.*

58. *Id.*

59. *Id.*

13,000 hearings were held; at that pace, without any new hearing requests, it will take five years to complete all the hearings.⁶⁰ The VA will not issue decisions until the requested hearing has occurred.⁶¹ Regrettably, to reduce the backlog of initial cases, the VA shifted many of its workers from reviewing appeals to reviewing initial claims.⁶² Now, in order to keep the number of both pending initial claims and appeals low, either the VA must find money to hire more staff or the laws of Congress governing the disability claims process must be rewritten to reduce the amount of appellate review allowed and the time period for the submission of evidence.⁶³

VI. TYPES OF CLAIMS

There are several types of claims that veterans can file to maximize their benefits from the VA. A service-connected claim can be granted upon the theory of a direct relationship to service—the disability first manifested itself during the veteran’s period of service.⁶⁴ This also includes service-connection based upon a theory of aggravation of a disability that existed prior to the veteran’s enlistment.⁶⁵ If that preexisting disability was aggravated beyond its “natural progress[ion]” by the veteran’s period of service, then the veteran can be service-connected for that disability.⁶⁶

Disabilities that arose as a result of a service-connected disability can also be service-connected on a secondary basis.⁶⁷ For example, if the veteran was service-connected for his or her back and bilateral hips and had an antalgic gait, and that abnormal gait caused the veteran to develop bilateral knee problems, then the bilateral knees can be service-connected as well. This can occur where a service-connected condition contributes to the creation of a new disability or when a service-connected condition aggravates a nonservice-connected condition.⁶⁸

In certain claims for service-connection, there are instances where it is unnecessary for there to be a medical opinion linking the current disability to an incident during service.⁶⁹ There are certain diseases that

60. *Id.*

61. 38 C.F.R. §§ 20.700, .702, .709 (2015).

62. Zarembo, *supra* note 50.

63. *Id.*

64. 38 C.F.R. § 3.303(a).

65. 38 U.S.C. § 1153 (2012).

66. *Id.*

67. 38 C.F.R. § 3.306.

68. *Id.*

69. *Id.* § 3.309.

are presumptively related to certain exposures that occur during service and as long as the veteran shows that he or she was exposed to the offending substance, service-connection will be granted. For example, Vietnam veterans who served in-country or within the shallow, inland waterways during a certain time period are presumed to have been exposed to various chemical herbicides and will be presumptively service-connected to fourteen different groups of diseases associated with herbicide exposure.⁷⁰ A Vietnam veteran who currently suffers from lung cancer can be presumptively service-connected for that disease even if he is a life-long smoker, as that cancer is presumptively related to herbicide exposure.⁷¹

Surviving spouses or dependent children of veterans who die as a result of their service-connected disability can apply for benefits as well.⁷² For example, if a veteran was service-connected for ischemic heart disease and ultimately died of a heart attack, the veteran's spouse can file a claim in her own right to receive benefits. Additional benefits are available to certain dependents of the veteran if, at the time of the veteran's death, the veteran was rated one hundred percent disabled for ten or more years immediately prior to death, the disability was rated totally disabling since discharge from active duty and for five years immediately preceding death, or the veteran was a former prisoner of war and rated totally disabled for a continuous period of one year prior to death.⁷³

Finally, a veteran (or an appropriate dependent if the veteran is deceased) can be granted service-connection for any disability or death that arose as a result of "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault" on the part of a VA medical facility.⁷⁴

Once a veteran is service-connected for a disability, the veteran must ensure that the he or she is appropriately rated.⁷⁵ Evidence can be submitted to show that a veteran's condition has worsened and warrants a higher rating. For veterans whose service-connected disabilities prevent "substantially gainful employment," a total disability rating is available, even if that disability normally does not meet the criteria for a one hundred percent rating based upon symptoms alone.⁷⁶ Similarly, if a

70. *Id.*

71. *Id.*

72. 38 U.S.C. § 1318(a) (2012).

73. *Id.* § 1318(b).

74. *Id.* § 1151(a).

75. 38 C.F.R. § 4.1.

76. *Id.* § 4.16.

veteran's disability is such an "exceptional or unusual disability picture" that the regular schedular rating criteria is rendered impractical, a request for an extraschedular rating can be claimed.⁷⁷ Finally, special monthly compensation—an additional compensation above the regular rating schedule—can be assigned for veterans with service-connected special disabilities or hardships, such as the loss of both feet or hands or requiring the care of others to complete activities of daily living.⁷⁸

VII. IMPACT OF DENIALS AND DELAYS IN CLAIMS PROCESSING

As one would imagine, being repeatedly denied service-connection can have a deleterious effect on a veteran's mental and physical well-being.⁷⁹ The first obvious issue would be the financial implications that occur with repeated denials. Veterans are only paid once a claim is granted. The longer that takes, due to the backlog of appeals or the necessary development of the claim, the greater the negative impact on a veteran's finances. This is especially true if the veteran alleges that service-connected disabilities are preventing him or her from maintaining substantially gainful employment.

As stated earlier, part of the qualifying criteria for a veteran's eligibility to VA health care is the veteran's service-connected disability status.⁸⁰ Without this status, many veterans may not be eligible for VA health care and therefore do not receive any health care at all.⁸¹ For those that are chronically ill, the effects can be devastating with a lack of access to care.

Similarly, research has hinted at a correlation between denials and a veteran's viewpoint of the VA.⁸² Repeated denials of a disability claim may lead a veteran to refrain from attempting to access other benefits available through the VA due to a negative viewpoint of the agency.⁸³

The VA disability claims process is extremely protracted. It can be tremendously frustrating for a veteran to wait months or even years before the VA issues a decision, only to be denied. It can also be confusing for veterans who do not understand why they can receive health care from the VA for a particular disability, yet the VA is denying that disability is related to service.

77. *Id.* § 3.321(b).

78. *Id.* § 3.350(6)(b).

79. Fried et al., *supra* note 4, at 1038.

80. *See Health Benefits, supra* note 6.

81. Fried et al., *supra* note 4, at 1039.

82. *Id.*

83. *Id.*

Many veterans take personal offense to the repeated denials and view them as a sign that the VA is alleging they are liars. In fact, the denial is usually due to a lack of a medical nexus between the veteran's current disability and his or her injury during service, and not because the veteran is not credible.⁸⁴ Unless the veteran is a medical professional, they would not be considered competent to opine on medical causation or a disability's etiology.⁸⁵

VIII. CONCLUSION

The importance of VA disability benefits for veterans cannot be stressed enough. They attempt to compensate the veteran for disabilities that were incurred during service and are one way in which veterans can gain access to VA-provided health care. While the adjudication process is purportedly pro-claimant, flaws exist with the system and proper representation is necessary for the veteran to maximize the benefits he or she is entitled to receive as a result of his or her period of service. These flaws, coupled with the oppressive backlog of appeals at the VA leading to a delayed adjudication process, combine to create a perfect storm that negatively affects the well-being of veterans. The denial of claims, due to the VA's failure to properly or timely develop the claims, has had a deleterious effect on veterans' finances, access to VA health care, viewpoints of the VA itself, and positive self-concepts. As a result, a modest, if not large-scale, overhaul of the VA system is necessary to reduce the backlog of claims, as to allow for timely adjudication and additional training for consistent results among the different VA regional offices. The disability system was originally created to protect one of our nation's valued populations: veterans. Over the years, the system has become antiquated in many ways and reform is necessary to continue to maintain the history of valuing our veterans.

84. 38 C.F.R. § 3.159(d) (2015).

85. *Id.* § 3.159(a)(1)–(2).
