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NAVIGATING THE DEPARTMENT OF VETERANS AFFAIRS WITH INVISIBLE WOUNDS: HOW TO OVERCOME THE STIGMA OF “DELAY, DENY, & HOPE YOU DIE”

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Unfortunately, “delay, deny, and hope you die” became a common aphorism among Vietnam veterans describing the Department of Veteran Affairs’ (VA) way of doing business. Over 9,000,000 military personnel served during the Vietnam War and, in 1979, Congress acknowledged a significant number of Vietnam-era veterans facing readjustment problems—later identified as post-traumatic stress disorder (PTSD) —when it established the Vet Center Program. Today, nearly 40 years after U.S. troops withdrew from Vietnam, many veterans of the Iraq and Afghanistan wars have developed the same sentiment towards the VA and are battling to tear through the red tape in order to obtain the services and benefits to which they are entitled.

Under the Veterans Mental Health and Other Care Improvements Act of 2008, Congress increased funding for treatment, research, and services for veterans with PTSD, substance abuse issues, and mental disorders (Public Law 110-387, 2008). While the VA has made strides forward regarding care programs, treatment plans, education, awareness, and support to veterans suffering from these invisible wounds, as well as providing for their dependents and caregivers, some of these veterans are nonetheless falling through the cracks (Mullhall and Williamson, 2009). The problem stems not

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from a lack of funding, but from an imperfect system to address the needs of veterans and their families. In order to fulfill its mission, the VA must make several significant changes to the way that it manages its bureaucracy and dispenses service and benefits.

A Disorienting Maze

As anyone who has dealt with the VA can attest, it is a maze. Many VA facilities are physically challenging to navigate—getting to the appropriate facility, locating the right department, and then finding the right person to talk to can take all day. Even navigating the VA website is a laborious task, particularly for those suffering from post-traumatic stress disorder and/or traumatic brain injury (TBI).

In addition, the bureaucracy involved in processing a claim can be convoluted and take years to resolve. I

recently represented a 77-year-old woman whose husband was a WWII Veteran suffering from severe dementia and was unable to sign the official documents required for her to renew her Veteran’s Dependent ID card. The VA’s ID card office told her that it needed a signed letter from her

husband’s doctor to renew her ID card, yet the VA doctor refused to sign any official document, not even a note on his prescription pad. The VA’s legal office told her she needed to be appointed as his conservator by a civilian judge, a process that could take months. After several unsuccessful attempts to navigate the VA alone, and with her ID card about to expire in days, she came to our clinic. Once involved, I spoke to multiple people within the VA who each had their own (incorrect) idea of how to solve the issue. It is an indication of the scope of the VA’s bureaucratic inefficiency that a VA office was requiring a doctor’s note that the VA’s own doctor was refusing to provide. My client finally received her military

ID card—only after an outside doctor agreed to step in and assist.

If the VA is an intimidating and daunting maze to me, a first year attorney, imagine the difficulty for a veteran fresh off the plane from Iraq, struggling with the memories of war, adjusting to life back at home, and potentially suffering from invisible wounds. Navigating the VA system alone can frustrate any veteran, especially one suffering from invisible wounds, and may lead him or her to quit before getting help.

Delays in Care and Benefits

Veterans suffering from psychological disorders are entitled by law to disability benefits as support for themselves and their families as they regain their health, but the extensive delays in adjudicating a claim for benefits—an average of more than four years!—“may make the difference between life and death.” (*VCS v. Shinseki*, 2011). A veteran must first be treated for an injury and receive a doctor’s diagnosis before receiving VA disability benefits, which means that delays in health facilities create a further backlog on review and receipt of disability payment. In addition to delays, the application form for disability benefits is a daunting ten pages, plus the supporting affidavits and medical records which must also be submitted.

