



## Testimony

Before the Subcommittee on Disability Assistance and Memorial Affairs,  
Committee on Veterans' Affairs,  
House of Representatives

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# VA DISABILITY BENEFITS

## Board of Veterans' Appeals Should Address Gaps in Its Quality Assurance Process

### Accessible Version

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# GAO Highlights

Highlights of [GAO-24-106156](#), a testimony before the Subcommittee on Disability Assistance and Memorial Affairs, Committee on Veterans' Affairs, House of Representatives

## Why GAO Did This Study

Each year, the Board adjudicates thousands of cases in which a veteran was dissatisfied with the Department of Veterans Affairs' (VA) initial decision on their claim for benefits. However, researchers and Congress have raised questions about how the Board ensures the quality of its adjudications.

GAO was asked to review the Board's QA process. This testimony examines (1) how the Board assures and measures the quality of its adjudicative decisions, and (2) the extent to which the Board builds and uses evidence to assess its QA process.

GAO reviewed relevant federal laws and Board documents. GAO analyzed QA data provided by the Board for fiscal years 2019 through 2022 and assessed its reliability. GAO also reviewed relevant quality assurance literature and interviewed VA officials, attorneys, VLJs, and subject matter experts, including researchers and veterans service organizations. GAO also conducted group discussions with randomly selected Board decision-writing attorneys and VLJs.

## What GAO Recommends

GAO is making four recommendations, including that the Board develop policies for calculating its accuracy rate; develop and implement an evidence-based decision-making process for its QA efforts; and study decision-making consistency. The Board generally agreed with three recommendations and disagreed with the fourth about consistency. GAO continues to believe that the recommendation is valid as discussed in the report.

View [GAO-24-106156](#). For more information, contact Elizabeth H. Curda at (202) 512-7215 or [curdae@gao.gov](mailto:curdae@gao.gov).

November 29, 2023

## VA DISABILITY BENEFITS

### Board of Veterans' Appeals Should Address Gaps in Its Quality Assurance Process

#### What GAO Found

The Board of Veterans' Appeals (Board) has a quality assurance (QA) process and a related accuracy measure for its decisions. Specifically, its QA process involves: 1) checking a random sample of draft decisions for certain types of Board-defined errors each month through its case review process; and 2) monitoring outcomes of Board decisions that were further appealed to the U.S. Court of Appeals for Veterans Claims (CAVC). The Board uses results from these activities to provide various interventions, such as individual feedback to veteran law judges (VLJs) or training. The Board also calculates and publishes an accuracy rate that represents error-free adjudications. However, GAO found shortfalls in the Board's process for calculating this measure. Contrary to federal internal control standards, GAO found that the Board did not have:

- (1) written policies or procedures for calculating its accuracy rate or managing case review error data, or
- (2) checks on its accuracy rate calculation.

As a result, the Board lost data and GAO could not verify accuracy rates provided by the Board in 2 of 4 fiscal years. Until the Board develops written policies and procedures, the Board will likely continue to have difficulty supporting the accuracy of its publicly reported measure.

GAO found gaps in the Board's efforts to build and use evidence—such as a lack of data and analysis—to assess its QA process and related activities. GAO analyses of CAVC and Board data show that over the past 3 fiscal years, CAVC remanded (sent back) about 80 percent of appealed Board decisions, often because CAVC found the Board's explanation of its findings to be inadequate. However, GAO found that the Board lacked evidence to better understand and address these and other issues and set priorities to help improve its QA process. Specifically:

- Board officials told GAO it has no comprehensive, written plan outlining how it will accomplish the mission and goals of its QA process.
- Board officials told GAO they had not fully analyzed trends or underlying causes of the most common Board-identified errors or CAVC remands.
- The Board has not systematically or comprehensively built or used evidence to better understand and improve its interventions, such as collecting feedback about training.
- The Board does not assess VLJ decisions for consistency, such as whether common misunderstandings of policy or law exist in decisions.

GAO's prior work has identified key practices for evidence-based decision-making. These practices involve building and assessing evidence and using it to foster a culture of continuous improvement. Absent such a process and a plan to guide it, the Board is not positioned to fully understand and address underlying causes of the most common errors and remands or understand consistency—evidence which is needed to target and implement effective interventions and foster continuous improvement of its QA efforts.

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee:

I am pleased to be here today to discuss our review of the Department of Veterans Affairs' (VA) Board of Veterans' Appeals' (Board) quality assurance (QA) process. As you know, the Board adjudicates appealed cases in which a veteran is dissatisfied with the Veterans Benefits Administration's (VBA) initial decision on their claim.<sup>1</sup> In turn, if the veteran is dissatisfied with the Board's decision, they may appeal their case to the U.S. Court of Appeals for Veterans Claims (CAVC).

Veterans often wait years for a final VA decision for their claims for disability compensation and other benefits. To make changes to the appeals process, the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) was enacted, which VA implemented in February 2019.<sup>2</sup> The Board continues managing appeals that were in process before the AMA took effect, called legacy appeals.

The Board conducts QA activities through its Office of Assessment and Improvement (OAI). However, researchers and Congress have raised questions about the quality of the Board's decisions on appealed claims, particularly given the pace needed to expeditiously process the large volume of appeals now before the Board.<sup>3</sup> We were asked to examine the Board's QA process.

My statement today focuses on (1) how the Board assures and measures the quality of its adjudicative decisions, and (2) the extent to which the Board builds and uses evidence to assess its QA process and related activities.

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<sup>1</sup>In addition to disability compensation appeals, the Board decides appeals from all three VA Administrations—VBA, the Veterans Health Administration (VHA), the National Cemetery Administration (NCA)—and the Office of General Counsel (OGC).

<sup>2</sup>Pub. L. No. 115-55, 131 Stat. 1105.

<sup>3</sup>See David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, "Quality Review of Mass Adjudication: A Randomized Natural Experiment at the Board of Veterans Appeals, 2003–16," *The Journal of Law, Economics, and Organization*, Vol. 35, no. 2 (2019): 239-288.

For both objectives, we reviewed relevant federal laws and documents from VA and the Board, including reports, guidance, and training materials related to its QA process. We also interviewed Board officials about their QA process.

To address the first objective, we analyzed Board data produced by OAI's case review process for legacy and AMA appeals, and OAI's monitoring of CAVC remands from fiscal year 2019 through fiscal year 2022.<sup>4</sup> We compared the Board's data management and accuracy rate calculation process against standards for internal controls in the federal government.<sup>5</sup> We also assessed the reliability of these data by conducting electronic testing, examining documentation, and interviewing Board staff knowledgeable about the data. We found that some of the data elements are sufficiently reliable for our purposes of describing overarching trends and how the Board measures quality. However, the Board's data management practices limit the usefulness of these data.<sup>6</sup> We describe these limitations in detail later in this statement.

To address the second objective, we also reviewed relevant literature and interviewed VA officials and subject matter experts. We selected subject matter experts from veterans service organizations (VSO), research organizations, and private law firms that studied or worked with veterans appealing VBA's initial decision on their claim. We also conducted two group discussions with Board decision-writing attorneys and two with veteran law judges (VLJs). Each group consisted of eight to 10 participants randomly selected from lists of attorneys and VLJs provided to us by the Board. Information obtained from these group discussions cannot be generalized to all VLJs and attorneys. We compared the Board's QA process to the Board's guidance, and performance plans; the Administrative Conference of the United States key practices for QA

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<sup>4</sup>A CAVC remand is an appellate decision by CAVC that does not resolve the merits of the issues, but that returns matters to the Board for further factual development and, in some cases, readjudication. If additional development is required, the Board remands the case to VBA, usually to the Decision Review Operations Center.

<sup>5</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 10, 2014), principles 3, 10, 13 and 16.

<sup>6</sup>We found that case review data on errors, data on reasons for remand from CAVC, and the fiscal year accuracy rates provided by OAI are sufficiently reliable for the purposes of describing trends for this engagement. However, the Board could not provide the original raw data on the number of cases with errors for fiscal years 2019-2020, which would support the accuracy rate information they provided to us. Instead, they reconstructed the data using other internal documents. We concluded that these reconstructed data are not sufficiently reliable for our purposes.

