

1 JEFFREY S. BUCHOLTZ
 Acting Assistant Attorney General
 2 JOSEPH P. RUSSONIELLO
 United States Attorney
 3 RICHARD LEPLEY
 Assistant Branch Director
 4 DANIEL BENSING D.C. Bar No. 334268
 STEVEN Y. BRESSLER D.C. Bar No. 482492
 5 KYLE R. FREENY California Bar No. 247857
 Attorneys
 6 United States Department of Justice
 Civil Division, Federal Programs Branch

7 P.O. Box 883
 8 Washington, D.C. 20044
 Telephone: (202) 305-0693
 9 Facsimile: (202) 616-8460
 Email: Daniel.Bensing@USDOJ.gov

10 Attorneys for Defendants Hon. James B. Peake, the U.S. Department of Veterans Affairs, Hon.
 11 James P. Terry, Hon. Daniel L. Cooper, Bradley G. Mayes, Hon. Michael J. Kussman, Ulrike
 Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.
 12 Greene, Jr.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO

16	VETERANS FOR COMMON SENSE and)	
17	VETERANS UNITED FOR TRUTH,)	No. C 07-3758-SC
18	Plaintiffs,)	
19	v.)	DEFENDANTS' ANSWER TO
20	Hon. JAMES B. PEAKE, Secretary of)	PLAINTIFFS' COMPLAINT
21	Veterans Affairs, <i>et al.</i> ,)	
22	Defendants.)	
23	_____)	

24 Defendants, through their undersigned counsel, hereby respond to plaintiffs' complaint.

25 First Affirmative Defense

26 Plaintiffs lack Standing to pursue their claims.

27 Second Affirmative Defense

28 Plaintiffs' claims are barred by the doctrine of sovereign immunity.

1 Third Affirmative Defense

2 Plaintiffs' claims are barred by 38 U.S.C. § 511.

3 Fourth Affirmative Defense

4 Plaintiffs' claims are barred by 38 U.S.C. § 502.

5 Fifth Affirmative Defense

6 The agency action challenged by Plaintiffs is "committed to agency discretion by law"
7 under 5 U.S.C. § 701(a)(2) and so not subject to judicial review.

8 Sixth Affirmative Defense

9 Plaintiffs have failed to state a claim on which relief may be granted.

10 Seventh Affirmative Defense

11 Answering the numbered paragraphs of plaintiffs complaint, defendants respond as
12 follows:

13 1. Deny.

14 2. Deny first and second sentences Deny third sentence except to admit that claims remaining
15 active for ten years or more are very rare and likely involve remands for purpose of assisting
16 claimants. Defendants lack information as to the truth of the fourth sentence. Deny fifth and
17 sixth sentences. Defendants lack information as to the truth of the seventh sentence except to
18 admit that some veterans die while their claims are pending. The final sentence is a legal
19 conclusion to which no response is required.

20 3. Defendants lack the ability to respond to the first and second sentence because the term
21 "serious" in the first sentence and "compromise" in the second sentence are vague and undefined.
22 Deny third sentence except to admit that claims backlogs have been recognized as a problem.
23 Deny fourth and fifth sentences.

24 4. Deny.

25 5. Deny first sentence and aver that in FY 05 the Board of Veterans' Appeals (Board) denied
26 13,032 cases (38.1%). In FY 06 the Board denied 18,107 cases (46.3%). Deny second sentence.
27 Admit third sentence.

28 6. Deny first sentence. Defendants lack information as to the truth of second and third

1 sentences.

2 7. Admit.

3 8. Admit first sentence. Deny second sentence except to the extent that it accurately
4 characterizes the Department of Defense (DoD) report. The Court is referred to that document
5 for a full and complete statement of its contents. Admit sentence three, except to state that there
6 is now a total of 803,757 veterans of OEF and OIF, based on DoD data and Department of
7 Veterans Affairs (VA) records through December 31, 2007. Defendant lacks knowledge as to the
8 truth of the fourth sentence.

9 9. Defendants lack knowledge as to the truth of the first sentence, but deny that there are
10 extraordinary delays in the VA's claim process or systemic failures to address the financial and
11 health needs of veterans. Deny second sentence and aver that depression, alcoholism, suicide
12 and the other behavioral features may best be considered problems or behaviors that can be
13 associated with PTSD, but also with other mental disorders. Admit third sentence.

14 10. Deny first sentence. Deny second sentence except to admit that veterans have complained of
15 long wait times for PTSD treatment and difficulties of obtaining mental healthcare in rural areas.
16 Deny except to admit third sentence to the extent that veterans who do not seek VA care within
17 the statutory period will not receive care within that period, but for veterans who sought care
18 during this period defendants lack information as to the truth of the sentence.

19 11. Deny first sentence except to the extent that it accurately characterizes Dr. Murphy's
20 statement to former members of a presidential commission. The Court is referred to that
21 document for a full and complete statement of its contents. Deny second sentence except to aver
22 that VA has PTSD programs in 45 VA medical centers and note that VA has 5 specialized
23 inpatient PTSD units, 3 evaluation and brief PTSD units, 18 PTSD residential rehabilitation
24 units, 16 PTSD domiciliaries that provide service related to PTSD, either as the primary focus of
25 care or as an important and extensive component of the care, and 6 women's trauma recovery
26 residential programs. Defendants lack information as to the truth of the third sentence.

27 12. Deny first and second sentences to the extent that they overstate entitlement because, for
28 example, defendants aver that disability compensation is generally available only to veterans who

1 are rated at least 10% disabled and VA hospital and medical care is subject to the availability of
2 appropriations. Admit third sentence, except that claims procedures are also contained in title 38
3 of the U.S. Code of Federal Regulations. Deny fourth sentence.

4 13. Deny.

5 14. Deny first sentence except to admit that although the form contains 23 pages, at least 5 of
6 those pages are instructions and the form is an application for both compensation and pension.

