

VA Disability Appeals & 38 U.S.C. § 7105: Is the One Year Timeframe for the Filing of a Notice of Disagreement Excessive?

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As the Global War on Terror continues, the pressure on the U.S. Department of Veterans Affairs (VA) to deliver prompt benefits to our well-deserving veterans and their dependents intensifies.² Perhaps the greatest challenge confronting VA today is amelioration of the huge groundswell of disability benefits claims that began with the Persian Gulf War, and which has intensified since fiscal year (FY) 2000.³ Of paramount concern is the length of time required to process appeals of denied disability benefit claims.⁴ This comment will consider various timeframes for initiating an administrative appeal as they compare to the VA timeframe for appeal.

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² See, e.g., *The Challenges and Opportunities Facing Disability Claims Processing in 2006: Hearing Before the H. Comm. on Veterans' Affairs*, 109th Cong. 75 (2005) [hereinafter *Challenges & Opportunities*] (testimony of Ronald R. Aument, Deputy Under Secretary for Benefits, Dep't of Veterans Affairs) ("Ongoing hostilities in Afghanistan and Iraq are expected to continue to increase the VA compensation workload.").

³ *Id.* at 75-76 ("The number of veterans filing initial disability compensation claims and claims for increased benefits has increased every year since fiscal year (FY) 2000. Disability claims from returning Afghanistan and Iraq war veterans as well as from veterans of earlier periods of war increased from 578,773 in FY 2000 to 788,298 in FY 2005. For FY 2005 alone, this represents an increase of more than 209,000 claims or 36 percent over the 2000 base year The claims rate for Gulf War Era veterans, which began in 1991 and includes veterans who are currently serving in Operations Enduring Freedom and Iraqi Freedom, is significant. Veterans and survivors of the Gulf War Era currently comprise the second largest population of veterans receiving benefits after Vietnam Era veterans.").

⁴ *Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 1-2 (2007) [hereinafter *Adjudication Process*] (testimony of Rep. John Hall, Chairman, H. Comm. on Veterans' Affairs) ("With a current backlog of over 39,000 cases, the average length of an appeal filed with the BVA is an amazing 761 days. This is after the 240 days a claim spends at the regional office. This inefficiency is only exceeded by the outcome of these long waits—a 71 percent denial rate by the BVA. . . . The increased work load

The appeal of a denied claim for VA benefits is initiated by the filing of a Notice of Disagreement.⁵ Under the provisions of 38 C.F.R. § 20.302, an appellant has one year from the date that VA mails notice of a decision to file a Notice of Disagreement.⁶ On its face this may seem quite generous and, *ergo*, veteran friendly. But, is a year excessive? Let's consider the responsive filing timeframes prescribed for other federal regimes.

The Administrative Procedures Act (APA), lays the parameters for decision-making by federal agencies. Significantly, however, although the APA sets out guidelines for administrative adjudications, it does not prescribe respective timeframes.⁷

at both the [Appeals Management Center (AMC)] and BVA is not lost on this Committee. The most recent fiscal year 2007 figures indicate that there are more than 18,300 remands pending at the AMC and over 39,206 appeals waiting for adjudication at the BVA. Moreover, the BVA expects to receive up to 48,000 appeals through the course of 2007. As such, any increase in productivity has not been able to keep pace with the increase of appeals being sent to the BVA. So we are aware of the tall task that we are facing.”).

⁵ 38 C.F.R. § 20.200 (2007) (“An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal.”); *Id.* § 20.201 (2007) (“A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified. For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the Notice of Disagreement must make that clear.”).

⁶ 38 U.S.C. § 7105(b)(1) (2000); 38 C.F.R. § 20.302 (2007) (“Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.”).

⁷ 5 U.S.C. § 557(c) (“Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions - (1) proposed findings and conclusions; or (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and (3) supporting reasons for the

Within the disability benefits scheme, analogy may be made to the Social Security Administration, another federal provider of disability benefits. Social Security regulations provide that a claimant must request review, in writing, no later than 60 days after the date of notice of an initial determination, unless good cause is shown for grant of an extension.⁸

With regard to Medicare claims, the Department of Health & Human Services follows a similar timeframe. Under the Original Medicare plan, a participant has 120 days from the date of receipt of a Medicare Summary Notice, which shows the amount of claimed medical expenses Medicare has paid, within which to file an appeal.⁹ If a claimant disagrees with a decision issued by a Medicare Managed Care Plan, an appeal must be filed, in writing, within 60 calendar days after the date of notice.¹⁰ Medicare's Prescription Drug Coverage program also follows the 60-day rule.¹¹

As is apparent, VA's one year interim within which to gain review of a denied claim is clearly out of kilter with the timeframes followed by these comparable organizations. There is nothing like it in the federal judiciary system, either.

In order to obtain review by the Court of Appeals for Veterans Claims (Court) of a final Board of Veterans' Appeals decision, a claimant

exceptions or proposed findings or conclusions. The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of - (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.”)

⁸ 20 C.F.R. § 405.210(b) (2007) (“[The Social Security Administration] will review an initial determination if [review is requested] in writing no later than 60 days after the date [the claimant receives] notice of the initial determination (or within the extended time period if [the Social Security Administration] extend[s] the time . . .”).

