

The Effects of the Comptroller General's 1954 Report to Congress Regarding the Compensation and Pension Program of the Veterans Administration

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*"Those who cannot remember the past are condemned to repeat it."*²

INTRODUCTION

The last surviving U.S. Veteran of World War I, Frank Buckles, died in February 2011, more than 90 years after the end of that war. His death serves as a reminder that veterans can live long past the end of the wars in which they fought. Consequently, it is not unreasonable to expect that claims from Veterans of World War II and the Korean Conflict will be the subject of review for another generation. It is, therefore, not surprising that a review of compensation cases conducted across the Veterans Administration (VA) in the mid-1950s and early 1960s continues to echo in present cases.

This article will examine the review in depth, including the event that precipitated it, and will discuss how VA implemented it. Because VA failed to comply with their own regulations regarding reductions in ratings and severance of service connection, a grave injustice was done to thousands of veterans. VA should take action to rectify this injustice.

In July 1954 the Comptroller General of the United States³ published the Review of Compensation and Pension Program Washington Offices Veterans Administration ("July 1954 GAO Report").⁴ Although the GAO Report did not reveal any specific pattern of weakness, it was critical of the VA⁵ in several areas. The main areas were not actually conducting routine future examinations in cases where a previous determination had been made that one was warranted, assigning ratings that were not warranted by the medical evidence, and canceling examinations without authorization from the Chairman of the Rating Board.⁶

In response to the GAO Report VA initiated a national review ("the Review") that resulted in the severance of service connection or reduction in assigned disability rating for thousands of veterans. It has been sixty years since the Review was initiated in 1954. Yet some of these cases are still working their way through the adjudicatory process on the basis of error in regional office ("RO") decisions that were done during the Review.

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² GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* 284 (1920).

³ The Comptroller General is the head of the Government Accountability Office (GAO). *Office of the Comptroller General*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/about/workforce/ocg.html> (last visited Aug. 30, 2014). At the time of this Report the GAO was known as the General Accounting Office. The name was changed to the Government Accountability Office on July 7, 2004, when the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 111, was signed. *Working for Good Government Since 1921*, U.S. GOV'T ACCOUNTABILITY OFF., <http://www.gao.gov/about/history/articles/working-for-good-government/01-introduction.html/> (last visited AUG. 30, 2014).

⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, B-114859, REVIEW OF COMPENSATION AND PENSION PROGRAM, WASHINGTON OFFICES, VETERANS ADMINISTRATION (1954) [hereinafter July 1954 GAO Report].

⁵ The Veterans Administration (VA), which was established on July 21, 1930, as a result of an executive order signed by President Hoover, became the Department of Veterans Affairs on March 15, 1989, when the Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988), became effective.

⁶ See July 1954 GAO Report, *supra* note 4, at 43-57.

Even though more than five decades have passed since the Review was completed in 1962, the effects still linger to this day. Therefore it is important to understand what happened and why. Absent a full understanding of what happened during the Review, today's VA decision makers are likely to repeat the mistakes of their predecessors.

Generally the issue for consideration now is whether there was clear and unmistakable error (CUE) in the severance of service connection or error in the reduction in the rating for the disability in question.⁷ Cases affected by the Review are easily identified because the rating sheet, under the heading of Jurisdiction,⁸ will state either "DA Letter 12/14/54" or "Nationally authorized review."

Any veteran who was receiving compensation or pension at the time the Review was in progress would have had his or her case reviewed even if no changes were made to the rating. A current appealed case dealing with an issue that is seemingly unrelated to what happened in the 1950s may contain an inextricably intertwined issue raised by the record, the appellant, or the appellant's representative, such as new and material evidence to re-establish service connection for a disability that was severed as part of the Review.⁹ Cases involving Dependents Indemnity Compensation (DIC) could also be impacted by the Review if the veteran was in receipt of a total rating for less than ten years.¹⁰ This situation would be applicable if a total rating, either schedular or on the basis of individual unemployability, was reduced as part of the Review. If the reduction was erroneous, and but for the error the veteran would have been in receipt of a total rating for ten years or more, the widow would be entitled to DIC.¹¹

It is also important to understand the tenor of the times. While VA had procedural safeguards in place to guard against arbitrary reductions of disability ratings that had been in effect for long periods of time (e.g. longer than five years), as well as arbitrary severances, no judicial body existed to enforce them. Therefore ROs could and did ignore VA regulations. Decisions by the Board of Veterans' Appeals (Board) at that time were final and judicial review of Board decisions did not exist.¹² From July 28, 1933, when President Roosevelt signed Executive Order 6230, which created the Board, until November 18, 1988, when President Reagan signed the Veterans Judicial Review Act of 1988,¹³ there was no real recourse from an unfavorable Board decision.¹⁴ In the absence of a judicial body to review agency decisions, the Board was, in essence, "King of the Hill" and could do, and in fact did, pretty much whatever it wanted. It is this

⁷ Because the allowable time to appeal the original decision by the regional office (RO) in any case affected by the Review has long since passed, there is only one way to obtain a review of any reduction/severance today. This is by mounting a collateral attack on the original decision by alleging that there was clear and unmistakable error (CUE) in the reduction of the rating for the disability in question or the severance of service connection. Each of the following must be demonstrated to establish CUE: (i) the decision being challenged must be undebatably erroneous; (ii) the alleged error, had it not been made, would have changed the outcome of the decision; and (iii) the allegation of CUE must be based on the law and evidence that existed at the time of the decision. *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992). The regulation in effect during most of the Review period that pertained to CUE was 38 C.F.R. § 3.9 (1949). The current regulation providing for CUE is 38 C.F.R. § 3.105(a) (2014).

⁸ At the time of the Review, individual ratings generally had four parts to them: Jurisdiction, Issue, Facts, and Decision.

⁹ Inextricably intertwined issues are those that are so closely tied together that the outcome of one would affect the outcome of the other. *See Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001); *Harris v. Derwinski*, 1 Vet. App. 180, 183-84 (1991).

¹⁰ *See* 38 U.S.C. § 1318 (2012). This statute provides that if a veteran is rated as totally disabled for compensation purposes for a period of ten consecutive years, or five years from date of discharge from service, or one year if a prisoner of war, and dies from a disability not due to service, then the surviving spouse is eligible for dependents indemnity compensation. *Id.*

¹¹ *See* 38 C.F.R. § 3.22(b)(1) (2014).

¹² *About the Court*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/about.php> (last visited Aug. 30, 2014). Congress addressed the question of judicial review of veterans' claims in the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, and elected not to provide for it.

¹³ Pub. L. No. 100-687, 102 Stat. 4105.