7 Only those pages related to compensation need to be submitted. Admit remainder of paragraph

8 15. The first sentence constitutes plaintiff's characterization of the VA process for which no
9 response is required. Deny except to admit second sentence to the extent that, pursuant to 38

10 C.F.R. § 19.9, the Board shall remand a claim that requires additional development by the

11 regional office. Admit third sentence to the extent that development in a remanded case may

12 take up to two years; deny to the extent that two-year period is representative period of time for

13 VA to complete development of a remanded case. Admit fourth sentence only to the extent that

14 it correctly characterizes the percentage of cases remanded by the Board during Fiscal Year 2006;

15 deny remainder of the sentence as it constitutes plaintiff's characterization for which no response
16 is required.

17 16. Deny the first sentence, except to admit that appeals have increased over time. Deny the

18 second sentence, except to admit that CAVC has seven active judges and that it has roughly

19 twice as many cases per judge as the average number per judge for the Article III courts of

20 appeals. Deny the third sentence, except to admit that the CAVC may resolve cases through

21 single judge decisions as permitted by 38 U.S.C. § 7254(b), and that CAVC has considered

22 adopting, but has never adopted, the use of summary decisions in certain cases. Defendants lack

23 information as to the truth of the fourth sentence.

24 17. Deny.

25 18. Deny.

26 19. Deny except to aver that VA does not keep statistics on emergence of PTSD after discharge.

27 VHA keeps data on suicide, prevalence of PTSD, and other health care needs of returning

28 veterans, with needs of Guard and Reserve component specifically identified.

- 1 20. Deny.
- 2 21. Deny sentences 1-3. Deny sentence four except to admit that Senior Executive Service
3 employees throughout VA were paid a total of \$3.8 million dollars in performance awards in
4 fiscal year 2006, and to note that, by law, Senior Executive noncareer appointees are not eligible
5 to receive performance bonuses.
- 6 22. Deny. Aver that VA does not "save money" by denying claims, because the agency's
7 appropriations are independent of the amount of claims denied or granted.
- 8 23. Deny first sentence. Deny second sentence except to admit that, although a deceased
9 veteran's surviving spouse, children, or dependent parents may receive the entire amount of
10 accrued benefits, other surviving relatives are not eligible for such benefits.
- 11 24. Defendants lack information as to the truth of this paragraph.
- 12 25. Deny first sentence. Deny except to admit second sentence to the extent it refers to rating
13 criteria in 38 C.F.R. § 4.130. Deny third sentence, except to admit that VA's rating criteria are
14 based on occupational and social impairment. Deny fourth sentence. Defendants lack
15 information as to the truth of the fifth sentence.
- 16 26. Deny.
- 17 27. Deny.
- 18 28. Deny all except to admit that VA sought a supplemental appropriation in FY 2005 to cover a
19 \$273 million shortfall in funding for veterans returning from Iraq and Afghanistan, Operation
20 Iraqi Freedom/Operation Enduring Freedom (OIF/OEF) and amended its FY 2006 budget request
21 to add an additional \$677 million to cover a 2 percent increase in number of patients, \$276
22 million of which is for OIF/OEF veterans returning from Iraq and Afghanistan.
- 23 29. Deny except to admit that these are plaintiffs' allegations.
- 24 30. Deny except to admit that these are plaintiffs' allegations.
- 25 31. Deny except to admit that these are plaintiffs' allegations.
- 26 32. Deny, noting further that we deny that these challenged practices occur to the degree alleged
27 by plaintiffs.
- 28 33. This paragraph constitutes a conclusion of law to which no response is required.

- 1 34. This paragraph constitutes a conclusion of law to which no response is required.
- 2 35. Defendants lack information as to the truth of this paragraph.
- 3 36. Defendants lack information as to the truth of this paragraph.
- 4 37. Defendants lack information as to the truth of this paragraph.
- 5 38. Defendants lack information as to the truth of the first and third sentences. Deny second
6 sentence.
- 7 39. Defendants lack information as to the truth of this paragraph.
- 8 40. Admit, noting further that VA benefits and services are not limited to veterans who served in
9 foreign wars but include all veterans of the U.S. Armed Forces.
- 10 41. Deny except to admit that James B. Peake, M.D., is currently the Secretary of the
11 Department of Veterans Affairs.
- 12 42. Admit
- 13 43. Admit
- 14 44. Admit first and second sentences. Admit third sentence only to the extent that the
15 Compensation and Pension Service issues directives for the guidance of regional offices.
16 However, aver that VBA's Office of Field Operations has direct oversight of the regional offices.
- 17 45. Admit
- 18 46. Deny, except to admit that Pritz K. Navaratnasingham is the Director of the VA Regional
19 Office in Providence, Rhode Island.
- 20 47. Admit the first sentence only to the extent that it states that William P. Greene, Jr. is Chief
21 Judge of the CAVC. The remainder of the first sentence is plaintiffs' characterization of their
22 action to which no response is required. Defendants lack sufficient information as to answer the
23 second and third sentences, which are ambiguous in the meaning of the phrase "is responsible
24 for." Defendants aver that numerous individuals have a role in formulating the CAVC's Internal
25 Operating Procedures and Rules of Practice and Procedure.
- 26 48. Deny, except to admit that Michael B. Mukasey is the Attorney General of the United States.
- 27 49. This constitutes a conclusion of law to which no response is required; to the extent a reply is
28 required, deny.

1 50. Defendant lacks information as to the truth of the first sentence. Deny the second sentence
2 except to admit that as of September 30, 2007, 299,585 OIF/OEF veterans had received VA
3 health care with 120,000 receiving a provisional mental health diagnosis.

4 51. Deny the first and second sentences except to the extent that they accurately characterize the
5 Bilmes article. The Court is referred to that document for a full and complete statement of its
6 contents. Deny the first clause of the third sentence except to the extent that it accurately quotes
7 the unnamed DoD report. The Court is referred to that document for a full and complete
8 statement of its contents. Defendants lack information as to the truth of the remainder of the
9 third sentence.

10 52. Deny this paragraph except to the extent that it accurately characterizes the Government
11 Accountability Office (GAO) report, No. GAO 06-794R. The Court is referred to that document
12 for a full and complete statement of its contents.