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systems;<sup>7</sup> and, the four interrelated topic areas containing key practices for evidence-based decision making from our prior work.<sup>8</sup>

We conducted this performance audit from July 2022 to November 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

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### Board Organizational Structure and Roles

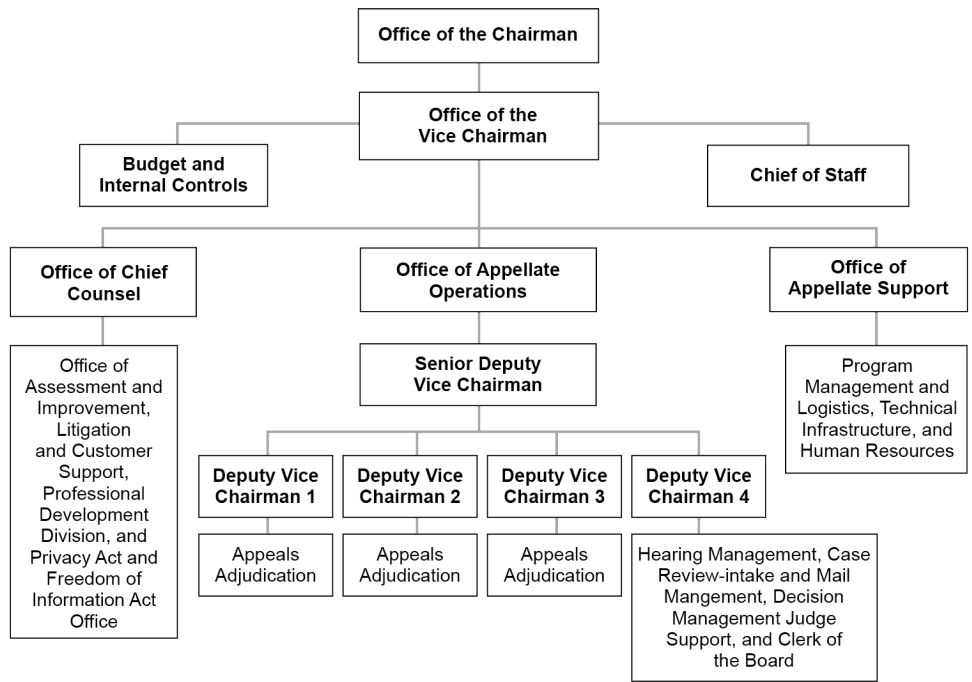
The Board is responsible for deciding appeals for veterans benefits and services on behalf of the Secretary of Veterans Affairs. Board documents state that its mission is to conduct hearings and dispose of appeals properly before the Board in a timely manner. See figure 1 for an overview of the Board's organizational structure.

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<sup>7</sup>Administrative Conference of the United States, *Administrative Conference Recommendation 2021-10: Quality Assurance Systems in Agency Adjudication*, (Washington, D.C.: adopted Dec. 16, 2021). The Administrative Conference of the United States is an independent federal agency within the executive branch whose statutory mission is to identify ways to improve the procedures by which federal agencies protect the public interest and determine the rights, privileges, and obligations of private persons.

<sup>8</sup>GAO, *Evidence-Based Policymaking: Practices to Help Manage and Assess the Results of Federal Efforts*, [GAO-23-105460](#) (Washington, D.C.: July 12, 2023).

**Figure 1: Board's Organizational Structure**



Source: Board of Veterans' Appeals (Board) Fiscal Year 2022 Annual Report. | GAO-24-106156

**Accessible Data for Figure 1: Board's Organizational Structure**

- Office of the Chairman
  - Office of the Vice Chairman
    - Budget and Internal Controls
    - Chief of Staff
  - Office of Chief Counsel
    - Office of Assessment and Improvement, Litigation and Customer Support, Professional Development Division, and Privacy Act and Freedom of Information Act Office
  - Office of Appellate Operations
    - Senior Deputy Vice Chairman
      - Deputy Vice Chairman 1
        - Appeals Adjudication
      - Deputy Vice Chairman 2
        - Appeals Adjudication
      - Deputy Vice Chairman 3
        - Appeals Adjudication
      - Deputy Vice Chairman 4

- Hearing Management, Case Review-intake and Mail Management, Decision Management Judge Support, and Clerk of the Board
- Office of Appellate Support
  - Program Management and Logistics, Technical Infrastructure, and Human Resources

Source: Board of Veterans' Appeals (Board) Fiscal Year 2022 Annual Report. | GAO-24-106156

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## VA's Legacy and AMA Processes

Under AMA, veterans have more options to appeal VA's claims decisions than in the legacy process. For example, under the legacy process, veterans who were dissatisfied with VBA's decision on their initial claim needed VBA to re-examine the case and issue a decision before a veteran could appeal to the Board. Under AMA, VA offers five appeal options. Two of those options afford veterans opportunities to have their VBA claims decision undergo an additional review within VBA. Veterans also may choose one of three options when appealing to the Board: (1) a hearing before the Board, which can include providing new evidence; (2) review by the Board, where there is no hearing or new evidence; or (3) review by the Board without a hearing, but where the veteran can submit new evidence.

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## Process at the U.S. Court of Appeals for Veterans Claims

If a veteran is dissatisfied with the outcome of their appeal at the Board, they may appeal to CAVC by filing a Notice of Appeal. According to CAVC officials, almost all appealed cases receive mediation conferencing, also called a Rule 33 conference. They also said that the goal of mediation conferencing is to determine whether the parties can resolve the case without a full briefing and without the case going before a judge. Mediation may serve to narrow the issues on appeal. It may also result in agreement between the veteran's representative and VA's Office of General Counsel that, due to a Board factual or legal error, the case will be returned to the Board for readjudication, according to CAVC officials.

If the parties agree that the case must be returned to the Board, the parties file with CAVC a joint motion for remand (JMR) or partial remand

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(JMPR), identifying the Board errors.<sup>9</sup> The Clerk of the Court grants the motion and returns the case to the Board for any necessary development and readjudication. If after mediation the parties are not able to resolve the appeal as described, briefs are filed and the case is decided by a single CAVC judge or a panel of judges. A panel of judges is generally required if the outcome of the case is reasonably debatable or would establish or alter existing law. In its decisions, CAVC may affirm, modify, remand, or reverse a Board decision, as appropriate.

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## Trends in Pending Workloads and Decisions at the Board

In our prior work, we noted that developing and implementing a comprehensive QA program is important as the Board contends with large workloads, which potentially create pressure to sacrifice the quality of work activities to meet timeliness goals.<sup>10</sup> Moreover, since 2003, VA's management of disability compensation workloads has remained on GAO's High-Risk List.<sup>11</sup>

Currently, the Board is adjudicating appealed cases through its legacy and AMA processes and facing a growing inventory of cases. During fiscal year 2020—the first full fiscal year of AMA—through fiscal year 2022, the combined number of cases pending at the Board has increased by approximately 20 percent (see fig. 2).

