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The Veterans Affairs Canada Internal Review Process

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Veterans Ombud des vétérans

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Message from the Ombud

It does not take very long for new Canadian Armed Forces recruits to learn that trust among one's comrades-in-arms is sacrosanct. Betraying that trust is a surefire way to ostracization, which in the CAF is almost one of the worst things. I imagine it is the same for the Royal Canadian Mounted Police.

As a result, Veterans are highly sensitive to matters of trust. When they return to civilian life and seek benefits and services from Veterans Affairs Canada, most do so from a place of trust in the institution that, in their mind, is there to take care of them when they have been injured or suffered illness as a result of their service to Canada.

Every interaction matters to a Veteran. I have heard first-hand all across the country from some Veterans and their families whose trust in VAC has been eroded. They say, "I don't even understand why I have been denied this benefit." Our primary finding in this review suggests that they are not wrong in questioning the decision letters they receive from VAC when they seek redress, in good faith, for initial denials. We found that the reasons provided by the Department's National First and Second Level Appeals units often did not meet the requirements for fair reasons set out by the Supreme Court of Canada. The letters in many cases did not address the concerns that the Veteran provided in their request for review; how frustrating to submit an appeal in the expectation that one's points will be considered and then to receive what is essentially a form letter that does not meaningfully address those points.

The OVO strives to assist the Veteran community by identifying gaps or barriers in equitable access to the benefits and programs put in place by Parliament for Canada's Veterans and their families. VAC is charged with delivering those benefits and programs to a unique community of Canadians who value trust and truth as the high watermark of service. We know that institutional trust is strengthened by clear, consistent, truthful communication about decisions that affect people. When VAC provides decision letters that don't meet the standard for administrative justice, that deny a Veteran a benefit without appearing to acknowledge the Veteran's arguments, evidence, or specific circumstances, the Department risks destroying the sacred trust that has been afforded them by Canada's Veterans.

I cannot more strongly encourage the Minister to implement the recommendations we are making here, not only to make it right, but to safeguard and strengthen the institutional trust that the Veteran community deserves.

Colonel (Ret'd) Nishika Jardine
Veterans Ombud

Executive Summary

We launched this review to assess whether the Veterans Affairs Canada (VAC) internal review process is fair. This internal review process applies to appeals of decisions under the *Veterans Health Care Regulations* as well as Parts 1, 1.1, 2, and 3.1 of the *Veterans Well-being Act*. VAC provides two levels of review for these decisions.

Why this issue is important

Reviews of decisions that go through the VAC internal review process are different from reviews of disability benefit decisions, which are conducted by the Veterans Review and Appeal Board and include access to legal counsel through the Bureau of Pensions Advocates. In the VAC internal review process, applicants do not have this free access to legal counsel and the review decision is made by an internal VAC decision maker. While only a small proportion of VAC decisions are appealed each year, we have heard from Veterans that the VAC internal review process can be frustrating, and the reasons for decisions can be difficult to understand.

What we found

Our review found systemic unfairness in two areas of the VAC internal review process. We found that the reasons provided in decision letters often did not meet the requirements for fair reasons set out by the Supreme Court of Canada. We also found certain differences in the rules for reviewing decisions depending on the benefit and the level of appeal, and VAC policy and other guidance to decision makers are unclear on some of these differences.

Key findings and recommendations

- We looked at unfavourable internal review decision letters to assess the quality of reasons, and found that the letters most often did not meaningfully address applicants' arguments or evidence. In addition, we found that the letters did not always show how the decision maker weighed competing evidence, or how they linked the decision-making criteria to the specific facts of the situation. We also found that in many cases, the internal worksheets included better reasons than the letters. Because many VAC internal review decisions can be highly impactful (for example, they can decide whether a client receives lifelong income replacement), the reasons for these decisions must be robust and understandable.

  Recommendation 1: Ensure National First Level Appeals (N1LA) and National Second Level Appeals (N2LA) decision letters contain reasons for the decision that: a) show that the decision maker considered all relevant client submissions; b) follow an understandable chain of reasoning from the evidence to the decision outcome in the context of the applicable rules; and c) explain how any competing evidence was weighed.