13 53. Admit first and second sentence. Defendant lacks information as to the truth of the third
14 sentence.

15 54. Defendants lack information sufficient to answer the first sentence which is ambiguous in
16 the meaning of the phrases "substantial proportion" and "personally experiences severe traumatic
17 events." Deny second sentence except to the extent that it accurately characterizes the Hoge
18 article. The Court is referred to that document for a full and complete statement of its contents.
19 Deny third sentence except to the extent that it accurately characterizes the statement of Dr.
20 Murphy to the presidential commission. The Court is referred to that document for a full and
21 complete statement of its contents.

22 55. Defendants lack information as to the truth of this paragraph.

23 56. Defendants lack information as to the truth of this paragraph.

24 57. Defendants lack information as to the truth of this paragraph.

25 58. Admit.

26 59. Admit.

27 60. Deny first sentence except to the extent that it accurately characterizes the third Diagnostic &
28 Statistical Manual of Mental Disorders. The Court is referred to that document for a full and

1 complete statement of its contents. Deny second sentence except to the extent that it accurately
2 characterizes the fourth Diagnostic & Statistical Manual of Mental Disorders (DSM-IV-TR).
3 The Court is referred to that document for a full and complete statement of its contents.

4 61. Deny paragraph except to the extent that it accurately characterizes the DSM IV TR. The
5 Court is referred to that document for a full and complete statement of its contents.

6 62. Deny paragraph except to the extent that it accurately characterizes the DSM IV TR. The
7 Court is referred to that document for a full and complete statement of its contents.

8 63. Admit.

9 64. Admit.

10 65. Admit.

11 66. Admit.

12 67. Deny that DOD or VA do not adequately diagnose or effectively treat PTSD in veterans.

13 Admit that precise statistics on the prevalence of undiagnosed PTSD are unavailable, but deny
14 that VA is unable to determine the exact number of OEF/OIF veterans currently service
15 connected for PTSD.

16 68. Deny paragraph except to the extent that it accurately characterizes Ms. Rosenberg's
17 statement to Congress. The Court is referred to that document for a full and complete statement
18 of its contents.

19 69. Admit first sentence. Deny second sentence except to the extent that it accurately
20 characterizes the unidentified "studies."

21 70. Deny first sentence except to the extent that it accurately characterizes the DoD report. The
22 Court is referred to that document for a full and complete statement of its contents. Deny second
23 sentence except to the extent that it accurately characterizes the Corbett article. The Court is
24 referred to that document for a full and complete statement of its contents.

25 71. Deny first sentence except to the extent that it accurately characterizes VA Office of
26 Inspector General (OIG) report 05-00765-137. The Court is referred to that document for a full
27 and complete statement of its contents. Deny second sentence except to the extent that it
28 accurately characterizes VA Annual Benefits Report FY 2005. The Court is referred to that

- 1 document for a full and complete statement of its contents. Deny third sentence.
- 2 72. Deny.
- 3 73. Deny the first sentence. Admit the remainder of the paragraph.
- 4 74. Deny the paragraph except to the extent that it accurately characterizes the Corbett article.
5 The Court is referred to that document for a full and complete statement of its contents.
- 6 75. Deny the paragraph except to the extent that it accurately characterizes the Ricketts article.
7 The Court is referred to that document for a full and complete statement of its contents.
- 8 76. Deny the first sentence except to the extent that it accurately characterizes the February 2005
9 Murdoch article. The Court is referred to that document for a full and complete statement of its
10 contents. Deny the remainder of the paragraph except to the extent that it accurately
11 characterizes the April 2003 Murdoch article. The Court is referred to that document for a full
12 and complete statement of its contents.
- 13 77. Deny the paragraph except to the extent that it accurately characterizes the Manier &
14 Graham article. The Court is referred to that document for a full and complete statement of its
15 contents.
- 16 78. Defendants lack information as to the truth of the first sentence as the meaning of the phrase
17 "potentially eligible" is ambiguous. Deny second sentence.
- 18 79. Deny first sentence except to admit that some veterans with service-connected disabilities
19 are entitled to compensation. The second, third and fourth sentences constitute legal conclusions
20 to which no response is required. To the extent a response is required, deny.
- 21 80. Defendants lack information sufficient to answer the first sentence which is ambiguous in
22 the meaning of the phrase "entitlement program," but admit that, once a veteran is found to be
23 entitled to a particular disability benefit, that veteran has a property interest in that benefit.
24 Admit second sentence, except that disability and death compensation are paid on a monthly
25 basis rather than annually.
- 26 81. This paragraph constitutes legal conclusion to which no response is required.
- 27 82. This paragraph constitutes a legal conclusion to which no response is required.
- 28 83. This paragraph constitutes a legal conclusion to which no response is required.

1 84. Deny first sentence, except to note that 38 U.S.C. § 1710 prescribes criteria for eligibility for
2 VA hospital care and medical care. The second and third sentences constitute legal conclusions
3 to which no response is required. Defendant lacks information about the truth of the fourth
4 sentence because the phrase "mandatory medical services" is ambiguous.

5 85. This paragraph constitutes a legal conclusion to which no response is required.

6 86. This paragraph constitutes a legal conclusion to which no response is required.

7 87. This paragraph constitutes a legal conclusion to which no response is required.

8 88. This paragraph constitutes a legal conclusion to which no response is required.

9 89. Deny first sentence and aver that the law requires the Secretary, and not Congress, to
10 establish a patient enrollment system and manage the enrollment in accordance with the priorities
11 set forth in the law, and the regulation cited should be 38 C.F.R. § 17.36(b). Deny the second
12 and third sentences. Admit the fourth and fifth sentences.

13 90. Deny.

14 91. Deny first sentence and aver that veterans described in under section 1710(e)(1)(D) may not
15 be provided this free medical care "with respect to a disability that is found, in accordance with
16 guidelines issued by the Under Secretary for Health, to have resulted from a cause other than the
17 service described in [section 1710(e)(1)(D)]." 38 U.S.C. 1710(e)(2)(B). Admit the second
18 sentence to the extent that this statutory eligibility includes those Reserve and National Guard
19 members who have left active duty and returned to their units. Defendant lacks information
20 about the truth of the third sentence because the word "generally" is ambiguous. Deny the fourth
21 sentence.

