

DECISION, APPEAL, REPEAT HOW VA CAN LIMIT WAIT TIMES, ERROR, AND RED TAPE THROUGH SETTLEMENTS

Yelena Duterte[†]

CONTENTS

INTRODUCTION	408
I. BACKGROUND OF VA CLAIMS	409
II. CONGRESS’S 2017 LEGISLATION	413
III. SETTLEMENTS	417
IV. EQUITABLE RELIEF	419
A. <i>Equitable Relief</i>	421
V. PROPOSED AGENCY ACTIONS	422
A. <i>Secretarial Delegation of Equitable Relief</i>	423
B. <i>Proposed Procedure of Equitable Relief</i>	425
VI. CONGRESSIONAL ACTIONS	426
CONCLUSION	427

Amy Airman walks into an attorney’s office. She is in her late twenties and served in the Army from January 2010 to August 2011, including a six-month deployment to Afghanistan. Amy tried to obtain health care from the Syracuse VA Medical Center. The hospital refused to provide health services, since she only served twenty months of her four-year contract and is outside of the five-year combat window.¹ Amy appealed the initial denial and is currently waiting on a hearing. Amy became pregnant in the service and was separated from the service early. The attorney explains to Amy that although she may not meet the twenty-four month criteria for VA healthcare, she could obtain healthcare if she were eligible for service-connected disability compensation.² Amy thought she made it clear that she did not want money from the government, only healthcare. However, after further explanation and discussion with the attorney, Amy decides to apply for compensation for a knee injury she sustained in Afghanistan, in order to assist her in her

[†] Yelena is an Associate Teaching Professor and Director of the Wohl Family Veterans Legal Clinic at Syracuse University College of Law. This article is dedicated to her current and former clients who keep fighting in the face of opposition.

1. 38 C.F.R. § 3.12a(a)(ii) (2017); U.S. DEP’T OF VETERANS AFFAIRS, COMBAT VETERAN ELIGIBILITY 1 (Feb. 2011), <https://www.va.gov/healthbenefits/assets/documents/publications/FS16-4.pdf>.

2. 38 U.S.C. § 1710(a)(2)(A) (2012).

goal to obtain health care from VA.

Amy's situation happens often when advocates are counseling veterans³ on their goals. To achieve the sought-after outcome, an advocate may pursue an avenue which the client was not anticipating and unexpected benefits are granted. In situations like Amy's, it would be in the VA's fiscal interest to grant healthcare benefits and avoid paying monthly compensation for the rest of her life. Similarly, Amy only wanted healthcare and she would have been satisfied without receiving monthly compensation. This article will articulate the need for a settlement program within the VA adjudication system and propose how best to reach that outcome.

INTRODUCTION

As the Department of Veterans Affairs (VA) struggles to find a balance among its budget concerns,⁴ efficiency,⁵ paternalistic mission,⁶ duty to assist veterans,⁷ and legal obligation to make timely decisions on claims for benefits,⁸ the VA's latest budget proposal to Congress reflects its hope for change.⁹

Many have written about the broken VA claims process from a thousand-foot view, including the never-ending hamster wheel of claims.¹⁰ Prior to becoming a judge for the United States Court of Appeals

3. Throughout this article, "veteran" will be used as a catch-all term for a claimant, including a spouse, a dependent child, and a dependent parent.

4. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018, at 20–22 (2017). The 2018 federal budget lays out goals aimed to improve the Department of Veterans' Affairs' current budgetary constraints. *Id.* at 21–22.

5. See *Veterans Benefits Administration Reports*, U.S. DEP'T VETERANS' AFF. (Mar. 2, 2016), <http://www.benefits.va.gov/REPORTS/aspiremap.asp>. The Aspire Dashboard map provides the specific data measures on how the Veterans Benefits Administration is performing nationally and by state and local area. *Id.*

6. *Skoczen v. Shinseki*, 564 F.3d 1319, 1328 (Fed. Cir. 2009) (citing H.R. REP. NO. 100-963, at 13 (1988)) ("For us to disregard . . . the uniquely pro-veteran, non-adversarial nature of the veterans' claims process would be wrong."); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done . . .").

7. 38 C.F.R. § 3.159 (2017).

8. 28 U.S.C. § 1651(a) (2012); see U.S. CT. APP. VETERANS CLAIMS R. PRAC. & P. 21.

9. See generally U.S. DEP'T VETERANS AFFAIRS, SUPPLEMENTAL INFORMATION AND APPENDICES CONGRESSIONAL SUBMISSION, 2018 (2017), <https://www.va.gov/budget/docs/summary/fy2018VAbudgetVolumeIsupplementalInformationAndAppendices.pdf> (explaining the proposed mission and budgetary goals of the VA for fiscal year 2018).

10. See, e.g., Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 390–91 (2011) ("[T]he VA's system for adjudicating benefits claims has become nothing short of a national disgrace.").

for Veterans Claims (CAVC) in 2017, Michael Allen dove deep into these issues and proposed several ways to fix the VA's procedural system. These ways include creating an independent commission reviewing VA's claims system, integrating more lawyers in the process, increasing the use of presumptions for service connection, and removing and improving pieces of the appellate process.¹¹ Each of Judge Allen's proposals would be a great improvement to the VA system; however, it is unlikely any of these, individually, would fix the never-ending hamster wheel of claims.

For that reason, this article will focus on a very specific piece of VA authority that can help VA balance its many duties. The answer to the problems facing the VA is settlements, through VA's current authority or through Congressional action.¹² Before getting into the weeds of how a settlement process could be created in the VA system, this article will briefly explain the VA claims process and its current problems. Next, it will look at Congress's most recent attempt to fix the claims process through legislation. It will then discuss the history of settlements and why our legal system has preferred settlement over trial. Next, this article will explore the Secretary's power of equitable relief, how it is used today, its inefficiencies, and how to transform that authority into a settlement mechanism. Finally, this article will discuss what Congress can do to create a settlement system and safeguard veterans from the government.

I. BACKGROUND OF VA CLAIMS

VA is comprised of three separate administrations: Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), and National Cemetery Administration (NCA).¹³ Veterans may apply for a variety of benefits, including education, vocational rehabilitation, wartime pension, and disability compensation, which are all adjudicated and provided by VBA.¹⁴ For simplification purposes and due to the substantial number of these claims, this article will only focus on veterans seeking monthly monetary benefits through disability compensation.

In short, disability compensation is awarded when a veteran can show that her disability or injury is related to her time in military

11. See Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 UNIV. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 19–33 (2015).