- We found that there are differences in the rules for internal reviews. These differences include that the basis for changing decisions on review can be different depending on the level of appeal as well as which set of regulations applies. Whereas the *Veterans Health Care Regulations* review authorities are broad at both levels, under the *Veterans Well-being Regulations* the grounds for changing a decision are narrow at the second level but broad at the first level. We found that VAC policy and other guidance is not clear

enough about these different grounds for changing decisions. Another difference is that there is no way to correct an error of fact or law in a *Veterans Health Care Regulations* decision after clients have gone through the two levels of appeal. This gap is unfair.

> **Recommendation 2:** Clarify in policy and training that the first level review authority for decisions under Part 1, Part 1.1, Part 2 and Part 3.1 of the *Veterans Well-being Act* is broader than its second level review authority, and instruct that the first level review decision maker should take a fresh look at the evidence rather than narrowly verify that the decision under review was free from error.
>
> **Recommendation 3:** Add a Minister's own motion authority to the *Veterans Health Care Regulations.*

The Veterans Affairs Canada Internal Review Process

Introduction

This report focuses on the Veterans Affairs Canada (VAC) review process for decisions made under the *Veterans Health Care Regulations* and under Parts 1, 1.1, 2, and 3.1 of the *Veterans Well-being Act*. Two units conduct these reviews: the National First Level Appeals (N1LA) unit conducts the first level of reviews, and the National Second Level Appeals (N2LA) unit conducts the second level of reviews.[1]

The scope of reviews conducted by N1LA and N2LA is wide, and encompasses review decisions on benefits ranging from, for example, the relatively low cost of transportation to a medical appointment (health-related travel) to financially significant monthly payments based on 90% of a Veteran's pre-release military salary (Income Replacement Benefit). This internal review process is separate from reviews conducted for disability benefits,[2] for which applicants have a right of review under the Veterans Review and Appeal Board and are provided free legal counsel by the Bureau of Pensions Advocates (Veterans Affairs Canada, 2024). Veterans have told us that the Department's internal review process is complex, the reasons for the decisions can be difficult to understand, and their arguments are not always considered by decision makers.[3]

In the following sections, we present our methodology, background information, and our analysis of various components of the N1LA and N2LA process organized by two key findings and three recommendations to address these findings.

Methodology

Scope

This report focuses on whether the Department's N1LA and N2LA process is fair to applicants. (The report will use the terms "Veteran," "client," and "applicant" interchangeably.) Fair process includes decisions made by an unbiased decision maker that provide an opportunity for the client to give evidence. It also includes providing meaningful reasons for the decision. This report does not include an analysis of whether the outcomes of these decisions are fair.

Data Sources

To examine whether the N1LA and N2LA process is fair to Veterans, we scanned various literature and information on the purpose and structure of the internal review process. We looked at the guiding legislation,

[1] For this report, references to the Department's internal review process are to the N1LA and N2LA process. See the "Overview of Other VAC Review Processes" section of our *What to do when you disagree with a Veterans Affairs Canada (VAC) decision* infographic for information on other internal reviews conducted by VAC (Office of the Veterans Ombud, 2023).

[2] Disability benefits are authorized under Part 3 of the *Veterans Well-being Act* and under the *Pension Act*. For this report, unless otherwise specified references to *Veterans Well-being Act* benefits will be to benefits not under Part 3.

[3] These are common concerns our office has heard from Veterans, both in our formal complaints and at outreach events such as town halls.

regulations, and policies applicable to N1LA and N2LA decisions, along with relevant Federal and Supreme Court decisions, literature on other review processes in Canada, as well as information presented on the VAC external website and in VAC reports.

We also collected and analyzed internal VAC data to better understand the Department's internal review process, including:

- Information on the internal VAC website, such as training and business processes
- Administrative statistical reports on the number of reviews by program and approval rates for N1LA and N2LA decisions
- 85 N1LA and 49 N2LA randomly selected unfavourable decision letters and associated worksheets

Letter Analysis

We analyzed representative samples of unfavourable decision letters at both levels of review between 1 September 2022 and 1 March 2023.[4] VAC indicated that during this timespan there were a total of 804 N1LA unfavourable decisions and 99 N2LA unfavourable decisions.[5] We requested that VAC randomly select 86 N1LA[6] and 49 N2LA unfavourable decision letters for our assessment. The sample size for each level of review was calculated with a 95 percent level of confidence and a 10 percent sampling error with the finite population correction (Dean et al., 2013). No stratification by program type or language was requested (for the letter breakdown by program, see Appendix A). Thirty-two letters were in French and the remaining 102 were in English. VAC redacted all identifying personal information.

