



# Board of Veterans' Appeals

## REPORT OF THE CHAIRMAN



**Fiscal Year 2011**



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

February 1, 2012

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 2011 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 2011 and the projected activities of the Board for Fiscal Years 2012 and 2013, as required by 38 U.S.C. § 7101(d)(1), are provided in Parts I and II.

Fiscal Year 2011 saw the Board increase productivity to nearly its highest level since Judicial Review was enacted in 1988 and conduct a record number of personal hearings. Although Veterans benefits law continued to evolve, and the Board underwent a significant facility move to a new location, the employees of the Board 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 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 2011.

Very respectfully,

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

Steven L. Keller  
Executive in Charge

Enclosure

**Blank Page**

# Table of Contents

<b>INTRODUCTION .....</b>	<b>1</b>
<b>PART I: ACTIVITIES OF THE BOARD OF VETERANS' APPEALS</b>	
<b>FISCAL YEAR 2011 .....</b>	<b>3</b>
<i>Successes .....</i>	<i>3</i>
<i>Succession Planning .....</i>	<i>5</i>
<i>The Board's Goals for Fiscal Years 2012 and 2013 .....</i>	<i>6</i>
1. <i>Reduce the Backlog .....</i>	6
2. <i>Advocate for Legislative Initiatives .....</i>	8
3. <i>Expand Use of Video Hearings .....</i>	9
4. <i>Efficiently Adjudicate Paperless Appeals .....</i>	9
<i>Significant Judicial Precedent and Its Effect on the Board .....</i>	<i>9</i>
<i>Assistance to VBA Regional Offices, VHA, and NCA .....</i>	<i>11</i>
<i>Veterans Service Organization Forums and Training .....</i>	<i>11</i>
<i>Veterans Law Review .....</i>	<i>12</i>
<i>Volunteer Activities .....</i>	<i>12</i>
<i>Planning for the Future .....</i>	<i>13</i>
<b>BOARD MEMBERS .....</b>	<b>14</b>
<b>PART II: STATISTICAL DATA .....</b>	<b>15</b>
<b>PROJECTIONS FOR FISCAL YEARS 2012 AND 2013 .....</b>	<b>19</b>
<b>ADDITIONAL INFORMATION .....</b>	<b>20</b>

**Blank Page**

# INTRODUCTION

The law requires that the Chairman of the Board of Veterans' Appeals (Board or BVA) report the activities of the Board at the conclusion of each fiscal year. On February 22, 2011, Chairman James P. Terry retired from the Board after nearly serving his six-year term. On February 23, 2011, Secretary Eric K. Shinseki appointed Vice Chairman Steven L. Keller as Acting Chairman for 210 days pursuant to 5 U.S.C. §§ 3345, 3346. Upon the expiration of that appointment, as a nominee for the Chairman had not yet been submitted to the United States Senate, Secretary Shinseki designated Vice Chairman Keller as Executive in Charge (EIC). As EIC, Mr. Keller presents this Annual Report, which includes two parts. Part I provides a discussion of BVA activities during Fiscal Year 2011 and projected activities for Fiscal Years 2012 and 2013. Part II provides statistical information related to BVA activities during Fiscal Year 2011 and projected activities for Fiscal Years 2012 and 2013.

The Board makes 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, and health care delivery.

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 2011  
Veterans Law Judges**

**Blank Page**

# PART I

## ACTIVITIES OF THE

### BOARD OF VETERANS' APPEALS

#### FISCAL YEAR 2011

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 (VLJ), twelve Senior Counsel, more than 300 staff counsel, and other administrative and clerical staff. The Chairman reports directly to the VA Secretary. The Board is comprised of four Decision Teams with jurisdiction over appeals arising from the VA Regional Offices (RO), Medical Centers, and the National Cemetery Administration, in one of four geographical regions: Northeast, Southeast (including Puerto Rico), Midwest, and West (including the Philippines). Each Decision Team includes a Deputy Vice Chairman, two Chief VLJs, 13 line 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 review by a VLJ who reviews the draft and issues the final decision or appropriate preliminary order in the appeal. The Board also has an Appellate Group, which consists of the Principal Deputy Vice Chairman, the Chief Counsel for Policy and Procedure, the Chief Counsel for Operations, the Chiefs of Litigation Support, the Quality Review Team, the 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. The Office of Management, Planning, and Analysis is the administrative directorate of the Board, consisting of the Director, the Deputy Director, the Administrative Support Division, the Decision Team Support Division, and the Financial Management Division.

The Board has jurisdiction over a wide variety of issues and matters, but most appeals (95%) involve claims for disability compensation or survivor benefits. Examples of other types of claims that are addressed by the Board include fee basis medical care, waiver of recovery of overpayments, reimbursements for emergency medical treatment expenses, education assistance benefits, vocational rehabilitation training, burial benefits, and insurance benefits.

In Fiscal Year 2011, the Board issued 48,588 decisions and conducted 14,727 hearings with a cycle time of 119 days. Cycle time 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. The Board physically received 47,763 appeals in Fiscal Year 2011. Based on historical trends in case receipts, the Board expects to receive 66,600 appeals in Fiscal Year 2012.

### *Successes*

The Board issued 48,588 decisions in Fiscal Year 2011, a slight decrease from the 49,127 decisions issued in Fiscal Year 2010. The Board's slight decrease in productivity in Fiscal Year 2011 is primarily a function of a decrease in full time employee equivalents (FTE). The Board carried an average of 535 FTE during Fiscal Year 2011, down from 549 FTE in Fiscal Year 2010. The Board effectuated this



decrease through attrition, to prepare for operating in the constrained fiscal environment affecting the entire Federal government in Fiscal Year 2012. The Board also relocated from its location near VA Central Office to a different office location in Washington, DC. This involved moving over 600 employees and VSO personnel, as well as more than 32,000 claims folders. Due to the expert planning of the Board and its partners in the General Services Administration and VA's Office of Administration, this major facility move was executed without misplacement of files and with minimum effect on productivity.