¹⁴ BOARD OF VETERANS' APPEALS, DEP'T OF VETERANS AFFAIRS, REP. OF THE CHAIRMAN, FISCAL YEAR 1994, at 1 (1994), available at http://www.bva.va.gov/docs/Chairmans_annual_Rpts/BVA1994AR.pdf.

lack of judicial review that caused these cases to go unnoticed. While it is true that the appellant could file a motion for reconsideration in the event of an adverse Board decision, any expanded panel of six members would have included the same three board members that rendered the original decision.¹⁵

During the early years of the author's career these cases were fairly prevalent and curiosity about the meaning of headings such as DA Letter 12/14/54 and Nationally Authorized Review triggered his interest. Given VA's current backlog of claims,¹⁶ the author believes it is safe to say that it would be very difficult, if not impossible, for VA to undertake a review of this magnitude today. In addition given the fact that judicial review is now a reality, the likelihood of one or more affected parties suing VA would be high.¹⁷

OVERVIEW

This article will begin by providing the history of the Review, including its origins. Then the after effects of the Review will be addressed followed by a discussion of two actual cases that were directly impacted by the Review as well as comments on them. This article will also show that a grave injustice was done to an untold number of veterans. The author then suggests that VA should take the steps necessary to attempt to identify the individuals affected by the Review that are still alive, or their survivors, and determine whether the severance/reduction was proper. That section will be followed by some closing comments.

HISTORY

Prior to the release of the July 1954 GAO Report, the GAO's Division of Audits conducted a spot audit at VA's Washington, D.C., RO and VA Central Office. The findings from the audit were incorporated in the July 1954 GAO Report.¹⁸ GAO sent a memorandum to VA officials in January 1954, which summarized their tentative findings following a review of compensation cases in the Washington, D.C., RO. This memorandum prompted VA to undertake a review of all cases in which compensation or pension was being paid to veterans under the age of 55. The spot audit, which was conducted pursuant to the provisions of the Budget and Accounting Act of 1921 and the Accounting and Auditing Act of 1950, was submitted to the House of Representatives Sub-Committee on Appropriations. GAO submitted the formal Report to both houses of Congress on June 4, 1956.¹⁹

¹⁵ This practice is now prohibited by the provisions of 38 U.S.C. § 7103(b)(2) (2012). Prior to the enactment of the Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, Pub. L. No. 103-271, 108 Stat. 740, Board decisions were rendered by three member panels so any reconsideration decisions rendered prior to that time would have been made by six member panels. This is still the case if reconsideration is ordered on a panel decision. After July 1994, when Congress gave the Board authority to render single member decisions, any reconsideration of a single member decision is made by a panel of three members.

¹⁶ According to the most recent information from the Veterans Benefits Administration, the VA processed 1.17 million claims in 2013 but received 1.04 million. Bob Brewin, *VA Processed 100,000 Fewer Claims than Planned Last Year*, NEXTGOV (Oct. 22, 2013), <http://www.nextgov.com/defense/2013/10/va-processed-100000-fewer-claims-planned-last-year/72389/>.

¹⁷ A prime example of what could happen if VA were to undertake a review of this magnitude today with a view toward saving money is the case of *Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34 (D.P.R. 1993). In this case, the Plaintiffs alleged that VA conducted a discriminatory, special review against Puerto Rican and U.S. Virgin Island veterans in receipt of a 100 percent disability rating for a psychiatric condition. The review, which was instituted by VA in 1983, resulted in reductions for many of these veterans. As a result of the lawsuit, which was brought by the National Veterans Legal Services Program, VA settled the case in 1993. The settlement cost VA over \$60,000,000 in retroactive benefits. Undoubtedly judicial review is what made the difference in the outcome here versus what happened as a result of the Review. Without judicial review, VA might have been able to do this without being challenged.

¹⁸ While it is unclear when the spot audit took place, the July 1954 GAO Report suggests that it took place as early as 1953. See July 1954 GAO Report, *supra* note 4, at Appendix B.

¹⁹ Letter from the Comptroller Gen. of the U.S. to the Speaker of the House of Representatives (Jun. 4, 1956), available at <http://archive.gao.gov/lglpdf71/a82099.pdf>.

The audit examined approximately one thousand cases.²⁰ Within this group of cases the auditors found 104 cases with specific errors.²¹ The errors were both procedural and substantive in nature. The most common error found in this category was misapplication of the rating schedule.²² Of the 104 cases with errors, 29 cases, or approximately 28%, fell into this category.²³ In addition to the 104 cases with specific errors, an additional 185 cases were found where the procedures pertaining to re-examinations were not followed. One hundred twenty of those cases involved cancellation of routine future examinations²⁴ without the approval of the Chairman of the Rating Board.²⁵

As a result of the spot audit, the Deputy Administrator (“DA”) for Veterans Benefits, Ralph Stone,²⁶ sent a letter to the ROs on April 2, 1954.²⁷ In this letter he cited the spot audit and instructed all VA offices to “take such action immediately as is necessary to determine whether similar practices exist at your station and if such exist to take corrective action.”²⁸ The letter authorized overtime if needed and a deadline of May 1, 1954, was established for each station to provide an estimate of the problems found and the results obtained. DA Stone’s letter focused mainly on the subject of routine future examinations, or lack thereof.

On December 14, 1954, DA Stone issued another letter extending the Review and providing more guidance to the field.²⁹ He also indicated that it was “not anticipated” that overtime would be needed in order to conduct the Review. He further stated that the primary object of the Review was to ensure that the provisions of VA Regulation 1185³⁰ were “properly applied.”³¹

Because the federal government’s fiscal year at the time ran from July 1 to June 30,³² and the Review had only been underway for a couple of months, the VA Administrator’s Annual 1954 Report did not mention the Review.³³ It was however mentioned in the 1955 Report. The Report stated that the purpose of the Review was to ensure the following:

²⁰ Letter from Ralph Stone, Deputy Adm’r, Dep’t of Veterans Benefits 1 (Apr. 2, 1954) [hereinafter Apr. 1954 Letter from Ralph Stone] (on file with author).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* Routine future examinations were much more common then than they are now because of the current backlog of claims.

²⁵ Rating boards were three member panels that rendered rating decisions. Each panel was headed by a chairman and included a member who was a physician.

²⁶ Deputy Administrator (DA) Ralph Stone was the head of the Department of Veterans Benefits, which was established in accordance with the reorganization plan approved by the President in June 1953.

²⁷ Apr. 1954 Letter from Ralph Stone, *supra* note 20.

²⁸ *Id.*

²⁹ Letter from Ralph Stone, Deputy Adm’r, Dep’t of Veterans Benefits (Dec. 14, 1954) [hereinafter Dec. 1954 Letter from Ralph Stone] (on file with author).

