



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

April 22, 2010

The Honorable Charles E. Grassley  
United States Senate  
Washington, DC 20510

Dear Senator Grassley:

Thank you for sharing your concerns regarding statements made before the Supreme Court in the case of *Astrue v. Ratliff* suggesting that, in between 50 and 70 percent of appealed cases, the position of the Department of Veterans Affairs (VA) is not substantially justified. I assure you that VA is committed to providing Veterans with prompt, accurate, and fair decisions on their claims for benefits and continues to work diligently to meet those goals. I am concerned, however, that the figures mentioned in the *Ratliff* case create the mistaken impression that most VA decisions are erroneous and unjustified. That is certainly not the case.

In fiscal year (FY) 2009, VA regional offices issued more than 1.9 million appealable decisions, and the Board of Veterans' Appeals (Board) decided more than 48,000 appeals. The U.S. Court of Appeals for Veterans Claims (Veterans Court) decided 4,379 appeals in FY 2009. Because the court reviews only a very small percentage of VA decisions, in cases in which a claimant disagrees with VA's decision, the rate of remands and reversals before the court is not reflective of the overall quality of VA decisions.

The Veterans Court rarely reverses VA's decisions and directs an award of benefits to claimants. One published analysis (by an employee of the Veterans Court) estimates that the Veterans Court reverses the Board in approximately 6 percent of the appeals in which the Veterans Court issues a decision, a figure that compares favorably with the rate at which Federal circuit courts reverse decisions on appeal. See Ridgeway, James D., Why So Many Remands? A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims, 1 Veterans Law Review 113, 155 (2009) (available at [http://www.bva.va.gov/VLR\\_VOL1.asp](http://www.bva.va.gov/VLR_VOL1.asp)). However, the court remands a significant number of cases each year for further action by VA. During the period from FYs 2005 to 2009, the Veterans Court decided an average of 3,690 cases per year. During that period, the Veterans Court remanded cases, in whole or in part, in an average of 2,010 cases per year, or 54 percent of the cases decided. The majority of these remands (an average of 1,190 per year) are based upon joint motions of the parties, which generally are approved by the Clerk of the Veterans Court and thus involve no decision by the judges of that court. Remands may be required for reasons other than VA error, such as when there has been a change in statute, regulation, or judicial precedent. Additionally, a significant number of remands during the period from FYs 2005 to 2009 occurred as a result of the



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misapplication of the statutory rule of prejudicial error when reviewing minor and non-substantive agency errors of law. The Supreme Court confirmed that misapplication last year in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

Approximately half of all remands from the Veterans Court are based upon a finding that VA failed to provide an adequate statement of the reasons or bases for its decision, as required by 38 U.S.C. § 7104(d)(1). In these cases, the remand requires VA to reevaluate the claim and provide a more detailed explanation of the basis for its decision. Although VA has worked diligently to reduce the number of these "reasons or bases" remands, and the length and detail of the Board's decisions have grown considerably as a result, this area continues to present a unique challenge, as it is often difficult to predict the ways in which a Board decision may be found to be insufficiently detailed. It is also important to note that a "reasons or bases" remand does not necessarily indicate that VA committed any factual or legal error in finding that a claimant did not meet the requirements for entitlement to benefits, but may reflect only the Veterans Court's judgment that a fuller explanation is needed with respect to a particular issue.

As you note, the colloquy before the Supreme Court in *Ratliff* suggests that VA's position is not "substantially justified" in between 50 and 70 percent of cases before the Veterans Court. It is our understanding that the attorney for the Government in that case relied upon data in the Veterans Court's annual reports published on the court's Web site. A copy of the Veterans Court's annual reports for FYs 2000-2009 is enclosed for your reference. Data in those reports indicate that, during the period from FYs 2005 to 2009, the Veterans Court granted applications for attorney fees under the Equal Access to Justice Act (EAJA) in an average of 1,656 cases per year, or in 45 percent of cases decided. An award of attorney fees under EAJA may be made to a prevailing party in litigation with the Government, unless the Government can establish that its position was "substantially justified."