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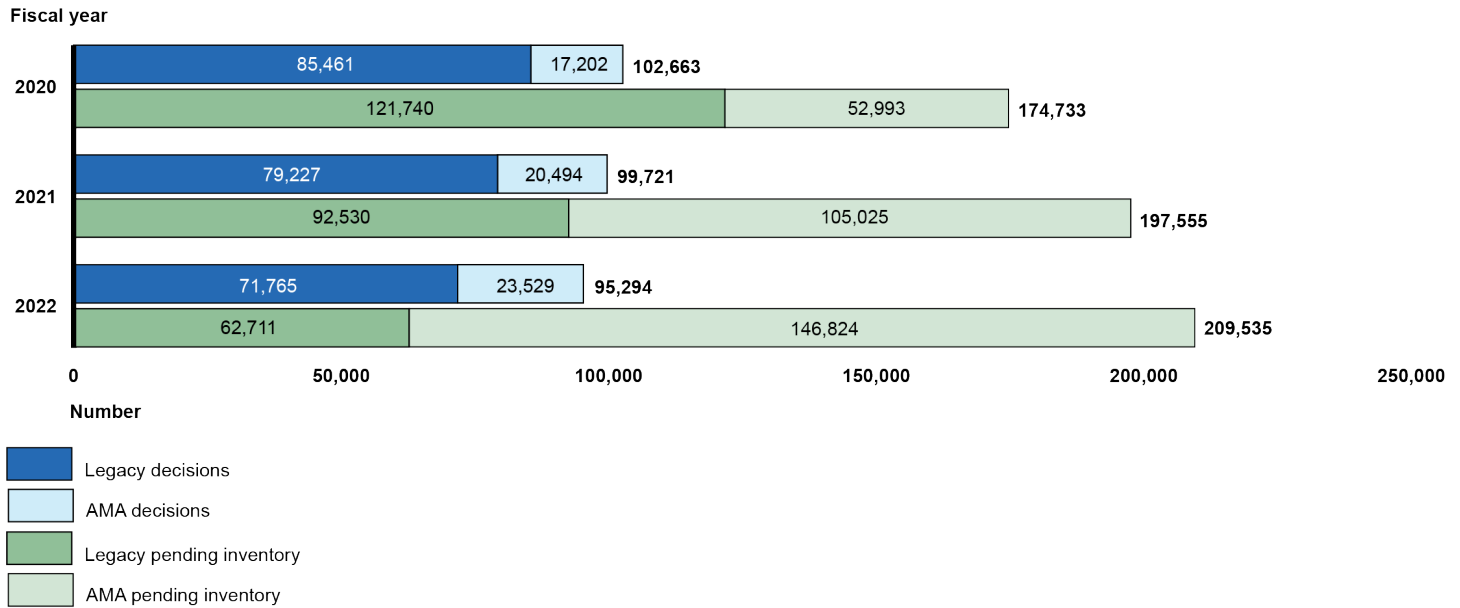
<sup>9</sup>As we describe later in the statement, these remands are often related to reasons or bases, where the Board did not provide an adequate explanation for its findings or conclusions, according to Board data we analyzed.

<sup>10</sup>GAO, *VA Disability Benefits: Actions Needed to Better Manage Appeals Workload Risks, Performance, and Information Technology*, [GAO-21-105305](#) (Washington, D.C.: July 13, 2021).

<sup>11</sup>GAO's High-Risk List focuses attention on government operations that are vulnerable to fraud, waste, abuse, or mismanagement, or in need of transformation to address economy, efficiency, or effectiveness challenges. Our 2023 High-Risk Report provides VA a road map for better managing its disability workloads. See GAO, *High-Risk Series: Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas*, [GAO-23-106203](#) (Washington, D.C.: April 20, 2023).



**Figure 2: Number of Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Decisions and Appeals Pending at the Board, Fiscal Years 2020-2022**



Source: Board of Veterans' Appeals (Board) Annual Reports. | GAO-24-106156

**Accessible Data for Figure 2: Number of Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Decisions and Appeals Pending at the Board, Fiscal Years 2020-2022**

Fiscal year	Legacy decisions	AMA decisions	Total decisions	Legacy pending inventory	AMA pending inventory	Total pending inventory
2020	85461	17202	102663	121740	52993	174733
2021	79227	20494	99721	92530	105025	197555
2022	71765	23529	95294	62711	146824	209535

Source: Board of Veterans' Appeals (Board) Annual Reports. | GAO-24-106156

Note: The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) required VA to change its appeals process. VA is currently managing two sets of workloads related to appeals: appeals under AMA and legacy appeals that were in process before AMA took effect. As of November 2023, the Board had not released its fiscal year 2023 annual report. However, according to the Board's website, the Board further reduced the pending inventory of legacy cases to 23,146 as of September 2023.

From fiscal years 2020 through 2022, the Board has decided around 100,000 appeals annually, most of which were decisions on legacy cases, as shown in figure 2. In that time, the Board decreased its legacy inventory by about 48 percent. Meanwhile, the number of pending AMA appeals has almost tripled. According to Board data, during fiscal year 2023, the Board issued 103,245 decisions and the pending inventory was slightly reduced from 209,535 pending appeals at the end of fiscal year 2022 to 208,155.

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## The Board's Quality Assurance Process Lacks Written Policies to Support Its Accuracy Calculations and the Board Does Not Monitor whether Errors Are Corrected

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### The Board's Quality Assurance Process Involves Reviews of Draft Board Decisions and CAVC Decisions

The Board's OAI manages the QA process. The QA process involves two primary activities: (1) case review, which is a review of randomly selected draft Board decisions each month; and (2) monitoring of CAVC decisions. For each activity, the Board conducts interventions intended to inform VLJs and attorneys about errors and CAVC trends. These interventions include notices, training, and guidance.

**Case Review.** During case review, OAI attorneys follow a series of checklists to help them identify Board-defined errors in randomly selected draft decisions.<sup>12</sup> Board officials told us that OAI attorneys must respect judicial discretion and therefore look for errors that the Board describes as “undebatable.” If an OAI attorney identifies a potential error, they add it to an agenda for discussion at OAI’s twice weekly meetings. Board officials said that the majority of the OAI attorneys and the Chief of OAI must agree that the situation fits the description of an error, as defined in the Board’s internal documentation of error standards, before OAI can provide feedback to a VLJ, as discussed below.

The error standards describe categories of errors as: (a) customer service errors, which occur when an undebatable mistake is made that could significantly impact the appellant’s experience interacting with the Board,

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<sup>12</sup>According to Board documents, OAI’s sampling methodology yields a monthly estimated accuracy rate with a five percent margin of error at the 95 percent level of confidence. On a yearly basis, the aggregate results are likely to produce an estimated accuracy rate with an approximate 1.5 percent margin of error at the 95 percent level of confidence. According to Board documents, the sample size calculation assumes a population accuracy rate of 90 percent and an estimated Board production of 6,000 cases per month. Currently, the Board samples about 137 legacy cases and 164 AMA cases per month. According to Board documents, the higher number of AMA cases being reviewed is based on the estimated AMA accuracy rate of 87.5 percent in fiscal year 2021. Beginning in June 2022, the Board began reviewing over 160 AMA cases each month. Cases are randomly selected for review on a rolling basis until the appropriate number of cases are pulled for that month.

but they may or may not affect the outcome of the decision; (b) procedural errors, which are undebatable errors that occur when the proper adjudicative process is not followed, but they may or may not affect the outcome of the decision; and, (c) clear and unmistakable errors, which occur when a VLJ gets the facts or law wrong in a way that, but for the error, the decision outcome would have been manifestly different.<sup>13</sup>

According to Board officials and our analysis of Board documents, OAI provides interventions based on the case review results. For example:

- **Feedback memorandum.** Board officials said that when the OAI team agrees that an error exists, a feedback memorandum is sent to the VLJ that signed the draft decision. The memo explains the error(s) that OAI found and recommends solutions. Board officials said that VLJs have the discretion to address the error(s) however they choose. Some VLJs may follow OAI's recommended correction, while others may choose to not address the error or to formally request reconsideration of the error.<sup>14</sup>
- **Error Digest.** OAI creates an "error digest" each month, which describes all errors found that month and recommended solutions. The Office of the Chief Counsel sends this digest to VLJs and attorneys.
- **Training.** OAI develops and administers trainings to attorneys and VLJs multiple times per year, based on themes identified during case review. These trainings have included, for example, guidance on aspects of new AMA requirements. OAI coordinates with the Board's Professional Development Division, the main training office, to avoid duplicating trainings, according to Board officials.

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<sup>13</sup>In addition to customer service errors, procedural errors, and clear and unmistakable errors, OAI attorneys look for opportunities to make "preauthorized corrections," which involve correcting minor mistakes, such as incorrect dates or incorrect veteran biographical information. These mistakes are not classified as errors.

<sup>14</sup>According to the Board's Operations Handbook, if the VLJ disagrees with OAI about the validity of an error, the VLJ may request reconsideration through a written request outlining the reasons they disagree, within 5 business days from the date on the feedback memo. OAI then reviews the feedback memo and the request for reconsideration and makes a recommendation to the Chief Counsel regarding whether the error should be upheld or withdrawn. The Chief Counsel, whose office is above OAI in the chain of command (see figure 1), will provide the final decision to the VLJ. Board officials told us that after the Chief Counsel makes the decision, the VLJ has final discretion to address the error.

