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BULLETIN THE NEWSLETTER OF VETERANS UNITED FOR TRUTH, INC.

#47

*"VETERANS STANDING UP FOR EACH OTHER"*

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## KEEPING YOU UP TO DATE ON THE LAWSUIT

The newsletter for the International Institute for Conflict Prevention & Resolution (IICPR) is titled ***"Alternatives: to the high cost of litigation"***. In its July/August issue on pages 130, 137-139, the newsletter presented a clear and concise summary of our case and the Ninth Circuit's ruling. The references to "ADR" are to their mission of "Alternative Dispute Resolution".

The IICPR is a New York City based organization which, according to its website, is:

"...an independent, nonprofit think tank that promotes innovation in commercial dispute prevention and resolution. By harnessing the collective expertise of leading minds in ADR and benchmarking best practices, it is the resource of choice for multinational corporations with billions of dollars at risk. CPR is also a leading online destination for lawyers seeking superior arbitrators and mediators and practical ADR resources and solutions."

The following article is forwarded to you with their permission [Ed.]

## ADRBRIEFS ~ VOL 29 NO7 JULY/AUGUST 2011 – PP 130, 137-139

Russ Bleemer And Peter Siemons

### **'THIS IS THEIR WAKE-UP CALL': NINTH CIRCUIT TRASHES THE VETERANS' ADMINISTRATION CLAIM PROCESSES**

U.S. veterans recently scored a courtroom victory over the principal government agency charged with assisting them. A Ninth Circuit decision castigated the government for failing to live up to its constitutional obligations to aid the veterans.

The May 10 opinion rests in part on a rushed need for alternative processes to counteract a litigation-style logjam. In the decision, the Ninth Circuit has ordered the U.S. Department of Veterans Affairs to overhaul its benefits claims process to eliminate backlogs.

And in its remand, the appeals panel ordered a U.S. District Court to monitor the department's progress and improvements— an apparent separation-of-powers issue that sparked a strong dissent.

The situation has been simmering for years as the VA promised Congress it would address slow processing of disability appeals. The numbers of veterans in benefits limbo has grown steadily, many with claims from recent service in Iraq and Afghanistan.

More than 830,000 disability determinations claims are filed annually, and the delays are immense. The opinion notes that "it takes on average 1,419 days (3.9 years) from the veteran's initial [appellate] filing ... to the veteran's receiving a decision from the Board." Waits at other points in the claims process similarly exceed the department's targets.

In the 2-1 opinion, the Ninth U.S. Circuit Court of Appeals held that backlogs in the VA's disability claims process violate the constitutional due process rights of veterans. *Veterans for Common Sense v. Shinseki*, No. 08-16728, 2011 WL 1770944 (9th Cir. May 10, 2011). (available at [www.ca9.uscourts.gov/datastore/opinions/2011/05/16/08-16728.pdf](http://www.ca9.uscourts.gov/datastore/opinions/2011/05/16/08-16728.pdf)). The case affirmed in part, and reversed in part, a trial court decision that can be found at 563 F.Supp.2d 1049 (N.D. Cal. 2008).

The 77-page majority opinion, by Circuit Judge Stephen Reinhardt, recommended more procedural protections for the claims processes and suggested ADR-style time management techniques, citing the Supreme Court's mandate for non-adversarial administration of veterans' benefits in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

The appeals panel puts the process-improvement supervision in the hands of a

California federal district court—a solution that drew Chief Circuit Judge Alex Kozinski's 26-page dissent. "The majority tramples over the strict jurisdictional limits Congress has imposed on our ability to review the VA's decisions on veterans' benefits," wrote Kozinski.

The majority's lengthy analysis of the government's constitutional due process responsibility to the veterans emphasized the fate of injured members of the U.S. military. In his first paragraph, Reinhardt wrote,

On an average day, eighteen veterans of our nation's armed forces take their own lives. Of those, roughly one quarter are enrolled with the Department of Veterans Affairs ("VA") health care system. Among all veterans enrolled in the VA system, an additional 1,000 attempt suicide each month. Although the VA is obligated to provide veterans mental health services, many veterans with severe depression or posttraumatic stress disorder ("PTSD") are forced to wait weeks for mental health referrals and are given no opportunity to request or demonstrate their need for expedited care. For those who commit suicide in the interim, care does not come soon enough. Like the cavalry of Alfred, Lord Tennyson's "Charge of the Light Brigade," these veterans may neither "make reply" nor "reason why" to the "blunder" of those responsible for their safety.

The federal district court wasted no time in calling the parties back to San Francisco to begin the remand process. Ron Elsberry, staff attorney at Disability Rights Advocates in Berkeley, Calif., which represents the plaintiff veterans' advocacy groups, told *Alternatives* in an E-mail that at a May 27 status conference, San Francisco-based U.S. District Court Senior Judge Samuel Conti "indicated his concern that despite the lengthy period during which the case was on appeal, the VA may have done little to improve the problems with its system."