22 92. Deny the first clause of the first sentence except to the extent that it accurately characterizes
23 the Bannerman article and deny the second clause of the first sentence. The Court is referred to
24 that document for a full and complete statement of its contents. Deny the second sentence.

25 93. The first sentence constitutes a legal conclusion to which no response is required. Admit
26 second and third sentences.

27 94. Admit first and second sentences except to deny that all 23 pages of the application form
28 must be completed. Deny third sentence except to admit that, pursuant to 38 U.S.C. § 5103A,

1 VA is obligated to make reasonable efforts to help a claimant obtain the evidence necessary to
2 substantiate his or her claim.

3 95. Deny and aver that the development of a factual record at the regional office level is not
4 always the most "critical aspect" of the claims process in every individual case and further aver
5 that "gaps in the evidence" often can be cured later in the claims process.

6 96. Deny the paragraph except to the extent that it accurately characterizes Mr. Bertoni's
7 testimony to Congress. The Court is referred to that document for a full and complete statement
8 of its contents.

9 97. Deny.

10 98. Admit.

11 99. Admit.

12 100. Admit.

13 101. Deny except to the extent that the paragraph accurately characterizes the 2006 VA
14 handbook. The Court is referred to that document for a full and complete statement of its
15 contents.

16 102. Admit.

17 103. Deny except to admit that notices of decisions are prepared by staff (not computers) in VA
18 regional offices and every decision that "denies a benefit sought" includes "a statement of the
19 reasons for the decision, and . . . a summary of the evidence considered by the Secretary." 38
20 U.S.C. § 5104(b).

21 104. The first sentence constitutes a legal conclusion, to which no response is required. Admit
22 second sentence to the extent that it states that a claimant does not have the right to subpoena
23 witnesses or conduct discovery under the Federal Rules of Civil Procedure; deny to the extent it
24 implies that claimants have no right to obtain evidence from VA, other Government agencies, or
25 third parties.

26 105. Deny first sentence to the extent that it suggests that VA's generally applicable rules do not
27 apply to PTSD claims, but admit that 38 C.F.R. § 3.304(f) contains additional considerations
28 relevant to certain aspects of a PTSD claim. Admit second sentence.

- 1 106. Deny except to the extent that it accurately quotes 38 C.F.R. § 3.304(f).
- 2 107. Admit.
- 3 108. Deny the first sentence except to the extent that it accurately characterizes the VASRD.
4 Admit second sentence. Admit third sentence to the extent that disability payments for a single
5 veteran with no dependents are approximately within the described range.
- 6 109. Deny except to the extent that the paragraph accurately characterizes the PTSD Manual.
7 The Court is referred to the PTSD Manual for a complete statement of its contents.
- 8 110. Defendant lacks information sufficient to answer this paragraph, which contains the
9 ambiguous word “elaborate.”
- 10 111. Deny except to the extent that the paragraph accurately characterizes the VA Clinician's
11 Guide. The Court is referred to the VA Clinician's Guide for a complete statement of its
12 contents.
- 13 112. Deny except to the extent that the paragraph accurately characterizes the VA Clinician's
14 Guide. The Court is referred to the VA Clinician's Guide for a complete statement of its
15 contents.
- 16 113. Deny.
- 17 114. Deny the first sentence except to the extent that it accurately quotes the DSM IV TR; the
18 Court is referred to that document for a full and complete statement of its contents. Deny second
19 sentence.
- 20 115. Deny the paragraph except to the extent that it accurately quotes the Chairman's Fiscal Year
21 2006 report to Congress. The Court is referred to that document for a full and complete
22 statement of its contents.
- 23 116. Defendants lack information sufficient to answer the first sentence which is ambiguous in
24 the meaning of the phrase "independence from the VA." The second sentence constitutes a legal
25 conclusion to which no answer is required, but to the extent an answer is required, admit. Deny
26 third and fourth sentences.
- 27 117. Deny the first sentence. Deny the second sentence except to the extent that it accurately
28 characterizes the DSM-IV-TR. The Court is referred to that document for a full and complete

1 statement of its contents. Deny third sentence.

2 118. Deny first sentence, and aver that the only step to initiate an appeal is to file a notice of
3 disagreement (NOD). See 38 U.S.C. § 7105(a) ("[a]ppellate review will be initiated by a notice
4 of disagreement"). Deny second sentence, except to admit that the NOD must be postmarked no
5 later than one year after the date of the decision with which disagreement is expressed, 38 U.S.C.
6 § 7105(b)(1). Further aver that a notice of disagreement only requires a "communication
7 expressing dissatisfaction or disagreement with the adverse decision" and "[s]pecial wording is
8 not required."

9 119. Admit first sentence. Deny second sentence, except to admit that no deadline applies to the
10 VA's preparation of the SOC.

11 120. Deny first sentence except to the extent that it accurately characterizes 38 C.F.R. § 19.29.
12 The Court is referred to that regulation for a complete statement of its contents. Deny second
13 sentence.

14 121. Admit first sentence. The second and third sentences constitute legal conclusions to which
15 no response is required. Aver that VA may extend for good cause the deadline to file a
16 substantive appeal. See 38 U.S.C. § 7105(d)(3).

17 122. Deny first sentence. See 38 C.F.R. § 20.202 (substantive appeal "should," not "must," set
18 forth specific arguments). Deny second sentence and aver that dismissal of a claim for failure to
19 satisfy specificity requirements is not mandatory.

20 123. Admit first sentence. Admit second sentence but aver that the Board may accept later
21 submitted evidence in certain circumstances. 38 C.F.R. § 20.1304.

22 124. Deny first sentence, except to admit that, although all claimants are entitled to hearings, see
23 38 U.S.C. § 7107(b), VA requires that they indicate whether they desire a hearing. Deny second
24 and third sentences. Deny the fourth sentence except to admit that the vast majority of BVA
25 appeals are resolved upon the written record transmitted by the regional office.