**Monitoring CAVC Outcomes.** As part of the QA process, OAI monitors the outcomes of Board decisions that were appealed to CAVC. In particular, OAI attorneys read CAVC decisions and use Board-defined categories to identify the reason, or reasons, why a case was remanded. According to Board documents, reasons for remand may include duty to assist errors that CAVC identified, which are instances when VA failed to help the veteran collect necessary evidence to decide a disability claim,<sup>15</sup> among other types of errors. The Board defined other categories of remands as a result of various reasons or bases issues, where CAVC decided that the Board's explanation or discussion of its findings and conclusions is inadequate. According to Board documents, OAI staff use their judgement to identify which reason, or reasons, best represent CAVC's decision to remand a case to the Board.

OAI's interventions related to these monitoring efforts include guidance and training. These are intended to address issues identified in CAVC decisions, common reasons for remands, or other notable information. For example, Board officials provided documentation of a May 2022 training session that covered ten examples of cases that OAI found CAVC had frequently cited in its remand decisions in fiscal year 2021.

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### The Board Tracks the Accuracy of Its Decisions, but Lacks Written Policies and Procedures to Support Its Calculations and Data Management

The Board uses the results of its case review process to calculate accuracy rates for legacy and AMA cases each fiscal year (see fig. 3). The accuracy rates represent the percentage of cases reviewed by OAI that did not contain any Board-defined errors during that year. The fiscal year accuracy rates for legacy and AMA cases are published in the Board's annual report.<sup>16</sup> In addition, Board officials told us they calculate and monitor accuracy rates each month for legacy and AMA cases and discuss trends at internal meetings. In fiscal year 2022, the Board established an annual accuracy rate goal of 92 percent accuracy for AMA and legacy cases. Although the accuracy rate for AMA cases was 91.9 percent in fiscal year 2022, the Board is still producing some AMA

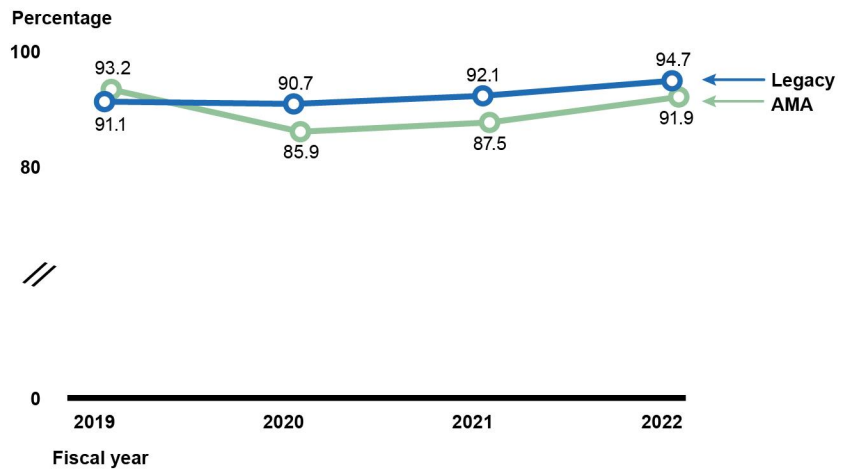
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<sup>15</sup>VA has a legal duty, known as the duty to assist, to make reasonable efforts to assist a claimant in obtaining the necessary evidence, such as medical records, to support a veteran's disability claim.

<sup>16</sup>The Board began publishing its AMA fiscal year accuracy rate in annual reports in fiscal year 2021.

decisions with errors. Based upon our analysis of the sampled case review results for AMA appeals in fiscal year 2022, we estimate that up to 2,220 decisions on AMA cases may have been sent to veterans with one or more errors in them, at the 95 percent level of confidence.<sup>17</sup>

**Figure 3: Board Reported Annual Accuracy Rates for Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Appeals, Fiscal Years 2019-2022**



Source: Board of Veterans' Appeals (Board) data. | GAO-24-106156

**Accessible Data for Figure 3: Board Reported Annual Accuracy Rates for Legacy and Veterans Appeals Improvement and Modernization Act of 2017 (AMA) Appeals, Fiscal Years 2019-2022**

Fiscal year	AMA	Legacy
2019	93.2	91.1
2020	85.9	90.7
2021	87.5	92.1
2022	91.9	94.7

Source: Board of Veterans' Appeals (Board) data. | GAO-24-106156

<sup>17</sup>In fiscal year 2022, OAI identified 144 draft AMA decisions containing error(s) out of the 1,779 sampled draft decisions that were reviewed, resulting in an estimated accuracy rate of 91.9 percent—which indicates an estimated error rate of 8.1 percent. According to Board documents, the aggregate fiscal year accuracy rate is calculated from 12 monthly simple random samples of draft decisions. We applied this estimated error rate to total AMA decisions made in fiscal year 2022—23,529 decisions, see figure 2—to estimate the range of AMA decisions sent to veterans that may have contained one or more errors as defined by the Board's error standards. We estimate that the range of AMA decisions that may have contained errors is between 1,620 and 2,220 at the 95 percent level of confidence. Note that the error(s) identified by OAI may have been corrected before being sent to veterans.

Figure Note: VA is currently managing two sets of workloads related to appeals: appeals under AMA and legacy appeals that were in process before AMA took effect. Because the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) was fully implemented at the Board in February 2019, the fiscal year 2019 AMA accuracy rate represents a partial year and nongeneralizable sample of cases, from February to September 2019.

However, we found that the Board does not have written policies or procedures for calculating its accuracy rates or managing case review error data. Instead, Board officials could only describe their accuracy rate calculation and data management practices to us, and we identified potential risks in their efforts to measure accuracy. Specifically, we found that:

- The Board does not have any checks on its calculation of legacy and AMA accuracy rates. One official in OAI is solely responsible for identifying the relevant data and calculating the percentage of cases without errors. Officials said that while OAI makes a good faith effort to prepare the calculations correctly, no process exists to check that official's work.
- The Board faces challenges with managing data related to the AMA accuracy rate calculations. While the process for calculating the legacy accuracy rate is mostly automated,<sup>18</sup> the AMA accuracy rate is calculated manually, using data from two sources. The Board does not store or maintain documentation of these sources or the actual accuracy rate calculations in a centralized location.

We found that these challenges with data management led to two specific shortfalls. First, the Board could not provide the original, raw data on the number of cases containing errors in 2 of 4 fiscal years. Without these data, we could not verify the accuracy rates the Board provided to us for those 2 years.<sup>19</sup> Second, the Board provided us with two different versions of raw data on errors from fiscal year 2020 through fiscal year

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<sup>18</sup>The legacy case management system, Veterans Appeals Control and Locator System (VACOLS), automatically tracks the number of legacy cases with error(s) and the number of cases reviewed by OAI and displays the percentage of cases with error(s). One official in OAI subtracts this error rate from 100 to calculate the accuracy rate.

<sup>19</sup>The Board misplaced the raw data on the number of cases containing one or more errors for fiscal year 2019 and 2020. We attempted to replicate the accuracy rates for those two years using data that the Board reconstructed by reviewing past error feedback memos and internal email communications. However, we found that the resulting accuracy rates did not align with the accuracy rates the Board provided to us. We determined the reconstructed data to be unreliable for our purposes.

2022 that contained differences that officials could not explain.<sup>20</sup> Board officials said that automating the calculations for AMA would help reduce the vulnerabilities that exist in their current methods. They also said that the Board requested that VA's Office of Information and Technology develop a feature in Caseflow—the AMA case management system—to automatically track the number of cases with error(s) and calculate the accuracy rate. However, as of November 2023, Board officials said there is no timeline for completion, as VA's Office of Information and Technology must balance the needs and priorities of the entire department.

According to federal standards for internal control, agencies should segregate key duties and responsibilities among multiple people to reduce the risk of error, misuse, or fraud.<sup>21</sup> In addition, agencies should maintain effective documentation that enables them to retain organizational knowledge and communicate knowledge as needed to external parties.