We also asked for the internal worksheets associated with the decision letters. These worksheets document background information on the decision, the evidence and information that the decision maker used, as well as the decision rationale. VAC does not send these internal worksheets to clients.

We assessed the letters for the adequacy of reasons for each decision. Specifically, our assessment was based on whether each decision letter:

- Provided a clear explanation of the correct and relevant provision, rule, or eligibility criteria
- Mapped the rule onto the client's argument and situation
- Demonstrated that the applicant's arguments and evidence were considered
- Explained how competing evidence was weighed

We assessed each letter for the above criteria,[7] and marked letters as inadequate when they failed to meet one or more of the above requirements for adequate reasons. We separately evaluated whether there was a better rationale provided in the worksheet than in the decision letter, as well as whether certain letters referred to an absence of error as their reason for upholding the decision under review. Our analysis of these letters was used to develop Finding 1 and support Finding 2.

[4] Office of the Veterans Ombud, Random Sample Request for VAC Internal Review Process (personal communication), May 5, 2023.
[5] We were later notified by VAC that there were 100 N2LA unfavourable decisions in this timeframe. (Veterans Affairs Canada, Response to Request for Information on VAC Internal Review Process (personal communication), October 18, 2024).
[6] The Department's selected sample included one duplicate N1LA letter, leaving us with 85 N1LA letters for review.
[7] Our assessment criteria were adapted from the Canadian Council of Parliamentary Ombudsman's (2022) *Fairness by Design: An Administrative Fairness Assessment Guide*.

Before publication, we submitted a draft of this report to VAC officials for comment and to confirm the accuracy of information related to VAC processes and programs.

Background

Overview of the VAC Internal Review Process

Benefits and services under the *Veterans Well-being Act* (Part 1, Part 1.1, Part 2, and Part 3.1) and the *Veterans Health Care Regulations* provide for two levels of review, which follow an internal administrative process[8] (see Appendix B for the list of programs). The N1LA unit conducts the first level review, and the N2LA unit the second. These units are not involved in the original decision (Veterans Affairs Canada, 2019).

When dissatisfied with an initial decision, a Veteran has 60 days to write to VAC and request a first level review.[9] Should they be dissatisfied with the first level review decision, a Veteran has 60 days to request a second level review (for decisions under the *Veterans Well-being Act,* they must provide a reason for requesting this second level review). The second level review decision is considered a final decision by VAC (Veterans Affairs Canada, 2019).[10]

Options following the second level review decision are to accept the decision or apply for a judicial review in the Federal Court of Canada. Veterans have 30 days to file a Notice of Application for judicial review with the Federal Court after receiving the second level review decision (*Federal Courts Act*, 1985; Federal Court, 2019). Veterans may also file a complaint with our office if they are dissatisfied following both levels of review;[11] however, the Office of the Veterans Ombud has no power to compel VAC to change a decision.

Decisions Reviewed by N1LA and N2LA

Each year, VAC makes millions of decisions on benefits and services for Veterans.[12] The vast majority of decisions are not appealed. From fiscal years 2018-2019 to 2023-2024, the N1LA unit adjudicated an average of 1970 reviews per year and the N2LA unit adjudicated an average of 344.[13]

While a small percentage of decisions are appealed, a breakdown by program of first and second level review decisions reveals that Veterans are appealing decisions that may impact their health and well-being, financial security, and ability to stay in their homes. For the fiscal years 2018-2019 to 2023-2024, the greatest number of review decisions in both N1LA and N2LA units were made for Veterans Independence Program benefits (an average of 301 per year and 49 per year, respectively), followed by decisions for prescription drugs for N1LA (an

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[8] In this type of review a new decision maker from the same administrative authority, in this case VAC, conducts the review internally. This approach is different from a tribunal process, like that of the Veterans Review and Appeal Board. For a thorough overview of the avenues of administrative review in Canada, see Ford (2018).

[9] A Veteran can request an extension on the timeline to submit a first or second level review due to circumstances out of their control, which may be granted at the discretion of the Department.

[10] For benefits and services under the *Veterans Well-being Act*, if an error of fact or law becomes apparent a VAC employee can initiate a Minister's own motion review to correct the decision, even after the second level of review. Finding 2 discusses reviews on the Minister's own motion in more detail.

[11] For health care decisions, the Office of the Veterans Ombud may intervene after the first level of review, because the *Veterans Health Care Regulations* lack the authority to correct a decision after both levels of review have been exhausted. This issue is discussed in more detail in Finding 2.

