

103^D CONGRESS
1ST SESSION

S. 1445

To amend title 38, United States Code, to improve and clarify certain adjudication and appeal procedures relating to claims for benefits under laws administered by the Department of Veterans Affairs.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 9 (legislative day, SEPTEMBER 7), 1993

Mr. ROCKEFELLER (by request) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to improve and clarify certain adjudication and appeal procedures relating to claims for benefits under laws administered by the Department of Veterans Affairs.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; REFERENCES TO TITLE 38,**
4 **UNITED STATES CODE.**

5 (a) **SHORT TITLE.**—This Act may be cited as the
6 “Veterans’ Appeals Improvement Act of 1993”.

7 (b) **REFERENCES.**—Except as otherwise expressly
8 provided, whenever in this Act an amendment is expressed

1 in terms of an amendment to a section or other provision,
2 the reference shall be considered to be made to a section
3 or other provision of title 38, United States Code.

4 **SEC. 2. COMPOSITION OF THE BOARD OF VETERANS' AP-**
5 **PEALS.**

6 (a) BOARD MEMBERS AND PERSONNEL.—Section
7 7101(a) is amended to read as follows:

8 “(a)(1) There is in the Department a Board of Veter-
9 ans’ Appeals (hereafter in this chapter referred to as the
10 ‘Board’). The Board is under the administrative control
11 and supervision of a Chairman directly responsible to the
12 Secretary.

13 “(2) The members of the Board shall be the Chair-
14 man, a Vice Chairman, such number of Deputy Vice
15 Chairmen as the Chairman may designate under sub-
16 section (b)(4), and such number of other members as may
17 be found necessary to conduct hearings and consider and
18 dispose of matters properly before the Board in a timely
19 manner. The Board shall have such other professional, ad-
20 ministrative, clerical, and stenographic personnel as are
21 necessary to conduct hearings and consider and dispose
22 of matters properly before the Board in a timely man-
23 ner.”.

24 (b) APPOINTMENT AND REMOVAL OF BOARD MEM-
25 BERS.—Section 7101(b) is amended—

1 (1) in paragraph (2)(A), by striking “other
2 members of the Board (including the Vice Chair-
3 man)” and inserting in lieu thereof “Board members
4 other than the Chairman”;

5 (2) in paragraph (2)(B), by striking “para-
6 graph” and inserting in lieu thereof “subpara-
7 graph”; and

8 (3) by striking out paragraph (4) and inserting
9 in lieu thereof the following new paragraph (4):

10 “(4) The Secretary shall designate one Board mem-
11 ber as Vice Chairman based upon recommendations of the
12 Chairman. The Chairman may designate one or more
13 Board members as Deputy Vice Chairmen. The Vice
14 Chairman and any Deputy Vice Chairman shall perform
15 such functions as the Chairman may specify. The Vice
16 Chairman shall serve as Vice Chairman at the pleasure
17 of the Secretary. Any Deputy Vice Chairman shall serve
18 as Deputy Vice Chairman at the pleasure of the Chair-
19 man.”.

20 (c) ACTING BOARD MEMBERS.—Section 7101(c) is
21 amended—

22 (1) by striking out paragraph (1) and inserting
23 in lieu thereof the following new paragraph (1):

1 “(1) The Chairman may from time to time designate
2 one or more employees of the Department to serve as act-
3 ing Board members.”;

4 (2) by striking out paragraph (2);

5 (3) by redesignating paragraph (3) as para-
6 graph (2); and

7 (4) in paragraph (2), as so redesignated—

8 (A) by striking out “temporary Board
9 members designated under this subsection and
10 the number of”; and

11 (B) by striking out “section
12 7102(a)(2)(A)(ii) of this title” and inserting in
13 lieu thereof “paragraph (1) of this section”.