³⁰ 38 C.F.R. § 3.185 (Supp. 1954). VA Regulation 1185, which dealt with routine future examinations for disability rating purposes and when they were warranted, was originally promulgated in 1937 as VA Regulation and Procedure 1185. It was revised on numerous occasions and is the predecessor to 38 C.F.R. § 3.327, which is in effect today. Effective 1952, VA Regulation 1185 provided for a graduated schedule of routine future examinations. The higher the rating, the more frequent the routine future examinations. For example, if a disability rating was 10-30%, a routine future examination would be done five years after the initial rating. If the rating was 40-70%, the routine future examination would be done three years after the initial rating. If the rating was 80-100%, the routine future examination would be done two years after the initial rating. The July 1954 GAO Report found that ROs were routinely failing to abide by this regulation by failing to schedule re-examinations.

³¹ Dec. 1954 Letter from Ralph Stone, *supra* note 29.

³² Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297. The Act changed the dates of the federal government’s fiscal year from July 1 to June 30, to October 1 to September 30, effective fiscal year 1977.

³³ See 1954 ADMIN. VETERANS AFFAIRS ANN. REP.

(1) that VA regulations controlling future scheduled examinations are properly applied on an individual case basis and in a reasonable and realistic manner and (2) that the adjudication of each case is sound and in accordance with the applicable laws and regulations and that veterans are not denied benefits to which they are entitled and are not maintained on the rolls if the ratings pursuant to which they were added to the rolls were clearly and unmistakably erroneous.³⁴

The Report further stated that the duration of the Review was “indefinite.”³⁵

By the time the Administrator's 1956 Report was released, some initial results of the Review were available. While the 1956 Report cited the same two justifications for the Review that were cited previously, the clearly and unmistakably erroneous language was specifically not included.³⁶ There was only a brief mention of the CUE issue as part of the summary of what had happened to date as a result of the Review. In addition the 1956 Report indicated that the Review continued on a “time available basis during the fiscal year.”³⁷ The Report further stated that the Review would eventually cover 1,710,478 cases in which “World War II or Peacetime veterans under the age of 55 [were] receiving compensation for service-connected disabilities and in which World War I and World War II veterans under the age of 55 [were] receiving non-service-connected pension benefits.”³⁸

By the end of the 1956 fiscal year, 572,800 cases out of slightly more than 1.7 million had been reviewed.³⁹ The Administrator was quick to point out that 95% of the cases reviewed as of that time did not require adjustment, and of the 30,173 that did need adjustment, payments were terminated in a total of 12,998 cases.⁴⁰ Put differently, 2.3% of the cases reviewed resulted in payments being terminated for one reason or another. The Administrator also pointed out that 0.045 of 1% of the cases reviewed resulted in payments being terminated due to CUE.⁴¹ In terms of numbers, the cases in which payments were terminated due to CUE amounted to approximately 258. The Administrator's 1956 Report also stated that of the cases that resulted in payments being terminated, most “resulted from an improvement in the condition of the veteran.”⁴² It is not known how many of these terminations/reductions were appealed. The analysis of Board decisions in the 1956 Report broke down the decisions by broad category (*e.g.* disability, death, etc.) but did not mention the ongoing review; nor was it mentioned in the section of the Report dealing with the Board's workload at the time.

The 1957 Report indicated that the number of cases of those reviewed in which no change was warranted had declined to 92.2% and the number of cases reviewed in which payments were terminated due to CUE had more than doubled to slightly more than 1 percent.⁴³ The 1958 and 1959 Reports also showed increases in the number of cases where payments were terminated due to CUE. In the 1960

³⁴ 1955 ADMIN. VETERANS AFFAIRS ANN. REP. 67.

³⁵ *Id.*

³⁶ It is not clear why the clearly and unmistakably erroneous language was not included. It may have been because the number of cases affected by CUE was small. Even though the CUE language was omitted as one of the justifications for the Review, this omission had no practical effect on what was actually happening as a result of the Review. This is because the 1957 Report indicated that the number of cases where payments were terminated due to CUE had more than doubled. 1957 ADMIN. VETERANS AFFAIRS ANN. REP. 65.

³⁷ 1956 ADMIN. VETERANS AFFAIRS ANN. REP. 79.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ 1957 ADMIN. VETERANS AFFAIRS ANN. REP. 65.

Report the percentage of cases reviewed in which no change was made declined again with 91% found requiring no adjustment.⁴⁴ The Report also stated that payments had been terminated in a total of 61,200 cases.⁴⁵ This figure included 1,224 cases where payments were terminated on the basis of CUE.⁴⁶

In the 1962 Report the Administrator stated that the Review of cases that started in 1954 was completed during the fiscal year.⁴⁷ The final results of the 8 year Review were as follows:

Number of cases reviewed:	approximately 1.7 million ⁴⁸
Cases where payment was adjusted:	174,000 ⁴⁹
Cases where payment was terminated:	83,000 ⁵⁰
Cases where payment was increased:	20,700 ⁵¹
Cases where payment was decreased:	70,100 ⁵²

With regard to the 83,000 cases where payments were terminated, the Administrator stated that such terminations occurred “either because the condition was no longer disabling or because the condition had erroneously been considered as service connected. Less than 2 percent were in the latter category.”⁵³

THE EFFECTS OF THE REVIEW

Now that we know what the final figures resulting from the Review were, it would be instructive to see how the results of the Review affected veterans and, to the extent possible, VA itself.

We know from the 1962 Report that 83,000 veterans had their benefits terminated. In addition, 70,100 had their benefits reduced. Altogether over 153,000 veterans either lost their benefits entirely or had their payments reduced. During the Review, which spanned from 1954 to 1962, the average monthly compensation payment was approximately \$60.78.⁵⁴ The equivalent in today’s dollars would be \$504.13.⁵⁵ This equates to slightly more than \$5 million in lost compensation⁵⁶ or \$41.8 million in today’s dollars.⁵⁷

⁴⁴ 1960 ADMIN. VETERANS AFFAIRS ANN. REP. 58.

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See* 1962 ADMIN. VETERANS AFFAIRS ANN. REP. 53.

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.* at 54.

⁵² *See id.*

⁵³ *See id.* at 53.

⁵⁴ *See* 1962 ADMIN. VETERANS AFFAIRS ANN. REP. 236; 1961 ADMIN. VETERANS AFFAIRS ANN. REP. 244; 1960 ADMIN. VETERANS AFFAIRS ANN. REP. 214; 1959 ADMIN. VETERANS AFFAIRS ANN. REP. 198 (providing the average monthly compensation figures back to 1950).

⁵⁵ *See CPI Inflation Calculator*, BUREAU OF LAB. & STATS., http://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 30, 2014).

⁵⁶ This figure was obtained by multiplying the average annual monthly compensation rate for the years that the Review was in progress by 83,000, which was the number of veterans that had their benefits terminated.

