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TRIAL | Protecting those who serve
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Representing veterans in the battle for benefits

They risked their lives for our country. But when it comes to getting benefits they're entitled to, veterans face an array of administrative hurdles that only trained advocates can overcome.

Each year, increasing numbers of veterans file claims for disability benefits from the Department of Veterans Affairs (VA). But the process is not easy: Claims often need extensive proof and substantiation and, if connections between injuries and service are not appropriately made, benefits will be denied. In addition, because of an arcane law dating back to the Civil War, attorneys are not allowed to charge fees to represent veterans at the VA until after the veterans have exhausted several levels of appeal, usually years after the claims are first filed.

Veterans' service organizations such as the American Legion provide lay advocates who represent veterans for free. But some advocates are overworked and cannot represent all the people seeking their help. So veterans can be left on their own until late in the appeals process, losing benefits.

To help them, bills in the House and Senate propose to abolish the Civil War-era prohibition on fees for attorneys who work for veterans in the VA benefits process. In addition, the National Veterans Legal Services Program (NVLSP) provides training and other assistance for lay advocates. NVLSP also trains attorneys who represent appellants before the U.S. Court of Appeals for Veterans Claims.

Ronald B. Abrams, joint executive director of NVLSP, is a former VA attorney who has been training veterans' advocates since 1989. He spoke with TRIAL.

Associate Editor **Valerie Jablow** about how the system as it currently stands is and is not helping vets—and what lawyers can do to help.

TRIAL: Given the ongoing wars in Afghanistan and Iraq, are you seeing an increase in demand for legal services for veterans?

Abrams: Yes. Here's what we just said in testimony submitted to Congress: "The number of disabled veterans who need representation with their claims before the VA is staggering, and it is increasing over time." According to the VA, disability claims from returning war veterans, as well as veterans of earlier periods, have increased 36 percent between 2000 and 2005. The VA estimates that disability claims in 2006 will increase to almost 812,000. Because the VA has realized that in certain states, not enough veterans have applied for benefits, the VA is conducting outreach that will encourage many more veterans to file claims.

TRIAL: Doesn't every veteran who is eligible apply for benefits?

Abrams: Many veterans don't realize that these benefits are available to them. They come home from their tour of duty, and they no longer associate themselves with the veterans' community. Some wait 50 years before they seek out VA benefits. They involve themselves in their lives, in raising their children and focusing on their careers and families. They don't bother with the VA and don't know what's out there for them.

TRIAL: What kind of events or injuries may lead to a veteran needing to file a claim: injury during service, exposure to chemicals during service, denial of benefits?

Abrams: All of these and more. The VA can establish service connection and begin to pay compensation benefits if a current disability can be linked to an event, symptoms, exposures, or treatment in service. NVLSP publications explain in detail all the ways a current disability can be linked to service. Generally, my advice to veterans' advocates is to work backward: Ask what conditions the veteran suffers from now and then see if there is a link between what he or she is suffering from and what happened in service.

It's amazing what can be done. We've been able to get people benefits 50 years after discharge.

In addition, any veteran who served during wartime and goes into a nursing home generally has entitlement to what is called a non-service-connected pension. That is, these veterans don't have to prove a connection between their current condition and their service to get a non-service-connected pension. Once basic entitlement is established, all they have to prove is permanent and total disability with limited net worth and limited income.

The danger is that an advocate with limited knowledge might get a veteran a non-service-connected pension, which allows that veteran's family to spend down his or her assets over time and keep the veteran in a nursing home. But it's possible that the conditions for which the vet is in the nursing home could be service-connected. So instead of receiving \$800 a month, the veteran could be receiving \$2,400 a month in benefits. That's \$144,000 over five years.

TRIAL: What is the basic process by which veterans can claim benefits?

Abrams: A veteran who may have a claim for benefits is generally first represented by advocates called service representatives or service officers. These lay advocates represent veterans for free through service organizations such as the American Legion, the Veterans' of Foreign Wars, or the Disabled American Veterans. Some of these lay advocates are trained by their service organizations, and some are trained by NVLSP. They are generally not attorneys.