Although the above-referenced data appear to suggest that VA's position is not "substantially justified" in 45 percent of all cases before the Veterans Court, we believe that characterization is misleading. In our experience, the Veterans Court has applied the "substantial justification" requirement of EAJA more liberally than other Federal courts and generally has found that virtually any error warranting remand will establish that the Government's position was not substantially justified. In cases involving "reasons or bases" remands, for example, the Veterans Court has found that the defects in the Board's articulation of its decision establish that VA's position lacked substantial justification, irrespective of whether the Board's decision was legally sound and supported by evidence. In *Thompson v. Principi*, 16 Vet. App. 467, 470 (2002), the court held that "a 'reasons or bases' error has no reasonable basis in law or fact." With



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all due respect to the Veterans Court, we believe it is inaccurate to conclude that defects in the Board's articulation of its decision necessarily render the Government's position not substantially justified. As one judge of the Veterans Court has noted, "[n]o other court in the country awards EAJA fees as liberally as this one" and "no other federal court awards EAJA fees when an agency fails to appropriately articulate reasons for its administrative decision." *Cullens v. Gober*, 14 Vet. App. 234, 251 (2001) (en banc) (Holdaway, J., dissenting).

Because the Veterans Court has indicated that virtually any remand will warrant an award of EAJA fees, VA generally does not contest EAJA awards when a case is remanded. In such cases, VA files a "no contest" pleading in which we concede that the Government's position lacked substantial justification. This is done to minimize the cost to the Government in cases where we believe the Veterans Court is likely to award EAJA fees. If VA contests an EAJA award, the appellant may obtain additional attorney fees for the time spent litigating the EAJA claim, if the claimant prevails. The vast majority of EAJA petitions before the Veterans Court are resolved through this "no contest" process. Although it is unfortunate that VA must concede that its position was not justified even when we strongly believe otherwise, our experience has shown that this is the most prudent course in view of the Veterans Court's precedents.

We do not agree with the suggestion that VA decisions generally lack substantial justification. We recognize, however, that we can, and must, continue to improve the quality of VA decisions in order to reduce appeals and remands. To this end, VA maintains vigorous quality-review and training programs both at the Board and at the Veterans Benefits Administration (VBA), which is responsible for initial claim development and decision at regional offices throughout the country. The Board's quality-review program includes five full-time attorneys assigned to review and evaluate a statistically valid random sample of signed but undispached Board decisions. This process enables errors to be identified and corrected in the selected individual cases prior to dispatch and collects data that is used to measure the overall quality of the Board's decisions. The information obtained from the Board's quality-review process is used to identify quality trends over time, identify areas of strength or weakness in the appellate decision-making process, set realistic goals for improvement, and develop remedial or corrective training as needed. Using the information gathered, the Board conducts extensive training, including periodic "Grand Rounds" training for all Veterans Law Judges and staff counsel, monthly training and team-level training on a variety of legal and medical issues, extensive on-line training and research tools, and joint training sessions with VBA and VA's Office of the General Counsel. The Government Accountability Office has thoroughly reviewed and favorably commented upon the Board's quality-review processes.



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VBA's Systematic Technical Accuracy Review (STAR) program conducts quality review of VA regional office decisions. VBA has implemented a number of improvements to this program within the past 2 years, consolidating the program operations at a single location, more than doubling the staffing levels, expanding the number of decisions reviewed to ensure a statistically valid sample, and implementing a second level of peer review to ensure the accuracy of findings in these reviews. During FY 2009, STAR staff reviewed 24,797 rating and authorization cases and 3,671 fiduciary cases. The targeted number of cases for STAR review in FY 2011 is 37,932.

Information from STAR reviews is used to identify error trends to be addressed by targeted corrective actions and training. Regional offices are given explanations of identified errors and are required to certify to VBA headquarters that corrective actions have been taken for all such errors. In addition to STAR review, VBA's quality-assurance program includes regional office site visits, consistency reviews, and special focus reviews. Regional offices are timely informed of identified errors and inconsistency trends and provided with constructive feedback, including instructions on correcting and avoiding errors. Data from all tiers of the quality assurance program are used to develop and deploy appropriate training. During monthly national Quality Calls, VBA training staff, policy and procedures staff, and quality-review staff collaborate to address national error trends and training needs. VBA training staff develops curricula for mandatory training of regional office claims personnel. Among other things, the training staff is currently developing a curriculum for regional office appeals teams, whose role is to process and, if possible, resolve appealed claims prior to the Board's involvement.