⁵⁷ This figure was obtained by multiplying the average monthly compensation in 2014 dollars, \$504.13, by 83,000, which was the number of veterans that had their compensation terminated.

The average annual budget authority⁵⁸ for VA during the Review was \$4,834.5 million dollars⁵⁹ (or \$40,078.9 million⁶⁰ in constant 2014 dollars). Therefore, the \$5 million in lost compensation was slightly more than one tenth of one percent of VA's average budget authority during the time the Review was in progress.

The average number of veterans receiving compensation during the period covered by the Review was approximately 1.9 million. Using the figures supplied by VA, that means that slightly more than 4% of the veterans receiving compensation during this period had their benefits terminated and another 3.7%, had their benefits reduced. Altogether, about 8%, of the veterans receiving compensation during that period were adversely affected by the Review. The figure for veterans that had their benefits increased, 20,700 veterans, pales in comparison to the number of veterans who had their benefits terminated or reduced. While there is no way to determine how many of the terminations/reductions were appealed due to the lack of statistics addressing this issue in the Administrator's Annual Reports, it may be possible to assume that not many were appealed due to several factors.

First, the average annual unemployment rate during the period of time the Review was in progress was 5.4%.⁶¹ Because unemployment was low, there was less need for VA compensation. Second, the Administrator's Annual Reports for these years generally reveal that the number of appeals filed in the field offices declined significantly from 55,000 in 1954, the first year of the Review, to 40,500 in 1962, the last year of the Review.⁶² Third, the average age of the veteran population during the period covered by the Review ranged from 38 in 1955 to 43 in 1962,⁶³ a period which would correspond to approximately mid-career. All of these factors lend credence to the hypothesis that few of the reductions/terminations were appealed at the time of the original decision.⁶⁴

In addition to the reductions/terminations cited above, there is yet another way these veterans were affected by the Review. As noted by the Administrator, many of the reductions were based on an improvement in the underlying disability. Further, many of these cases involved compensable ratings that had been in effect for more than five years. Therefore, the rating boards were required to apply the provisions of 38 C.F.R. § 3.172, which was the regulation in effect during most of the Review period, that dealt with stabilization of ratings (commonly known as the 5-year rule). The 4 parts of this regulation are outlined below. This regulation was the predecessor to today's 38 C.F.R. § 3.344.

⁵⁸ See *Glossary*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/budget_authority.htm (defining budget authority as the "[a] uthority provided by law to enter into obligations that will result in outlays of Federal funds") (last visited Aug. 30, 2014).

⁵⁹ See CHRISTINE SCOTT, CONG. RESEARCH SERV., *VETERANS AFFAIRS: HISTORICAL BUDGET AUTHORITY FY 1940-FY 2012* (2013).

⁶⁰ As the *CPI Inflation Calculator* used by the Bureau of Labor Statistics does not have the ability to process such figures, it was necessary to use the U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last visited Aug. 30, 2014). This figure was obtained by converting the budgetary authority for each year the Review was underway to 2014 dollars using the inflation calculator cited above. These figures were then added together and an average was obtained.

⁶¹ See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. & STATS., <http://www.bls.gov/cps/cpsaat01.htm> (last modified Feb. 26, 2014) (reporting the unemployment for the general population for the years 1954 to 1963 as separate figures for unemployed veterans were not kept at the time).

⁶² See 1962 ADMIN. VETERANS AFFAIRS ANN. REP. 109; 1960 ADMIN. VETERANS AFFAIRS ANN. REP. 106. In 1958 there was a 10.1% increase in appeals over the previous year. 1958 Admin. Veterans Affairs Ann. Rep. 94. This increase was the only exception to the downward trend. Other than stating that the issues involved in this increase were claims to establish service connection and increased ratings, the Administrator did not elaborate on this increase. It is at least possible that the spike in appeals in 1958 included some veterans that were affected by the Review. It was common practice at that time to phrase a reduction issue as entitlement to an increased rating or entitlement to service connection as opposed to addressing the proper issue of whether the reduction in the rating or severance of service connection was proper. Since the issues were incorrectly phrased, it is impossible to determine how many of the cases affected by the Review were appealed.

⁶³ See 1962 ADMIN. VETERANS AFFAIRS ANN. REP. 6; 1955 ADMIN. VETERANS AFFAIRS ANN. REP. 9.

⁶⁴ The author has worked on quite a few of these cases over the years and observed that it was rare for veterans to appeal a reduction/termination of a benefit at the time the decision was made.

The 5-year rule, which provides for stabilization of disability ratings that have been in effect for long periods of time (*e.g.* 5 years or more), had 4 basic provisions.⁶⁵ First, the disability had to be reviewed in relation to its history.⁶⁶ Second, prior examinations had to be reviewed to determine whether they were at least as full and complete as the examination(s) on which benefits were granted or continued.⁶⁷ Third, the rating board had to determine whether there was material improvement in the disability.⁶⁸ Fourth, the rating board had to determine whether the improvement was *permanent*⁶⁹ and would be maintained under the ordinary conditions of life.⁷⁰

Many of the cases the author has worked over the years that were affected by the Review involved rating reduction that had been in effect for more than five years. In fact some involved ratings that had been in effect for over a decade. *Without exception* 38 CFR § 3.172 was not applied in its entirety in any of the cases the author worked where the assigned rating had been in effect for more than five years, and in some cases for more than ten years.

While the RO may have complied with the first two parts, there was no compliance with the remaining two parts. In addition some of the severances involved disability ratings that had been in effect for more than ten years. The concept of protected ratings as we know it today did not become law until 1958, when legislation was enacted providing for preservation of total disability ratings.⁷¹ Legislation providing for protection of ratings, other than total ratings, which had been in effect for twenty years or more, was not enacted until 1964.⁷² Furthermore, legislation prohibiting severance of service connection after it has been in effect for ten years or more, except upon a showing of fraud in the original grant or a showing that the person concerned did not have the requisite service or character of discharge, was not enacted until June 10, 1960.⁷³

One of the primary concerns cited by the GAO in their Report was the fact that rating boards were not conducting routine future examinations to determine whether the disability in question had improved. Section (a) of 38 C.F.R. § 3.185, which was the regulation in effect during most of the Review pertaining to re-examinations, had several provisions. First, a re-examination would be scheduled when the evidence indicated that there had been a material decrease in the severity of the disability or there was evidence pertinent to the case indicating that the disability would likely improve materially in the future. Second, an automatic re-examination after the initial examination in two years if the disability rating was 80 percent or higher, in three years if the disability rating was 40 to 70 percent, and five years if the disability rating was 10 to 30 percent.⁷⁴

⁶⁵ 38 C.F.R. § 3.172 (1949).