14 (d) CHAIRMAN’S ANNUAL REPORT.—Section
15 7101(d)(2) is amended—

16 (1) in subparagraph (D), by striking out “year;
17 and” and inserting in lieu thereof “year;”;

18 (2) in subparagraph (E), by striking out
19 “year.” and inserting in lieu thereof “year; and”;
20 and

21 (3) by adding at the end the following:

22 “(F) the names of those employees of the De-
23 partment designated under subsection (c)(1) to serve
24 as acting Board members during that year and the

1 number of cases each such acting Board member
2 participated in during that year.”.

3 (e) CONFORMING AMENDMENTS.—(1) Section
4 7101(d)(3)(B) is amended by striking out “section
5 7103(d)” and inserting in lieu thereof “section 7101(b)”.

6 (2) Section 7101(e) is amended in the first sentence
7 by striking out “a temporary or” and inserting in lieu
8 thereof “an”.

9 **SEC. 3. ASSIGNMENT OF MATTERS BEFORE THE BOARD.**

10 Section 7102 is amended to read as follows:

11 **“§ 7102. Assignment of matters before the Board**

12 “The Chairman may determine any matter before the
13 Board, or rule on any motion in connection therewith, or
14 may assign any such matter or motion to any other Board
15 member or a panel of members for determination. Any
16 such assignment by the Chairman may not be reviewed
17 by any other official or by any court, whether by an action
18 in the nature of mandamus or otherwise.”.

19 **SEC. 4. DETERMINATIONS BY THE BOARD.**

20 (a) IN GENERAL.—Section 7103(a) is amended to
21 read as follows:

22 “(a) When the Chairman retains a matter or submits
23 it to another Board member or a panel of members for
24 determination in accordance with section 7102 of this
25 title, or to an expanded panel of Board members in ac-

1 cordance with subsection (b) of this section, the Chairman,
2 other member, or panel of members may:

3 “(1) Issue an order dismissing any appeal, in
4 whole or in part, which fails to allege specific error
5 of fact or law in the determination being appealed
6 or in which the determination being appealed has be-
7 come moot. Each order of dismissal shall include a
8 written statement of the Board’s findings and con-
9 clusions, and the reasons or bases for those findings
10 and conclusions, in support of the dismissal.

11 “(2) Issue an order remanding the case, in
12 whole or in part, to the agency of original jurisdic-
13 tion for such additional development as the Chair-
14 man, other member, or panel of members may con-
15 sider necessary for proper disposition of the case.

16 “(3) Render a written decision with respect to
17 any issues not dismissed or remanded, which deci-
18 sion shall constitute the Board’s final disposition of
19 the issues so decided. Such decisions shall be based
20 on the entire record in the proceeding, upon consid-
21 eration of all evidence and material of record, and
22 upon applicable provisions of law and regulation.
23 The Board shall be bound in its decisions, including
24 allowances made under the provisions of subsection
25 (d) of this section, by the regulations of the Depart-

1 ment, the instructions of the Secretary, and the
2 precedent opinions of the chief legal officer of the
3 Department. Each decision of a Board member or a
4 panel of members shall include—

5 “(A) a written statement of the Board’s
6 findings and conclusions, and the reasons or
7 bases for those findings and conclusions, on all
8 material issues of fact and law presented on the
9 record; and

10 “(B) an order granting appropriate relief
11 or denying relief.

12 Decisions by a panel of Board members, except as
13 otherwise provided in subsection (b), shall be made
14 by a majority of the members of the panel.”.

15 (b) RECONSIDERATION.—Section 7103(b) is amend-
16 ed to read as follows:

17 “(b) The decision of a Board member or a panel of
18 members is final, unless the Chairman orders reconsider-
19 ation of the case, and a claim disallowed by the Board
20 may not thereafter be reopened or allowed except as pro-
21 vided in section 5108 of this title and subsection (d) of
22 this section. If the Chairman orders reconsideration in a
23 case, the case shall be considered upon reconsideration by
24 a panel of members other than the Chairman if one mem-
25 ber originally decided the case or by an expanded panel

1 of members other than the Chairman if a panel originally
2 decided the case. When a panel considers a case after a
3 motion for reconsideration has been granted, the decision
4 of a majority of the panel members shall constitute the
5 final decision of the Board, except as provided in sub-
6 section (d). If the expanded panel cannot reach a majority
7 decision, the Chairman may either assign additional mem-
8 bers other than the Chairman to the panel or vote with
9 the members of the expanded panel so as to create a ma-
10 jority decision. Either the expanded panel majority or the
11 majority made with the vote of the Chairman shall con-
12 stitute the final decision of the Board, except as provided
13 in subsection (d).”.