To boot, submitted documents often go missing—one client of mine had to place three requests just to receive a copy of his records from the VA—yet another delay in receiving benefits. Even assuming the VA has all of the veteran’s documents, it could take months or years for a veteran to receive an initial decision. Tack on another few years for the appeal. It usually takes at least a year for a veteran to receive a Statement of the Case, whether he/she chooses to go through a Decision Review Officer (DRO) or a Personal Appearance Hearing, and it could take another several years before appearing before the board. With this broken system, a 19 year-old servicemember suffering from extreme PTSD or TBI won’t receive his well-deserved benefits until his mid-twenties, if he is lucky, and a homeless veteran suffering from severe PTSD may remain on the streets for years awaiting a decision.

It was due to such delays that in May 2011, Veterans for Common Sense (VCS)—on behalf of themselves, their members, and a putative class of veterans with PTSD—sought injunctive and declaratory relief to remedy administrative delays in mental health care and the adjudication of service-connected death and disability compensation claims by the VA. The Court found in favor of VCS and held that the U.S. Constitution grants veterans and their surviving relatives a right to effective mental health care and to the just and timely adjudication of their claims for health care and service-connected death and disability benefits. Furthermore, it found that the VA denies veterans what they have been promised by delay, without justification and without any procedure to expedite, in violation of the veterans’ constitutional rights.¹

A Shortage of Staff & Mental Health Providers

Subsequent to the case decided in May 2011, the VCS reported that recent veterans had filed more than 550,000 disability claims and that the VA still had no plan for handling new claims. Although the VA set a 120-day goal for the initial processing of a disability claim, the process takes an average of 394— in some cases has taken several years (PBS, 2011). In December 2011, VCS summarized several government reports relating to OEF/OIF servicemembers and found that there are 1,442,987 veterans eligible for VA Healthcare, only 49% of whom have been treated, 52% suffered from a mental health condition, and 30% suffered from PTSD. A more startling statistic is that only 43% of eligible veterans have filed for disability claims, and only 17% of veterans that applied have received an approved PTSD claim (Brown, 2011).

The government has failed in many respects to adequately prepare for veterans returning home from the Iraq and Afghanistan wars. In 2006, the VA claimed it was expecting only 2,900 new veteran PTSD claims; the actual number was six times that (Mullhall and Williamson, 2009). Any adequate response to the crisis has lagged, with VA facilities needing more staff and facing a shortage of mental health professionals, making mental health and

substance abuse care “virtually inaccessible” at some clinics. Thus, veterans with psychological or traumatic brain injuries have to fight another war upon their return just to receive treatment and disability benefits.

Lack of Guidance for Veterans

The problems do not end once an appeal meets the DRO or the Board of Veterans’ Appeals. Often a veteran with invisible wounds files their claims and subsequent appeals without any assistance and may not be able to recognize when the VA has violated his/her rights. Even if a veteran receives help from an outside support agency, due to the flood of veterans returning home, there is only so much time and effort that can be devoted to each claim. With these cases, unless it is a visible injury such as loss of limb or gunshot wound proved up by combat medals, the VA seems quick to disregard and deny the claim, especially regarding invisible wounds. One client I have was screened positive for TBI and PTSD as a result of an IED explosion, yet the VA denied the existence of the TBI and claimed there was no evidence to prove that the veteran was even in combat. Even with a representative, it will take years for this veteran to receive the complete benefits that he deserves.

Under 38 CFR §5.103(a), the VA has a statutory duty to assist a claimant in developing the facts pertinent to the claim for service-connected disability benefits. When there is a balance of positive and negative evidence regarding material determination of a matter, the VA must give veterans the benefit of the doubt. When the VA fails to meet this obligation, courts have begun to step in with some frequency. In May 2011, the Supreme Court in *Henderson v. Shinseki* heard a claim by a Korean War veteran who rated 100% for paranoid schizophrenia and had filed for VA supplemental benefits for in-home care, but was denied. Although he filed a claim with the Veterans Court, he missed the 120-day filing deadline

under 38 USC 7266(a) by 15 days. The Court held that the 120-day deadline should not be regarded as having jurisdictional consequences as the statute does not suggest or provide clear evidence of such Congressional intention (*Henderson v. Shinseki*, 2011; *United States v. Oregon*, 1961). The Court acknowledged that VA proceedings are informal and nonadversarial and that the VA assists veterans in developing their supporting evidence and must give them the benefit of any doubt in evaluating that evidence. The growing trend of favorable judicial decisions in support of veterans provides comfort that the VA is being held accountable to its purpose.