26 125. Deny except to the extent that the first sentence accurately quotes the cited regulation.
27 Deny second sentence. Deny third sentence except to admit that expert testimony is rarely
28 submitted. Aver that documentary evidence is frequently submitted during a hearing and

1 claimants are frequently accompanied at hearing by friends, family member, or other witnesses.

2 126. Deny the sentence except to the extent that it accurately characterizes GAO Report no.
3 GAO-02-806. The Court is referred to that report for a complete statement of its contents.

4 127. Deny the paragraph except to the extent that it accurately quotes the Chairman's Fiscal Year
5 2006 report to Congress. The Court is referred to that document for a full and complete
6 statement of its contents.

7 128. Admit first and third sentences. Deny second sentence, except to admit that CAVC's name
8 was changed by law in 1999.

9 129. Deny first sentence and aver that the appellant must file a notice of appeal within 120 days
10 after the date on which notice of the Board decision was mailed except when an appellant files a
11 motion for reconsideration of the Board decision with the Chairman of the Board. Admit second
12 and third sentences.

13 130. Deny the first and second sentences except to the extent that they are consistent with 38
14 U.S.C. § 7252. Deny third sentence and aver that 38 U.S.C. § 7292(d) pertains to the jurisdiction
15 of the U.S. Court of Appeals for the Federal Circuit and not the CAVC.

16 131. Deny the first and second sentences except to the extent that they are consistent with 38
17 U.S.C. § 7292(d). Deny the third sentence except to the extent that it accurately characterizes
18 the Allen article. The Court is referred to that document for a full and complete statement of its
19 contents.

20 132. Deny the sentence except to the extent that it accurately characterizes the Allen article. The
21 Court is referred to that document for a full and complete statement of its contents.

22 133. Deny the first sentence, except to the extent that it is consistent with 38 U.S.C. §§ 7252
23 and 7261. Deny the second sentence, except to admit that the jurisdiction of CAVC is limited to
24 arguments made within the context of an individual's claims.

25 134. Defendants lack sufficient information as to the truth of the first sentence, as the phrase
26 "some of the attributes of a formal legal proceeding" is ambiguous. Deny the second sentence,
27 except to admit that discovery procedures and compulsory attendance of third party witnesses are
28 not available for proceedings before the CAVC. However, aver that the CAVC can remand to

1 VA for additional record development.

2 135. Deny the first sentence, except to admit that in FY 2007, 53% of appellants were
3 unrepresented at time of filing. However, aver that only 19% were unrepresented at time of
4 closure. Defendants lack information as to the truth of the second sentence.

5 136. Deny the first sentence. Deny the second sentence, except to admit that VA employs
6 trained legal professionals who represent the agency before the CAVC. Defendants lack
7 information as to the truth of the third sentence.

8 137. Deny.

9 138. Deny.

10 139. Deny.

11 140. Deny, except to the extent that it accurately characterized former Chief Judge Nebeker's
12 1994 State of the Court address.

13 141. Deny, except to the extent that it accurately characterizes former Chief Judge Nebeker's
14 1998 State of the Court address.

15 142. Deny, except to admit that CAVC lacks the power to authorize class actions and that
16 CAVC's jurisdiction is limited to review of individual claims.

17 143. Deny.

18 144. Deny the first sentence. Defendants lack information as to the truth of the second
19 sentence. Deny the third and fourth sentences.

20 145. Deny.

21 146. Deny the first and second sentences. Deny third sentence, except to admit that the total
22 number of received claims - as distinguished from inventory - increased by 39% from 578,773 to
23 806,382 between fiscal years 2000 and 2006.

24 147. Deny, except to admit that a report of VA's Office of Inspector General found that as of
25 August 2001, VA regional office (VARO) Oakland was ranked 46th out of VBA's 57 VAROs in
26 the timely completion of Compensation and Pension service rating related actions.

27 148. Deny introductory sentence.

28 a. Deny subparagraph (a), except to the extent that it accurately characterizes 38 U.S.C. §

1 5121(a).

2 b. Deny first sentence in subparagraph (b) to the extent that it states that VA "refuses" to
3 award interest, and admit that VA has no authority to award interest. Admit second sentence in
4 subparagraph (b). Deny third sentence in subparagraph (b) and aver that VA's appropriations are
5 independent of the number of claims that VA grants or denies.

6 c. Deny subparagraph (c) except to the extent that it accurately quotes the May 2005 VA
7 Inspector General report 05-00765-137. The Court is referred to that document for a full and
8 complete statement of its contents.

9 d. Deny subparagraph (d), except to admit that there has been an increase in SCDDC claims
10 and one of the contributing factors is the casualties from the Iraq and Afghanistan wars.

11 149. Deny except to the extent that it accurately characterizes the Blimes study. The Court is
12 referred to that document for a full and complete statement of its contents.

13 150. The first sentence is an ambiguous statement to which defendants can neither admit nor
14 deny. Deny the second sentence, and aver that only approximately 360 of the approximately
15 6000 cases on the Court's docket are pending decision by the judges. Admit the third sentence
16 except to the extent that it characterizes the situation as a "backlog." Defendants lack
17 information as to the truth of the fourth sentence, which is ambiguous in the meaning of a "year
18 of cases."

19 151. Admit.

20 152. Admit the first sentence, but aver that approximately 1,100 of the 2,542 new cases in the
21 first two quarters of FY 2007 related to appeals on a single issue on which there was controlling
22 precedent. Deny the second sentence, except to the extent that it accurately characterizes Chief
23 Judge Greene's statement. Admit the third sentence except to the extent that it characterizes the
24 number of appeals as "extraordinary."

25 153. The entire paragraph is plaintiffs' characterizations and legal conclusions to which no
26 response is required. To the extent that a response is required, deny.

27 154. Deny the first and fourth sentences. Admit the second sentence, except to the extent that
28 it uses the characterization "full cycle." Admit the third sentence.