12. See, e.g., 38 U.S.C. § 501(a) (2012); 38 C.F.R. § 2.7(a) (2017).

13. Stacey-Rae Simcox & John Paul Cimino, *Veterans Benefits*, in *SERVICEMEMBER AND VETERANS RIGHTS* 6-1, 6-5 (Matthew Bender & Co. ed., 2016).

14. *Summary of VA Benefits*, U.S. DEP'T VETERANS' AFF. (Sept. 2012), <http://www.benefits.va.gov/BENEFITS/benefits-summary/SummaryofVABenefitsFlyer.pdf>.

service.¹⁵ In order to receive disability compensation from VA, a veteran must file a claim for benefits with VBA, through the Agency of Original Jurisdiction, also known as the Regional Office (RO).¹⁶ Once a veteran claims a benefit, the RO will attempt to collect evidence, including the veteran's service records, current medical records, and information regarding that veteran's injury.¹⁷ Typically, VA will then schedule a medical examination (compensation and pension examination) by its doctors to determine three main elements: whether the disability exists, its relationship to military service, and the level of severity.¹⁸ After the examination, the RO will decide whether the veteran is entitled to compensation for the disability.¹⁹ If the RO determines that a condition is service-connected, it will assign a rating for that disability.²⁰ The ratings are codified in the Code of Federal Regulations and are based on symptoms related to that condition.²¹ Generally speaking, adjudicators at the RO are laypersons with no formal medical or legal training.²² The average wait time for an initial claim decision is ninety-nine days,²³ with the Anchorage, Alaska RO having the longest wait time, 186 days.²⁴

If the veteran is not satisfied by the RO's decision, she has the right to appeal the decision through a Notice of Disagreement.²⁵ A veteran has one year to submit this appeal from the date of the decision letter.²⁶ Once

15. 38 U.S.C. § 101(16) (2012).

16. 38 C.F.R. § 3.155(b)(1)(ii) (2017); *Board of Veterans Appeals*, U.S. DEP'T VETERANS' AFF. (Apr. 20, 2017), <https://www.bva.va.gov/>.

17. 38 C.F.R. § 21.1032 (2017). *See Compensation: Evidence Requirements*, U.S. DEP'T VETERANS' AFF. (July 13, 2017), <https://www.benefits.va.gov/compensation/evidence.asp>.

18. VETERANS BENEFITS ADMIN., VA ADJUDICATION PROCEDURES MANUAL M21-1, pt. III(iv), ch 3, § A (2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000015809/M21-1-Part-III-Subpart-iv-Chapter-3-Section-A-Examination-Requests-Overview.

19. *See* U.S. DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL M21-1, pt. III(iv), ch 6, § C (2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/; *see also Compensation: Claims Process*, U.S. DEP'T VETERANS AFF. (Apr. 1, 2014), <https://www.benefits.va.gov/compensation/process.asp>.

20. U.S. DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL M21-1, pt. III(iv), ch 5, § B (2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/.

21. 38 C.F.R. pt. 4 (2017).

22. *Job Description: Veteran Service Officer*, VETERANS RESOURCE CTRS. AM. (2016), <http://www.vetsresource.org/image/VeteranServiceOfficerTrainee.pdf>.

23. DEP'T OF VETERANS AFFAIRS, COMPENSATION AND PENSION RATING BUNDLE METRICS (Aug. 5, 2017), http://www.benefits.va.gov/REPORTS/mmwr/2017/MMWR_8-7-17.xlsx (illustrating the average wait times across various jurisdictions).

24. *Id.*

25. 38 U.S.C. § 7105(a) (2012).

26. *Id.* § 7105(b)(1).

the Notice of Disagreement is filed, a veteran can submit additional evidence and arguments.²⁷ The RO will then make a second decision either through a Decision Review Officer (DRO) decision or through a Statement of the Case.²⁸ Statement of the Case and DRO decision wait times are 419 days on average.²⁹

If a veteran is unhappy with the outcome of the Statement of the Case or DRO decision, she may further appeal that decision to the Board of Veterans Appeals (the “Board”) with a Form 9 substantive appeal, within sixty days of the issuance of the Statement of the Case or DRO decision.³⁰ The Board’s standard of review is *de novo*.³¹ Veterans file the Form 9 within thirty-nine days, on average.³² The veteran will then wait an average of 537 days for the appeal to be certified to the Board.³³ Certification is merely the collection of all the records in the file and transfer of the file from the RO to the Board in Washington, D.C.³⁴ The wait time can increase when a veteran adds evidence to the file and requests the RO to make another decision.³⁵ Once the claim has been certified to the Board, the Board may hold a hearing and must do so if a veteran requests it.³⁶ The Board will explain to the veteran what type of evidence will help with his or her claim.³⁷ A veteran may submit additional evidence to the Board before it makes its final determination.³⁸ Unlike the RO, The Board consists of Veteran Law Judges (VLJs) and staff attorneys, who are all licensed attorneys.³⁹ The time from the Board’s certification of a claim to its decision is 492 days, on average.⁴⁰

27. 38 C.F.R. § 3.2600(c) (2017).

28. *Id.* § 3.2600(a)–(b) (2017). Veterans have the right to choose one of two paths: traditional or decision review officer. *Id.* § 3.2600(f). If the decision review officer is chosen, then the veteran has a right to a hearing. *Id.* § 3.103(a).

29. U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 21 (2015) [hereinafter ANNUAL REPORT], https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

30. 38 U.S.C. § 7105(d)(3); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS APPEALS: HOW DO I APPEAL? 7 (2002).

31. 38 U.S.C. § 7104(a) (2012).

32. ANNUAL REPORT, *supra* note 29, at 21.

33. *Id.*

34. *See* U.S. DEP’T OF VETERANS AFFAIRS, THE VETERANS APPEALS PROCESS 7 (Jan. 6, 2016). However, beginning in Fiscal Year 2015, the Board reported case receipts beginning with certification (Form 8) in the field. ANNUAL REPORT, *supra* note 29, at 28.

35. LEXISNEXIS, VETERANS BENEFITS MANUAL 973 (Barton F. Stichman et al. eds., 2016) [hereinafter BENEFITS MANUAL].

36. 38 U.S.C. § 7107(b) (2012).

37. *Id.* § 7105(e)(1)–(2).

38. BENEFITS MANUAL, *supra* note 35, at 1016.

39. *Id.* at 1003.