Board officials acknowledged that their current methods of measuring accuracy have vulnerabilities, and that policies or procedures are needed to ensure data is properly managed. Until the Board develops written policies and procedures, it is likely that the Board will continue to have difficulty supporting and checking the accuracy of its accuracy rate measure, which the Board communicates internally and to the public. Further, without written policies and procedures, the Board could face further challenges such as additional data loss, improperly storing data, or using inconsistent methodologies.

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<sup>20</sup>Error data tracks all individual errors that OAI finds regardless of whether they occurred in the same case. The Board provided us with two versions of this AMA error data. The first version of the AMA error data contained 208 individual errors in fiscal year 2020 and 232 in fiscal year 2021; while a second version contained 199 and 234, respectively. Officials could not reconcile the trackers in those years. We used the first version of AMA error data for our analyses, according to the Board's recommendation not to use the second version. The error data in fiscal year 2022 was consistent in both versions, with 168 errors.

<sup>21</sup>[GAO-14-704G](#), principle 3 and 10.

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## The Board Does Not Monitor How Feedback from Its Case Review Process Is Incorporated or whether Errors Are Corrected

As mentioned above, VLJs decide whether or how to address error(s) that OAI finds during the case review process, and whether they will incorporate OAI's recommended corrections. However, we found that the Board does not monitor whether or how case review feedback is incorporated or if errors are corrected before decisions are sent to veterans. Board officials said that OAI receives about one request to reconsider an error per month, and occasionally, OAI withdraws the error. Board officials said that because VLJs have the ultimate discretion to determine what benefits a veteran will receive, they were unsure whether it would be useful to monitor how case review feedback is used.

However, according to federal standards for internal control, management should use quality information to achieve their objectives, and establish and operate activities to monitor internal control systems.<sup>22</sup> In this case, OAI's objectives are to assess accuracy and identify opportunities for improvement. Until the Board begins monitoring how case review feedback is incorporated—or if errors are corrected before decisions are sent out—it will continue to invest resources in the case review process without understanding how it impacts decisions for veterans and without identifying opportunities to improve the process. Monitoring this information could also help management identify case review design or implementation challenges and inform their decision-making related to what the Board considers an important aspect of its QA process. For example, once the Board gains an understanding of how VLJs incorporate feedback from case review, or whether specific types of errors frequently remain unaddressed, it can use this evidence to consider whether changes to the case review process or error standards may be appropriate.

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<sup>22</sup>[GAO-14-704G](#), principle 13 and 16.



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## Gaps Exist in the Board's Efforts to Build and Use Evidence to Assess its Quality Assurance Process

GAO found that the Board lacked evidence to better understand and address the most common errors and reasons for remands and set priorities to help improve its QA process. Specifically, we found that the Board has no comprehensive plan outlining how it will accomplish the mission of its QA process. In addition, it has not fully assessed the underlying causes of the most common errors in its decisions or the reasons for CAVC remands. The Board also has not systematically or comprehensively built evidence to assess, better understand, and improve its interventions. In addition, we found that the Board is not positioned to fully understand systemic inconsistencies across VLJ adjudicative decision-making.

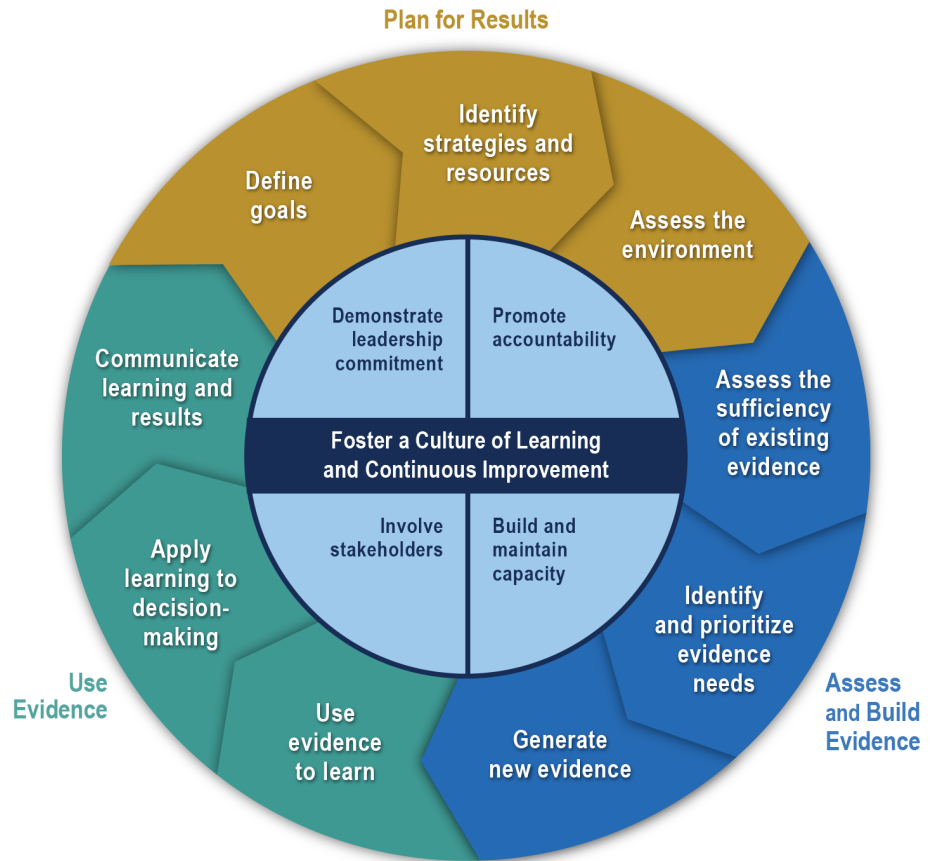
Our prior work has identified 13 key practices that can help federal agency leaders and employees develop and use evidence to effectively manage federal performance and guide decision-making at different organizational levels, including for individual projects or programs.<sup>23</sup> Evidence can include performance information, program evaluations, statistical data, and other research and analysis.

These practices can be viewed as four interrelated topic areas: (1) planning for results, (2) assessing and building evidence, (3) using evidence, and (4) fostering a culture of learning and continuous improvement. For example, our prior work has found that successful organizations monitor their internal and external environments continually and systematically, which allows them to anticipate opportunities and challenges and to plan accordingly. Planning helps a federal organization provide a clear picture of what it is trying to achieve, how it will achieve it, and any obstacles that may affect its ability to do so. In addition, these practices can help agency leaders foster a culture of learning and continuous improvement. As illustrated in figure 4, the first three topic areas and their practices can be viewed as an iterative cycle, with the fourth area and its practices central to effectively implementing that cycle.

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<sup>23</sup>[GAO-23-105460](#).

Figure 4: Topic Areas and Key Practices for Evidence-Based Decision-making



Source: GAO-23-105460. | GAO-24-106156

**Accessible Data for Figure 4: Topic Areas and Key Practices for Evidence-Based Decision-making**

**Foster a Culture of Learning and Continuous Improvement**

1. Demonstrate leadership commitment
2. Promote accountability
3. Build and maintain capacity
4. Involve stakeholders

**Plan for Results**

- Define goals
- Identify strategies and resources
- Assess the environment

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**Assess and Build Evidence**

- Assess the sufficiency of existing evidence
- Identify and prioritize evidence needs
- Generate new evidence

**Use evidence**

- Use evidence
- Apply learning to decision-making
- Communicate learning and results

**Plan for Results**

- Define goals
- Identify strategies and resources
- Assess the environment

Source: GAO-23-105460. | GAO-24-106156

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## The Board Lacks a Comprehensive Plan Outlining How It Will Accomplish the Mission of the Quality Assurance Process

Board officials told us they have no comprehensive, written plan outlining the mission and goals of the Board’s QA process and how the related interventions will achieve those goals. The Board’s stated mission for its QA process includes (1) reviewing Board decisions for legal errors to assess accuracy before sending them to veterans; and (2) developing resources based on identified opportunities for improvement to support the Board’s mission of delivering legally correct decisions to veterans and other appellants. As previously described, the Board has a 92 percent accuracy rate goal. Beyond that goal, Board officials told us the purpose of OAI is to improve decision quality through a greater understanding of the applicable law. Moreover, they said that the Board’s Operation Handbook and OAI Case Review Guide outline processes to achieve that goal.