1 155. Deny except to aver that the method of calculating processing time is from the date of
2 earliest possible entitlement, which by statute is after a veteran is discharged from active duty.

3 156. Insofar as the phrase "the date the appointment is set" is an ambiguous phrase, defendants
4 lack adequate information as to the truth of this paragraph. Defendants nevertheless aver that
5 patient waits times are calculated using the date on which a patient is seen by a provider.

6 157. Admit the introductory sentence only to the extent that it accurately characterizes the
7 Chairman's Report. Deny the first, second, and third rows of the chart. Defendants lack
8 information as to the truth of the fourth and fifth rows of the chart, as well as the row marked
9 "Total."

10 158. Defendants lack information as to the truth of this paragraph.

11 159. Admit first sentence. Deny second and third sentences.

12 160. Defendants lack adequate information as to the truth of this paragraph.

13 161. To the extent that the sentence is plaintiffs' characterization of hypothetical facts, no
14 response is required. To the extent that a response is required, deny.

15 162. Deny first sentence except to the extent that it accurately characterizes the GAO report
16 referenced. The Court is referred to that document for a full and complete statement of its
17 contents. Deny second sentence except to the extent that it accurately characterizes the
18 Chairman's Report referenced. The Court is referred to that document for a full and complete
19 statement of its contents. Defendants lack sufficient information to answer the third sentence,
20 which is ambiguous in the terms "recycled" and "timely."

21 163. Admit first sentence. Deny second sentence except to the extent that it accurately
22 characterizes the Chairman's Report to Congress. The Court is referred to that document for a
23 full statement of its contents. Defendants lack sufficient information as to the truth of the third
24 sentence.

25 164. Deny, except to the extent that it accurately characterizes Chief Judge Greene's May 22,
26 2007 statement to the U.S. House of Representatives. The Court is referred to that document for
27 a full statement of its contents.

28 165. Deny the first sentence. Deny the second sentence, except to admit that CAVC has

1 considered adopting, but has never adopted, the use of summary decisions in certain cases.

2 166. The first sentence contains plaintiffs' ambiguous characterizations to which no response is
3 required and other statements for which defendants lack adequate information. Defendants deny
4 the remainder of the paragraph except to the extent that it accurately characterizes Judge Michel's
5 2007 State of the Court address.

6 167. Deny the first sentence except to admit that some veterans die while their claims are
7 pending and aver that if a veteran dies while his claims are pending, accrued benefits may be paid
8 to surviving family members under 38 U.S.C. § 5121. Defendants lack information as to the
9 truth of the second sentence. Deny the third sentence.

10 168. The first sentence is both ambiguous and plaintiffs' characterization of their claims, to
11 which no response is required. To the extent that a response is required, deny the first sentence.
12 Admit the second sentence.

13 169. Defendants lack information as to the truth of this paragraph.

14 170. Defendants lack information as to the truth of this paragraph.

15 171. Defendants lack information as to the truth of this paragraph.

16 172. Deny.

17 173. Deny the first sentence. Deny second sentence. Admit the third sentence, but aver that in
18 the last quarter of fiscal year 2007, 80% of veterans accessing VA health care were screened for
19 PTSD.

20 174. Deny the first and second sentences. Admit the third sentence except to aver that the
21 VASRD currently contains a classification under which traumatic brain injury (TBI) can be
22 evaluated and that new criteria for evaluating TBI were published as proposed regulations in the
23 Federal Register on January 3, 2008. Defendants lack information as to the truth of the fourth
24 and fifth sentences.

25 175. Deny the paragraph, which constitutes a nearly verbatim quote fro the IOM PTSD
26 Compensation and Military Service Book, except to the extent that it accurately characterizes that
27 book.

28 176. Deny first sentence. Deny the second sentence except to the extent that it accurately

1 characterizes Mr. Bertoni's testimony to Congress and GAO Report 07-512T. The Court is
2 referred to those documents for a full and complete statement of their contents.

3 177. Deny first, third, and fourth sentences. Deny the second sentence, except to the extent
4 that it states that one general rating scheme is applied to all types of mental disorders.

5 178. Deny, except to the extent that it accurately characterizes the publication of the
6 Committee on Veterans Compensation for PTSD entitled PTSD Compensation and Military
7 Service. The Court is referred to that document for a full statement of its contents.

8 179. Deny, except to the extent that it accurately characterizes the publication of the
9 Committee on Veterans Compensation for PTSD entitled PTSD Compensation and Military
10 Service. The Court is referred to that document for a full statement of its contents.

11 180. Deny, except to the extent that it accurately characterizes the publication of the
12 Committee on Veterans Compensation for PTSD entitled PTSD Compensation and Military
13 Service. The Court is referred to that document for a full statement of its contents.

14 181. Deny, except to the extent that it accurately characterizes the publication of the
15 Committee on Veterans Compensation for PTSD entitled PTSD Compensation and Military
16 Service. The Court is referred to that document for a full statement of its contents.

17 182. Deny.

18 183. Deny the first sentence. Deny the second sentence except to the extent that it accurately
19 characterizes the Inspector General study. The Court is referred to that document for a full
20 statement of its contents.

21 184. Deny the first sentence. Defendants lack information as to the truth of the second
22 sentence, which is ambiguous in the use of the terms "rapidly" and "long"; deny the remainder of
23 the second sentence. Deny the third sentence, except to admit that VA stopped accepting new
24 enrollees in Category 8 after January 17, 2003. The fourth sentence is an ambiguous
25 characterization to which no response is required. To the extent that a response is required, deny.

26 185. Admit.

27 186. Admit the first sentence. Deny the second sentence except to the extent that it accurately
28 characterizes the Bilmes study. The Court is referred to this document for a full statement of its

1 contents.

2 187. Deny, except to the extent that it accurately characterizes the statement of Dr. Murphy in
3 2006. The Court is referred to this document for a full statement of its contents.

4 188. Deny.

5 189. The VA lacks sufficient information to answer the first sentence, which is ambiguous as
6 to the meaning of the phrase "without authorization." Deny the second sentence except to the
7 extent that it accurately characterizes the GAO report 05-287. The Court is referred to this
8 document for a full statement of its contents.