The Board conducted 14,727 hearings, which is an increase of 1,212 hearings over Fiscal Year 2010 and the most hearings ever held by the Board in a year. 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). This productivity was possible because of the extraordinary efforts of the VLJs, staff counsel, and administrative support staff.

In addition to dispatching 48,588 decisions issued by the Board in Fiscal Year 2011, the Board's administrative support staff reviewed and processed 44,046 pieces of mail. The administrative staff, including our call center in Wilkes-Barre, Pennsylvania, also answered over 95,626 inquiries from Veterans or their representatives by phone, email, or written correspondence.

In Fiscal Year 2011, the Board focused on methods to increase the quality of the decisions rendered while maintaining the high level of decision output. The Board's Office of Learning and Knowledge Management (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 Court of Appeals for Veterans Claims (CAVC or Court) and the Court of Appeals for the Federal Circuit (Federal Circuit). In addition, the Board added expanded 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 the Veterans Benefits Administration (VBA), Veterans Health Administration (VHA), National Cemetery Administration (NCA), and the Office of the General Counsel (OGC). Partnership was strengthened with leadership at each of these organizations to open lines of communication and coordinate 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 21<sup>st</sup> century organization. Specifically, the Board contributed to the 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 and the particular requirements for adjudication of 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 a mobile device. This system has promoted transparency and improved customer service.

During this fiscal year, Board leadership continued to strongly promote legislative proposals that, if passed into law, will implement systemic changes aimed at increasing efficiency in the appeals process in a way that is both fair and beneficial to Veterans.

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 2011. The Board's decisions reached a 91.8% accuracy rate for the fiscal year, 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, the Board has three Senior Executive Service (SES) positions and two Senior Level (SL) positions. The three SES positions are the Vice Chairman, the Principal Deputy Vice Chairman, and the Director of Management, Planning, and Analysis. 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 creation of the CAVC and the rapidly increasing involvement of the Federal Circuit, the complexity and length of BVA decisions has increased tremendously. Additionally, the number of claims filed at ROs and Medical Centers continues to increase significantly. The Board's workload, therefore, also is projected to increase proportionally to the increase of the workload of the originating agencies. Because of the dynamic leadership of our SES and SL leaders, 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 Senior Counsel also are responsible for leading the Board's quality review and training programs, as well as the Office of Litigation Support.

In matters of recruitment and retention, the Board continues to maintain an in-house program for all employees on matters of diversity and inclusion that illuminates the goals in place for sustaining a diverse workforce. Because of the anticipated fiscal constraints, the Board's normal rigorous recruitment program was placed on hold. However, during the summer of Fiscal Year 2011, the Board hired 8 law clerks from diverse law schools throughout the country. These students worked with attorneys and VLJs to draft decisions and other work products. In addition to completing challenging writing assignments, the summer law clerks 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. Additionally, the Board's administrative division developed and implemented a successful volunteer program, aimed at better serving

Veterans by supplementing and enriching the Board's workforce with a diverse pool of talented individuals. 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 2012 and 2013***

The Board's challenge is to transform into a 21<sup>st</sup> 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 they do.

### ***1. Reduce the Backlog***

The Board will continue to focus in the coming year on reducing the backlog, within existing resources, by concentrating on the following:

- ***Eliminating avoidable remands:*** Fewer remands mean fewer appeals returned to the Board and, thus, more timely decisions for Veterans and other Appellants. In Fiscal Year 2011, the Board began working closely with VBA to assist them with their 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 agreed to a mandatory joint supplemental training program, to be executed by subject matter experts in both organizations, to standardize claims adjudication. Additionally, the Quality Review staffs of each organization began 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. In all, 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 remands, and that data is accessible by all VA components in the adjudication system for training purposes. In addition, the Board's Quality Review Office continued to engage in extensive liaison efforts with VBA's Appeals Management Center (AMC) during Fiscal Year 2011 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. Further, for purposes of reducing remands based on new evidence submitted directly to the Board, the Board has a process in place to solicit a waiver of initial Agency of Original Jurisdiction (AOJ) review of such submissions. By soliciting waivers in those cases where an Appellant or representative submits evidence without a waiver, the Board can in many cases avoid unnecessary remands.

- ***Increasing efficiencies through video technology:*** The Board has instituted efficiencies in its operations, and particularly, in its hearing process. In Fiscal Year 2012 and beyond, the Board will shift its focus to utilizing more video teleconference technology to conduct hearings. The video equipment has been upgraded both at the Board and in the field, providing a crisp picture with clear sound, despite the distance between locations. Early in Fiscal Year 2012, all systems will also be upgraded to a digital audio recording system. While the Board will continue to travel to field stations each year, those trips will be more limited in number. Relying more on video teleconference technology will allow the Board to explore ways to responsibly expand the number of locations at which video hearings are offered, making it more convenient to the Veteran population at large. Equally as important, this shift will also allow VLJs to gain more time in the office to issue decisions. On average, only 76% of Appellants who are scheduled for a Travel Board hearing report to the appointment. That results in significant down time for VLJs when they are in the field. By contrast, when conducting hearings by video, VLJs can easily return to their case load if Appellants fail to 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 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 together the top leaders from each organization that touches the benefits process to ensure cooperative solutions to cross cutting issues.
- ***Internal training:*** In Fiscal Year 2011, the Board's Office of Learning and Knowledge Management coordinated training for Board attorneys and VLJs. Throughout the past year, the VLJs and attorneys attended courses on topics such as Evaluating Lay Evidence & Making Credibility Determinations; Recent Significant CAVC and Federal Circuit Decisions; Speculation & Medical Opinions; Recent Trends in the Duty to Assist; Supervisory Training; Medical Training on the Back, Heart Disease, Knee, and Psychiatric Disorders; VA's Core Values & Characteristics; Women Veterans Issues; Disability Benefit Questionnaires; and ongoing Medical Advisor and Quality Review small group chat sessions.
- ***Writing clear, concise, coherent, and correct decisions:*** The Board's leadership continued to stress to the VLJs and attorneys the value of writing clear, concise, coherent, and correct decisions in Fiscal Year 2011. The benefits of this initiative continued to be apparent, as evidenced by the high volume of decisions the Board was able to produce, despite a loss in FTE and a major facility move. 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 remains in use to increase employee motivation and satisfaction, as well as to increase decision quality and productivity. Effective November 1, 2005, the Chairman authorized a permanent flexiplace program to permit a limited number of attorneys to prepare draft decisions and other work products at their primary residence (a pilot flexiplace program had been in effect since 1999). This program enables the Board to retain attorneys who might otherwise have resigned due to the location of their primary residence, other personal reasons, or because another employer would allow more extensive telecommuting. 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, and the home work sites are periodically inspected to ensure continued compliance with the Board’s data security rules. In Fiscal Year 2011, 178 of the Board’s employees telecommuted in some capacity, which was an increase from the prior fiscal year.