⁶⁶ *Id.* at § 3.172(a).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* But see 38 C.F.R. § 3.344(a) (1962) (stating that the improvement “will be maintained under the ordinary conditions of life,” but not requiring a permanent improvement).

⁷⁰ § 3.172(a).

⁷¹ Act of Sept. 2, 1958, Pub. L. No. 85-857, § 110, 72 Stat. 1113 (preserving total disability ratings that had been in effect for 20 years or more).

⁷² Act of Aug. 19, 1964, Pub. L. No. 88-445, 78 Stat. 464 (striking out “total” from the “preservation of total disability ratings” in the section heading and adding language specifying that a disability rating that had been in effect for twenty years or more could not be reduced below that percentage unless the original rating was based on fraud).

⁷³ Act of Jun. 10, 1960, Pub. L. No. 86-501, § 359, 74 Stat. 195. Prior to the enactment of this legislation, rating boards were free to sever service connection on the basis of a CUE, even if it had been in effect for more than ten years, and they did so.

⁷⁴ 38 CFR § 3.185(b)(1)(i) (1954).

Section 3.185 also provided for re-examination after the initial rating when the rating for the disability was increased or decreased by more than 10 percent of the prior rating.⁷⁵ A re-examination would be scheduled if the rating for the disability remained unchanged for five years following the examination, disclosing “the current percentage of disability.”⁷⁶ The regulation also outlined circumstances when no future examination would be scheduled, to include when the disability was static, meaning it was not felt that it would improve; when the disability from the disease was “permanent in character,” such that there was “no likelihood of improvement;” and when, following re-examination, the disability had existed “without material improvement for a period of [five] years or more.”⁷⁷

There were other provisions in the regulation in question dealing with re-examinations (*e.g.* tuberculosis, prisoner of war, and World War I cases where the veteran was over the age of 55), but the provisions cited above are undoubtedly the most important sections of the regulation that existed at the time. The regulation remained unchanged during most of the period of the Review, until it was replaced by 38 C.F.R. § 3.327 on February 24, 1961.⁷⁸

While the GAO took VA to task for not conducting routine future examinations in accordance with § 3.185, we know from the Administrator's comments on the draft Report that the reason for not conducting the examinations was the workload at the time. In a letter to the GAO's Director of Audits, Robert Long, VA Administrator Harvey Higley stated that in an effort to reduce the volume of work and improve quality, “the Administration had followed a policy of canceling as many examinations as possible.”⁷⁹ The letter also stated that, “in retrospect no other course is believed to have been possible; however, your report has been convincing that this effort has gone too far.”⁸⁰

The Administrator also stated that as a result of the GAO Report, the review of cases was undertaken. What is interesting about the Administrator's letter is his comment that a properly executed review of the nature that VA was conducting “is a time consuming affair and has made slow progress.”⁸¹

The Administrator's comments about the amount of time the Review was taking and the progress of it are clear indications that VA officials underestimated the time and effort that would be required to undertake a review of this magnitude. He also stated that the completion of the Review “is anticipated in about three years [sic] time.”⁸² His estimate proved to be overly optimistic because the Review was not completed for another six years, which was double the amount of time estimated by the Administrator. The Administrator's comments are a clear indication that this Review was having an adverse effect on VA and was certainly increasing its workload. In addition, his comments are not surprising when one considers that the Korean War had just ended in 1953 and the Review was initiated in 1954. The end of the Korean Conflict obviously generated more veterans, at least some of whom filed claims.⁸³

⁷⁵ *Id.* at § 3.185(b)(1)(ii)(a)-(b). The wording of the regulation dealing with decreases provided that if the amount of the reduction was more than 10% of the prior rating, a re-examination would be scheduled in 2 years irrespective of the actual rating.

⁷⁶ *Id.* at § 3.185(b)(1)(ii)(c).

⁷⁷ *Id.* at § 3.185(b)(2)(i)-(iii).

⁷⁸ See 26 Fed. Reg. 1586 (Feb. 24, 1961).

⁷⁹ Letter from Harvey Higley, VA Adm'r, to Robert Long, Dir. of Audits, U.S. Gov't Accountability Office 1 (Jan. 17, 1956), <http://www.gao.gov/assets/280/275266.pdf>. In 1950 and 1951 VA undertook a “general review of cases” to determine whether the necessity for routine future examinations was determined “in accordance with prescribed criteria” so that unnecessary examinations would not be conducted. July 1954 GAO Report, *supra* note 4, at 56.

⁸⁰ Letter from Harvey Higley to Robert Long, *supra* note 78, at 1.

⁸¹ *Id.*

⁸² *Id.*

⁸³ As of June 30, 1954, there were nearly 113,000 Korean Conflict veterans. 1954 ADMIN. VETERANS AFFAIRS ANN. REP. 236. By June 30,

There is yet another indication that this Review was affecting VA. DA Stone issued at least three different system-wide letters dealing with the subject as well as at least two different Information Bulletins (IB)⁸⁴ providing further instructions when the severance of service connection was proposed in cases involving running awards. The letters were dated April 2, 1954; December 14, 1954; and December 29, 1954. The first letter commenced the Review.⁸⁵ The second letter, which is the one most commonly cited in rating decisions from the time, extended it.⁸⁶ The third letter provided more instructions for conducting the Review.⁸⁷

In addition, there is an indication that VA was cutting corners in cases where severance was proposed. For example, DA Stone sent a teletype to the field on September 2, 1955, instructing the ROs to forward all cases in which severance was proposed to the central office. In this same teletype he stated “[d]o not inform veterans or representatives of proposal to sever.”⁸⁸ DA Stone later issued IB 8-130 stating that compliance with the requirements of the Review, including the veteran’s age, was “to be determined by the status of the case as of December 14, 1954,” which was the date of his second letter to the field stations on the subject.⁸⁹ It is interesting to note that the number of cases where service connection was severed increased dramatically during the Review period, reaching a peak of 7,242 during fiscal year 1958.⁹⁰ The overwhelming majority of these cases involved World War II veterans.⁹¹ Given the huge demobilization following the end of World War II, this is not surprising as VA was likely inundated with claims.

Finally, one must consider the fact that an untold number of man hours were expended in conducting the Review. This is time that could have been better spent processing claims. In addition, even VA hospitals were affected by the Review because they had to conduct additional examinations in cases where VA was considering a reduction that might not otherwise have been conducted.

EXAMPLES OF TWO CASES INVOLVING THE 1954 REVIEW AND THEIR OUTCOMES

No discussion of how the Review affected veterans would be complete without providing examples of actual cases it affected. The author believes the cases cited provide a better understanding of what happened as a result of the Review. Below is a summary of two cases involving the Review, which the author personally worked.⁹²

1955, this figure was almost 154,000, an increase of more than 36 percent. See 1955 Admin. Veterans Affairs Ann. Rep. 231. This is a clear indication that Korean War veterans were filing claims with VA.