⁹ 42 U.S.C. § 1395ff(a)(2)(C)(i) (“A redetermination . . . shall be available only if notice is filed with the Secretary to request the redetermination by not later than the end of the 120-day period beginning on the date the individual receives notice of the initial determination . . .”); *see also* U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., PUB. NO. 10050, MEDICARE & YOU 84 (2008) [hereinafter HHS 10050].

¹⁰ U.S. DEP’T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., FORM NO. CMS-10003, IMPORTANT INFORMATION ABOUT YOUR APPEAL RIGHTS (2008).

¹¹ HHS 10050, *supra* note 9, at 88.

must file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed.¹² By contrast, Rule 31(a)(1) of the Federal Rules of Appellate Procedure provides that the appellee serve and file a brief within 30 days after the appellant's brief is served.¹³ The Federal Rules of Civil Procedure are even more austere.¹⁴ While federal responsive filing procedures are not precisely analogous to administrative (agency) claims processing, it is noteworthy that the maximum period for a responsive filing in each of the other organizations is 120 days, well short of the year provided under VA law.

VA's one-year timeframe within which to initiate an appeal stands out as an aberration in the federal administrative and judicial systems. As stated before, on its face this may appear to be particularly "veteran friendly."¹⁵ However, the argument can be made that this delay in time is a prime

¹² 38 U.S.C. § 7266(a) ("In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.").

¹³ FED. R. APP. P. 31(a)(1) ("The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.").

¹⁴ FED. R. CIV. P. 12(a)(1) ("Unless another time is specified . . . the time for serving a responsive pleading is as follows: (A) A defendant must serve an answer: (i) within 20 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States. (B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim. (C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.").

¹⁵ Letter from Joseph A. Violante, National Legislative Director, Disabled American Veterans, to Senate Veterans' Affairs Committee Members (June 15, 2006) ("The VA benefits delivery system was designed to be open, informal, and helpful to veterans The goal of providing a veteran-friendly claims process was to ensure that veterans received the benefits a grateful nation has provided for them and at no cost to them, rather than discouraging or inhibiting their claims with government 'red tape' or lengthy litigation or requiring veterans to expend their money to receive these benefits. Pursuant to title 38, Code of Federal Regulations § 3.103(a): 'Proceedings before VA are ex parte in nature, and it is the *obligation* of VA to assist a claimant in *developing* the facts pertinent to the claim and to *render* a decision which grants every benefit that can be supported in law while protecting the interests of the Government.'"), available at http://www.dav.org/voters/letter_senator_vet_comm_061506.html (last visited November 3, 2008).

contributor to VA's backlog of pending disability benefits appeals.¹⁶ This is particularly apparent when one considers the additional time needed for acquisition of records and contemporary medical examinations, which usually occurs *after* the filing of the Notice of Disagreement.¹⁷ The delay caused by newly discovered facts and changes in the law, which further elongates the appeal period, is also problematic.¹⁸ Deterioration in the veteran's health and economic circumstances further confounds the appellate review process.¹⁹

Given the amount of time needed to assist an appellant with the development of an appeal for disability benefits, the question remains whether a shorter interim within which to initiate an appeal, more in line with comparable federal organizations, would help to alleviate the backlog of disability claims and, thereby, be more veteran friendly.

¹⁶ Board of Veterans' Appeals: Expedited Claims Adjudication Initiative—Pilot Program, 73 Fed. Reg. 20,571–20,572 (Apr. 16, 2008) (to be codified at 38 C.F.R. pts. 3, 20) (“The VA claims adjudication and appeals process is designed with many procedural protections for claimants. As a result of these procedural protections, the amount of time it takes to process an initial claim and an appeal can be unnecessarily lengthened due to various statutory and regulatory response periods. Often, a case may sit without any action occurring while waiting for one of these response periods to end.”).

¹⁷ See 38 C.F.R. § 19.26(a) (2007) (“When a timely Notice of Disagreement (NOD) is filed, the agency of original jurisdiction (AOJ) must reexamine the claim and determine whether additional review or development is warranted.”).

¹⁸ Challenges & Opportunities, *supra* note 2, at 78 (“The increase in claims receipts is not the only change affecting the claims processing environment. The greater number of disabilities veterans now claim, the increasing complexity of the disabilities being claimed, and changes in law and processes pose additional challenges to the claims processing workload. The trend toward increasingly complex and difficult-to-rate claims is expected to continue for the foreseeable future Multiple regulations, multiple sources of evidence, multiple potential effective dates and presumptive periods, preparation of adequate and comprehensive Veterans Claims Assistance Act of 2000 (VCAA) notice and rating decisions, increase proportionately and sometimes exponentially as the number of claimed conditions increases. Additionally, as the number of claimed conditions increases, the potential for additional unclaimed but secondary, aggravated, and inferred issues increases as well. Since veterans are able to appeal decisions on specific disabilities to the Board of Veterans' Appeals [BVA] and courts, the increasing number of claimed conditions significantly increases the potential for appeal.”).

¹⁹ *Id.*; see, e.g., *Adjudication Process*, *supra* note 4, at 33 (testimony of James P. Terry, Chairman, Board of Veterans Appeals) (In response to a query regarding the length of time before a decision is issued by the Board of Veterans' Appeals, Chairman Terry stated: “Well you have to remember, sir, that . . . we take more than 12,000 cases a year and move them ahead of the pack, because either the person is aged, is infirm, has a financial disability of some kind, or it is a remand case. That goes to the head of the line.”).