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 conjunction with the Fiscal Year 2011 budget request, the Secretary submitted the following legislative proposals, all of which are aimed at improving timeliness in the processing of Veterans’ benefits appeals: (1) reduce the time period for initiating an appeal from one year to 180 days; (2) allow, through an automatic waiver, the Board to consider in the first instance evidence submitted by a claimant after a substantive appeal has been filed, rather than having to remand the case back to the agency of original jurisdiction for consideration of that evidence; (3) allow the Board more flexibility in scheduling video conference 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; and, (4) amend 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. Collectively, these proposals will result in improved timeliness and efficiency of VA’s adjudication of claims and appeals both at the Regional Office level and at the Board level.

In May 2011, Vice Chairman Keller testified before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans’ Affairs. His testimony involved a provision of H.R. 1484, the “Veterans Appeals Improvement Act of 2011,” which would create an automatic waiver similar to that which was proposed by the Secretary, noted above.



### ***3. Expand Use of Video Hearings***

Related to one of the Board's legislative proposals outlined above, the Board will leverage video conferencing technology to increase the capability of, and access to, video hearings. The Board worked with the Office of Information and Technology (OIT) to upgrade the current video conferencing technology at the Board and at ROs. Early in Fiscal Year 2012, all systems will also be upgraded to a digital audio recording system. The Board's new facility has an increased number of video hearing rooms (from 8 to 13). The Board also is working with VBA and VHA to allow video hearings to be held from more locations in the field (beyond ROs), which will be more convenient for Veterans and make the video option more appealing. In addition to the increased efficiencies noted above, BVA will use the expanded video capability to reduce the backlog of hearings. Updating and expanding the Board's video capability will reduce the time Veterans currently wait for a hearing and, in some instances, will reduce the Veteran's travel time to reach a video site.

### ***4. Efficiently Adjudicate Paperless Appeals***

In Fiscal Year 2011, the Board held 66 hearings with a paperless record and completed 92 paperless appeals, a significant increase since Fiscal Year 2010 (14 hearings and 53 appeals). Since 2008, VA has been processing Benefit Delivery at Discharge (BDD) claims for separating Servicemembers by using a paperless claims processing system at ROs in Salt Lake City, Utah and in 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 put in place to adjudicate these virtual appeals. The Board has worked within the constraints of the current system and has cataloged lessons learned along the way. We are working to have these valuable insights incorporated into the development of the new and upgraded paperless system that the Department is currently creating, 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. Electronic files are secure 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 parts of the 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***

- ***Arneson v. Shinseki, 24 Vet. App. 379 (2011):*** In this case, the Appellant had two Board hearings before different judges, thus prompting panel assignment by the Chairman for a decision. In a November 2008 Board decision, the three-member panel denied the Appellant's claims for service connection for bilateral plantar fasciitis and a bilateral knee disorder. On appeal to the CAVC, the Appellant argued that he was entitled to a hearing before all members of the panel. The CAVC agreed. It interpreted 38 U.S.C. §§ 7102, 7107, and 38 C.F.R. § 20.707 as entitling a claimant to an opportunity for a hearing before every member of the panel who will ultimately decide his appeal. The Court reasoned that

the failure to provide a claimant with the opportunity for a hearing before the third panel member deprives him of “an opportunity to meaningfully participate in the processing of his claim,” particularly with regard to the Board’s credibility determinations. The Court emphasized that a claimant need not be afforded a hearing before every member of the panel at the same time. This is significant for the Board in that it changed the practice of relying on the testimony of the previous two hearings of record to render a decision, and now requires the Appellant to be offered the opportunity for a third hearing before the Board.

- ***Savage v. Shinseki*, 24 Vet. App. 259 (2011):** The Veteran in this case appealed a decision that denied an increased rating for service-connected hearing loss. The Board acknowledged several private audiological examinations of record, but noted that it was unclear whether the specific test required by regulation was conducted; therefore, it found the private examinations not adequate for rating purposes and relied instead on the complete VA examinations only.

On appeal to the CAVC, the Court found that when a private examination report is “unclear” or “not suitable for rating purposes” and the information “reasonably contained in the report otherwise cannot be obtained, VA has a duty to ask the private examiner to clarify the report, or the Board must explain why such clarification was not needed.” The holding was limited “to those instances in which the missing information is relevant, factual, and objective—that is, not a matter of opinion—and where the missing evidence bears greatly on the probative value of the private examination report.” On this basis, it vacated the Board’s decision and remanded the appeal to the Board to seek clarification or explain why it was not needed. This is significant for VA in that it further defines the duty to assist in the context of the submission of private medical evidence, regardless of the adequacy of the VA medical evidence of record.