40. ANNUAL REPORT, *supra* note 29, at 21.

Currently, thirty-one percent of Board decisions grant benefits, forty-seven percent remand the case to the RO due to a RO error, and nineteen percent deny benefits.⁴¹ Although remands are expedited,⁴² the average wait time is still an additional 255 days.⁴³

Based on the averages, and assuming that a veteran appeals on the same day a RO decision is rendered, she is waiting 1,547 days, or over four years, to obtain a Board decision from the date of application.⁴⁴ Further, if the veteran's claim is remanded, she will have to wait an additional 255 days to receive a decision correcting its errors outlined by the Board.⁴⁵

In this current appellate process, the wait time between filing a Form 9 and a Board decision is substantial and it will continue to grow.⁴⁶ In 2015, the Board rendered 55,713 decisions.⁴⁷ Based on the Board's own projections, the Board's docket will likely quadruple in 2017.⁴⁸ At the current rate, it will take at least five years for a decision to be rendered on a Form 9 filed today.⁴⁹

In addition to this long appeals process, if a veteran is unhappy with the ultimate result and does not timely appeal, she may seek to reopen the claim for any condition she chooses, as long as she submits new and material evidence.⁵⁰ The reopening of a claim can start the adjudication process all over again from the beginning, the veteran must continue to wait, and the VA must utilize its valuable resources to make another determination.⁵¹

Moreover, in the appellate process, most appealed claims are found to have errors, which either lead to the grant of benefits or remand for further adjudication.⁵² Specifically at the Board, 77.51% of claims are

41. *Id.* at 26. These rates may also relate to new evidence being submitted.

42. 38 U.S.C. § 7112 (2012).

43. ANNUAL REPORT, *supra* note 29, at 21.

44. *Id.*

45. *Id.*

46. *See id.* at 23.

47. *Id.* at 28.

48. ANNUAL REPORT, *supra* note 29, at 23.

49. *See id.*

50. 38 U.S.C. § 5108 (2012). Under the statute that just passed, veterans may file supplemental claims with new and relevant evidence, which may be similar to the reopen process. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(i)(1)(a), 131 Stat. 1105, 1109 (to be codified at 38 U.S.C. § 5108).

51. *See generally* Taylor v. Nicholson, 21 Vet. App. 126 (2007) (detailing a veteran's appeal process that began in 1958 and was ongoing until 2007).

52. ANNUAL REPORT, *supra* note 29, at 26; *see* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: OCTOBER 1, 2015 TO SEPTEMBER 30, 2016, at 2 (2017) [hereinafter CAVC REPORT 2015–2016], <http://www.uscourts.cavc.gov/documents/FY2016Annual>

2018]

Decision, Appeal, Repeat

413

either granted or remanded due to error by the RO.⁵³ Likewise, 77.4% of claims appealed to the CAVC are fully or partially remanded or reversed, due to an error by the Board or the RO.⁵⁴

Due to the substantial backlog of appeals, the never-ending process of VA claims, and the rate of VA error, Congress is attempting to pass legislation to solve these problems.

II. CONGRESS'S 2017 LEGISLATION

In 2017, Congress passed the Veterans Appeals Improvement and Modernization Act of 2017.⁵⁵ There are four main changes that Congress has made to the procedure of VA appeals. First, Congress followed now-Judge Allen's recommendation to rid the VA system of the second decision at the RO level, the Statement of the Case.⁵⁶ Second, if a veteran files a Notice of Disagreement, he will be required to choose whether to pursue a fully developed appeal.⁵⁷ Third, Congress allows the Board to further develop a claim, however, in certain instances, it forces the Board to remand for development.⁵⁸ Last, Congress allows for veterans to file supplemental claims within a year of a decision and keep the original effective date.⁵⁹

As to the first change, ridding VA of the Statement of the Case may be a positive revision. The Statement of the Case, generally, reiterates the Rating Decision and provides all statutes and regulations upon which it relies.⁶⁰ The Rating Decision will now provide all of the regulations and statutes it relied upon and will likely look very similar to the Statement of the Case.⁶¹ Separately, the legislation provides that a veteran can request higher level of review, which sounds very similar to electing a

Report.pdf.

53. ANNUAL REPORT, *supra* note 29, at 26.

54. *See* CAVC REPORT 2015–2016, *supra* note 52, at 2.

55. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (to be codified in scattered sections of 38 U.S.C.).

56. *Id.* § 4(b)(3)(A)(i); Allen, *supra* note 11, at 28–29.

57. Veterans Appeals Improvement and Modernization Act of 2017 § 4(b)(2)(A).

58. *Id.* § 4(b)(3)(D)–(E). For example, § 2(j) of the Act requires the Board to remand to obtain a medical opinion if it finds that the Veterans Benefits Administration should have obtained one. *Id.* at § 2(j) (to be codified at 38 U.S.C. § 5109).

59. *Id.* at § 2(h)(1)(a)(2)(B) (to be codified at 38 U.S.C. § 5104C).

60. BENEFITS MANUAL, *supra* note 35, at 959. The Statement of the Case includes summaries of the evidence that considered and applicable laws and regulations, as well as a discussion of how they affected the decision, and the reason for the determination. *Id.* The Ratings Decision should include the issues involved, relevant law and evidence relied on, and an explanation of the decision. *Id.* at 937.

61. Veterans Appeals Improvement and Modernization Act of 2017 § 2(e) (to be codified at 38 U.S.C. § 5104(b)).

Decision Review Officer.⁶² It is unclear whether VA's process will be any quicker by removing this step. As discussed above, the wait time from filing of the Form 9 to a decision from the Board is over two and a half years.⁶³ The Board's docket already increases each year and it will likely increase exponentially by removing an additional appeal requirement of the veteran.⁶⁴ Board attorneys are currently expected to complete at least three cases per week.⁶⁵ In order for the Board to meet the increasing docket, it will likely need a substantial increase of staff at the Board level to keep up with its docket.⁶⁶ Conversely, since Veteran Service Officers (VSOs), who assist veterans with their claims, are more comfortable at the RO level, many VSOs may advise veterans to file for higher level of review by the RO or file a supplemental claim, rather than filing a Notice of Disagreement.⁶⁷

The second and largest change to the appeals system is the fully developed appeal.⁶⁸ The fully developed appeal will give veterans a choice to be in one of two dockets.⁶⁹ The first docket is the traditional route, where a veteran requests a hearing or submits evidence.⁷⁰ If he chooses this route, the process will be unchanged, including the ability to provide testimony and to submit new evidence.⁷¹ However, if a veteran chooses not to have a hearing or submit additional records, he will be in an expedited docket.⁷² Congress lays out a one-year timeline for the Board to decide fully developed appeals from the date of the Notice of Disagreement.⁷³ A veteran may not submit any additional evidence through this expedited process.⁷⁴ Although the veteran may have his claim decided quickly, he may be at a significant disadvantage if he is not able to submit additional evidence or testimony.

