Legal Backgrounder

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VA BENEFITS AT A CROSSROADS: TIME TO FIND SOLUTIONS

by

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There are over twenty-three and a half million living veterans in the United States – and almost every veteran is entitled to one or more benefits conferred by Congress and administered by the U. S. Department of Veterans Affairs (VA). Although VA administers scores of benefits for veterans, the benefits garnering the most attention from the media, Congress and veterans groups are healthcare and disability compensation benefits. Following revelations of substandard living conditions for returning wounded active duty soldiers at Walter Reed Army Medical Center in February 2007, several commissions, study groups and task forces were formed to review the situation and make recommendations for improvement in the VA benefits delivery system.[1]

This LEGAL BACKGROUNDER will address veterans benefits at a crossroads in a time when the nation is fighting a war on two fronts; when over 800,000 citizen soldiers are now veterans who served in the combat theater, when some have paid the ultimate price for freedom, others have suffered major injuries and still others are experiencing some identifiable physical or mental injury or disease as a result of their service to our country; and finally, when Congress and the American people must decide the appropriate level of benefits for disabled veterans now and in the future.

The Current Veterans Benefits System. The laws conferring and governing veterans benefits are in Title 38, United States Code, and the implementing regulations are found in 38 Code of Federal Regulations. A veteran must apply for benefits, usually in writing or on various forms. Applying the criteria published in the applicable regulations, VA makes a determination whether the veteran is eligible for the claimed benefits, and the amount of any benefits. Eligibility for VA healthcare benefits is fairly straightforward: if *any* veteran[2] has a physical or mental injury or disease that was the result of active duty military service, she or he is entitled to lifetime VA medical care for that injury or disease. This is known as a "service-connected" injury or disease.[3] Some veterans are presumed eligible for healthcare as a matter of status even if they do not have a service-

[1] *President's Interagency Task Force on Returning Global War on Terror Heroes*, report submitted April 2007; *President's Commission on Care for America's Returning Wounded Warriors* (commonly referred to as the Dole-Shalala Commission) issued its report on July 25, 2007; Institute of Medicine. *A 21st Century System for Evaluating Veterans for Disability Benefits.* Washington, D.C., National Academies Press, report of June 7, 2007. *Honoring the Call to Duty: Veterans' Disability Benefits in the 21st Century*, Veterans' Disability Benefits Commission, Oct. 2007.

[2] "The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C.§ 101(2).

[3] "The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service." 38 U.S.C.§ 101(16).

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connected ailment, such as former POWs and anyone who served in the Persian Gulf since 2001. Persian Gulf veterans must apply for VA medical benefits within five years of discharge from active duty if they do not otherwise have a service-connected injury or disease. 38 U.S.C. § 1710(e)(1)(D).

Many are familiar with the Social Security Administration's all or nothing disability claims system. Social Security pays only for total disability and the payments may be subject to income tax. No benefits are payable for partial disability or short-term disability and the level of benefits does not depend upon marital status.

The VA disability compensation system compensates for service-connected disabilities on a scale from 0% to 100%. The percentage of service-connected disability is derived from tables published in the *Federal Register* [38 C.F.R.§§4.1 *et. seq.*] and are displayed in a matrix by body systems and the degree of impairment. Payments are higher for veterans with a spouse and/or dependent children. The payments are not subject to federal or state income tax. The original intent of the rating tables was to provide compensation to World War II veterans for post-service loss of earning capacity due to their service-connected disabilities. As confirmed by the various commissions, the current compensation tables have very little correlation to today's employment environment.

On the surface the process of applying for VA disability compensation is deceptively simple. The veteran files a claim and submits evidence that he or she 1) meets the definition of eligible veteran in 38 U.S.C. § 101(2); 2) has a current physical or mental disability or ailment that causes some impairment; 3) the current disability is the result of an event which occurred while the veteran was on active military duty and which caused the current disability or ailment; and, 4) some evidence of the degree of impairment.

A glance at the rating tables, however, reveals the complexity of the VA adjudicator's task. A single claim might contain 4, 6 or even 10 different issues, e.g., injured knee, sprained back, hypertension, shoulder injury, PTSD, and alcoholism secondary to all of the conditions. For each issue claimed the adjudicator must determine each of the above-mentioned elements. VA takes an average of 185 days to fully adjudicate an initial claim submitted by a veteran. During this time the veteran is not receiving any payments from VA, but the veteran will receive retroactive payments if any compensation is ultimately awarded.