A Move in the Right Direction

Despite all of these shortcomings, the VA is making positive movement in some areas. Despite the bureaucratic process, the VA has advanced its care and treatment with new regulations, education programs, and services for veterans and their caregivers. Additionally, in the past few years, the VA has recognized the outdated criteria which underrated the effects of brain trauma in the benefit manual, and updated the provisions regarding TBI and PTSD.² By eliminating the necessity of searching for records and verifying stressor situations, the VA hopes to “simplify and improve the PTSD claims adjudication process by eliminating this time-consuming requirement” (VA Fact Sheet, 2010). Finally, the VA has also implemented programs to assist veterans with invisible wounds,³ as well as their caregivers.⁴ These changes in the standards and procedures are a significant improvement by the VA to benefit veterans with invisible wounds.

Next Steps to Improve VA Service

While the VA has initiated some internal improvements — including the promulgation of its new PTSD benefits rules — these changes are slow to come about and many problems

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still exist. Poor evaluations for TBI and PTSD, staffing shortages, and insufficient training are areas of continuing concern, and civilian courts and Congress are becoming increasingly more involved in the VA's inner-workings to address these problems. In 2010, the Center for a New American Security reported that "a new paradigm for veterans' care will require a dramatic reprioritization in the allocation of federal funds and fundamental changes to the relationship between the [VA] and the [DoD]" (PBS, 2009). The VA must fix the archaic system in which bureaucracy overwhelms a veteran seeking health and disability benefits.

Recommendations for Improving VA Service

For the VA

1. ***Make the VA more accessible/comprehensible.*** Ideally, the VA would scrap the whole system and start from the ground up. As this is not a reasonable solution, the VA should invest in programs such as "Lean Six Sigma," which works with companies to streamline their process to cut out delays and defects. The VA could simplify the claims process by cutting out steps (such as the Decision Review Officer level of review), make over their website to be veteran-friendly and focused on those seeking assistance, and improve communication to streamline processes between different departments.

2. ***Increase staffing of mental health providers and VA-navigation assistance.*** On April 19, 2012, the VA announced they were increasing their Mental Health Staff by 1,900 — a number that includes nurses, psychiatrists, psychologists, and social workers, as well as nearly 300 support staff (VA Public and Intergovernmental Affairs, 2012). This addition is a step in the right direction toward improving the quality of mental health care provided by the VA, and further similar steps are needed.

3. ***Streamline claims process by training VA employees and improving VA navigation assistance.*** While the staffing increase in health care services is promising, the VA needs more customer service representatives as well. A veteran should not have to call and make an appointment for the following week just to ask a

simple question. These representatives are often the first ones that speak with the veteran and provide the first level of instruction. Thus, it is imperative that they are provided better training, and perhaps instructed to provide just a bit of sympathy, compassion, and appreciation for the veterans that they speak with daily.

4. ***Be pro-active through the VA/Government side.***

The U.S. Court of Appeals for the Ninth Circuit recently reversed the decision on *VCS v. Shinseki*, stating that only Congress or the President has authority to direct changes and step into VA matters regarding the speed with which veterans are treated.⁵ This pivotal case aside, it would be more effective and timely to address the problems within the VA system and bureaucracy through government channels, as opposed to waiting for court decisions regarding individual cases.

Therefore, the VA must actively work to resolve its internal bureaucratic problems regarding delays and lack of understanding among its own employees regarding its departmental roles and procedures. This can be achieved by developing a task force to review each department to determine whether the VA is following its own guidelines, whether the processes in place are working, and what changes are needed to resolve the delays. Adding more employees, while helpful, is like placing a band-aid over a bullet wound. The VA has to do a thorough survey, find the cracks in the system, and fix them.