The expedited docket may be enticing to many veterans due to the

62. *Id.* at § 2(g)(1)(a)(1) (to be codified at 38 U.S.C. § 5104B).

63. ANNUAL REPORT, *supra* note 29, at 21.

64. In fiscal year 2015, 157,189 new Notices of Disagreement were received in the field; 69,957 cases were received at the Board. Starting in fiscal year 2015, case receipts begin with certification in the field. *Id.* at 20, 24.

65. BENEFITS MANUAL, *supra* note 35, at 1004.

66. *See id.* at 972–73.

67. *Id.* at 973–74.

68. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, § 4(b)(1), 131 Stat. 1105.

69. *Id.* § 2(t)(e) (to be codified at 38 U.S.C. § 7107).

70. *Id.* § 2(t)(a)(3)(B)(ii) (to be codified at 38 U.S.C. § 7107).

71. *Id.* § 2(w)(1)(b)–(c) (to be codified at 38 U.S.C. § 7113).

72. *Id.* § 2(k)(1) (to be codified at 38 U.S.C. § 5109B).

73. Veterans Appeals Improvement and Modernization Act § 4(b)(3)(B)(IV).

74. *Id.* § 4(b)(3)(C)(i)(I).

2018]

Decision, Appeal, Repeat

415

promise of shortened wait times.⁷⁵ However, veterans may be disadvantaged by this process, as the Board may not have a full understanding of a veteran's claim without that additional testimony or evidence.⁷⁶ As discussed above, over three quarters of claims appealed to the Board and CAVC are found to have a material error, requiring a grant of benefits or a remand.⁷⁷ These error rates will likely not diminish. Rather, errors may *increase*, due to the expedited nature of claims and the inability for a veteran to submit additional evidence. Additional evidence may assist a veteran in having his claim granted at the Board, not requiring a remand back down to the RO or an appeal to the CAVC. Separately, requiring the Board to make decisions within a year, with a substantial backlog of cases, will only increase its error rate.

The third change formalizes the Board's ability to develop facts at the Board, but requires some issues to be remanded to the RO for further adjudication.⁷⁸ This change is subtle, but will likely amplify some of the hamster-wheel-like qualities. Currently, the Board must remand claims to the RO for further development, such as collecting federal records and obtaining independent medical evaluations.⁷⁹ This law will allow the Board to develop its own evidence, including working directly with medical professionals to make sure that the evaluation addresses the issue(s) at hand and is performed by a competent medical professional.⁸⁰ One caveat to this is that the Board is required to remand claims for independent medical examinations when the RO did not use its discretion to obtain medical opinions.⁸¹

Fourth, Congress created an avenue for a veteran to file a supplemental claim for benefits after a decision is made by the RO, the Board, or the CAVC.⁸² A supplemental claim is a claim where a veteran submits new and relevant evidence for further adjudication.⁸³ The supplemental claim must be filed within one year of any decision and will continue to hold the effective date of the original application.⁸⁴ Meaning,

75. *See id.* § 4(b)(3)(B)(IV).

76. *See id.* § 4(b)(3)(C)(i)(I).

77. ANNUAL REPORT, *supra* note 29, at 26.

78. *Id.* § 4(b)(3)(D).

79. BENEFITS MANUAL, *supra* note 35, at 1039.

80. Veterans Appeals Improvement and Modernization Act § 2(j)(d)(2) (to be codified at 38 U.S.C. § 5108).

81. *Id.* § 2(j)(d)(1) (to be codified at 38 U.S.C. § 5108).

82. Veterans Appeals Improvement and Modernization Act § 2(i) (to be codified at 38 U.S.C. § 5108).

83. *Id.* § 2(i)(a). This replaces the reopen claims, by changing new and material to new and relevant. *Id.* § 2(c)(2) (to be codified as amended at 38 U.S.C. § 5103A(f)).

84. *Id.* § 2(l)(1)(a)(2) (to be codified at 38 U.S.C. § 5110(a)).

if a veteran filed a claim in 2010 with the RO, appealed to the Board, then to the CAVC, and received a denial by the CAVC in 2017, he could file a supplemental claim with the RO within a year of the CAVC decision and keep his 2010 effective date.⁸⁵ If the veteran is ultimately awarded benefits, it would have to pay back benefits to 2010.⁸⁶ With this power, many claims will not end. This section of the legislation will magnify the hamster-wheel like qualities of the VA process.

Although it will likely take the VA many months to draft proposed regulations after the bill became law, some of these changes are superficial at best. The removal of the Statement of the Case seems to be quickly replaced by the higher level of review and supplemental claims.⁸⁷ It is likely that many advocates will advise clients to opt for this higher level of review after an initial decision by the RO, so new evidence can be introduced and it does not force a veteran to choose between expediency and accuracy.⁸⁸ Without additional funding to the appellate process, the Board will likely have even longer wait times for those who do choose a hearing.⁸⁹ The combination of formalizing reconsideration with a higher level of review and removing the ability to submit additional evidence in the expedited lane will likely discourage many veterans from appealing their claims.⁹⁰ As discussed above, the RO is found to have a seventy-seven percent error rate on claims that are appealed to the Board.⁹¹ Incentivizing veterans to file for a higher level of review only continues that high error rate.

This legislation seems to value speed over accuracy and quality.⁹² Thus, as well-intentioned as it is, this legislation may solve small issues, but will likely not fix the errors that will come with speedy decisions and will continue the hamster wheel that forces veterans to endure lengthy wait times for decisions.

85. *See id.*

86. Veterans Appeals Improvement and Modernization Act § 2(l)(1)(a)(2).

87. *See id.* §§ 4(b)(2)(A), 4(b)(3)(A)(i).

88. *See id.* § 2(k)(1) (to be codified at 38 U.S.C. § 5109B); *id.* § 4(b)(3)(C)(i)(I) (noting that while the expedited docket requires claims to be heard within a one year time frame, the claimant is barred from introducing new evidence that could potentially be beneficial to his claim).

89. *See* Veterans Appeals Improvement and Modernization Act §§ 2(k)(1), 4(b)(3)(C)(i)(I); *see also* ANNUAL REPORT, *supra* note 29, at 7.

90. *See* Veterans Appeals Improvement and Modernization Act §§ 2(k)(1), 4(b)(3)(C)(i)(I).