- ***Mitchell v. Shinseki*, 25 Vet. App. 32 (2011):** In the underlying case, the Board denied entitlement to an initial disability rating in excess of 10 percent for a left knee disability. In denying the claim, the Board found that the Appellant’s range of motion did not warrant a compensable rating under either Diagnostic Code (DC) 5260 or DC 5261, and ultimately concluded that 10 percent was the appropriate rating for painful motion of the left knee under DC 5003. Before the CAVC, the Appellant, citing to *Lichtenfels v. Derwinski*, 1 Vet. App. 484 (1991) (“painful motion . . . is deemed to be limited motion”), argued that she was entitled to maximum ratings under both DC 5260 and DC 5261 because she experienced pain throughout the entire range of motion of her left leg. The Court disagreed and held that pain alone does not constitute functional loss under VA regulations that evaluate disabilities based upon loss of motion, such as DCs 5260 and 5261. Rather, pain must affect some aspect of “the normal working movements of the body” such as “excursion, strength, speed, coordination, and endurance,” 38 C.F.R. § 4.40, in order to constitute functional loss. The Court distinguished *Lichtenfels* as limited to the specific situation where a claimant demonstrates noncompensable loss of motion and is rated under DC 5003. This case further clarifies the proper course of action in situations in which the Appellant alleges only pain.
- ***Shade v. Shinseki*, 24 Vet. App. 110 (2010):** In this case, the Appellant’s claim for service connection for a skin disorder had been previously denied, due to a lack of a current diagnosis. Several years later, the Appellant attempted to reopen his previously denied claim on the basis of new and material evidence. In conjunction with his appeal, the Appellant

submitted a private medical statement indicating a diagnosis of a skin disorder. The Board denied the claim, finding that although the evidence submitted was new, it was not material, because it did not raise a reasonable possibility of substantiating the claim (particularly because it did not address the nexus requirement for service connection).

The CAVC interpreted the language of 38 C.F.R. § 3.156(a) as creating a low threshold to reopening previously denied claims based on new and material evidence. Specifically, the Court found the language of “raises a reasonable possibility of substantiating the claim” as “enabling rather than precluding reopening.” Further, it indicated that the review of the new evidence must be conducted in light of all the evidence of record, in order to determine whether the possibility has been raised. The Court then emphasized, however, that the regulation is designed to be consistent with 38 C.F.R. § 3.159(c)(4), which “does not require new and material evidence as to each previously unproven element of a claim.” This is significant in that it defines the threshold for reopening previously denied claims as very low and clarifies the process by which the evidence must be reviewed.

### ***Assistance to VBA Regional Offices, VHA, and NCA***

During the past year, the Board continued its efforts to reduce the backlog of cases on appeal awaiting Board hearings at ROs. For most Travel Board visits, the Board has historically sent an attorney along with the VLJ to assist in preparing for the 43 hearings that are generally scheduled each week. During the course of the week, the attorney also has been responsible for offering to provide training and other assistance, as requested, to the RO staff. In March 2011, however, the then-Acting Chairman determined that, due to budget reductions and concomitant travel expense increases, the Board was no longer able to maintain attorney staffing for Travel Board visits at the same level as the Board has done in the past. Hence, under these constraints, a policy was instituted to significantly reduce the number of trips that include an accompanying counsel in order to maintain our productivity. Thus, in Fiscal Year 2011, 91 attorneys provided assistance to 56 ROs. The attorneys conducted training for adjudication personnel at 38 of the ROs visited and answered questions with respect to individual appeals during each trip.

With respect to appeals originating from VA hospitals, the Board participated in conference calls with VHA staff across the country that handle appeals to the Board to discuss issues of concern related to the processing of claims and appeals by VHA. As a result of these talks, the Board has altered the way these appeals are handled administratively, to better coordinate the movement of files.

The Board also worked closely with NCA to better acclimate the Administration to appeals processing and tracking.

### ***Veterans Service Organization 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 questions that are 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 our 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 judges and to participate in the in-house training that is provided to BVA staff. This year, we also provided training to VSOs on Virtual VA, the current software utilized in paperless claims and appeals at VA. Although this system is set to be replaced in Fiscal Year 2012, the Board continues to receive and adjudicate a number of these appeals in the prior system.

During this fiscal year, VLJs and other Board staff provided substantive training on behalf of the Chairman to the Wisconsin County Veterans Service Officers; Ohio County Veterans Service Officers; Tennessee National Service Officers; District Injured Support Coordinators Wounded Warrior Regiment; Veterans of Foreign Wars; and, Disabled American Veterans.

## ***Veterans Law Review***

During Fiscal Year 2011, the Board published the third volume of the *Veterans Law Review*. The *Veterans Law Review* offers the opportunity for attorneys both inside and outside of VA, legal scholars, and other legal professionals to write on topics critical to the rights of Veterans and the legal obligations of those who serve them. It also serves as a forum for the discussion of legal issues and trends affecting the adjudication of claims for VA benefits and thus serves as a way for the different stakeholders in the Veterans adjudication process to share information and ideas. The *Veterans Law Review* is edited and managed by an all-volunteer staff. No duty time is used for writing or editing activities. The fourth volume will be published in early 2012.

## ***Volunteer Activities***

The Board proudly supports Veterans and their families and educates VA employees by creating educational exhibits at the Board on subjects such as the Vietnam War, the Korean conflict, Operation Enduring Freedom, Operation Iraqi Freedom, female Veterans and Prisoners of War (POWs). The Board also facilitates the collection and donation of comfort items for distribution to Veterans at the Washington VA Medical Center and the United States Armed Forces Retirement Home (U.S.A.F.R.H.); distributes DOD, VA POW/MIA Day and Veterans Day posters to Veterans; collects Toys for Tots for the United States Marine Corps Reserve; and, facilitates the collection of calendars and valentines for Veterans to distribute at the U.S.A.F.R.H. Several Board employees have participated in the Honor Flight Network, greeting WWII Veterans who have been flown, free of charge, to Washington, DC, to view the memorials. The Board also participates actively in the Combined Federal Campaign.