Seeking Recourse in the Courts. Some veterans are so frustrated with the current system they have resorted to the federal courts. There was a fascinating recent case in the U.S. District Court for the Northern District of California, *Veterans for Common Sense, and Veterans United for Truth, Inc. v. James B. Peake, M.D., Secretary of Veterans Affairs*, Case no. C-07-3758 SC (Dist. Ct. ND CA). The complaint was originally reported as a class action but the case went forward as a petition for injunctive relief. Plaintiffs alleged that VA failed to provide the healthcare services to which the class members were constitutionally entitled, and also failed to timely decide claims for VA disability benefits. The case is fascinating not because individual veterans complained about their particular issues, but because the action indicted the entire VA system, from healthcare delivery to the disability claims process. Plaintiffs essentially asked the District Court to issue a permanent injunction which would have placed VA into court receivership while VA devised a plan for a better, faster way of delivering healthcare and other benefits, followed by continued judicial involvement in overseeing implementation.

The court issued its *Memorandum of Decision, Findings of Fact and Conclusions of Law* ["Decision"] on June 25, 2008 concluding, "The remedies sought by Plaintiffs are beyond the power of this Court and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction." Decision at 82. The court recognized that exclusive jurisdiction over issues of law and fact related to veterans benefits rests with the Secretary of Veterans Affairs under 38 U.S.C. § 511,[4] with exclusive review in the Court of Appeals for Veterans Claims, an Article I appellate court, 38 U.S.C. §§ 7251-7299, further appellate review in the Court of Appeals for the Federal Circuit, 38 U.S.C. § 7292, and final review in the U.S. Supreme Court. Veterans for Common Sense has appealed the court's decision.

[4]"The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. § 511(a).

The Supreme Court rarely reviews a veterans' case from the U.S. Court of Appeals for the Federal Circuit, but on June 16, 2008 the court granted *certiorari* in *Peake v. Sanders*, Case No. 07-1209. At issue is whether the court of appeals erred in holding that a failure of the VA to give the written notice to the veteran as required by the Veterans Claims Assistance Act of 2000[5] (VCAA) must be presumed prejudicial to the veteran claimant. VA asserts that the court of appeals failed to take due account of the rule of prejudicial error[6] and incorrectly found that prejudice was presumed if there was a failure to provide the required notice without a showing of actual prejudice, and that this interpretation conflicts with rulings in other circuits. Oral argument and a decision are expected by 2009 and the result could have a significant impact on how VA process claims under the VCAA.

Are Sweeping Changes Needed in the Veterans Benefits System? According to many in Congress and members of various veteran service organizations (VSO), the answer is resoundingly in the affirmative. It takes an average of 185 days for VA to make a decision on an initial claim for disability benefits – much longer if there is an appeal involved. Everyone agrees this is too long, but few agree on how to make the system more efficient.

The current disability claims system is a creature of statute. Congress has dictated what benefits will be made available to veterans and Congress has the power to change (improve) the system. The Dole-Shalala Commission gave Congress a road map for change to modernize the system and the President has asked Congress to pass laws implementing those recommendations. The Commission recommended that Congress revise the objectives for VA disability payments to include:

- *"Transition Payments"*— payments intended to cover living expenses for disabled veterans and their families. They should receive either three months of base pay, if they are returning to their community and *not* participating in further rehabilitation, ***or*** longer-term payments to cover family living expenses, if they are participating in further rehabilitation or education and training programs.

- *Earnings-loss Payments*—payments received once transition payments end to make up for any lower earning capacity remaining after training;

- *Quality-of-life Payments*— payments designed to compensate for non-work-related effects of permanent physical and mental combat-related injuries.

In other words, the Commission recommends that the VA disability system be refocused to concentrate on rehabilitation and helping the veteran integrate into the work force rather than lifetime payments designed to replace potential lost earnings, which forms the basis for the current disability payments system. This would entail a seismic shift in Congress' approach to veterans' disability benefits.

Many veterans organizations agree with most of the Commission's recommendations, but specifically disagree with the recommendation to overhaul the disability rating system. They see any effort to impose rehabilitation and training as a condition for payments and any effort to reevaluate a veteran's physical or mental status after initially receiving VA disability payments as an effort to strip veterans and their families of their livelihood. In essence, this specific recommendation for overhauling the system has become the "third rail" of veterans politics and apparently one which this Congress will gladly boot to the next Congress, or beyond.