91. ANNUAL REPORT, *supra* note 29, at 26.

92. *See id.* at 6; Press Release, The White House: Office of the Press Sec'y, WTAS: Praise for President Trump Signing The Veterans Appeals Improvement and Modernization Act of 2017 (Aug. 24, 2017).

2018]

Decision, Appeal, Repeat

417

III. SETTLEMENTS

The best route for VA or Congress to fix this procedural and error-ridden nightmare is through settlements.

In civil litigation and criminal prosecution, most cases settle.⁹³ Only a small percentage of cases are decided by a judge or jury through trial.⁹⁴ Settlements are typically seen as a litigation tool.⁹⁵ This tool is used by parties in a potential or ongoing lawsuit to mitigate potential damages, shorten the length of time to reach a resolution, and restrict either party from appealing a settlement, bringing finality to a case.⁹⁶ Moreover, settlements can assist in limiting disclosure, which may cause a public relations disaster.⁹⁷

Although settlements are typically seen through a litigation lens, many governmental agencies use settlements in their daily practices, including the Internal Revenue Service.⁹⁸ VA already uses settlements⁹⁹ in the debt collection context.¹⁰⁰

Similarly, settlements in the disability compensation context makes fiscal and public relations sense. Fiscally, settlements allow VA to minimize its costs per veteran. VA can direct its manpower and resources to matters of serving veterans, rather than making multiple decisions through the appellate system on one specific claim. Due to the high rate of error by both the RO and the Board, it seems that VA could mitigate this repeated error and manpower cost by coming to a settlement with the veteran. VA could evaluate the claim and calculate the actual cost of benefits if the veteran received what she sought. This evaluation can help VA negotiate with the veteran to determine how much VA is willing to settle for and establish boundaries for a fair settlement. Moreover, this settlement could end the claim, with no additional appeals.¹⁰¹ In the aggregate, this could reduce VA's budget if more claims were settled and

93. See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994) (discussing the prevalence of settlement as a resolution to and in tandem with litigation—or, as the authors style it, "litigotiation"); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996).

94. Gross & Syverud, *supra* note 93, at 2.

95. See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 1 (8th ed. 2016).

96. See *id.*

97. See *id.*

98. See 26 C.F.R. § 301.7122-1(a) (2017).

99. 38 U.S.C. § 3685(a), (c) (2012); 38 C.F.R. § 17.103 (2017).

100. 26 C.F.R. § 301.7122-1.

101. See ANNUAL REPORT, *supra* note 29, at 29 (illustrating that out of the 55,713 decisions made, 52,509 were appealed).

not continuously appealed for VA to adjudicate or defend.¹⁰²

Not only does this make fiscal sense, but VA may have less public relations issues regarding wait times for claims in the appeals process.¹⁰³ A settlement process may reduce this type of bad publicity and may reduce the overall wait times for veterans collectively. In the public relations context, VA needs as much help as it can get.¹⁰⁴ VA has been in the news continually for the past several years, whether stories are about benefits being taken away from a veteran caregiver¹⁰⁵ or the backlog and denial of benefits for decorated veterans.¹⁰⁶

On the veteran's end, many veterans are looking for a timely resolution to their claims.¹⁰⁷ This resolution may not be additional compensation. Rather, many veterans are looking for recognition that their claimed disability was caused by their military service.¹⁰⁸ For instance, a veteran may want to service-connect her hearing loss to service, even though the rating will be zero percent due to the relatively mild symptoms she experiences.¹⁰⁹ This recognition of the disability by VA may be enough for a veteran and she will no longer need to appeal.¹¹⁰

Separately, the resolution that a veteran seeks could be an increase in compensation that may not be contemplated by the codified rating schedule.¹¹¹ For example, a veteran may be rated at fifty percent for post-

102. *See id.* (considering the cost per case to the VA, a settlement could significantly reduce these costs and ultimately, the VA's budget).

103. Press Release, Iraq & Afghanistan Veterans of Am., *The Wait We Carry 2.0 Launched by IAVA* (Mar. 17, 2015), <https://iava.org/press-release/the-wait-we-carry-2-0-launched-by-iava/>.

104. *See* Douglas Ernst, *VA Secretary: "I Deeply Regret" Disneyland Comments*, WASH. TIMES (May 24, 2016), <http://www.washingtontimes.com/news/2016/may/24/robert-mcdonald-veterans-affairs-secretary-i-deepl/>.

105. *See, e.g.*, Quil Lawrence, *Some VAs Are Dropping Veteran Caregivers from Their Rolls*, NPR (Apr. 5, 2017), <http://www.npr.org/2017/04/05/522690583/caregivers-for-veterans-dropped-from-va-plan>.

106. *See, e.g.*, Leo Shane III, *Once a Fixed Issue, The VA Disability Claims Backlog is on the Rise Again*, MIL. TIMES (Mar. 24, 2017), <https://www.Militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/>.

107. Sandra Basu, *Veterans Continue to Wait for Years for Resolution of Claims Appeals*, U.S. MED. (Feb. 2015), <http://www.usmedicine.com/agencies/department-of-veterans-affairs/veterans-continue-to-wait-for-years-for-resolution-of-claims-appeals/>.

108. *See* Robert McDonald, Sec'y, U.S. Dep't of Veterans' Affairs, Remarks at the Disabled American Veterans National Convention (July 31, 2016); *see also* Chris Attig, *5 Reasons to Celebrate a Non Compensable Rating*, VETERANS L. BLOG, <https://www.veteranslawblog.org/zero-percent-va-rating/> (last visited Nov. 25, 2017).

109. Attig, *supra* note 108.

110. *Id.* Veterans will be eligible for healthcare for service-connected conditions, even those that do not warrant a rating sufficient for monthly compensation payments. *Id.*

111. 38 C.F.R. § pt. 4 (2017).

traumatic stress disorder and seek a higher rating.¹¹² The rating schedule does not provide for a sixty percent rating; rather, the schedule jumps from fifty percent to seventy percent.¹¹³ Similar to parties in a settlement, a veteran may be willing to take less than what they believe they are entitled to in order to have a final and speedy resolution of their claim for benefits. In this situation, it may be beneficial for all parties to agree on a sixty percent rating.

A settlement process would resolve the many issues that VA faces, but in order to implement such a mechanism, VA would be required to rewrite regulations, or Congress would be required to act.¹¹⁴ The next two sections will explore how the VA may utilize its power of equitable relief to create settlements. The last section will discuss what Congress can do to create a settlement mechanism within the VA even if equitable relief is not a feasible option.