14 (c) ADMINISTRATIVE ALLOWANCE; NOTICE OF DE-
15 TERMINATION.—Section 7103 is amended by adding at
16 the end the following:

17 “(d) Whenever a Board member other than the
18 Chairman or Vice Chairman is of the opinion that a prior,
19 otherwise final denial of a claim should be revised or
20 amended to allow the claim in whole or in part, based on
21 a difference of opinion as to how the evidence should be
22 evaluated rather than on any error in the prior decision,
23 the Board member shall recommend such allowance to the
24 Chairman or Vice Chairman. The Chairman or Vice
25 Chairman, whether upon the recommendation of any other

1 Board member or upon the Chairman's or Vice Chair-
2 man's own motion, if of the opinion that a prior, otherwise
3 final denial of a claim should be revised or amended to
4 allow the claim in whole or in part, based on a difference
5 of opinion as to how the evidence should be evaluated rath-
6 er than on any error in the prior decision, shall approve
7 the award of any benefit, or any increase therein, on the
8 basis of such difference of opinion. The discretionary exer-
9 cise of the authority provided to the Chairman and Vice
10 Chairman under this subsection shall not be reviewed by
11 any other official or by any court, whether by an action
12 in the nature of mandamus or otherwise.

13 “(e) After reaching a determination under any of the
14 provisions of this section, the Board shall promptly mail
15 a copy of its written decision to the appellant and the ap-
16 pellant's authorized representative (if any) at the last
17 known address of the appellant and at the last known ad-
18 dress of such representative (if any), respectively.”.

19 **SEC. 5. JURISDICTION OF THE BOARD.**

20 Section 7104 is amended—

21 (1) by striking out “(a)”;

22 (2) by striking out “211(a)” and inserting in
23 lieu thereof “511(a)”; and

24 (3) by striking out all after “made by the
25 Board.”.

1 **SEC. 6. APPELLATE PROCEDURE.**

2 Section 7105(d) is amended by striking out para-
3 graph (5).

4 **SEC. 7. MEDICAL OPINIONS.**

5 Section 7109 is amended to read as follows:

6 **“§ 7109. Medical opinions**

7 “(a) A Board member or a panel of members before
8 whom a matter which involves a medical question is pend-
9 ing may, in the discretion of the member or panel, request
10 an opinion on that medical question from—

11 “(1) an employee of the Board who is licensed
12 to practice medicine in any State;

13 “(2) an employee of the Veterans Health Ad-
14 ministration who is licensed to practice medicine in
15 any State and who has been designated by the
16 Under Secretary for Health to provide such an opin-
17 ion; or

18 “(3) an employee of any Federal department or
19 agency who is licensed to practice medicine in any
20 State and who has been designated, in accordance
21 with arrangements made by the Secretary with the
22 head of any such Federal department or agency, to
23 provide such an opinion.

24 “(b) When, in the judgment of a Board member or
25 a panel of members assigned a matter for determination
26 in accordance with section 7102 of this title, the medical

1 complexity or controversy involved in that matter warrants
2 expert medical opinion in addition to, or in lieu of, that
3 available within the Department or within another Federal
4 department or agency, the Board may secure an advisory
5 medical opinion from one or more independent medical ex-
6 perts who are not employees of the Department or of an-
7 other Federal department or agency. The Secretary shall
8 make necessary arrangements with recognized medical
9 schools, universities, or clinics to furnish such advisory
10 medical opinions at the request of the Chairman. Any such
11 arrangement shall provide that the actual selection of the
12 expert or experts to give the advisory opinion in an individ-
13 ual case shall be made by an appropriate official of such
14 institution. For purposes of this section, an employee of
15 a medical school, university, or clinic shall not be consid-
16 ered an employee of the Department or another Federal
17 department or agency just because the medical school, uni-
18 versity, or clinic receives grants from, or provides contract
19 services to, the Department or another Federal depart-
20 ment or agency.