However, these documents provided by the Board mainly outline the case review process, which focuses on OAI’s stated mission to assess accuracy but not its mission for identifying opportunities for improvement. Moreover, contrary to key practices for evidence-based decision-making, these documents do not identify the key questions it will address to

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improve quality and the ways in which the Board will collect and use evidence to answer them.

In addition, we learned that the Board has begun planning an evaluation of its QA process. According to the Board's January 2023 draft statement of work (the latest available at the time of our review), a contractor will evaluate the Board's QA process against best practices for internal quality review procedures and standards, and methods used by other federal entities, and will advise on new processes. While the planned evaluation is a good step, we found that these separate documents—Operation Handbook, Case Review Guide, and draft statement of work—do not constitute a strategy or plan for systematically and comprehensively assessing, building, and using evidence to improve its QA process.

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## The Board Is Not Fully Assessing, Building, and Using Evidence to Foster Continuous Improvement

**Board's Evidence and Assessment of the Most Common Errors.** We found that the Board is not fully using existing or newly identified sources of information to determine whether its QA process and interventions are working as intended—that is, whether they are improving the accuracy of Board decisions. Specifically, Board officials told us they discuss short-term trends in errors at weekly meetings. However, they said they have not conducted systematic analyses of errors identified by OAI in recent years.

Our analysis of Board data revealed that from fiscal year 2020 through fiscal year 2022, three of the four most prevalent errors in AMA cases remained consistent. Those three errors were: (1) improper remands to VBA, where a case is unnecessarily sent back to VBA for rework; (2) failure to address an issue that was properly before the Board; and (3) failure to address a theory or contention, which is a statement about why a claim should be granted. These errors represented 31 percent, 14 percent, and 12 percent of all errors, respectively, during this period.<sup>24</sup> A fourth error, jurisdiction errors—which can happen when the Board decides an issue that it did not have jurisdiction over—were the second

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<sup>24</sup>The percentages presented are the percentage of each error type out of the sum of all errors from each fiscal year in 2020-2022. Analysis is based on data available at the time the Board prepared their responses to us. We excluded fiscal year 2019 error data from this analysis because AMA was implemented part way through fiscal year 2019 and thus that data did not represent a full year.

most common error in fiscal years 2020 and 2021 at about 20 percent of errors. However, this type of error only comprised 4 percent of errors in fiscal year 2022. Board officials were not aware of what factors may have contributed to this decrease.

Board officials told us that they have some ideas about the underlying causes of the most common error identified in AMA cases—improper remands to VBA—but they have not formally studied them. For example, Board officials told us that VLJs might be attempting to apply remand rules for legacy appeals to AMA appeals with the well-intentioned, but legally improper belief that doing so would help the veteran. These improper remands are a source of rework for VBA and the Board.

To learn more about improper remands, Board and VBA officials told us they had assembled a “tiger team” in 2023 to evaluate the root causes and ways to reduce improper remands, consistent with leading practices for evidence-based decision-making. However, VA officials told us there is no charter for the team that might include the initiative’s scope, strategic framework, and success measures. An effective plan can help ensure that the evidence the tiger team assesses and builds will meet relevant quality standards.<sup>25</sup>

**Board’s Evidence and Assessment of CAVC Remands.** According to our analysis of data published in CAVC annual reports, remands are a common outcome at CAVC. In fiscal year 2019 through 2022, over 80 percent of cases appealed to CAVC were partially or fully remanded. In addition, the Board must expedite adjudicating cases that are remanded

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<sup>25</sup>[GAO-23-105460](#). In addition, our past work has identified leading practices for effective reforms, such as establishing outcome-oriented goals and implementation plans. See GAO, *Government Reorganization: Key Questions to Assess Agency Reform Efforts*, [GAO-18-427](#) (Washington, D.C.: June 13, 2018). Moreover, in July 2022, we reported that VA undertook 23 initiatives in recent years to improve its disability compensation program, including a team that examined duty to assist errors. However, we found that VA did not consistently follow leading management practices, such as establishing goals for the reforms and involving key stakeholders, to achieve intended results. We made eight recommendations (and VA generally concurred), but VA has not yet implemented six of them as of November 2023. See GAO, *VA Disability Benefits: Compensation Program Could Be Strengthened by Consistently Following Leading Reform Practices*, [GAO-22-104488](#) (Washington, D.C.: July 18, 2022).

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by CAVC, which accounted for almost 14 percent of its workload in fiscal year 2022.<sup>26</sup>

While OAI tracks the reasons for remands from CAVC, Board officials told us they have not analyzed the underlying causes of CAVC remands. According to our analysis of available Board data,<sup>27</sup> about three quarters of remand reasons are related to reasons or bases, where CAVC determined that the Board did not provide an adequate explanation for its findings or conclusions.<sup>28</sup>

The Board's 2022 annual report states that CAVC remands or decisions rarely result in a reversal of the Board's decision. However, errors are known to exist independent of a CAVC reversal. In instances where VA and the claimant agree to a JMR, it generally involves acknowledgement that VA made a factual or legal error in its decision or that additional information is needed before making a final decision, according to CAVC officials.

While Board officials have not studied the underlying causes of CAVC remands, they acknowledged that some remands are a result of flaws in Board decisions. However, they stated that the main cause of remands was related to reason or bases, and that the term is not defined in statute. They said the subjectivity of the term gives CAVC broad license to remand cases. In many instances, this decision is made through Rule 33 mediation conferencing without a CAVC judge or panel of judges examining the case. However, the documents and explanations the Board provided to us do not reflect a systematic or comprehensive analysis of whether there are any factors within their control contributing to the underlying causes of CAVC remands.

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<sup>26</sup>See 38 U.S.C. § 7112. The Board prioritizes cases with certain circumstances over original appeals. For example, in addition to cases that are remanded by CAVC, the Board prioritizes adjudicating cases based on a veteran's age, or where a veteran is facing serious health conditions, or financial hardship (called "advance on docket"). Since fiscal year 2020, the majority of Board decisions are on appeals with one of these circumstances.

<sup>27</sup>Board officials tracked remand reason data in fiscal year 2019, 2021, and 6 months of fiscal year 2022. Board officials said they did not track remand reasons in fiscal year 2020 nor half of fiscal year 2022 due to staffing challenges.

<sup>28</sup>See 38 U.S.C § 7104(d).

Congress has expressed concern about recurring issues that continue to surface on appeals to CAVC.<sup>29</sup> In addition, two experts we interviewed told us the Board could do more to understand the underlying causes of CAVC remands and develop approaches, tools, or other interventions to reduce the likelihood that a case will be remanded by CAVC. While Board officials told us it is not their goal to reduce the number of CAVC remands, in the past the Board has analyzed CAVC remands for specific types of cases. For example, in 2017, the Board analyzed CAVC remands of cases involving extra-schedular ratings.<sup>30</sup> Board documents show that this effort resulted in training that advised VLJs to change their behavior in this area of law.

**Board’s Approach to Assessing Interventions.** Board officials told us they have not systematically or comprehensively built evidence to assess the results of its interventions. For example, the Board lacks information on how interventions affect errors found during case review. Board officials said OAI reviews evidence on an informal basis, such as anecdotal evidence that suggests a particular training has either been effective or ineffective. Board officials said they welcome feedback from any source that would improve the effectiveness of their trainings and guidance, and they told us they use such feedback to improve interventions. For example, they have sometimes used post-event participant surveys to learn whether the material presented was relevant and whether the method used to deliver the training was effective.<sup>31</sup>

Most Board attorneys and VLJs we spoke with during discussion groups found the interventions—such as individualized feedback memos,

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<sup>29</sup>168 Cong. Rec. S9236 (Dec. 20, 2022). In the Explanatory Statement accompanying the Consolidated Appropriations Act, 2023, CAVC was directed to provide a report on recurring issues that CAVC addresses in VA decisions, and the impact it has on the quality or timeliness of a veteran’s claim. In its report, CAVC wrote that recurring issues are duty to assist errors and reasons or bases. CAVC stated that, because it is an independent Court, it is unable to comment on the impact that these recurring issues have on quality or timeliness at the Board. CAVC wrote that it “can only note that claims remanded by our Court are entitled to expeditious treatment by the Board.”