As in previous years, the Board also sponsored an attorney in the Overseas Military Services Program (OMSP) that was established between VA and DOD. Under the auspices of this program, VA provides Overseas Military Services Coordinators to military facilities in Japan, England, Germany, and Italy as part of the Operation Transition program for those military personnel separating or retiring. Our attorney provided briefings on a full range of VA benefits, interviewed active duty military personnel, and assisted in the completion of applications for benefits.

## *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 2011 included a networking meet and greet; a school-supply drive for Operation Homefront; a group of employees volunteering at two Honor Flight events at Reagan National airport; a presentation on career development at the Board; a luncheon for Administrative Professionals Day; a mock hearing in conjunction with Take Your Children to Work Day; and, a luncheon for the Excellence in Leadership Award.
- ***Other BVA Training Initiatives:*** The Board sends high quality, high producing attorneys, VLJs, and administrative professionals to Leadership VA, as well as leadership seminars and programs offered through OPM's Federal Executive Institute and its Management Development Centers. During the past year, four employees were competitively selected to attend Leadership VA, a corporate leadership development program that cultivates high-performing leaders for a 21<sup>st</sup> 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. Two Board employees attended Leadership for a Democratic Society at the Federal Executive Institute. This comprehensive four-week course builds the participants' knowledge and skills in personal leadership, transforming public organizations, and the policy framework in which Government leadership occurs. Finally, the Board sent 21 employees to OPM Management Development Centers to participate in courses such as the Supervisory Leadership Seminar: Learning to Lead, and other leadership development courses. All of these various training courses are an integral part of the Board's plan to develop its future leaders.

# BOARD MEMBERS

**Steven L. Keller, Executive In Charge/Vice Chairman**

**Laura H. Eskenazi, Principal Deputy Vice Chairman**

**Steven L. Cohn, Deputy Vice Chairman, Decision Team 1**

Robert E. Sullivan, Chief Member  
Mark W. Greenstreet, Chief Member

**Joaquin Aguayo-Pereles, Deputy Vice Chairman, Decision Team 2**

Kimberly E. Osborne, Chief Member  
Cherry O. Crawford, Chief Member

**David C. Spickler, Deputy Vice Chairman, Decision Team 3**

Wayne M. Braeuer, Chief Member  
Cheryl L. Mason, Chief Member

**Mary M. Sabulsky, Deputy Vice Chairman, Decision Team 4**

Michelle Kane, Chief Member  
Linda Anne Howell, Chief Member

## VETERANS LAW JUDGES

Karen J. Alibrando	Mark F. Halsey	John E. Ormond, Jr.
Keith W. Allen	Milo H. Hawley	Michael A. Pappas
Marjorie A. Auer	Michael A. Herman	Kalpana M. Parakkal
Kathy A. Banfield	Mark D. Hindin	Jeffrey D. Parker
Derek R. Brown	Vicky L. Jordan	Alan S. Peevy
Anna M. Bryant	Susan L. Kennedy	Ursula R. Powell
Theresa M. Catino	Michael E. Kilcoyne	Steven D. Reiss
Dennis F. Chiappetta, Jr.	Jonathan B. Kramer	Harvey P. Roberts
Vito A. Clementi	Michael S. Lane	Robert C. Scharnberger
Barbara B. Copeland	Mary Ellen Larkin	Ronald W. Scholz
John J. Crowley	Eric S. Leboff	Howard N. Schwartz
Thomas J. Dannaher	Michael D. Lyon	George R. Senyk
Paula M. DiLorenzo	James L. March	Deborah W. Singleton
Shane A. Durkin	James A. Markey	Susan S. Toth
Frank J. Flowers	Joy A. McDonald	Claudia Trueba
Kathleen Gallagher	Jacqueline E. Monroe	David L. Wight
George E. Guido, Jr.	Andrew J. Mullen	Stephen L. Wilkins

# PART II

## STATISTICAL DATA

### Fiscal Year (FY) 2011 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 2011:	<b>38,606</b>
Number of appeals physically received at the Board and docketed during FY 2011:	<b>47,763</b>

**38 U.S.C. § 7101(d)(2)(B)**

Cases pending before the Board at the start of FY 2011:	<b>45,722*</b>
Cases pending before the Board at the end of FY 2011:	<b>41,005*</b>
Cases physically at the Board at the end of FY 2011:	<b>31,314</b>

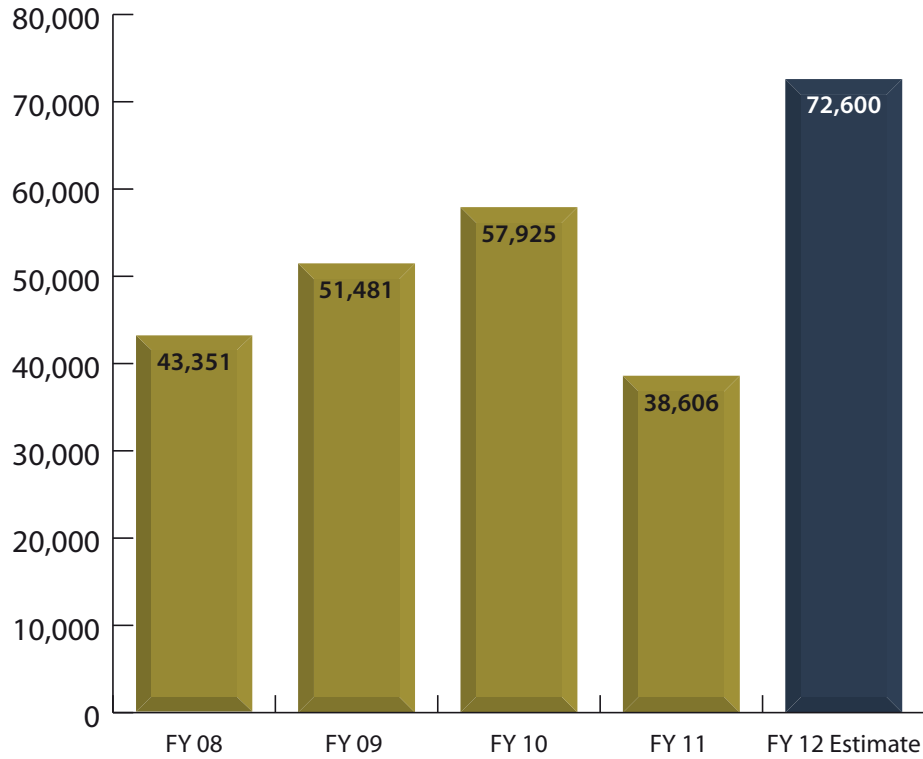
\*Includes certified appeals pending in the field awaiting hearings, as well as cases pending at BVA.