Then, if the veteran is denied his or her claim at a regional VA office, the veteran can appeal to the Board of Veterans' Appeals. If the board denies the claim, the veteran can hire an attorney to represent him or her at the U.S. Court of Appeals for Veterans Claims.

TRIAL: Why would a veteran need a private lawyer?

Abrams: After the veteran files a claim, the VA has a strange and almost Kafkaesque adjudication process. According to statute, the VA is supposed to tell the veteran and his or her advocate what evidence is needed to substantiate the claim and any other claim reasonably inferred by the evidence of record. Also, the VA, by statute, has a duty to assist the veteran in obtaining evidence to substantiate the claim.

Because the VA has a huge backlog of unresolved, unadjudicated claims, it sometimes skips crucial steps in the processing of these claims. These errors often adversely affect the fairness of the adjudication process. As a result, many claims that finally reach the Board of Veterans Appeals or the Court of Appeals for Veterans Claims are remanded because the VA failed to satisfy some of its statutory duties. Often, by the time a claim comes up for a final adjudication before a regional office, the adjudicators are pressured to finalize the claim, rather than send it back for additional development. This is because the regional offices are evaluated by how many claims they process and how quickly they process claims. And the VA regional offices obtain the same work credit for a fast and inaccurate denial as for a grant of benefits that took many more hours to adjudicate.

TRIAL: So despite its statutory duty, the government has little motivation to make sure claims are developed and adjudicated properly and that the veterans get their benefits?

Abrams: That's right. I'll give you an example that I witnessed while working for the VA on quality review.

The regional office would write to a veteran, asking him or her for information. It would then deny the claim on the same day it asked for the information. This was done to falsely obtain fast work credit. Of course, if the claimant provided the requested information, the regional office would adjudicate that claim and obtain a second, undeserved, work credit. Therefore, because VA managers are evaluated in part on how many

claims their offices adjudicate and how fast the claims are adjudicated, it was in the best interest of the VA managers to improperly deny claims quickly.

This need to adjudicate claims quickly often puts the VA regional office at odds with the needs of the veteran. This is why good advocates are worth their weight in gold. A knowledgeable advocate can cut through the VA red tape and focus on what the veteran really needs. This does not always guarantee that the veteran will win, but at least that veteran will have a fair shot at getting what he or she deserves.

TRIAL: Do veterans returning from Iraq and Afghanistan need legal services in particular areas?

Abrams: According to our experience with recently returned veterans and according to recent news reports, there is a relatively large percentage of veterans from Iraq and Afghanistan who may be suffering from posttraumatic stress disorder (PTSD). This may be because in some of these places there is no fixed front line. You can be attacked while walking down the street as well as going into combat. That situation may create such a stressful and traumatic situation that more than the usual number of people begin to suffer from PTSD, which is a controversial disease.

TRIAL: Why is PTSD controversial with respect to VA benefits?

Abrams: Generally, compensation benefits are politically popular. People think that if we send someone into combat and they suffer a bullet wound, we should pay them for the disability the bullet wound causes. But compensation is much more than that. It's basically a monthly payment for any disability incurred, or aggravated, in service.

Some people, however, have trouble accepting the fact that you can be subject to a traumatic event in 1975 and start suffering from a mental condition as a result of that event in 1995.

TRIAL: What happens with disabilities that are not immediately recognizable as a result of a veteran's service?

Abrams: It's clear that a veteran can suffer an exposure or an injury in service that does not cause an immediate disability but in the long run will cause a significant disability. For example, assume that a veteran has 30 parachute jumps in service. Each time, he lands on his knees, and they take the blow. Twenty years later, this veteran has arthritis in both knees. If a doctor determines that the repeated trauma in service caused the arthritis, that veteran can get service-connected benefits.

You need to prove three things in that case: First, you have to have a current condition for which the VA can pay benefits. Second, you have to be able to show by looking at the service records that something happened in service that might be linked to the current condition.

Third, you have to link the current condition to the incident, event, or exposure in service. In general, there are five major theories to link a current condition to service. The NVLSP textbook, the *Veterans Benefits Manual*, goes into quite a bit of detail about these linkage theories.

Underscoring all of this is the VA standard of proof. It's very liberal. It gives the veteran the benefit of the doubt. This means that if the evidence is approximately equal or balanced, then the veteran should win.