Elsberry added that that Conti said the case would proceed rapidly with the remedial phase ordered by the Ninth Circuit.

The government objected to continuing the proceedings in the district court, Elsberry explained, telling Conti that the court lacked jurisdiction to conduct the status conference. According to Elsberry, however, the judge "disagree[d] with that contention and proceeded with the status conference as originally scheduled."

The objection of the U.S. Justice Department, which is representing the VA, may have been to buy time in order to decide its next step. As this issue went to press, the department had not decided whether to ask for a rehearing or appeal of the Ninth Circuit decision, according to Charles Miller, a spokesman for the VA's civil division in Washington.

Under Ninth Circuit rules, the Justice Department had until June 24 to petition the appeals court for an en banc rehearing in front of the full circuit court. A certiorari petition to the U.S. Supreme Court would be due by Aug. 8, 90 days after the Ninth Circuit decision. In an E-mail, spokesman Miller noted, "No determination has been made as yet as to what the government's next step will be in regard to this matter. We are considering our options."

The day after the decision, White House Press Secretary Jay Carney said in response to a question about the decision that "the Veterans Administration and the Justice Department are taking a very hard look at [the] ruling and will work closely to address any of the issues raised by the court." Carney added that soldiers' health care has been "one of [the] highest priorities—[of] both the President, the Vice President, the First Lady, [and] Dr. Biden...."

The opinion attracted a lot of press coverage. In a May 19 editorial, the *New York Times* noted that the “government can keep appealing, but it should work with the advocates and enact a plan to fulfill the promise of the veterans affairs secretary, Eric Shinseki, to do better.”

The California suit was addressed in an April 2009 *Alternatives* article, which had followed a detailed 2007 article proposing to install a mediation-style claims facility to deal with the backlog. The articles’ author, Richard Rosenbleeth, a Philadelphia attorney, says the Ninth Circuit’s decision confirms the situation’s urgency. “The court has recognized the need to address the VA claims situation and its due-process problems immediately,” he says.

[Rosenbleeth’s articles are “Back to Veterans Affairs: We Need to Reconsider ADR for Appeals Board Matters,” 27 *Alternatives* 76 (April 2009), and “Why Not ADR? Burdened by Backlogs, the System that Deals with Veterans’ Disability Claims Needs Help,” 25 *Alternatives* 131 (September 2007). They are available on Lexis, Westlaw, and at [www.cpradr.org](http://www.cpradr.org) and [www.altnewsletter.com](http://www.altnewsletter.com).]

The plaintiffs in the Ninth Circuit case are two nonprofit veterans’ advocacy organizations, Veterans for Common Sense, of Washington, D.C., and Veterans United for Truth, in Santa Clara, Calif. The Washington group said in a statement, “Veterans had our day in court, we won and now we urge VA to move forward so no veteran is delayed or denied healthcare or disability benefits. Our nation can and must do better so no veteran is left behind as the wars in Iraq and Afghanistan wind down.”

The California organization credited its attorneys, the San Francisco office of Morrison & Foerster, and Disability Rights Advocates, for the Ninth Circuit victory.

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The Reinhardt majority opinion reverses a 2008 decision in California’s Northern District federal court in San Francisco. The appellant advocacy groups sought injunctive and declaratory relief, alleging department-wide failures within the VA in processing appeals of disability claims. The claims detailed horror stories of injured, sick and dying veterans frustrated in their attempts to get medical help. The Ninth Circuit ordered the district court to determine on remand how the VA must change their procedures.

In its analysis, the Ninth Circuit noted that the backlog of appeals is a significant impediment to veterans seeking assistance, and “may delay a veteran’s receipt of benefits for many years.” See the box below for details of the panel’s specific holdings.

The Ninth Circuit notes early in its opinion that it would have preferred that ADR resolve the case—a suggestion also supported in the dissent by Chief Judge Kozinski. After assailing Congress’s inaction, Reinhardt wrote in the majority opinion:

**The veterans Benefits mess**

**The issue:** out-of-control appeals backlog clogs the VA disability claims process.

**The effect:** U.S servicemen and servicewomen are dying while their benefits are under consideration.

**What happened?** the Ninth Circuit declared the VA’s process unconstitutional. A court-supervised remedy is now pending. Will the Board of Veterans’ Appeals use ADR?

[H]ad the VA agreed with [the plaintiffs] following oral argument to consider a practical resolution of the complex problems, the end result surely would have been more satisfactory for all involved. We joined in our dissenting colleague’s suggestion that we defer submission of this case in order to permit the parties to explore mediation, and we regret that effort proved of no avail. We willingly acknowledge that, in theory, the political branches of our government are better positioned than are the courts to design the procedures

necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job.