21 “(c) Any opinion provided under this section shall be
22 in writing and made a part of the record. The Board shall
23 notify a claimant that an advisory medical opinion has
24 been requested under this section with respect to the
25 claimant’s case and shall mail to the claimant and the

1 claimant's authorized representative (if any) at the last
2 known address of the claimant and at the last known ad-
3 dress of such representative (if any) a copy of such opinion
4 when the Board receives it. An opportunity for response
5 by or on behalf of the claimant shall be provided following
6 the mailing of the copy (or copies) of such advisory medi-
7 cal opinion.”.

8 **SEC. 8. HEARINGS.**

9 Section 7110 is amended to read as follows:

10 **“§ 7110. Hearings**

11 “(a) The Board shall decide any appeal only after af-
12 fording the appellant an opportunity for a hearing.

13 “(b) A hearing docket shall be maintained and formal
14 recorded hearings shall be held by such member or mem-
15 bers of the Board as the Chairman may designate. Such
16 member or members designated by the Chairman to con-
17 duct the hearing will participate in making the final deter-
18 mination in the claim.

19 “(c) An appellant may request a hearing before the
20 Board at either its principal location or a regional office
21 of the Department. Any hearing held at a regional office
22 of the Department shall be scheduled for hearing in the
23 order in which the requests for hearing in that area are
24 received by the Department at the place specified by the
25 Department for the filing of requests for such hearings.

1 “(d) At the request of the Chairman, the Secretary
2 may provide suitable facilities and equipment to the Board
3 or other components of the Department to enable an ap-
4 pellant located at a facility within the area served by a
5 regional office to participate, through voice transmission,
6 or picture and voice transmission, by electronic or other
7 means, in a hearing with a Board member or members
8 sitting at the Board’s principal location. When such facili-
9 ties and equipment are available, the Chairman may, at
10 his or her discretion, afford the appellant an opportunity
11 to participate in a hearing before the Board through the
12 use of such facilities and equipment in lieu of a hearing
13 held by personally appearing before a Board member or
14 members as provided in subsection (c).”.

15 **SEC. 9. TABLE OF CONTENTS.**

16 The table of contents at the beginning of chapter 71
17 is amended by—

18 (1) striking “7102. Assignment of members of
19 Board.” and inserting in lieu thereof “7102. Assign-
20 ment of appellate matters.”;

21 (2) striking “7109. Independent medical opin-
22 ions.” and inserting in lieu thereof “7109. Medical
23 opinions.”; and

24 (3) striking “7110. Traveling sections.” and in-
25 serting in lieu thereof “7110. Hearings.”.

1 **SEC. 10. EFFECTIVE DATES OF AWARDS BASED ON DIF-**
2 **ERENCE OF OPINION.**

3 Section 5110 is amended by adding at the end the
4 following new subsection:

5 “(o) The effective date of the award of any benefit,
6 or any increase therein, pursuant to section 7103(d) of
7 this title on the basis of a difference of opinion shall be—

8 “(1) if the award resulted from review initiated
9 by an application to reopen the claim for the benefit
10 in question under the provisions of section 5108 of
11 this title, fixed in accordance with the facts found
12 but shall not be earlier than the date the Depart-
13 ment of Veterans Affairs received such application;
14 or

15 “(2) if the award resulted from review of the
16 final determination undertaken by the Department
17 of Veterans Affairs solely on its own initiative, the
18 date the Chairman or Vice Chairman of the Board
19 of Veterans’ Appeals approved the award.”.

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