⁸⁴ Information Bulletins were one method that VA used to make policy at the time and are similar to the Fast Letters that VA uses today.

⁸⁵ See Apr. 1954 Letter from Ralph Stone, *supra* note 20.

⁸⁶ See Dec. 1954 Letter from Ralph Stone, *supra* note 29.

⁸⁷ Letter from Ralph Stone, Deputy Adm’r, Dep’t of Veterans Benefits, to Managers, all VA ROs, and the D.C. Veterans’ Benefits Office (Dec. 29, 1954) (on file with author).

⁸⁸ Teletype from Ralph Stone, Deputy Adm’r, Dep’t of Veterans Benefits, to Cent. Office Dir. of Veterans Servs. (Sept. 2, 1955) (on file with author).

⁸⁹ DEP’T OF VETERANS BENEFITS INFO. BULLETIN, COMP. AND PENSION, IB 8-130, 1 (1956).

⁹⁰ 1958 ADMIN. VETERANS AFFAIRS ANN. REP. 221.

⁹¹ *Id.*

⁹² Facts provided in these cases have been obtained from redacted documents that are on file with the author unless otherwise specified.

Case No. 1

The Veteran served honorably in the U.S. Army from September 1940, to June 1945. His entrance examination showed no abnormalities of the feet. He was diagnosed at separation with second-degree bilateral pes planus moderately severe. The Veteran filed his original claim on June 22, 1945. In a July 1945 decision, the RO granted service connection for bilateral pes planus and assigned a 10% disability rating, effective the day after discharge.

Following a November 1946 VA orthopedic examination, the RO rendered a February 1947 rating decision, which continued the Veteran's 10% rating. The Veteran was scheduled for a routine future examination in February 1952, but for reasons unknown to the author, it was never conducted.⁹³

In October 1960 the Veteran underwent an examination in conjunction with the Review of compensation cases that was underway at the time. He stated that he did not have any problems with his feet as long as he wore proper shoes. The examiner diagnosed first-degree bilateral pes planus with minimal symptoms. Based on the October 1960 examination, the RO reduced the 10% rating to 0%, effective February 7, 1961. The RO gave the Veteran the required 60 days' notice⁹⁴ of the proposed reduction and informed him that he had the right to submit evidence and/or argument to show that the reduction should not be made. The RO also apprised him of his appellate rights following the reduction. The Veteran neither contested the proposed reduction nor appealed the reduction itself.

Nothing else happened until February 2004 when the Veteran filed a claim for an increased rating. Following an examination, which showed an increase in disability, the RO awarded a 10% rating effective the date of the claim for increase. The Veteran did not appeal the effective date. In August 2009, the Veteran raised the issue of CUE in the 1960 reduction citing the RO's failure to consider the provisions of 38 C.F.R. § 3.172. When the RO denied the CUE claim, the Veteran filed a timely Notice of Disagreement and requested review by the Decision Review Officer (DRO). The DRO, after reviewing the file, affirmed the reduction and issued a statement of the case.

In January 2011 the author sought administrative review⁹⁵ of the DRO's decision by the Compensation and Pension Service (C&P Service) of VA Central Office. In a March 2011 decision, C&P Service reversed the DRO's decision and instructed the RO to reinstate the 10% rating retroactive to March 1, 1960. Because the 10% rating had been in effect for more than 14 years when it was reduced, the RO was required to apply all of the provisions of 38 C.F.R. § 3.172 when proposing a reduction, but failed to do so. As a result, the March 1960 rating was *void ab initio*. Had the decision from C&P Service been unfavorable, the case would eventually have been sent to the Board because the Veteran filed his substantive appeal while the case was pending at VA Central Office.

Case No. 2

The next Veteran served honorably in the U.S. Marine Corps from November 1943 to November 1945. While on active duty, he was wounded in action during the invasion of Iwo Jima when he was struck in the right thigh by shrapnel from enemy fire. Entries in the service treatment records

⁹³ Although there is no way to determine for certain why the examination was never conducted, it is distinctly possible that, in light of the Administrator's January 17, 1956, letter to the GAO Director of Audits, it was canceled as part of the Review. See *supra* text accompanying note 78.

⁹⁴ See 38 C.F.R. § 3.9(d) (1956).

⁹⁵ VA ADJUDICATION PROCEDURE MANUAL M22-4, pt. III, ch. 2, ¶ 2.06 (2013).

(STR) indicated that the wound was through and through and that he spent 96 days on the sick list. Although he was returned to duty, he still had physical complaints. Due to his continued physical complaints, he appeared before a Board of Medical Survey in September 1945. A contemporaneous medical rating report indicated that he had $\frac{3}{4}$ inch atrophy and healed tender scars on the medial and lateral sides of the leg with weakness in the movement of the knee. Due to the severity of his wound, he was given a Certificate of Disability for Discharge. He filed his original claim in November 1945 and was initially given a convalescent (pre-stabilization) rating of 50% under the 1933 rating schedule.

A May 1946 VA examination report showed that the Veteran complained of pain in the thigh and of aching in the leg. X-rays revealed some tissue loss as well as several retained foreign bodies (RFBs). Objectively, there was some limitation of motion, weakness in the leg, and some atrophy of the quadriceps muscle. The examiner found that he had a $\frac{1}{4}$ inch leg shortening. He was granted a 30% rating (severe) under the 1933 rating schedule for the muscle group injury and a separate 10% rating for the leg shortening. The combined rating was 40%, and he was scheduled to have a routine future examination in 1951. In August 1946 he was re-rated under the 1945 rating schedule and the rating for the muscle group injury was increased to 40%, which was a rating of severe under the 1945 schedule. As a result of this change, his combined rating was increased to 50%. No change was made to the rating for the leg shortening. Again, it was noted that he would have a routine future examination in 1951, but it was never held.⁹⁶

He underwent an examination in February 1959, which was done as part of the Review. The examination report showed that the Veteran complained of aching in the morning and a stiff thigh when he was on his feet for a prolonged period of time. The examination revealed that there was no thigh atrophy, even though atrophy had been noted previously. The residual scars were well-healed with no muscle loss or herniation. Both legs measured 35 inches in length, there was full range of motion of both hips, and complete flexion of the right knee with only complaints of tightness. X-rays noted the presence of RFBs. Based on the examination, the RO proposed to reduce the rating for the thigh wound from 40% to 30% and the rating for the leg shortening from 10% to 0%, effective 60 days after the date of notification to the Veteran. Two days after the date of the notification of the proposed reduction, the Veteran wrote the RO stating that he “wanted to appeal” the proposed reduction. As a result of his letter, the RO reviewed the case again and notified the Veteran that no change was warranted in his rating. The Veteran then wrote the RO and requested that he be sent VA Form 9 so he could appeal the reduction.⁹⁷ The RO sent the Veteran the form as requested, but he did not return it. Consequently, the case was never sent to the Board.