9 190. Deny, except to the extent that it accurately characterizes the GAO report. The Court is
10 referred to this document for a full statement of its contents.

11 191. Deny, except to the extent that it accurately characterizes the April 2003 OIG report. The
12 Court is referred to this document for a full statement of its contents.

13 192. Deny, except to the extent that it accurately characterizes the July 2005 OIG report. The
14 Court is referred to this document for a full statement of its contents.

15 193. Deny, except to the extent that it accurately characterizes the American Psychology
16 Association Task Force 2007 report. The Court is referred to this document for a full statement
17 of its contents.

18 194. Deny, except to the extent that it accurately characterizes the GAO recommendation
19 referred to therein. The Court is referred to this document for a full statement of its contents.

20 195. Deny the paragraph except to the extent that it accurately characterizes the May 2006 OIG
21 report. The Court is referred to that document for a full and complete statement of its contents.

22 196. Deny, except to the extent that it accurately characterizes the GAO Report 04-1069 and
23 cited sources. The Court is referred to this document for a full statement of its contents.

24 197. Admit first sentence. Admit the second sentence to the extent that it accurately
25 characterizes the Special Committee's reports. The Court is referred to this document for a full
26 statement of its contents.

27 198. Deny, except to the extent that it accurately characterizes GAO report 05-287. The Court
28 is referred to that document for a full and complete statement of its contents.

1 199. Defendants lack sufficient information to answer the first sentence. Deny the second
2 sentence, except to admit that there may be negative health consequences if a veteran does not
3 obtain treatment. Deny the third sentence except to the extent that it accurately characterizes the
4 American Psychological Association report. The Court is referred to this document for a full
5 statement of its contents.

6 200. Admit the first sentence. Deny the remainder of the paragraph except to the extent that it
7 accurately characterizes the C&P PTSD Review. The Court is referred to that document for a
8 full and complete statement of its contents.

9 201. Deny except to admit that veterans are vital to our democracy.

10 202. Deny.

11 203. Deny.

12 204. Defendants lack information sufficient to answer the paragraph which is ambiguous in the
13 meaning of the phrases "huge" and "dramatic."

14 205. Deny first sentence except to admit that VA identified a number of activities that needed
15 additional funding in fiscal years 2005 and 2006. Admit the second sentence.

16 206. Deny first sentence except to admit that in June 2005, the President asked Congress for a
17 supplemental appropriation of \$975 million for VA. Deny the second sentence except to the
18 extent that it accurately characterizes GAO Report 06-430R. The Court is referred to that
19 document for a full and complete statement of its contents. Deny the third sentence except to
20 admit that in July 2005, the President asked Congress for a budget amendment to VA's FY 2006
21 budget. Deny the fourth sentence except to the extent that it accurately characterizes the GAO
22 reports mentioned. The Court is referred to those documents for a full and complete statement of
23 their contents.

24 207. Defendants lack information sufficient to answer the first sentence which is ambiguous in
25 the meaning of the phrases "severe budget problems" and "ever-increasing bonuses." Admit the
26 second sentence. Deny the third sentence, except to admit that some executives within the VA
27 received bonuses of up to \$ 33,000.

28 208. Deny the first sentence. Admit subparagraphs (a) through (c) only to the extent that they

1 accurately reflect the contents of OIG Report 05-00765-137. The Court is referred to this
2 document for a full statement of its contents.

3 209. Deny first sentence except to the extent that it accurately characterizes the GAO report.
4 The Court is referred to this document for a full statement of its contents. Deny second sentence
5 except to the extent that it accurately characterizes the Performance and Accountability Report.
6 The Court is referred to this document for a full statement of its contents.

7 210. Deny except to the extent that it accurately characterizes the GAO report. The Court is
8 referred to this document for a full statement of its contents.

9 211. Deny except to the extent that it accurately characterizes the GAO report. The Court is
10 referred to this document for a full statement of its contents.

11 212. Admit, except to the extent that it characterizes VA's allocation of funds as a "promise."

12 213. Admit first sentence. The second sentence is plaintiffs' characterization to which no
13 response is required. To the extent that one is required, deny. Defendants lack information as to
14 the truth of the third sentence.

15 214. Admit the introductory sentence. Deny the remainder of the paragraph except to the
16 extent that it accurately characterizes the DoD Mental Health Report. The Court is referred to
17 this document for a full statement of its contents.

18 215. Deny the first sentence, except to admit that VBA requested funding for additional
19 Compensation and Pension personnel in the FY 2008 budget. Defendants lack information as to
20 the truth of the second sentence.

21 216. Deny, to the extent that the paragraph addresses VA actions. Defendants lack
22 information as to the truth of information about DoD actions.

23 217. Defendants lack information as to the truth of these statements.

24 218. This paragraph constitutes a legal conclusion to which no response is required, however,
25 to the extent a response is required, deny except to the extent that the statement is consistent with
26 38 C.F.R. 4.9 and 4.127 and aver that having a personality discharge does not automatically
27 make a veteran ineligible for VA medical care.

28 219. Defendants lack information as to the truth of these statements.

1 220. Defendants lack information as to the truth of these statements.

2 221. Defendants lack information as to the truth of this statement

3 222. The first sentence constitutes a legal conclusion to which no response is required,
4 however, to the extent a response is required, deny first sentence, except to the extent that it is
5 consistent with 38 C.F.R. § 4.16. Admit the second sentence. Deny the third sentence except to
6 the extent that it accurately characterizes the Inspector General Report. The Court is referred to
7 this document for a full statement of its contents.

8 223. Deny the first sentence. Deny the second sentence except to admit that in 1977 VA
9 initiated a review of TDIU cases for the purposes of determining if proper controls were in place
10 for unemployability reviews and if proper decisions in these cases had been made.

11 224. Admit the first and fourth sentences. Deny the second sentence, except to admit that VA
12 issued Circular 21-80-7, dated September 9, 1980, to call for review of TDIU cases. Deny the
13 third and fifth sentences.