**38 U.S.C. § 7101(d)(2)(C)**

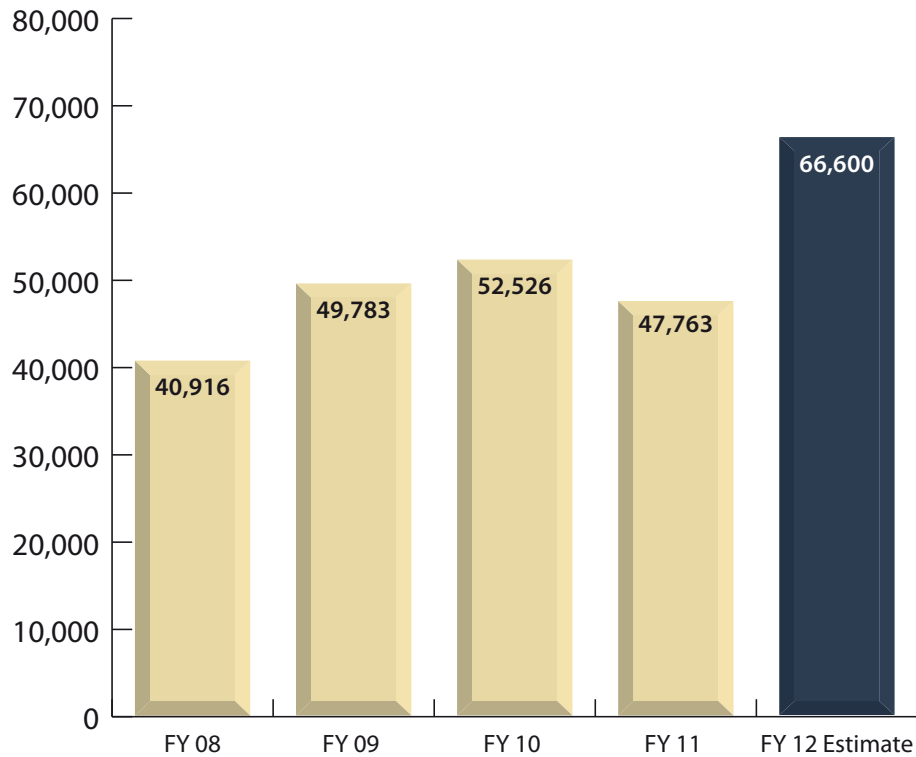
Number of new appeals filed at AOJ and cases received at BVA during each of the 36 months preceding FY 2011.

<b>Appeals Filed at AOJ</b>					<b>Appeals Docketed Upon Receipt</b>			
<b>Month</b>	<b>FY 08</b>	<b>FY 09</b>	<b>FY 10</b>	<b>FY 11</b>	<b>FY 08</b>	<b>FY 09</b>	<b>FY 10</b>	<b>FY 11</b>
<b>October</b>	4,133	4,497	5,295	3,693	3,713	3,459	5,197	3,907
<b>November</b>	3,646	3,392	4,853	3,392	3,201	2,879	3,611	3,949
<b>December</b>	2,956	3,590	4,788	3,103	2,767	3,766	3,392	3,171
<b>January</b>	3,703	3,730	5,246	2,957	3,248	3,462	4,926	3,359
<b>February</b>	3,579	3,840	3,535	2,909	3,701	3,691	3,190	3,514
<b>March</b>	3,389	4,593	5,697	3,670	4,351	4,467	5,069	4,538
<b>April</b>	3,651	4,459	4,936	3,280	3,337	5,145	4,194	4,269
<b>May</b>	3,629	3,801	4,462	3,464	3,121	4,278	5,289	4,555
<b>June</b>	3,559	4,632	5,201	3,610	3,279	5,011	4,974	3,934
<b>July</b>	3,696	5,003	4,526	2,833	3,107	4,653	4,462	4,010
<b>August</b>	3,517	4,650	4,756	2,884	3,443	4,466	3,823	4,131
<b>September</b>	3,893	5,294	4,630	2,811	3,648	4,506	4,399	4,426
<b>FY Total</b>	<b>43,351</b>	<b>51,481</b>	<b>57,925</b>	<b>38,606</b>	<b>40,916</b>	<b>49,783</b>	<b>52,526</b>	<b>47,763</b>

## Appeals Filed at AOJ FY 08 - FY 11



## Cases Received at BVA FY 08 - FY 11



**38 U.S.C. § 7101(d)(2)(D)**

The average length of time between filing the appeal and the Board’s disposition was **883 days**. The following chart demonstrates the average time intervals for particular portions of the appeals process.