IV. EQUITABLE RELIEF

In 1966, Congress amended section 210 of title 38, United States Code, by adding:

If the Administrator determines that benefits administered by the Veterans' Administration have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, he is authorized to provide such relief on account of such error as he determines equitable, including the payment of moneys to any person whom he determines equitably entitled thereto.¹¹⁵

In 1972, Congress added a provision to the 1966 statute.¹¹⁶ The 1972 legislation expanded the Secretary's authority to provide relief to those who relied on a VA determination to their detriment.¹¹⁷ Prior to this enactment, the only means of providing relief from administrative error of this sort was by private legislation, which, of course, was "time-consuming and burdensome for Congress."¹¹⁸ While Congress was

112. *Id.* § 4.129.

113. *Id.* § 4.130.

114. *See* Shane, *supra* note 106.

115. Veterans Hospitalization and Medical Services Modernization Amendments of 1966, Pub. L. No. 89-785, § 301, 80 Stat. 1368, 1376 (codified as amended at 38 U.S.C. § 503(a) (2012)).

116. Veterans' Compensation and Relief Act of 1972, Pub. L. No. 92-328, § 201, 86 Stat. 393, 396 (codified as amended at 38 U.S.C. § 503(b), (c) (2012)).

117. *Id.*

118. *Bills to Increase Compensation Payments to Service-Connected Disabled Veterans: Hearings on H.R. 13799, and Related Bills, H.R. 10505, H.R. 14086, and H.R. 14865 Before the Subcomm. on Comp. & Pension of the H. Comm. on Veterans' Affairs*, 92nd Cong. 2376 (1972) (statement of Donald E. Johnson, Administrator of U.S. Dep't of Veterans' Affairs).

considering this power, it held hearings in 1972 that outlined how the Administrator could use equitable relief.¹¹⁹ The then-Administrator, Donald E. Johnson, indicated that the law would continue to be conservatively construed only where basic entitlement existed.¹²⁰ The Administrator further testified that the regulations required a personal determination be made by the Administrator.¹²¹ That determination must be based on a recommendation which could only originate with the Department head and must be reviewed by the General Counsel.¹²² If the legislation proposed was enacted, the VA planned to implement it by applying the same restrictive procedures.¹²³

Today, the power of equitable relief falls under section 503. Under equitable relief

(a) If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

(b) If the Secretary determines that a veteran, surviving spouse, child of a veteran, or other person has suffered loss as a consequence of reliance upon a determination by the Department of eligibility or entitlement to benefits, without knowledge that it was erroneously made, the Secretary may provide such relief on account of such error as the Secretary determines is equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

(c) Not later than April 1 of each year, the Secretary shall submit to Congress a report containing a statement as to the disposition of each case recommended to the Secretary for equitable relief under this section during the preceding calendar year. No report shall be required under this subsection after December 31, 2014.¹²⁴

119. *See, e.g., id.* (“The Administrator would be authorized to provide such relief as he determines equitable, including payment of moneys, to the person or persons whom he determines equitably entitled.”). Prior to VA becoming a cabinet level position, the Administrator was the head of the VA. *ABOUT VA*, U.S. DEP’T VETERANS AFF. (Oct. 30, 2017), https://www.va.gov/about_va/vahistory.asp.

120. *See Bills to Increase Compensation Payments to Service-Connected Disabled Veterans*, *supra* note 118, at 2376.

121. *Id.*

122. *Id.*

123. *Id.*

124. 38 U.S.C. § 503 (2012).

2018]

Decision, Appeal, Repeat

421

A. Equitable Relief

Under 38 CFR § 2.7(c), VA interprets 38 U.S.C. § 503's equitable relief power as a non-delegable power reserved for the Secretary.¹²⁵ Recommendations may be initiated by the head of the administration, or by any concerned staff office, or by the Chairman of the Board.¹²⁶ VA General Counsel has further interpreted 38 U.S.C. § 503 to allow delegation of denials of equitable relief.¹²⁷ In the General Counsel's opinion, she found that the Secretary may grant equitable relief only when lesser-ranked officials have recommended the same relief through the General Counsel.¹²⁸

The Secretary is required to report each case recommended to him for equitable relief to Congress each year.¹²⁹ Additionally, equitable relief only becomes available after a veteran's claim has been denied at least once by VA.¹³⁰

Procedurally, a veteran is not likely to get a response from the Secretary if he requests equitable relief directly from him.¹³¹ Thirty-eight C.F.R. § 2.7 directs veterans to request equitable relief from the head of VBA, VHA, or the Chairman of the Board.¹³² Those parties may submit recommendations for equitable relief to the Secretary through General Counsel.¹³³ However, there is an additional mechanism outlined in the Adjudication Manual to refer claims to the Secretary from the RO.¹³⁴ Each of these individuals—the heads of VBA, VHA, or the Chairman of the Board—are restricted from granting equitable relief, but they may constructively deny equitable relief by not recommending the relief to the Secretary.¹³⁵

From 2000 to 2014, the Secretary granted 172 requests for equitable relief, averaging around eleven grants per year.¹³⁶ Based on the reports,

125. 38 C.F.R. § 2.7(c) (2017).

126. *Id.*

127. OFFICE OF GEN. COUNSEL, DEP'T OF VETERANS AFFAIRS, OGC PRECEDENT 11-94, AUTHORITY TO DENY CLAIMANT'S REQUEST FOR EQUITABLE RELIEF para. 10 (May 2, 1994) [hereinafter OGC PRECEDENT 11-94].

128. *Id.*

129. 38 U.S.C. § 503(c).

130. *Id.* § 503(a).

131. *See* OGC PRECEDENT 11-94, *supra* note 127, at paras. 6, 12.

132. 38 C.F.R. § 2.7(c) (2017).

133. *Id.*; OGC PRECEDENT 11-94, *supra* note 127, at para. 11.

134. U.S. DEP'T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL M21-1, pt. III(vi), ch 1, § B (2017), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/.

135. OGC PRECEDENT 11-94, *supra* note 127, at para. 11.

136. *See generally* U.S. DEP'T OF VETERANS AFFAIRS, SECRETARY'S EQUITABLE RELIEF REPORT (2000–14) [hereinafter SECRETARY'S EQUITABLE RELIEF REPORT] (containing the

the Secretary has focused mainly on granting requests for equitable relief for educational benefits, adaptive equipment, and health benefits.¹³⁷ Specifically, forty-four percent of these grants were for GI Bill educational benefits.¹³⁸ Only ten grants of equitable relief, or 5.8% of those reported, were for disability compensation.¹³⁹ It is uncommon for the Secretary to grant equitable relief for continuous benefits that the veteran or his dependents will receive indefinitely.¹⁴⁰ Based on the Secretary's previous reports to Congress, the Secretary has only reported grants of equitable relief and never a rejection.¹⁴¹ It is unclear whether the Secretary grants all recommendations for relief from his staff or if he is not required to report rejections.