For example, assume that a veteran suffered trauma to his or her back in service and now has an arthritic back condition. A medical opinion that says that it is as likely as not that the current back condition is linked to the back trauma in service could support a grant of service connection.

When we at NVLSP ask doctors for a medical opinion regarding a veteran's condition, they often have trouble dealing with the VA's benefit-of-the-doubt standard. Doctors like to talk about medical certainty, and we have to explain to them that we don't need medical certainty—we just need "as likely as not."

TRIAL: How successful are veterans in the appeals process?

Abrams: I know that there are more appeals going to the Court of Appeals for Veterans Claims than before. About 70 percent of the appeals from the regional offices to the Board of Veterans Appeals are remanded or reversed.

Studies by the VA inspector general show that the most important element in successful veterans' claims is that they have an advocate to represent them. Many veterans, unfortunately, don't get anyone to represent them.

TRIAL: Can a veteran find an attorney willing to work with him or her pro bono before either the board or the court?

Abrams: There is very limited pro bono representation by attorneys before the VA regional offices and before the board. But many appellants can obtain free representation by attorneys before the U.S. Court of Appeals for Veterans Claims. For example, NVSLP is part of the Veterans Consortium Pro Bono Program, which is dedicated to finding volunteer attorneys who will represent veterans on a pro bono basis before the court. The consortium trains lawyers, screens cases, and provides screening memos and mentors to the attorneys who take these cases. Also, some service organizations provide some of their clients free representation before the court.

We consider either a remand or a reversal a win, because in many cases either result leads to benefits being paid and because in many cases the VA has done something wrong that prevents the veteran from having a fair shot at getting benefits. If the case is remanded, it usually goes back to the board and then generally back to the regional office or to what the VA has called the "appeals management center." They are getting so many remands that they had to create a new organization to handle them, because the regional offices would never get credit for the appeals, so they simply did not touch them.

TRIAL: So if the veteran hires an attorney, it's best that the lawyer is trained in how to handle these claims?

Abrams: If you are going to get involved at the original level, unless you have a background in the system, you could miss very important benefits that the veteran doesn't know about. In representing people for VA benefits, the advocate should analyze the entire claim file. If this is not done, the client could be hurt.

Let me give you an example. A few years ago I was called by an attorney because he wanted to provide pro bono help to a Navajo code talker who was suffering from hearing loss. The veteran believed that his hearing loss was caused by the loud noise he was exposed to at Iwo Jima, during World War II. While we were working on the hearing loss claim, I asked the lawyer if he had talked to the veteran. The attorney said he had tried, but he discovered that the veteran lived on a mountain by himself and that he was very suspicious of strangers.

I then suggested that the attorney try to have the veteran examined for PTSD. I explained that the veteran was exposed to a stressor—combat—in World War II, and it was common knowledge among veterans' advocates that some veterans with PTSD tend to be suspicious of strangers and isolate themselves.

Sure enough, the veteran was eventually diagnosed with PTSD. In addition to whatever amount the veteran received for his hearing loss, the VA eventually granted service connection for the PTSD and awarded total disability. The claim took several years to adjudicate, and the veteran eventually received close to \$100,000 in back benefits.

If the pro bono attorney had not gotten involved, this veteran would have never filed a claim for PTSD. This attorney essentially changed this veteran's life for the better.

TRIAL: Why does that old law limiting the role of attorneys in helping veterans exist?

Abrams: Back in the Civil War, people were being charged a lot of money to file their claims. So they put in a \$10 fee limit. That was reasonable for the Civil War, but they kept that limit until 1988. A \$10 limit was certainly not reasonable by then. Therefore, most attorneys did not engage in the practice of veterans' law.

The way the system works now, an attorney can't get involved until the board denies a claim. Then, if the attorney is hired by the appellant, the attorney can receive a fee of up to 20 percent of the retroactive benefit.

I want to emphasize that many veterans' advocates are very knowledgeable and provide wonderful services to veterans. Veterans, however, should have a choice. If a veteran wants to pay an attorney to help him or her obtain VA benefits, that veteran should be allowed to hire a lawyer. Veterans should have the same rights as any other citizen.