14 225. Deny.

15 226. Deny the first sentence. Admit subparagraph (a), except to the extent that it is
16 characterized as a measure designed and calculated to reduce the number of grants and assigned
17 ratings for service connected disability. Admit subparagraph (b), except to the extent that it is
18 characterized as a measure designed and calculated to reduce the number of grants and assigned
19 ratings for service connected disability. Deny subparagraphs (c) and (d).

20 227. Admit to the first sentence only to the extent that it states that VBA employees receive
21 work credits for work performed but aver that such credits are only one component of an
22 employee's annual performance rating. Admit the first clause of the second sentence; deny the
23 second clause of the second sentence. Deny the third sentence.

24 228. Deny.

25 229. Deny the first sentence, except to admit that when a claim is denied, a claimant must
26 initiate (but need not perfect) an appeal by filing a notice of disagreement. Defendants lack
27 information as to the truth of the second sentence. Deny the third sentence, except to admit that
28 some cases are remanded for further development. Deny the fourth sentence, except to admit

1 that employees receive work credits for work performed on cases on remand.

2 230. Deny.

3 231. Deny, except to the extent that it accurately characterizes the criminal proceeding United
4 States v. Gottfried.

5 232. Deny, except to the extent that it accurately states what was reported in the Washington
6 Post article. The Court is referred to this document for a full statement of its contents.

7 233. Deny the first sentence. Deny the second sentence, except to the extent that it accurately
8 characterizes OIG Report 05-00765-137. The Court is referred to this document for a full
9 statement of its contents.

10 234. Deny.

11 235. These statements are plaintiffs' characterizations of law to which no response is required.
12 To the extent a response is required, deny.

13 236. Deny the first sentence. Deny the second sentence, except to admit that veterans may be
14 unfamiliar with VA rules. Deny third sentence.

15 237. Deny the first sentence. Deny the second sentence, except to admit that Board decisions
16 are drafted by Board attorneys and that, occasionally, a Board attorney has been detailed to a
17 regional office to assist in drafting regional office decisions. Admit the third and fourth
18 sentences.

19 238. Deny the first sentence. Deny the second sentence, except to admit that many service
20 representatives are not attorneys and do not receive formal training from VA, but that
21 representatives are accredited by VA and must go through extensive training within their own
22 organizations, who also must be approved by VA. Deny the third sentence. Deny the fourth and
23 fifth sentences.

24 239. Deny.

25 240. Deny.

26 241. Defendants lack information as to the truth of this paragraph.

27 242. Deny the first sentence. Deny the second and third sentences, except to the extent that it
28 accurately characterizes the GAO Report 02-806 findings about fiscals years 1999 to 2000. The

1 Court is referred to this document for a full and complete statement of its contents.

2 243. Defendants lack information as to the truth of the first sentence. Deny second sentence,
3 except to admit that two-third of initial notices of disagreement fail to become formal appeals
4 because the claimant fails to express continued dissatisfaction.

5 244. Deny.

6 245. Deny.

7 246. Deny.

8 247. These statements are conclusions of law to which no response is required.

9 248. Deny.

10 249. Deny.

11 250. Deny.

12 251. This paragraph constitutes a characterization of plaintiffs' action to which no response is
13 required. To the extent a response is required, deny.

14 252. This paragraph constitutes a characterization of plaintiffs' action to which no response is
15 required. To the extent a response is required, deny.

16 253. This paragraph constitutes a conclusion of law to which no response is required. To the
17 extent a response is required, deny.

18 254. This paragraph constitutes a conclusion of law to which no response is required. To the
19 extent a response is required, deny.

20 255. This paragraph constitutes a conclusion of law to which no response is required. To the
21 extent a response is required, deny.

22 256. This paragraph constitutes a conclusion of law to which no response is required. To the
23 extent a response is required, deny.

24 257. This paragraph constitutes a conclusion of law to which no response is required. To the
25 extent a response is required, deny.

26 258. Defendants incorporate by reference, as though fully set forth herein, their answers to each
27 and every allegation contained in Paragraphs 1 through 257 of the Complaint.

28 259. Deny.

1 260. Deny.

2 261. Defendants incorporate by reference, as though fully set forth herein, their answers to each
3 and every allegation contained in Paragraphs 1 through 257 of the Complaint.

4 262. Deny.

5 263. Deny.

6 264. Defendants incorporate by reference, as though fully set forth herein, their answers to each
7 and every allegation contained in Paragraphs 1 through 257 of the Complaint.

8 265. Deny.

9 266. Deny.

10 267. Defendants incorporate by reference, as though fully set forth herein, their answers to each
11 and every allegation contained in Paragraphs 1 through 257 of the Complaint.

12 268. This paragraph states a legal conclusion for which no response is required. To the extent a
13 response is required, deny.

14 269. Deny.

15 270. This paragraph states a legal conclusion for which no response is required. To the extent a
16 response is required, deny.

17 271. Deny.

18 272. Deny.

19 273. Defendants incorporate by reference, as though fully set forth herein, their answers to each
20 and every allegation contained in Paragraphs 1 through 257 of the Complaint.

21 274. Deny.

22 275. Deny.

23 276. This paragraph states a legal conclusion for which no response is required. To the extent a
24 response is required, deny.

25 277. Deny.

26 278. Deny.

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The balance of plaintiffs' complaint constitutes a prayer for relief to which no answer is required. Defendants deny that plaintiffs are entitled to the relief requested or to any relief.

Defendants hereby deny all allegations not expressly admitted or denied.

Defendants pray that plaintiffs' complaint be dismissed and defendants be awarded costs.

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Dated February 1, 2008

Respectfully Submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
JOSEPH P. RUSSONIELLO
United States Attorney
RICHARD LEPLEY
Assistant Branch Director

/s/ Daniel Bensing
DANIEL BENSING D.C. Bar # 334268
STEVEN Y. BRESSLER D.C. Bar #482492
KYLE R. FREENY California Bar #247857
Attorneys, U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044

Counsel for Defendants