In 2002 the Veteran filed a claim for an increased rating for his thigh wound as well as a compensable rating for the leg shortening. A VA examination was conducted and the examiner identified entrance and exit wounds. X-rays revealed the RFBs and the examiner opined that the wound would give him difficulty with intermittent pain. The examiner stated that there was no clinical evidence of “gross loss of muscle mass.” In addition, no leg shortening was identified. Following the examination, the RO denied the claim for increase. The Veteran subsequently filed

⁹⁶ Just like in the previous case, the file did not indicate why the future examination was never held; however, given the fact that VA was canceling examinations that were deemed “unnecessary,” it is distinctly possible that this is why the examination did not take place. *See supra* text accompanying note 78.

⁹⁷ In 1959, there was no requirement to issue a statement of the case upon receipt of a notice of disagreement. This requirement did not become law until January 1, 1963. Act of Sept. 19, 1962, Pub. L. No. 87-666, 76 Stat. 553.

a notice of disagreement and testified at a DRO⁹⁸ hearing. The DRO ordered another examination, but the results were no different than the one in 2002. Based on the examination results, the DRO continued the previous ratings.

The Veteran continued his appeal to the Board arguing that the 1959 reduction was CUE because it violated the provisions of 38 C.F.R. § 3.172. He also argued that he had had an open appeal since 1959 because his letters to the RO at the time constituted a valid request for appeal to the Administrator. Although the Veteran had not raised any of these issues or arguments before the RO, he argued that the CUE issue was inextricably intertwined with the issue of an increased rating.⁹⁹ The Board did not address the Veteran's arguments but referred both issues to the RO. Following the adverse Board decision, the Veteran filed a motion for reconsideration. He argued that the Board, by failing to remand the issues he had raised, deprived him of the ability to argue them to the RO.

In light of the Veteran's arguments, the Board vacated the prior decision and remanded it to the Appeals Management Center (AMC)¹⁰⁰ with instructions to adjudicate the new issues (whether he had had an open appeal since 1959 and whether the 1959 reduction was erroneous) the Veteran raised. The AMC agreed that the Veteran had had an open appeal since 1959, but did not agree that restoration of the previous 40% for the thigh wound was warranted or that the reduction was erroneous. Following issuance of a statement of the case, the author then requested administrative review by C&P Service on the sole issue of restoration of the 40% rating for the thigh wound.

C&P Service reviewed the file and opined that while the RO had complied with much of § 3.172, the failure to determine whether there was material improvement in the leg wound and whether it was "reasonably certain" that the material improvement would be maintained under the ordinary conditions of life, rendered the 1959 decision *void ab initio*. Therefore, they instructed the AMC to restore the previous 40% rating effective May 4, 1959. While the administrative review request was pending, the Veteran submitted his substantive appeal on the issue of the reduction. Following implementation of the instructions from Central Office, the AMC issued a supplemental statement of the case on the issue of an increased rating for the thigh wound beyond 40% and returned the case to the Board for further review. The Board denied the appeal on the increased rating issue and the Veteran did not pursue the claim any further.

Comments on Cases

The cases outlined above have several things in common. First, in both instances the Veterans were scheduled for routine future examinations that were never held. Second, in neither instance did the files reveal the reason the examinations were never held, but one can hypothesize that the reasons were probably due to the workload at the time, plus the 1950-51 Review that was aimed at eliminating unnecessary examinations. In addition, one might ask why the Veteran in Case #2 would have been scheduled for a re-examination in the first place as a disability involving a shell fragment wound would generally be considered a static disability.¹⁰¹

⁹⁸ DROs are RO employees authorized to review ratings that are under review following receipt of a Notice of Disagreement and make changes if warranted. VA ADJUDICATION PROCEDURE MANUAL M21-1, pt. IV, ch. 35 (2013).

⁹⁹ See generally *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) (explaining that issues are "inextricably intertwined" when the outcome of one would affect the outcome of the other); *Smith v. Gober*, 236 F.3d 1370 (Fed. Cir. 2001) (holding that a claim of CUE in a previous decision was inextricably intertwined with a new application to reopen the same claim based on new and material evidence).

¹⁰⁰ The AMC, which was created in 2003, handles most remand cases. *Oversight Hearing on the Bd. of Veterans' Appeals and Appeals Mgmt. Ctr.*, 109th Cong. (2005) (statement of Michael Walcott, Associate Deputy Undersecretary for Field Operations, Veterans Benefit Admin.).

¹⁰¹ See 38 C.F.R. § 3.327(b)(2)(i) (2014).

In both cases, the disability ratings had been in effect for more than 5 years and in neither case did the RO apply all the provisions of § 3.172. Also, both Veterans were adversely affected by the Review in that both lost benefits due to reductions in their ratings. In addition, both cases are clear indications that VA was either not complying with the regulation governing reductions in ratings that had been in effect for more than five years, or was complying with only part of it.

Finally, both cases are indicative of the manner in which the Review was carried out. Specifically, VAROs were more concerned about following the instructions issued by VA Central Office as a result of the GAO Report than they were in complying with the few safeguards that existed pertaining to reductions in ratings.

What Should VA Do Now?

Although the number of living veterans affected by the Review has declined significantly due to the passage of time,¹⁰² that does not mean that VA should not seek to correct an obvious injustice that was perpetrated on an untold number of veterans. This is especially true since VA has completed the *Nehmer* Review.¹⁰³ The author believes VA should attempt to identify individuals adversely affected by the Review and determine whether any reduction/severance was proper. Any reduction that was implemented after the disability rating had been in effect for more than 5 years that did not comply with all the provisions of §§ 3.172 or 3.344, whichever was applicable, was improper.¹⁰⁴

If a case involved a severance of service connection, the reviewer would have to determine whether the original grant of service connection was warranted. In order to conduct such a review VA Central Office would have to issue instructions, most likely in the form of a Fast Letter,¹⁰⁵ outlining how the Review should be carried out. Field stations would have to be told how to identify any case affected by the Review and to take corrective action if in order. Corrective action would include restoring any reduction that was done illegally, and restoring service connection if warranted by the evidence. If the veteran is deceased, VA would have to pay accrued benefits to the surviving spouse if one exists. If the veteran died of a disability that was improperly severed, DIC and accrued benefits would have to be paid to the surviving spouse. If there is no surviving spouse, VA would have to make a one-time payment to the individual that paid the last expenses of illness and burial.