<b>Time Interval</b>	<b>Responsible Party</b>	<b>Average Elapsed Processing Time</b>
Notice of Disagreement Receipt to Statement of the Case	AOJ	257 days
Statement of the Case Issuance to Substantive Appeal Receipt	Appellant	41 days
Substantive Appeal Receipt to Certification of Appeal to BVA	AOJ	585 days
Receipt of Certified Appeal to Issuance of BVA Decision*	BVA	240 days
Average Remand Time Factor	AOJ	427 days

\* This includes the Board’s cycle time of 119 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 2011: **64 members**

The number of professional, administrative, clerical and other personnel employed by the Board at the end of FY 2011: **471 employees not including 64 members above.**

**38 U.S.C. § 7101(d)(2)(F)**

Number of acting members of the Board during FY 2011: **94**

Number of cases in which acting members participated: **11,613**

**38 U.S.C. § 7101(c)(2)**

Number of acting members of the Board in terms of full-time employee equivalents: **15.4**

# PROJECTIONS FOR FISCAL YEARS 2012 AND 2013

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 2012:	VA Form 9s filed at the AOJ:	72,600
	Cases docketed upon receipt at BVA:	66,600
Fiscal Year 2013:	VA Form 9s filed at the AOJ:	72,600
	Cases docketed upon receipt at BVA:	73,932

## **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 the BVA to forecast its future timeliness of service delivery is BVA “response time” on appeals. By taking into account the Board’s most recent appeals processing rate and the number of appeals that are currently pending before the Board, BVA response time projects the average time that will be required to render decisions on that 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 conference hearings.

The following categories are calculated as follows:

<u>FY 2011 decisions (48,588) divided by</u> 261 work days	= 186.2 Decisions per Work Day
Cases Pending end of FY 2011 (41,005) <u>+ New Cases expected in FY 2012 (66,600)</u>	= 107,605 Total Workload in FY 2012
<u>Total Workload (107,605) (divided by)</u> Decisions per Work Day (186.2)	= 578 Work Days
<u>Work Days (578) (divided by)</u> 261 work days	= 2.2 Years
Work years (2.2) x 12 (months)	= 26.6 months

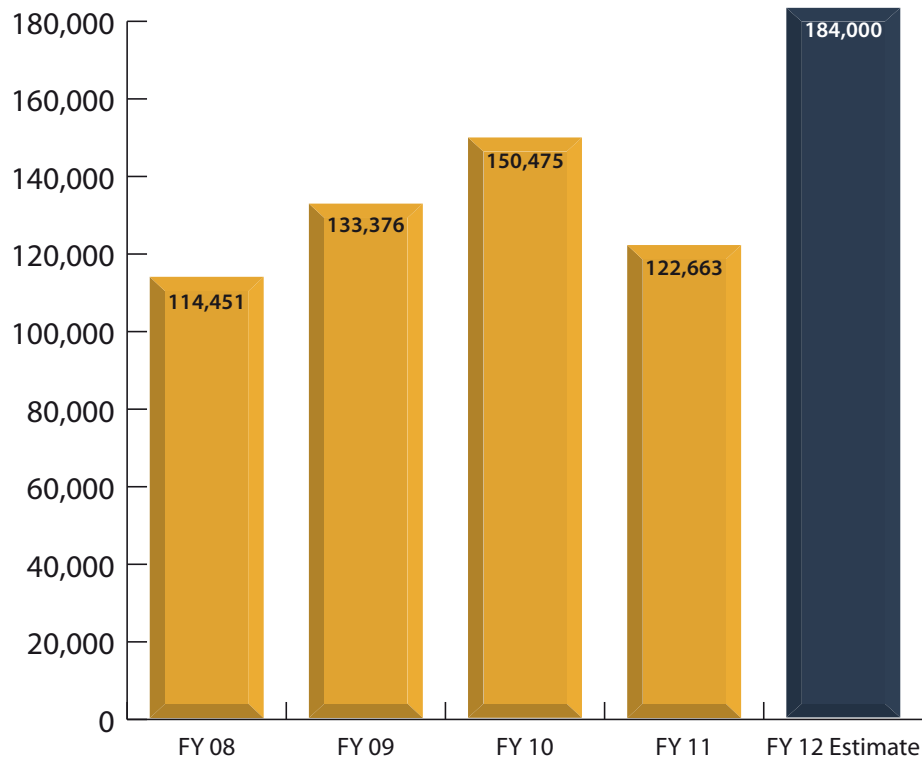


# ADDITIONAL INFORMATION

## Potential BVA Workload in VBA

Number of New Notices of Disagreement Received in the Field				
MONTH	FY 08	FY 09	FY 10	FY 11
October	10,217	12,036	12,956	12,587
November	8,781	9,530	11,079	11,248
December	7,962	10,229	11,685	9,719
January	9,552	10,627	11,710	10,130
February	9,654	10,709	12,260	9,233
March	10,020	12,226	14,885	11,041
April	10,245	11,633	13,138	9,414
May	9,745	10,767	12,045	9,829
June	9,704	11,926	13,038	10,152
July	10,230	11,813	12,416	9,513
August	9,503	11,119	13,338	10,562
September	8,838	10,761	11,925	9,235
<b>FY TOTAL</b>	<b>114,451</b>	<b>133,376</b>	<b>150,475</b>	<b>122,663</b>