Currently, practitioners request equitable relief as a last resort, after all administrative processes and remedies have been exhausted.¹⁴² Practitioners do not request equitable relief during the VA process, because the Secretary may grant only partial relief, and it is not appealable.¹⁴³ Moreover, there are no set processes to determine if the Secretary or any head administrator has rejected that request for equitable relief.¹⁴⁴

V. PROPOSED AGENCY ACTIONS

Agencies typically issue or amend regulations based on laws passed by Congress.¹⁴⁵ However, an agency may prioritize rulemaking for many reasons, including to address problems affecting society, lawsuits filed, and petitions from outside entities.¹⁴⁶ When drafting a new regulation, the

Secretary's annual reports to Congress for each year from 2000–2014, indicating the number of cases heard and amount of money granted each year). The author utilized the number of cases included in these reports to render statistics on equitable relief granted between 2000 and 2014.

137. *See id.*

138. *See id.* (calculated by dividing the total number of cases where relief was granted by the amount of equitable relief granted specifically for GI Bill educational benefits).

139. *See id.* (calculated by dividing the total number of cases where relief was granted by the number of cases involving grants for disability benefits specifically).

140. *See id.*

141. *See* SECRETARY'S EQUITABLE RELIEF REPORT, *supra* note 136.

142. BENEFITS MANUAL, *supra* note 35, at 976.

143. *Darrow v. Derwinski*, 2 Vet. App. 303, 303–04 (1992).

144. *See* OGC PRECEDENT 11-94, *supra* note 127, at para. 11.

145. 5 U.S.C. § 553 (2012) (articulating the process for an agency to promulgate regulations).

146. *A Guide to the Rulemaking Process: Before the Proposed Rule*, FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 25, 2017).

2018]

Decision, Appeal, Repeat

423

agency must review the statute from which it gets its power.¹⁴⁷ Specifically, the agency must determine if there is a gap in the statute to fill or an ambiguity for the agency to interpret.¹⁴⁸

Under 38 U.S.C § 503, there are several pieces of equitable relief that the VA can reinterpret, including delegation of authority and procedure.¹⁴⁹

A. Secretarial Delegation of Equitable Relief

To make equitable relief parallel to settlements, this power must be delegated down. The Secretary does not have enough bandwidth to make a substantial impact on claims, which is clear based on the past reports to Congress.¹⁵⁰

In order to do this, VA can rewrite 38 C.F.R. § 2.7 to delegate this power.¹⁵¹ Under 38 U.S.C. § 503, Congress uses the language “Secretary determines” and “Secretary may provide relief.”¹⁵² The Secretary has general authority to assign functions and duties and delegate authority to officers and employees of VA with respect to all laws administered by the Department.¹⁵³ Under that provision, the Secretary has “broad statutory authority” to determine the functions and duties of heads of components.¹⁵⁴ Furthermore, 38 U.S.C. § 501(a) authorizes the Secretary

147. *Id.*

148. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

149. 38 U.S.C. § 503(a)–(b).

150. *See* ANNUAL REPORT, *supra* note 29, at 17–23 (providing statistical data to show the backlog of claims). The 2000 to 2014 Annual Reports reach a similar conclusion. *See* U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 18–23 (2014); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 17–22 (2013); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 16–20 (2012); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 15–19 (2011); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 16–20 (2010); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 14–18 (2009); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 17–20 (2008); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 14–17 (2007); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 14–17 (2006); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT, 10–13 (2005); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 6–9 (2004); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 8–11 (2003); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 10–18 (2002); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 35–39 (2001); U.S. DEP’T OF VETERANS AFFAIRS, BOARD OF VETERANS’ APPEALS ANNUAL REPORT 33–37 (2000).

151. *See A Guide to the Rulemaking Process*, *supra* note 146.

152. 38 U.S.C. § 503(a).

153. *Id.* § 512(a); OGC PRECEDENT 11-94, *supra* note 127, at para. 3.

154. *See id.* § 512(a); OGC PRECEDENT 11-94, *supra* note 127, at para. 3.

“to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department.”¹⁵⁵ Outside of mere Congressional testimony made in 1972 and VA self-regulation, there is no statute restricting the Secretary’s authority to delegate.¹⁵⁶

Similar to 38 U.S.C. § 503, the Department of Agriculture has a statute regarding equitable relief.¹⁵⁷ The statute provides relief to parties who received loans or payments, even though they did not meet the requirements of the designated program.¹⁵⁸ The Department of Agriculture statute states, “[t]he Secretary may provide relief to any participant.”¹⁵⁹ However, unlike VA, the Department of Agriculture has interpreted that statute to delegate the power of equitable relief down.¹⁶⁰ If the Department of Agriculture delegated its equitable relief power from the Secretary to another party, it is axiomatic that the VA can do the same under § 503.¹⁶¹

Moreover, if Congress wanted to restrict equitable relief and make it non-delegable, it would not have left any ambiguity.¹⁶² Under 29 U.S.C. § 1132, Congress gave the Secretary of Labor discretion to waive or reduce penalties.¹⁶³ Congress specified that the Secretary of Labor would have “sole discretion, [to] waive or reduce the penalty.”¹⁶⁴ This narrow drafting by Congress shows its clear intent for the Labor Secretary to have full discretion and restricts delegation to any other official.¹⁶⁵ It is clear that if Congress intended for § 503 to be the Secretary’s non-delegable power, Congress would have drafted it as clearly as it did under 29 U.S.C. § 1132.¹⁶⁶

In order for 38 U.S.C. § 503 to have a substantial impact on veterans and the VA system, VA should rewrite 38 C.F.R. § 2.7 to delegate equitable relief to a committee.¹⁶⁷ In order to make equitable relief a

155. *Id.* § 501(a).

156. *See id.* § 501(a); *see also Bills to Increase Compensation Payments to Service-Connected Disabled Veterans*, *supra* note 118, at 2376.

157. 7 U.S.C. § 7996 (2012).

158. *Id.* § 7996(b).

159. 7 U.S.C. § 7996(b).

160. 7 C.F.R. § 718.305(a)(5) (2017).

161. *Id.*; 38 U.S.C. § 503 (2012).

162. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that an agency can interpret ambiguous legislation enacted by Congress).