Undoubtedly, an unknown number of claims files would have to be recalled from various records retirement/management centers (e.g. St. Louis, MO). VA could establish a task force at each RO, or at a central location, to work exclusively on this project. Notification letters would have to be sent to the veteran/widow at the last known address with copies to the current representative if there is one. Veterans Law Judges (VLJs) and staff attorneys should also be cognizant of these cases

¹⁰² Over 16 million U.S. service members participated in World War II. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS 1 (Nov. 2011). There were over 1.7 million living World War II veterans in 2011. *Id.* The actual number of living World War II veterans was still about the same as in 2011, but is projected to decline to slightly more than 1.0 million by September of 2014. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS 1 (May 2013).

¹⁰³ Pursuant to *Nehmer v. U.S. Veterans Admin.*, 712 F.Supp. 1404, 1409 (N.D. Cal. 1989), VA must re-adjudicate previously denied claims for specific diseases filed by *Nehmer* class members and provide retroactive benefits. See Processing of Claims for Ischemic Heart Disease (IHD), Parkinson's Disease (PD), Hairy Cell Leukemia and Other Chronic B-cell Leukemias (HCL/BCL), and Other Diseases Under *Nehmer*, Veterans Benefits Admin. (VBA) Fast Letter No. 10-41, at 1 (Sept. 28, 2010).

¹⁰⁴ 38 C.F.R. §§ 3.172, 3.344 (2014).

¹⁰⁵ Fast letters are often used to inform ROs of the requirements of new legislation until regulations implementing such legislation can be promulgated. See *Before the Subcomm. on Disability Assistance and Mem'l Affairs, House Comm. on Veterans' Affairs*, 109th Cong. (2006) (statement of Michael Walcoff, Associate Deputy Undersecretary for Field Operations, Veterans Benefits Admin.).

as they, as well as Veterans Service Officers (VSOs), also have a role to play. The VSOs' role, when they are reviewing cases involving World War II or Korean War veterans, would be to review any ratings done between 1954 and 1962 and see whether any changes were made. The Board would not have jurisdiction to review any illegal reduction/severance unless that is the issue for appellate consideration, or it is inextricably intertwined with the issue on appeal. The Board could, however, refer it to the RO for necessary action.

VSOs co-located at the Board could alert their field offices or even raise the issue to the Board as part of an informal hearing presentation. Obviously, this would be a massive undertaking and would probably take years to complete. Given the magnitude of VA's current backlog, this proposal may not be feasible. Still, that does not mean VA should not try. A review of this nature would obviously involve a fair amount of subjectivity because what appears to be an error to one rater may not appear the same to another rater. In addition, it should be borne in mind that not every case that was subject to the 1954 Review resulted in a change to a veteran's rating. Nevertheless, any living veteran that has been receiving compensation since the 1940s or 1950s would have been subject to the Review and may have been adversely affected by it.

Finally, there is one other thing VA should do based on what happened during the Review. That is, conduct regular training (*e.g.* at least once a quarter) with their raters on how to apply the provisions of 38 C.F.R. § 3.344, which pertain to the reduction of ratings that have been in effect for more than five years, and 38 C.F.R. § 3.105(d), which pertains to the severance of service connection

CONCLUSION

It is clear beyond a shadow of a doubt that tens of thousands of veterans were adversely affected by the Review as was VA itself. It is also clear to the author, with the benefit of hindsight, that the way VA carried out the Review was less than exemplary for reasons previously stated. While VA officials in Washington D.C. may not have had malicious motives, their benign neglect, failure to properly oversee the Review, and ensure compliance with the few procedural safeguards in place sent a clear message to the field that resulted in massive reductions and severances.¹⁰⁶ Furthermore, the lack of judicial review meant that VA could ignore its own regulations when conducting the Review because there was no impartial body to take them to task for doing that. In addition, DA Stone's instruction to not notify veterans' representatives of a proposed severance raises the following question: What was VA trying to hide? One really has to wonder what Stone's motive was in issuing that instruction, especially as it amounted to a *de facto* denial of representation. In addition, DA Stone's initial letter to the field on this issue gave the field offices only three weeks to respond. That time frame was unrealistic.

Did the VA officials' decision to conduct a massive review of cases involving running awards constitute an overreaction to the GAO's Report? Probably not because VA officials at the time indicated that they undertook the Review based on the GAO's findings in their spot audit. Since GAO is the investigative arm of Congress, and the results of the spot audit were submitted to a congressional subcommittee, VA officials certainly did not want to be perceived as ignoring the shortcomings identified by GAO. This is especially true since GAO found the same shortcomings in thirteen other ROs. In addition, VA officials did not want to be seen as poor stewards of the taxpayers' money and had

¹⁰⁶ It has been the author's experience with these cases that the reductions were not based on thorough examinations as was required by the regulations in effect at the time.

to be concerned about Congressional reaction to the Report. In addition, they also had to be concerned about potential adverse publicity. Furthermore, they had to be concerned about how the Report would affect VA's budget. Therefore, VA officials probably felt that their reaction was appropriate given the situation with which they were faced. In addition, GAO's comment to the effect that VA's action in initiating the Review was "commendable" reinforces that assessment.

The author believes, however, and the facts clearly show, that VA officials obviously did not appreciate the magnitude of what they were asking the field offices to do when they ordered a review of over 1.7 million cases that involved running awards. This is especially true when one considers that new examinations had to be ordered in cases where the rating of the disability was at issue. They may not have anticipated that the Review would result in improper reductions or that it would take over eight years to complete. Administrator Higley's lengthy letter dated January 17, 1956, supports the hypothesis that VA officials clearly underestimated the time it would take to conduct the Review.¹⁰⁷

Although VA is the one that initiated the Review and carried it out, the author is of the opinion that Congress shares some of the blame, at least indirectly, for what happened. The failure of Congress to create a judicial body to review VA's decisions allowed VA to carry out the Review with no outside judicial oversight whatsoever. Furthermore, the Administrator's Reports during this time did not address the Review in any great detail. The detail that was provided usually did not amount to more than a couple of pages and was usually buried deep in the Report. Even though the Reports were sent to Congress, there is no way to know how many members of Congress or their staff members actually read them.

The quote at the beginning of this article states what happens to those who cannot remember the past. If current and future VA officials forget what happened between 1954 and 1962, they will make the same mistakes as their predecessors. While the Review was probably necessary, the way it was carried out left much to be desired.

Hopefully, a situation like that described in this article will never happen again. If it does, the author takes comfort in knowing that there is now judicial oversight that would prevent VA from doing a repeat in isolation.

¹⁰⁷ See Letter from Harvey Higley to Robert Long, *supra* note 78, at 1.