## Notices of Disagreement Received FY 08 - FY 11



## BVA Dispositions by VA Program FY 2011

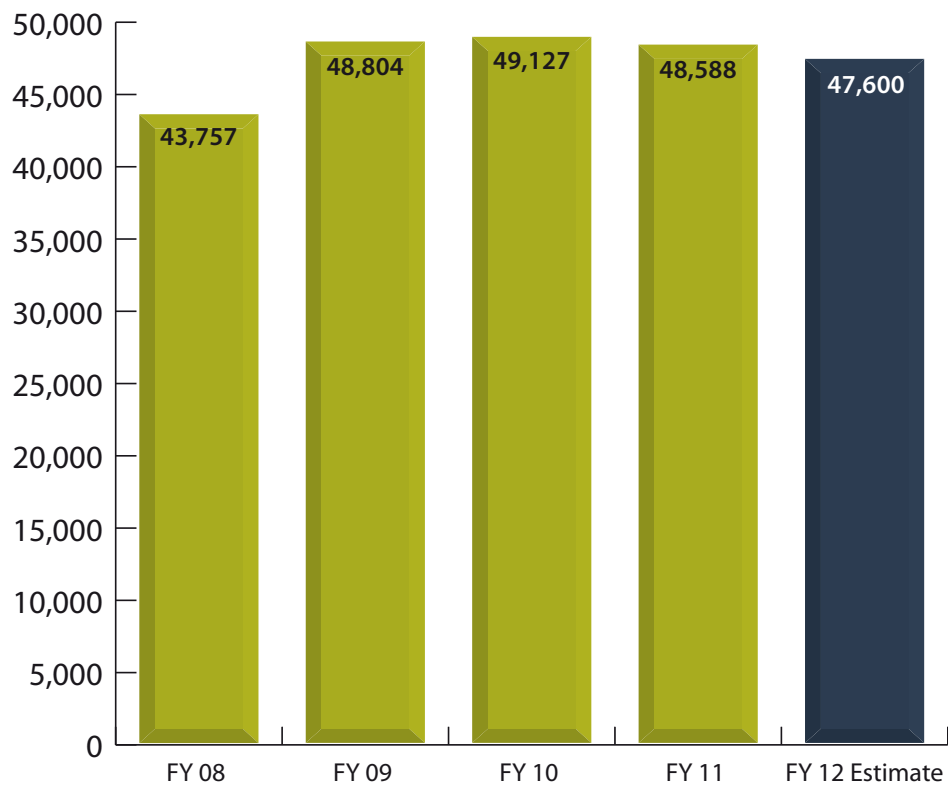
APPEAL PROGRAM	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
Burial Benefits	10	14.1%	19	26.8%	39	54.9%	3	4.2%	71	0.1%
Compensation	13,475	29.1%	20,672	44.6%	10,817	23.3%	1,390	3.0%	46,354	95.4%
Education	43	10.9%	120	30.4%	219	55.4%	13	3.3%	395	0.8%
Insurance	0	0.0%	5	71.4%	2	28.6%	0	0.0%	7	0.01%
Loan Guaranty	0	0.0%	4	50.0%	4	50.0%	0	0.0%	8	0.02%
Medical	109	21.3%	169	33.1%	187	36.6%	46	9.0%	511	1.1%
Pension	60	10.8%	194	35.0%	272	49.1%	28	5.1%	554	1.1%
VR&E	5	9.8%	25	49.0%	18	35.3%	3	5.9%	51	0.1%
Other Programs	7	15.9%	14	31.8%	21	47.7%	2	4.6%	44	0.1%
BVA Original Jurisdiction	9	10.6%	2	2.4%	55	64.7%	19	22.4%	85	0.2%
Multiple Program Areas	124	24.4%	240	47.2%	129	25.4%	15	3.0%	508	1.0%
<b>GRAND TOTAL</b>	<b>13,842</b>	<b>28.5%</b>	<b>21,464</b>	<b>44.2%</b>	<b>11,763</b>	<b>24.2%</b>	<b>1,519</b>	<b>3.1%</b>	<b>48,588</b>	<b>100%</b>

## BVA Dispositions by Representation FY 2011

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent
American Legion	2,705	27.8%	4,423	45.4%	2,237	23.0%	375	3.9%	9,740	20.0%
AMVETS	63	29.0%	78	35.9%	69	31.8%	7	3.2%	217	0.4%
Disabled American Veterans	4,212	29.8%	6,290	44.6%	3,143	22.3%	467	3.3%	14,112	29.0%
Military Order of the Purple Heart	138	31.9%	190	43.9%	94	21.7%	11	2.5%	433	0.9%
Paralyzed Veterans of America	148	27.9%	237	44.7%	121	22.8%	24	4.5%	530	1.1%
Veterans of Foreign Wars	1,322	30.7%	1,854	43.1%	1,007	23.4%	118	2.7%	4,301	8.9%
Vietnam Veterans of America	382	28.7%	665	49.9%	241	18.1%	44	3.3%	1,332	2.7%
State Service Organizations	2,243	28.0%	3,413	42.7%	2,162	27.0%	180	2.3%	7,998	16.5%
Attorney	1,295	30.1%	2,1151	49.2%	759	17.7%	127	3.0%	4,296	8.8%
Agent	71	32.7%	91	41.9%	47	21.7%	8	3.7%	217	0.4%
Other Representation	240	26.7%	376	41.9%	259	28.8%	23	2.6%	898	1.8%
No Representation	1,023	22.7%	1,732	38.4%	1,624	36.0%	135	3.0%	4,514	9.3%
<b>GRAND TOTAL</b>	<b>13,842</b>	<b>28.5%</b>	<b>21,464</b>	<b>44.2%</b>	<b>11,763</b>	<b>24.2%</b>	<b>1,519</b>	<b>3.1%</b>	<b>48,588</b>	<b>100%</b>

<b>BVA DECISIONS</b>					
<b>Fiscal Year</b>	<b>Decisions</b>	<b>Allowed</b>	<b>Remanded</b>	<b>Denied</b>	<b>Other</b>
2008	43,757	21.9%	36.8%	38.9%	2.5%
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%

### **BVA Decisions FY 08 - FY 11**



## BVA Operating Statistics

	<b>FY 2008</b>	<b>FY 2009</b>	<b>FY 2010</b>	<b>FY 2011</b>
<b>Decisions</b>	43,757	48,804	49,127	48,588
<b>Case Receipts*</b>	40,916	49,783	52,526	47,763
<b>Cases Pending**</b>	36,452	40,688	45,722	41,005
<b>Hearings - VACO</b>	672	470	589	625
<b>Video</b>	2,891	3,375	3,979	4,355
<b>Field</b>	7,089	7,784	8,947	9,747
<b>TOTAL</b>	10,652	11,629	13,515	14,727
<b>Decisions per FTE</b>	93.2	93.0	89.5	90.8
<b>BVA FTE</b>	469	525	549	535
<b>BVA Cycle Time</b>	155	100	99	119
<b>Cost per Case</b>	\$1,365	\$1,407	\$1,516	\$1,574

\* Case Receipts are 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).

\*\* Pending figures 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 2011