In 2004, the Board and VBA initiated a joint effort to reduce avoidable remands by collecting data on the most prevalent reasons for remands and targeting training and other measures to ensure that claims are properly developed and decided in the first instance. By "avoidable" remands, we are referring to a class of cases in which a remand could have been avoided if the case was properly processed and reviewed in accordance with existing laws and regulations. It is important to note that under the current adjudication system a certain percentage of remands are expected for various reasons beyond VA's control due to the nature of an open record system. For example, some cases must be remanded to address intervening changes in the law, new medical evidence, changes in medical condition, or other evidentiary considerations. In furtherance of this collaborative effort between the Board and VBA, the Board provides training to VA regional office personnel through teleconferencing and during Travel Board hearing trips, to address areas where improvements can be made in the development and decision of claims.

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Concerning your request for the total amount of attorney fees paid by VA for each of the past 5 years, our data show that we paid \$3.7 million in FY 2005, \$5.5 million in FY 2006, \$8.3 million in FY 2007, \$12.7 million in FY 2008, and \$12.3 million in FY 2009. Even when VA does not contest entitlement to attorney fees under EAJA, we do contest the amount of fees claimed by attorneys when necessary to ensure that the Government is not overcharged. Payments of EAJA fees are made from the Compensation and Pension benefit account and are reflected in VA's annual budget submissions for that account. We do not divert funds from other programs for this purpose.

I appreciate the opportunity to address this important matter, and I hope you find this information helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric K. Shinseki", with a stylized flourish at the end.

Eric K. Shinseki

Enclosure



# UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

## ANNUAL REPORTS

<b>Fiscal year ending Sept. 30</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
New cases filed	2442	2296	2150	2532	2234	3466	3729	4644	4128	4725
% self-represented at filing	70%	55.36%	58%	59%	58%	58%	63%	53%	64%	68%
<b>Cases decided (Total)</b>	<b>2164</b>	<b>3336</b>	<b>1451</b>	<b>2638</b>	<b>1780</b>	<b>1905</b>	<b>2842</b>	<b>4877</b>	<b>4446</b>	<b>4379</b>
% self-represented at closure	35%	29%	29%	21%	22%	29%	24%	19%	24%	28%
<b>Procedural decisions (Total)</b>	<b>545</b>	<b>483</b>	<b>479</b>	<b>486</b>	<b>443</b>	<b>624</b>	<b>707</b>	<b>1666</b>	<b>904</b>	<b>1109</b>
Dismissed, lack of jurisdiction	247	281	229	215	204	248	320	317	369	385
Dismissed for default	113	102	51	70	60	160	160	176	265	412
Dismissed voluntarily	163	78	106	132	123	144	198	1149	254	286
Extraordinary relief dismissed	22	22	93	69	56	72	29	24	16	26
<b>Merits decisions (Total)</b>	<b>1619</b>	<b>2853</b>	<b>972</b>	<b>2152</b>	<b>1337</b>	<b>1281</b>	<b>2135</b>	<b>3211</b>	<b>3542</b>	<b>3270</b>
Affirmed	526	27	109	129	155	271	448	1098	693	571
Affirmed or dismissed in part, reversed/vacated & remanded in part	325	65	24	22	35	40	266	442	603	496
Reversed/vacated & remanded	705	962	209	412	313	257	518	524	559	397
Extraordinary relief granted	0	0	0	0	0	1	0	2	2	0
Extraordinary relief denied	63	75	154	62	59	71	56	66	60	48
Remanded	0	1724*	476	1527	774	641	847	1079	1625	1758
<b>Time from filing to disposition</b>	<b>386</b>	<b>340</b>	<b>326</b>	<b>357</b>	<b>392</b>	<b>379</b>	<b>351**</b>	<b>416</b>	<b>446</b>	<b>344***</b>
<b>Nondispositive actions:</b>										
EAJA applications granted	634	617	466	1419	921	831	1105	1526	2433	2385
EAJA applications denied	32	19	554	40	30	10	22	22	16	21
EAJA applications dismissed	110	165	84	100	97	36	25	27	12	17
Oral Arguments	12	10	16	7	7	24	22	24	22	30
Appeals to USCA Federal Circuit	189	110	410	228	182	186	382	314	158	167

\* Due to enactment of the VCAA in November 2000, these cases were remanded to the VA for additional review.

\*\* In order to provide a statistical comparison to other Federal Courts of Appeal this figure was changed to median number of days for FY 2006.

\*\*\*This number no longer includes the number of days cases appealed from this Court spent under consideration at the Federal Circuit. The number of days spent on appeal at the Federal Circuit are reflected on that Court's annual report (change enacted in 2009).