In the absence of mediation, the Ninth Circuit appeals panel opinion focuses on the delays, and emphasizes the conciliatory nature of the Board of Veterans' Appeals' mandate in its remand order. It notes that although previous negotiations between the parties did not prove to be fruitful, it "still remain[s] hopeful that at least some of the problems in this case can be resolved by the parties working together."

The opinion discusses the government's interests in maintaining an "informal and non-adversarial" process for administering veteran's benefits, as articulated by the Supreme Court in the *Walters* case. *Veterans for Common Sense*, 2011 WL 1770944, at 35; 2011 WL 1770944, at 37 (Kozinski, A. dissenting).

The majority strongly criticized the entire claims and appeals system. "[M]uch of the delay appears to arise from gross inefficiency, not resource constraints." 2011 WL 1770944, at 32. In addition, the opinion points out that resources may not be the biggest problem—"To the contrary, the district court found that the [VA] is rapidly increasing its staff." *Id.*

In fact, there are no paid lawyers in the early stages of claims. Veterans submit them on their own to regional VA offices, often with the assistance of veterans advocacy groups. But under 38 U.S.C. § 5904(c)(1), veterans can pay a fee for assistance—that is, hire a lawyer—once they file a "Notice of Disagreement," seeking review by the Board of Veterans' Appeals. The board is based in Washington, but holds regional appellate hearings as per 38 U.S.C. § 7107(d)(1).

The opinion discussed frustration with the long-running nature of the problems, noting that the Board of Veterans' Appeals' chairman, James Terry, "was unable to explain the lengthy delays inherent in the appeals process before the Board."

Terry has dealt with this issue since he was appointed six years ago. In December 2005, he reported to Congress that one of the board's "most significant and persistent challenges...[is] [i]ncreasing productivity to contain and reduce the appeals backlog," noting that "[a]ppeals resolution time stood at 622 days." "The Challenges and Opportunities Facing Disability Claims Processing in 2006," before the House Committee on Veteran Affairs, 109<sup>th</sup> Cong. 22 (2005) (statement of James P. Terry)(available at [www.va.gov/oca/testimony/testimony\\_index.asp](http://www.va.gov/oca/testimony/testimony_index.asp)).

Terry's testimony followed a vow by his predecessor just seven months earlier to "develop new and creative solutions" to deal with these problems. See "The Board of Veterans' Appeals and Appeals Management Center," before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs, 109<sup>th</sup> Cong. 6 (2005) (statement of Ron Garvin, Former Acting Chairman, Board of Veteran Appeals)(available at [www.va.gov/oca/testimony/testimony\\_index.asp](http://www.va.gov/oca/testimony/testimony_index.asp)).

The situation has deteriorated. The trial court had found that waits for the Regional Office to certify an appeal to the Board of Veterans' Appeals—"a merely ministerial act," notes the Ninth Circuit—average 573 days.

The board's 2010 Annual Report states that the "average length of time between filing the appeal and the Board's disposition was 886 days." (Available at [www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](http://www.bva.va.gov/Chairman_Annual_Rpts.asp).)

Even though the buildup was one of the "most significant issues" that the board faced in 2005, and despite the fact that the 2010 report notes the board's top priority this year would be to "reduce the backlog," the appellate delays have continued to increase.

According to the 2010 board report, 40,688 appeals were pending on Oct. 1, 2009, the beginning of the 2010 fiscal year, and 45,722 were pending by the end of the fiscal year, which was last Sept. 30. The report notes that the board decided a record volume of cases last year, but also attributed a slowdown in the decisions to bad weather and a 10-day computer systems failure.

It now "takes approximately 4.4 years from the date of the veteran's initial filing ...to the final decision by the Board." *Veterans for Common Sense*, 2011 WL 1770944, at 9. In the majority opinion, Circuit Judge Reinhardt writes that "between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals." *Id.*, at 10.

The Ninth Circuit panel stops short of claims-process repair, leaving the details to the trial court on remand. But it suggests conflict resolution methods could play a part. "The district court may consider the need for setting maximum

time periods for determinations at various stages of the claims adjudication process,” the opinion notes, “and/or the need for a procedure to expedite claims where emergency circumstances are shown to exist.”

Richard Rosenbleeth—who is a retired litigation partner of Blank Rome LLP and longtime ADR advocate and neutral—says that the opinion renews the earlier calls for conflict resolution practices in dealing with veterans’ claims.

Now that the Ninth Circuit has held that the delays violate due process, notes Rosenbleeth, “Perhaps the VA, the veterans service organizations that represent veterans in the claims process, and the Board of Veterans’ Appeals will address creative ADR solutions for the extraordinary and unexplained delays in the claims/appeals process—and do what is fair for our veterans... This is their wake-up call.”