For Veterans

1. ***Contact your Congressmembers*** – Veterans struggling with invisible wounds of war—whether from WWII, Vietnam, Korea, Iraq, or Afghanistan—and their family members should contact their Congressmembers to voice their concerns about the current VA system and to demand the timely dispensation of their treatment and benefits.

2. ***Seek treatment and help in obtaining your VA benefits*** – Invisible wounds, like physical ones, require treatment. The VA can be difficult to navigate, so veterans and their families should seek help in obtaining treatment or filing a benefits claim, whether it is with a VA

caseworker, an outside agency or foundation, *pro bono* legal assistance, or other support avenue. In an ideal world, a caseworker would not be required for a VA filing, but as it now stands, it may provide some much needed guidance.

Conclusions

Only time will tell whether the VA has the wherewithal and incentive to adopt internal reforms, or whether reform will come through Court rulings and Congressional mandates. Regardless of the path to reform, for the thousands of Iraq and Afghanistan veterans now returning home, the VA must improve.

ENDNOTES

1. Just prior to publication, this decision was reversed by an en banc panel of the Ninth Circuit Court of Appeals. The court noted that while they wish for expeditious improvements in the way the VA handles mental health care and service-connected disability compensation, "it exceeded their jurisdiction to accomplish it" (*VCS et al v. Shinseki et al*, 2012). The court cited President Abraham Lincoln's second inaugural address, "There can be no doubt that securing exemplary care for our nation's veterans is a moral imperative. But Congress and the President are in far better position 'to care for him who shall have borne the battle.'" The dissent noted that the court's decision "leaves millions of veterans - present, past, and future - without any available redress for claims that they face years of delay in having their rights to hard-earned benefits determined." At the time this piece was published, Gordon Erspamer, who represents the veterans groups, said "the verdict will most likely be appealed to the U.S. Supreme Court" (*VCS et al v. Shinseki et al*, 2012).
2. Effective July 13, 2010, the VA has promulgated a new rule governing compensability of PTSD related conditions. It grants a presumptive benefit and requires the following three elements be met: 1) claimed stressor is related to "fear and hostile military or terrorist activity"; 2) is consistent with the places, types or circumstances of their service with no clear and convincing evidence to the contrary; and 3) a VA psychiatrist, psychologist, or contract psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD (VA, 2010).

3. In 2007, the VA implemented a Transitional Rehabilitation Program at each Polytrauma Rehabilitation Center and an Emerging Consciousness Program for those veterans with severe TBI who are slow to recover consciousness. The Polytrauma Telehealth Network facilitates provider-to-family coordination with an initiative called the "health buddy system" (VA, n.d.). This care program serves those veterans and families struggling with the effects of TBI, amputation, or other chronically ill veterans by maintaining daily contact with those patients that are located in rural or underserved areas (Research and Advancements, VA, n.d.).
4. In 2011, the VA began a landmark program for the caregivers of severely disabled Iraq and Afghanistan veterans to provide full benefits, including a monthly living stipend, respite care, and mental health service and counseling. Unlike other VA programs dealing with invisible wounds, this one is unique in that it recognizes the ongoing and sometimes exhausting efforts of caregivers in enhancing the health and well-being of our veterans.
5. In the *VCS v. Shinseki* case, the Court acknowledged that "the political branches of [the] government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill [the] country's obligation to care for those who have protected [it]" (*VCS v. Shinseki*, 2011). Recently, the U.S. Court of Appeals for the Ninth Circuit reversed this decision in a 10-1 ruling and said "it could not conclude that the VA's treatment of veterans, which sometimes causes claims to remain unaddressed for several years, was unconstitutional" (*VCS et al v. Shinseki et al*, 2012). This verdict will likely be appealed to the U.S. Supreme Court.

AUTHOR BACKGROUND

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