America and Congress Must Decide the Future of Veterans Benefits. The future of veterans' benefits is at a crossroads. According to many veterans, the current system for determining entitlement to certain benefits, especially disability compensation payments, is very complicated and takes too long. They point to the backlog of claims (currently almost 400,000) and the average time for a veteran to receive a decision on his or her initial claim. There is no simple solution. VA will make decisions on over 830,000 claims this year, but the number of claims received will be nearly 900,000. In the past two years Congress has provided VA with money to hire new employees to increase the number of claims specialists by over twenty percent. Still, the backlog of claims remains and the number of average days to adjudicate the claims continues to rise.

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[5] PUB. L. NO. 106-475, 114 Stat. 2096. *See also* 38 C.F.R 3.159.
[6] 38 U.S.C.§ 7261(b)(2) (Supp. V 2005); 5 U.S.C. § 706.

Congress is at a crossroads. Congress can either continue to provide funds to perpetuate the current adjudication system, or it can appropriate funds and legislate a new streamlined, simplified system. The VA disability claims process is too complex and it is burdened by paper claims. Some observers believe that simplification of the system is too complex and daunting, but others believe a solution exists in a partnership between VA and private industry. Congress and VA should challenge private industry to develop a fair and efficient claims system for VA disability compensation claims. This cannot be just another study about the appropriate level of benefits; rather this partnership must focus on two major deliverables. First, industry must produce an architecture for a claims process that is simple enough for veterans to understand, and efficient enough to ensure rapid, accurate decisions. Second, a list of laws that must be passed or repealed in order to implement the new system. History has shown that almost any change to the veterans benefits system will be met with skepticism and resistance from various veterans groups and organizations. Congress must have the will to pass or revise laws to effectively implement the new system.

An example of a law that will surely come under scrutiny by any private industry consultant is the VCAA, *supra*. The VCAA directed VA to provide assistance to the veteran in gathering evidence in support of a claim and written notice to the veteran of evidence that the veteran must gather to support her or his claim. The Court of Appeals for Veterans Claims has held VA to a standard requiring specific wording of certain letters and presuming prejudice if the exact words were not used. That strict interpretation frames the issue which was the subject of the writ of *certiorari* and the Supreme Court's grant mentioned above. Now that we have had almost eight years of experience with VCAA, Congress should evaluate the impact of the act on veterans and the VA disability claims process. Some groups feel certain provisions of VCAA have significantly added to the backlog of claims and the number of days to decide a claim. If that is the case, VCAA must be revised by Congress to more precisely describe the information VA is required to provide to a veteran claimant and reevaluate the waiting periods imposed by the statute before VA can make a decision on the claim.

Further, now that Congress has rescinded an antiquated provision preventing lawyers from charging for representing a veteran in a claim before VA, 38 U.S.C. § 5904(d), the claims system is more akin to an adversarial system common to many types of government claims and workers' compensation systems. As such, Congress should eliminate some of the more paternalistic provisions of the current law that add to the adjudication timeline of the claim but do not add value for the claimant. Congress should make "substantial compliance" with VCAA the acceptable legal standard for notification to claimants.

Conclusion. Social spending on veterans has provided tremendous returns for the nation. The original GI Bill of 1946 is a good example of targeted social spending and allowed an entire generation of World War II veterans to access higher education and realize upward social mobility. The new Post 9/11 GI Bill holds promise to do the same for this generation of veterans. Congress and the nation must decide the focus of VA disability benefits, whether the Dole-Shalala recommendations of rehabilitation, training and return to the workforce are appropriate, or the current system of lifetime compensation for potential lost earnings capacity. Whichever direction is appropriate, Congress and America must decide how best to compensate veterans for their sacrifices in service to our nation.

Congress has the power, and must find the will, to legislate a 21st century solution for the VA claims process to include a digital claims file and a simplified process for rating service-connected disabilities. Private industry should be challenged to find a solution that provides better, faster service to the veteran claimant (e.g., a decision on a veteran's claim within three months, the ability to track his or her claim online, and a single digital file for all benefits earned through service to our country) which produces consistent decisions across the entire VA system. There have been enough studies. It is time to find and implement real solutions.

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