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### Why the Ninth Circuit Backs ADR for Veterans Claims

The Ninth Circuit, in finding 2-1 in May that the Veterans Administration violated the due process rights of soldiers in dealing with disability benefits and ordering the department to overhaul its system, specifically held:

1. The veterans organizations had standing to file suit;
2. Sovereign immunity would not protect the VA from the veterans advocacy organizations’ constitutional claims;
3. The execution of the VA’s mental health strategic plan was not enforceable under the Administrative Procedure Act;
4. Veterans were deprived property without due process, under the Fifth Amendment’s Due Process Clause, as a result of the delays by the VA in providing mental health services.
5. Similarly, veterans were deprived property without due process, under the Fifth Amendment’s Due Process Clause, as a result of the untimely adjudication by the VA of their death and disability benefits claims.
6. The denial of the veteran organizations’ motion to compel the VA to answer an interrogatory was not an abuse of discretion by the federal district court.

The opinion was written by Circuit Judge Stephen Reinhardt, who was joined by Circuit Judge Procter Hug Jr.

In his dissent, Chief Circuit Judge Alex Kozinski agreed that the VA appeals process needs reform, but wrote that the needed changes are Congress’s task, not the judiciary’s. As “[m]uch as the VA’s failure to meet the needs of veterans...might shock and outrage us,” wrote Kozinski, “we may not step in and boss it around.”

Both the majority and the dissent discussed the Veterans Judicial Review Act, which dictates the jurisdictional limits on veteran’s claims. But each offered its own interpretation.

The majority read the VJRA broadly to determine that the court was acting within its jurisdiction. Kozinski countered that the VJRA language in 38 U.S.C. Secs. 502 and 511 precluded the court’s involvement.

Thus, both sides recognized a crisis and that new measures were needed—but they disagreed as to whether litigation and the courts could resolve it.

*Bleemer is Alternatives’ editor. Siemons is a CPR Institute Summer 2011 intern and a 2L at Brooklyn Law School.*

In the e-mail providing their permission for us to publish this article, Russ Bleemer provided me with this reference to a brief article by Peter Siemons on the “CPR” website. SPR is a think tank devoted to commercial dispute prevention and resolution. The brief article is at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/721/Justice-Asks-Ninth-Circuit-for-Rehearing-in-Veterans-Disabilities-Claims-Backlog-Case-July-11.aspx> and is quoted here in its entirety. [Ed.]

### **JUSTICE ASKS NINTH CIRCUIT FOR REHEARING IN VETERANS’ DISABILITIES CLAIMS BACKLOG CASE (JULY 11).**

In the wake of the May 10 decision in [Veterans for Common Sense v. Shinseki](#), which blasted the U.S. Department of Veterans Affairs for failing to provide servicemen and -women with timely adjudication of their disability claims, the government has petitioned for a rehearing en banc in front of the full Ninth U.S. Circuit Court of Appeals.

A 2-1 panel had remanded the case to a San Francisco federal district court to oversee immediately new VA measures that would ease a backlog in disability claims appeals that now stretches for more than four years.

The U.S. Justice Department, which is handling the case for the VA, says that the Ninth Circuit's order is an invalid intrusion by the judiciary into executive-branch processes.

The case highlights the difficulties veterans have in adjudicating their disputes over their disability benefits—an administrative appeals process that occurs well after initial determinations have been made.

The Board of Veterans Appeals has been deluged with claims in the wake of long-running wars in Iraq and Afghanistan. Claims and delays have been increasing for a decade, and the VA has continually said it was working to ease the situation.

U.S. Secretary for Veterans Affairs Eric Shinseki touched on the overall claims processing issues just last week at three stops in Montana, and the department posted this July 8 [Helena \(Mont.\) Air.com/Independent Record article](#) on the events at the VA's website.

The decision was the subject of [this CPR web article](#) last month. The new July/August [Alternatives](#) (subscription only) expands on the *Veterans for Common Sense* decision, and focuses on, among other things, the majority and the dissent's recognition of a separation-of-powers issue.

This Constitutional concern was the basis for the government's petition for a rehearing, which states that the Ninth Circuit's decision "ignored basic limits on judicial authority to compel systemic reform of agency programs."

The rehearing petition was filed just before the long holiday weekend on July 1. The Ninth Circuit ordered the plaintiffs, two veterans organizations, to respond by July 26.

Ron Elsberry, staff attorney at Disability Rights Advocates in Berkeley, Calif., which represents the veterans' advocacy groups, the Veterans for Common Sense and Veterans United for Truth Inc., notes in an E-mail that if the court grant the VA's rehearing petition, "the original appellate decision . . . will be of no force or effect, and an 11-judge panel will rehear the appeal and issue a new opinion."

--Peter Siemons, CPR Intern

**The fight goes on**

**Any donation you can make to help the cause would be greatly appreciated.**

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