<sup>30</sup>In some cases, a veteran can be given a higher disability rating than one based on the general schedule used for evaluating the degree of disability. These are called “extra-schedular” ratings. See 38 C.F.R. § 3.321(b).

<sup>31</sup>Our previous work has identified leading practices to help federal agencies improve their strategic training efforts that could be helpful to the Board. For example, leading practices for evaluating training include collecting feedback from a variety of stakeholders and incorporating it into the training program. See GAO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, [GAO-04-546G](#) (Washington, D.C.: Mar. 2004).

monthly error digests, and training—to be generally helpful. However, some told us that the interventions could be improved or that other tools are more useful in helping them improve their accuracy. For example, some attorneys and VLJs said OAI’s targeted trainings are inconsistently offered and often not as informative as they hoped. Some told us that they develop ad hoc trainings, which can be timelier and more helpful than OAI targeted training. While most of the attorneys and VLJs said that OAI’s monitoring of CAVC decisions and related notices from the Office of Chief Counsel were generally helpful, some told us that they find a staff-initiated, unofficial case law blog more helpful because it can be timelier and provide more detail. A few attorneys and VLJs said that daily emails from one VLJ who takes the initiative to summarize CAVC decisions have also been helpful.

Overall, we found that the Board lacks a systematic and comprehensive process for evidence-based decision-making to inform and assess their interventions. Board officials acknowledged that such a process could be helpful, but they have been focused on higher priority tasks. However, until the Board develops and implements an evidence-based decision-making process and a plan to guide it, the Board is not positioned to fully understand and address underlying causes of errors and remands. Specifically, this process and related planning could define strategies to address or mitigate relevant factors within its control leading to rework. Moreover, without systematically and comprehensively collecting information about these and other interventions, Board management has little insight into whether its QA process is improving the quality of its adjudicative decisions.

Such an evidenced-based decision-making process is a critical element to help reduce Board rework. This process could also point to new strategies to address areas outside of the Board’s control, such as partnering with CAVC on ways to reduce remands or helping to inform potential reforms to the overall appeals system for veterans. Through its planned evaluation of its QA process, the Board has an opportunity to take a first step towards developing an evidence-based decision-making process.

**Consistency of Decisions.** Currently, the Board does not systemically assess VLJ adjudicative decisions for consistency, such as whether there are common misunderstandings of policy, regulation, or the law. However, several stakeholders we interviewed told us inconsistency among VLJ decisions is a challenge at the Board. Specifically, two experts we interviewed who are familiar with the Board’s QA process and



Board decisions told us that a lack of consistency across VLJs is a problem at the Board. They said that while some VLJs write very reasoned, legally-based decisions that are difficult to appeal, others do not. An official at a VSO said he notices inconsistency in the quality of decisions among VLJs and that the record will contain evidence for the VLJ to consider, but that certain VLJs do not consider that evidence in their decisions. In addition, researchers who published a study in 2019 on the Board's QA process said inconsistency among VLJs is a recurring problem.<sup>32</sup>

Several subject matter experts we interviewed stressed the importance of consistency across VLJs when considering adjudications of the same type. For example, attorneys at a veteran law firm told us that studying decision-making among VLJs would be useful to identify those who make an inordinate number of errors, or errors of a certain type, and address the underlying issues leading to repeated mistakes. Another expert told us the Board should aim for a system that treats similar applicants the same way.

Board officials told us that a systematic study has not been done because an independent VLJ is necessary to ensure the rule of law is respected. Moreover, they said that judicial independence means that VLJs are not subject to pressure and influence and are free to make impartial decisions based solely on facts and law.

We recognize the importance of judicial independence and that variation is not necessarily an indicator of poor quality decision-making. While some degree of variance is expected given VLJs' decisional independence and the complex nature of cases, consistency studies could alert Board management to any large differences that could indicate a misunderstanding of policy regulation, or law, or other areas needing attention. The results of such analysis could provide a basis for targeting interventions, such as training and guidance, to assist VLJs.

Noting the importance of consistency among adjudications, the Administrative Conference of the United States recommended that a good practice for QA systems of adjudicative agencies is to assess whether decisions and decision-making processes are consistent across

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<sup>32</sup>Ames et al.

all adjudications of the same type.<sup>33</sup> In addition, the Social Security Administration (SSA) uses consistency studies for assessing decision-making consistency. For example, according to a study published by the Administrative Conference of the United States, SSA examined decisional consistency across administrative law judges by using collected evidence to develop a series of “heat maps”. These heat maps allowed SSA to determine whether inconsistencies result from adjudicator idiosyncrasy or something more systematic.<sup>34</sup> The co-author, who spearheaded the studies, told us that by using the heat maps he could see how common a specific type of error was across all administrative law judges, or if a particular judge was continually making the same error, which then led to direct feedback to that judge.

Beginning in 2011, SSA also established an electronic tool called “How MI Doing?”. This tool allows administrative law judges to compare their productivity and timeliness metrics to hearing office, regional, or national metrics. The tool also provides data on the agree rate for each judge as well as the hearing office, regional, and national agree rates. Using this tool, judges can also learn the reasons any prior decisions have been remanded, and access on-demand training pertaining to that reason.<sup>35</sup> Another study offered examples of how using analysis of adjudications of the same type might benefit VLJs.<sup>36</sup> For instance, if a VLJ misinterprets a CAVC precedent about a certain disease category, and as a result has an allowance rate that is higher than other VLJs, the feedback might help the VLJ understand the reason their allowance rate differs from their colleagues. Without systemically assessing VLJ adjudicative decisions for consistency, the Board is not positioned to fully understand and address systemic inconsistencies in decision making, if any, to target interventions, as appropriate.

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<sup>33</sup>Administrative Conference of the United States, *Administrative Conference Recommendation 2021-10: Quality Assurance Systems in Agency Adjudication*, (Washington, D.C.: adopted Dec. 16, 2021).

<sup>34</sup>Daniel E. Ho, David Marcus, & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication* (Nov. 30, 2021) (report to the Administrative Conference of the United States).

<sup>35</sup>See GAO, *Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions*, [GAO-18-37](#) (Washington, D.C.: Dec. 7, 2017).

<sup>36</sup>Ames et al.

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## Conclusions

The Board helps assure and measure the quality of its adjudicative decisions through its QA process. As part of this effort, the Board invests time and resources in the case review process and on generating its monthly accuracy rate. However, without written policies and procedures to guide the calculation of its accuracy rate and managing related data, the Board will continue to risk communicating unsupportable information internally and externally, losing underlying data, or using inconsistent methodologies. Furthermore, until the Board begins monitoring how VLJs incorporate feedback from the case review process and whether errors are corrected, it will continue to invest resources without understanding the usefulness of this QA activity.

The Board has taken a good step in planning an evaluation. However, as the Board contends with large workloads and expectations for timely decisions, planning, developing, and implementing a more systematic and comprehensive process for evidence-based decision making is important. Such a process will better position the Board to fully understand and address underlying causes of the most common errors and remands—a process needed to effectively target and implement interventions and assess the results. In addition, the Board has not systemically assessed VLJ adjudicative decisions for consistency, such as whether there are common misunderstandings of policy, regulation, or the law in their adjudicative decisions. The results of such analysis could provide a basis for targeting interventions, such as training and guidance, to assist VLJs.

Ultimately, the Board's ability to effectively manage workloads lies, in part, in developing and using evidence to effectively manage and assess its QA process and reduce the most common errors, identify the most common reasons for CAVC remands, or reduce other forms of rework.

