

**Military-Veterans Advocacy Written Testimony for the Record
in Opposition to**

S 1024

May 17, 2017

Submitted to the United States Senate Veterans Affairs Committee



Commander John B. Wells, USN (Retired),
Executive Director

Introduction

Distinguished Committee Chairman Senator Johnny Isakson, Ranking Member Senator Jon Tester and other members of the Committee; thank you for the opportunity to present Military-Veterans Advocacy's views on the pending legislation before the Committee, S 1024, the "Veterans Appeals Improvement and Modernization Act of 2017."

About Military-Veterans Advocacy

Military-Veterans Advocacy Inc. (MVA) is a tax exempt IRC 501[c][3] organization based in Slidell, Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for various legislation on the State and Federal levels as well as engaging in targeted litigation to assist those who have served.

As well as legislative advocacy, Military-Veterans Advocacy represents veterans in all facets of the veterans law system. MVA is admitted to practice before the Department of Veterans Affairs, the Court of Appeals for Veterans Claims, the Court of Appeals for the Federal Circuit and the Supreme Court of the United States.

Military-Veterans Advocacy's Executive Director Commander John B. Wells USN (Ret.)

MVA's Executive Director, Commander John B. Wells, USN (Retired) is a 22 year veteran of the Navy. Commander Wells served as a Surface Warfare Officer on six different ships, with over ten years at sea.

Since retirement, Commander Wells has become a practicing attorney with an emphasis on military and veterans law. He is counsel on several pending cases at various levels in the veterans legal system. He is very familiar with the veterans law rules and presents Continuing Legal Education on this subject to other attorneys. Commander Wells, on behalf of MVA routinely brings cases before the Board of Veterans Appeals and is familiar with the deficiencies in the appellate system.

General Comments

S-1024 is a marginal improvement over previous VA sponsored attempts to revise the appellate reform system. This bill still concentrates too much on form rather than substance. The Secretary seems to be asking Congress to trust them to work for the benefit of the veteran. Repeated scandals including document destruction and falsification as well as criminal conduct on the part of the VA should put the Congress on notice that the Department, in its present form, is not worthy of trust. We hope that this review and our recommendations will be helpful in

crafting legislation that is results oriented.

The proposed legislation does nothing to fix the systemic problems within the VA Appellate system. Instead it seems to make the process easier for the VA, at the expense of the veteran. The proposed legislation flies in the face of the non-adversarial, pro-veteran system envisioned by Congress. Currently the VA takes an adversarial anti-veteran approach designed to provide the illusion of efficiency while denying veterans their earned benefits.

Areas of Concern With the Proposed Legislation

Other than allowing veterans stuck on the “hamster wheel” of the VA appellate system to opt in to the new system, the bill does nothing to address the pending inventory of over 450,000 appeals. The actions of the VA in clearing the backlog through increased claim denials has expanded the appellate backlog. For some unfathomable reason, the Secretary and Acting Executive of the Board of Veterans Appeals, have failed to take action to resolve this backlog. Currently, the Chairman has the power to appoint temporary Board members from VA employees. This needs to be changed legislatively to remove the qualification that the temporary board member be a VA employee. MVA recommends, allowing the appointment of retired Military Judges to adjudicate the backlog near their local residence. While that would require some training in VA law, the retired Military Judges are conversant with the hazard of military service. Additionally, they are trained to make decisions in an equitable and efficient manner.

MVA does appreciate the requirement that the Secretary submit a plan for dealing with legacy appeals however has little confidence that they will devise an acceptable methodology. MVA recommends codifying the solution proposed above.

Like other versions of this proposal, S 1024 continues to strip the duty to assist from the veteran after the initial decision. As attorneys are not able to provide paid representation until after the initial decision, this measure effectively eliminates any ability to supplement the record.

Given the woeful inadequacy of many Veterans Service Officers, most attorneys have to do a baseline review of the claims file and often use the duty to assist to obtain critical records to support the appeal. While inadequate at best, the duty to assist allows the attorney some latitude to obtain records to prepare the case. Without the duty to assist, the attorney will be required to rely upon the Freedom of Information Act. This will not only result in costs being attributed to the veteran but result in undue delay.

Removal of the restriction on attorney representation and the agency of original jurisdiction would help to relieve this matter. More importantly, basic discovery should be allowed. Once a case is docketed at the Board, the use of a scheduling order with milestones would ensure that the case proceeds efficiently. Assigning a board attorney to shepherd the process would help resolve matters. Providing the veteran and his representative with contact information would help expedite the process.

The duty to assist is a matter of due process and is consistent with *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). In *Cushman*, the Federal Circuit joined seven of its sister Circuits in finding that there was a property interest, for due process purposes, in disability benefits. *Cushman*, 476 at 1297. Specifically *Cushman* recognizes a Constitutional right to due process in veterans benefits. In the event that the duty to assist provisions are enacted, Military-Veterans Advocacy will initiate litigation to stop its implementation.