163. 29 U.S.C. § 1132(l)(3) (2012).

164. *Id.*

165. *Id.*

166. *Compare id.* (indicating Congress clearly and unambiguously limiting the Secretary’s power to delegate authority down), *with* 38 U.S.C. § 503 (indicating Congress’s decision not to clearly and unambiguously limit the Secretary’s power to delegate down).

167. *See* 38 U.S.C. § 503; *see also* 38 C.F.R. § 2.7 (2017).

2018]

Decision, Appeal, Repeat

425

robust and fair process, a committee, rather than an individual, would be a sensible option.¹⁶⁸ VA can either utilize or mirror its already-established Committee on Waivers and Compromises.¹⁶⁹ The authority to create the Committee on Waivers and Compromises stems from 38 U.S.C. § 5302.¹⁷⁰ Although there is no mention of a committee in § 5302, VA delegated the Secretary's power to waive debts to a committee it created.¹⁷¹ The committee is comprised of VA employees serving the committee in a part-time capacity.¹⁷² Further, the committee members are current employees in the areas where the debt arises, giving them expertise in the area of the debt.¹⁷³ In order for VA to include settlements of awarding benefits to this committee, it must expand 38 C.F.R. § 1.995 to include that authority or create another regulation.¹⁷⁴

The proposed committee to which the power is delegated must determine whether the request for relief is equitable in that circumstance.¹⁷⁵ Unlike the RO or Board, the committee would not be bound by the same requirements set out in the statutes or federal regulations and could grant relief based on equity principles.¹⁷⁶

Accordingly, VA should rewrite 38 C.F.R. § 2.7 to delegate the Secretary's authority of equitable relief down to a committee.

B. Proposed Procedure of Equitable Relief

Since Congress left a gap in procedure under 38 U.S.C. § 503, VA is free to interpret how to reasonably administer equitable relief.¹⁷⁷

As discussed above, there is over a two and a half year waiting period between the filing of the Form 9 and the Board decision.¹⁷⁸ To best utilize the veteran's time and reduce the Board's docket, equitable relief should be allowed during the period between the RO and the Board.¹⁷⁹ Ideally, this process would not interfere with the Board's docket. Rather,

168. See Elizabeth Pollman, *Strengthening Special Committees*, 9 U.C. DAVIS BUS. L.J. 137, 138 (2009).

169. See 38 C.F.R. § 1.955(a).

170. 38 U.S.C. § 5302.

171. 38 C.F.R. § 1.955(a).

172. *Id.* § 1.955(b).

173. *Id.* § 1.955(e).

174. *Id.* § 1.995. Expansion and the creation of additional regulations require Congressional approval. See *A Guide to the Rulemaking Process: The Final Rule*, FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 25, 2017).

175. See 38 U.S.C. § 503 (2012).

176. *Id.*

177. *Id.*

178. ANNUAL REPORT, *supra* note 29, at 21.

179. See *id.*

equitable relief would run parallel to the Board's docket.

Although under § 503 there is no requirement that the veteran must specifically request equitable relief for it to be granted, it would follow that a veteran must affirmatively request equitable relief, similar to the current procedure.¹⁸⁰ The VA must inform the veteran that if his request is granted, the relief would not be appealable.¹⁸¹ To encourage participation in this process, VA must grant the request in full, not in part. It is unlikely that veterans will pursue equitable relief, if there is a chance that VA will only grant partial relief, without the option of appealing. Moreover, allowing requests for relief to be granted only in part may dissuade many advocates from advising veterans to request equitable relief.

Considering the long wait times, VA and the veteran could mutually benefit from allowing veterans to request equitable relief between the filing of the Form 9 and the certification to the Board. Further, to increase participation in equitable relief, VA should restrict itself to only granting requests in full.

VI. CONGRESSIONAL ACTIONS

As it seems unlikely that VA will act on its own to set up a settlement type program through equitable relief, Congress may need to act.

Congress may make the settlement authority as broad or as narrow as it deems appropriate.¹⁸² Nonetheless, there are specific safeguards for veterans that Congress should consider when it creates this power.

First, Congress should evaluate at what point during VA's appeals system the settlement process will take place. It would not be appropriate for settlements to happen before the initial decision is rendered, since it may undermine the entitlement through the normal VA process. On the other hand, it should not be done so late in the process or after several remands that it would feel like a last resort to a veteran. Similar to the suggestion above, the wait time between the Form 9 and certification to the Board time seems most appropriate for both VA and the veteran to compromise.

Second, it would be wise to require the veteran to either be represented by an attorney or have an unbiased third-party attorney or mediator assist both parties to come to a settlement. In order to have a fair settlement, an attorney should be available to explain and guide the

180. 38 CFR § 2.7 (2017).

181. *Darrow v. Derwinski*, 2 Vet. App. 303, 303–05 (1992).

182. U.S. CONST. art. I, § 8.

2018]

Decision, Appeal, Repeat

427

veteran through the settlement process.¹⁸³ Specifically, an attorney may advise the veteran what entitlements and rights the veteran may be giving up by pursuing or accepting a settlement.¹⁸⁴

Third, Congress should require VA to outline the possible outcomes of settlement, including monetary awards if awarded through the normal procedures and the time frame in which the Board may come to a decision.

Fourth, Congress may want to protect the veteran by only allowing the veteran to initiate a settlement. Congress should not allow VA to initiate the settlement process to pursue its strong fiscal interest.¹⁸⁵ Following, barring VA from initiating settlement would prevent VA from targeting specific veterans to undercut what the veteran may be entitled to.

Last and most important, settlements are not appealable and could not be reopened for a set period of three to five years, unless there is a substantial and unanticipated change in circumstances. Requiring unappealable settlements ensures that the process stops the never-ending hamster wheel of claims and decreases the number of claims in the system. To ensure that veterans are getting the best outcomes, Congress must also require that an attorney be part of this process and prevent VA from initiating the settlement process.¹⁸⁶

Thus, while the power of settlement could improve the landscape of VA benefits system, Congress must safeguard the process so veterans are protected from being harmed by the interests of the government.

CONCLUSION

Based on the VA's increasing wait times and error, VA should rewrite its equitable relief regulation to create a settlement mechanism to end the never-ending hamster wheel. If VA is not willing or able to rewrite its regulation, Congress should write comprehensive legislation to allow veterans to settle claims, but include a variety of safeguards to protect veterans from the government.

183. See CRAVER, *supra* note 95, at 242–43.

184. See *id.* at 243.

185. See *id.* at 10 (discussing different motivations to settle cases).

186. See *id.* at 10, 242–43.