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## Recommendations for Executive Action

We are making the following four recommendations to the Chairman of the Board of Veterans' Appeals:

The Chairman of the Board of Veterans' Appeals should develop written policies and procedures related to its accuracy rate measure, to require that OAI (1) involves more than one official in the calculation process; (2)

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documents its calculation of monthly and fiscal year accuracy rates; and (3) manages related error data. (Recommendation 1)

The Chairman of the Board of Veterans' Appeals should monitor how veteran law judges choose to incorporate the feedback they receive from the case review process—including whether errors are corrected—and use this data to inform decision making related to the case review process. (Recommendation 2)

The Chairman of the Board of Veterans' Appeals should develop and implement an evidence-based decision-making process that includes a plan outlining how it will build evidence to assess the underlying causes for the most common errors identified by the case review process and the most common reasons for CAVC remands. The Board should use this evidence to better target its interventions and assess their results. One option is to fold the development of this process into the Board's planned evaluation. (Recommendation 3)

The Chairman of the Board of Veterans' Appeals should study how to evaluate VLJ adjudicative decisional consistency. One option is to fold the development of this study into the Board's planned evaluation. (Recommendation 4)

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## Agency Comments and Our Evaluation

We requested comments on the contents of this statement, including our recommendations, from the Board. The Board provided technical comments, which we incorporated as appropriate. See appendix I for the Board's comments. The Board agreed with recommendation 2 and agreed in principle with recommendations 1 and 3. The Board disagreed with recommendation 4.

Regarding recommendation 1, Board officials stated in their emailed comments to us that we should clarify the recommendation about the Board needing a policy and procedure for managing data. They indicated that the loss of data was specific to fiscal years 2019 and 2020. However, the loss of data stemmed from not having policies and procedures. And without them, these types of data management issues could occur again in the future. We continue to believe that having policies and procedures are an important part of internal control. Without written policies and procedures, the Board could face further challenges such as additional data loss, improperly storing data, or using inconsistent methodologies.

Regarding recommendation 4, Board officials stated in their emailed comments to us that it would be inappropriate to force consistency in VLJ decisions in a way that is inconsistent with codes of judicial conduct and other standards applicable to VLJs. They stated that there will and should be variance in how legal authority is applied to the individual facts and circumstances of each case appealed to the Board. Board officials further stated that VLJs should be independent and not subject to pressure and influence. They also stated that, as part of evaluating individual VLJs' adherence to performance standards, the Board evaluates the total number of decisions each VLJ has adjudicated and the manner in which they have adjudicated them, among other things. In addition, Board officials noted that the number of decisions remanded does not demonstrate whether such remands were warranted, and that the number of CAVC remands or reversals does not necessarily correlate with productivity, legal acumen, or even with performance. Finally, they said that the concept of "consistency" of decision-making among individual judges evaluating sets of facts and circumstances of each individual case is a difficult one to address at all levels of adjudication, not only at the Board, but also at CAVC.

Our statement acknowledges the importance of judicial independence, that some degree of variance is expected given that independence, and that variation is not necessarily an indicator of poor quality decision-making. In addition, the Board's emailed comments acknowledge that consistency among VLJs in the use of appropriate legal authority is appropriate. However, without studying consistency, the Board will remain unaware of whether systemic inconsistencies in VLJ decision-making exist, and the Board will be unable to target interventions, as appropriate. We continue to believe that the results of systematic study of VLJ adjudicative decisions for consistency could provide a basis for targeting interventions, such as training, to assist VLJs. As such, this recommendation is not intended to "force" consistency in any VLJ decisions, but rather is meant to help the Board assist VLJs. We intentionally worded our recommendation to allow the Board the necessary latitude to implement it in a way that allows for the retention of judicial independence while meeting other goals it deems appropriate.

Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

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## GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Elizabeth Curda, Director, Education, Workforce, and Income Security, at (202) 512-7215 or [curdae@gao.gov](mailto:curdae@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

GAO staff who made key contributions to this testimony are James Whitcomb (Assistant Director), David Perkins (Analyst-in-Charge), and Kayla Good. Also contributing to this testimony were Carl Barden, John Bornmann, Rachael Chamberlin, Alex Galuten, Erin Godtland, Dana Hopings, Cheryl Jones, Terrell Lasane, Benjamin T. Licht, Mimi Nguyen, Jessica Orr, Walter Vance, Margaret Weber, and Adam Wendel.

## Appendix I: Comments from the Board of Veterans' Appeals

The Board of Veterans' Appeals disagrees with the very broad language used in Recommendation 4, especially when considering some of the subjective language and inputs used in the GAO report to support its recommendation for greater "consistency" in Veterans Law Judge (VLJ) adjudicative decisions. The recommendation fails to note that most remanded cases from the Clerk of the United States Court of Appeals for Veterans Claims are premised on the subjective opinions of party litigants that a decision did not provide adequate "reasons or bases" to support the findings of fact and conclusions of law in a Board judge decision. It would be inappropriate to force consistency in single judge VLJ decisions in a way that is inconsistent with codes/cannons of judicial conduct and the longstanding statutory, jurisdictional and performance standards applicable to VLJs. Consistency in citation/use of appropriate legal authority is appropriate, however, there will be and should be variance in how that legal authority is applied to the individual facts and circumstances of each case appealed to the Board.

First and foremost, we should note that the Judicial Cannons in the Code of Conduct for United States Judges applies to VLJs. In upholding their integrity and independence under Cannon 1, the commentary notes, "The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions" and it notes this is important to public confidence. The comment also states, "The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law."

Evaluation of individual judge performance and adherence to the VLJ performance standards is something the Board takes very seriously, pursuant to 38 U.S.C. §7101A. For example, the need to avoid unwarranted delays in the adjudication process, to include the total number of decisions each judge has adjudicated and the manner in which they have adjudicated them, is generally evaluated under the VLJ performance standard elements relating to legal acumen (which includes quality), and docket/case management (including productivity and timeliness). It is important to note, the total number of decisions remanded does not demonstrate whether such remands were warranted

because the record is not ready for appellate review or because referral to the agency of original jurisdiction is necessary and proper. Similarly, while the decisions of the U.S. Court of Appeals for Veterans Claims (CAVC) are a factor to be considered in performance evaluation, the number of remands and/or reversals does not necessarily correlate with productivity, legal acumen, or even with performance. It should be remembered that cases returned to the Board from the CAVC are predominantly Clerk "dispositions", rather than judge "decisions," and CAVC annual reports make this careful distinction. Of the remaining "decisions" by CAVC judges, very few are precedential panel decisions, with almost all of them constituting non-precedential, single judge memorandum decisions. Each year, CAVC only reverses an average of 1-2 dozen appeals out of the 7,000-9,000 appeals filed with CAVC for each of the past 5 years. The standard for reversal is whether the Board judge's findings are "clearly erroneous," and that is why there are so few reversals of Board decisions by CAVC judges.

Also, the following considerations are important to keep in mind: CAVC decisions on the merits are subject to reversal/remand by superior federal courts; a Board decision may have been in compliance with the law or the interpretation of the law that was in effect when the decision was made; and remands by the Court most often result from joint motions by the parties, which often have no bearing on the quality of the Board decision at issue nor express legitimate differences in judgment. While CAVC judicial decisions and Clerk dispositions concerning remanded issues for further adjudication must be considered, affirmances or other favorable comment by the Court should also be taken into consideration in order to achieve a balanced perspective on an individual VLJ's performance. We also know the number of Notices of Appeal filed with the Court does not appear to have any clear relationship to productivity in particular or performance, in general.

Finally, the concept of "consistency" of decision-making among individual judges evaluating the individual sets of facts and circumstances of each individual case is a difficult one to address at all levels of adjudication, not only at the Board, but also at CAVC. See Ridgway, James D. and Stichman, Barton and Riley, Rory E., 'Not Reasonably Debatable': The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims 27 *Stan. L. & Pol'y Rev.* 1 (2016). That article by prominent Veterans Law experts concluded outcome variance in single-judge decisions is a serious problem at the CAVC that can and does result in conflicting guidance to VA. However, Congress explicitly addressed and authorized single judge Board decisions in the 1990s as a



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**Appendix I: Comments from the Board of  
Veterans' Appeals**

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way to help manage the ever-increasing caseload of appeals, so awaiting Veterans receive more timely “final” decisions on their pending appeals. This process, and Congress’ subsequent passage of the Appeals Modernization Act (AMA) have served Veterans well, with full and final resolution of Veteran appeals being decided on average 4 years faster than under the older legacy system of appeals and over 92% of Board judge decisions not being appealed to CAVC.

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## Congressional Relations

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