The bill could be modified to allow a resumption of the duty to assist upon the filing of a Form 21-22a by an attorney indicating that he or she is representing the veteran. This reopening of the duty to assist can be limited to reasonable period, such as 90 days to allow the attorney time to obtain the documents necessary to prepare the appeal.

S-1024 retains the requirement that the veteran indicate in the Notice of Disagreement whether he or she desires a hearing or whether they wish to submit additional evidence. This effectively sets up separate dockets. As discussed below, this is not necessary should a scheduling conference/order be required as routinely occurs in other federal adjudication systems. More importantly, there is no ability to amend or supplement the request. In order to change the Notice of Disagreement, the veteran would have to withdraw and resubmit it, assuming that it was not outside the one year statute of limitations.

MVA feels that this provision is unconscionable. Attorneys are not required to provide that level of specificity when filing a notice of appeal in a federal appellate court. To expect a disabled veteran to meet this high standard is ludicrous.

While the bill does authorize the Secretary to issue regulations allowing for a change from one docket to another, this invitation is precatory. Military-Veterans Advocacy believes that unless required by Congress the Secretary will not issue those recommendations. Accordingly, Military-Veterans Advocacy strongly urges that the wording of proposed section 7107(e) be changed from “may develop and implement a policy allowing a claimant to move the claimant's case from one docket to another docket” to “shall develop and implement a policy allowing a claimant to move the claimant's case from one docket to another docket.”

It is my understanding that the Federal Bar Association, the Vietnam Veterans of America and National Organization of Veterans Advocates also have voiced concerns with the process outlined in S-1024. While there is support from some of the Veterans Service Organizations, VSO's, practicing attorneys are less enthusiastic.

The proposed legislation does nothing to fix the systemic problems within the VA Appellate system. Instead it seems to make the process easier for the VA, at the expense of the veteran. The proposed legislation flies in the face of the non-adversarial, pro-veteran system envisioned by Congress. Currently the VA takes an adversarial anti-veteran approach designed to provide the illusion of efficiency while denying veterans their earned benefits.

The dual docket, while an improvement over the initial triple docket recommendation, is just silly. There is no need for multiple dockets. The Board should adopt the procedures used by other federal adjudication systems, hold a pre-hearing conference and issue a scheduling order. This order should include the hearing date and cutoff dates for requesting or waiving a hearing, submitting evidence and termination of the duty to assist. This would replace the vague and misleading letters issued by the board. Coordination of dates, and a process to modify the scheduling order for good cause, will streamline the process. Pre-hearing conferences can be scheduled by e-mail and conducted by telephone. It is a simple and effective system used everywhere except the Board of Veterans Appeals.

Areas of Concern Not Addressed in the Proposed Legislation

The proposed legislation does address the Board of Veterans Appeals but it does not speak to the crux of the problem. The key to solving the appellate backlog is addressing the systemic problems of the Board. Initially, and as a matter of priority, the President must appoint a qualified chairman of the Board. Secondly, MVA recommends that all members of the Board, acting or permanent, be certified as Administrative Law Judges. The lack of training and learned reasoning in the opinions of the Board members is frankly striking.

Perhaps the single step that could expedite the process would be the institution of electronic filing. Currently evidence and written arguments must be printed into hard copy and sent both to the Board and to the Evidence Intake Center in Janesville. Sometimes the information is scanned into the correct record - sometimes it is not. Electronic filing would eliminate the time required for processing and ensure that the information and evidence is appended to the correct record. All federal courts and most state courts use some form of electronic filing. Off the shelf software is available commercially at little expense. Additionally, the software would allow VSOs and attorneys access to the records of those they represent.

The controllable remand rate from the Board is definitely unsatisfactory. The veteran is often relegated to a "hamster wheel" in which his case is sent back and forth between the Board, the Regional office and the Court of Appeals for Veterans Claims. Too many cases are remanded back because the board member simply does not do his or her job. MVA proposes that if more than 30% of any Board member's decisions are remanded within a given year the Chairman should review the performance and recommend action to the Secretary including additional training, probation, suspension or termination. Remands based upon a change in law or regulation would be exempt from computing the remand percentage. Given the high level of remands, MVA recommends that this information be included in the annual report to Congress.

Although the Board members call themselves "Veterans Law Judges," no statute designate them as Judges and in reality they are not. Notably these Board members are VA career employees. They are not certified as Administrative Law Judges and seldom have any real judicial training or experience. This is one of the main reasons for the high remand rate.

Conclusion

The VA continues to try to re-invent the wheel and wonders why they get a square product. The key to appeals reform is to adopting provisions that work, not to over bureaucratize an already paper heavy system. Should our concerns regarding the duty to assist and the ability to change dockets be addressed we will withdraw our opposition to this bill, although we cannot support it. Military-Veterans Advocacy stands ready to work with the Committee and the Secretary to devise a process that will be both efficient and effective. S-1024 does neither.

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