[12] In the fiscal year 2023-2024, through the Treatment Benefits program alone, VAC (and its Federal Health Care Processing Services contractor, Medavie Blue Cross) made decisions for almost 6 million transactions, not including transactions for Cannabis for Medical Purposes (Veterans Affairs Canada, Second Response to Request for Information on VAC Internal Review Process (personal communication), October 21, 2024). Almost all of these decisions, including the amount for approved transactions, were reviewable through the N1LA and N2LA process.

[13] These are the number of reviews adjudicated in a given fiscal year. They do not include applications that were not completed within the fiscal year or were withdrawn (Veterans Affairs Canada, Response to Request for Information on VAC Internal Review Process (personal communication), October 18, 2024).

average of 238 per year) and the Caregiver Recognition Benefit for N2LA (an average of 34 per year). For both N1LA and N2LA, Rehabilitation Services comprise the third largest number of reviews during the same timeframe (an average of 208 per year and 30 per year, respectively).[14] Decisions related to the Caregiver Recognition Benefit and the Education and Training Benefit, as well as prescription drugs, dental services, special equipment, and health related services provided under Treatment Benefits are consistently among the top 10 N1LA and N2LA reviewed decisions.

Between fiscal years 2018-2019 and 2023-2024, N1LA's rates of favourable reviews, where decisions were overturned or amended, ranged from 7.9% to 28.8% and N2LA's rates of favourable reviews ranged from 12.6% to 24.3%.[15]

Analysis and Findings

Finding 1: A majority of N1LA and N2LA unfavourable decision letters contain issues that compromise the quality of reasons for the decision.

Duty to provide reasons

When VAC issues a review decision through N1LA or N2LA, they must "advise the applicant in writing of the decision setting out the reasons for the decision" (*Veterans Well-being Regulations*, sections 68-69). While there is no such regulatory requirement in the *Veterans Health Care Regulations*, VAC has imposed a policy rule that health care decisions must "include the rationale for the decision" (Veterans Affairs Canada, 2012). Further, even where no legislation or regulation specifically compels an administrative decision maker to set out their reasons, the requirements of administrative law may nonetheless impose this obligation where the decision has sufficient impact on the party (*Baker v. Canada (Minister of Citizenship and Immigration*, 1999, p. 819).[16] The requirements for administrative decisions' reasons have been summarized by the Supreme Court of Canada in its 2019 *Vavilov* ruling, and include that a decision must be based on internally coherent reasoning; the decision maker must take into account the entirety of the evidence before them that relates to the decision; and the decision maker must respond to the relevant issues raised by the parties (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019, paras. 85, 102, 126-128). N1LA and N2LA decision letters are thus required by either regulation, policy, or administrative law to include the reasons for decision, and these reasons must show that the decision maker reached their decision through an exercise of understandable reasoning, taking into account all of the relevant evidence and decision-making criteria.

Guided by these requirements for reasons, we analyzed random representative samples of unfavourable N1LA and N2LA decision letters from fiscal year 2022-2023 to assess the quality of reasons.[17] Our scope was limited to the decision letters' reasons, and did not include assessing whether we agreed with the decision outcomes.

[14] Veterans Affairs Canada, Response to Request for Information on VAC Internal Review Process (personal communication), October 18, 2024.
[15] Veterans Affairs Canada, Response to Request for Information on VAC Internal Review Process (personal communication), October 18, 2024.
[16] The OVO made recommendations on the need for VAC to provide adequate reasons for disability benefit decisions in our report Veterans' Right to Know Reasons for Decisions: A Matter of Procedural Fairness (Office of the Veterans Ombud, 2012).
[17] See the Methodology for more detail.

Understanding that only a reviewing court can ultimately determine whether a decision was reasonable,[18] our approach nonetheless identified opportunities for improvement in a majority[19] of the reviewed decision letters' reasons.

Addressing client submissions

Whereas the reasons for administrative decisions must "meaningfully account for the central issues and concerns raised by the parties" (*Vavilov*, para. 127), among the decision letters where we found issues with the quality of reasons, a majority of both N1LA and N2LA letters did not meaningfully address applicants' arguments or evidence. This failure persisted even when the potential relationship between the client's submissions and the applicable decision-making criteria was clear and direct.

For example, an N1LA decision letter among our sample that upheld the denial of an application for the Caregiver Recognition Benefit did not address the arguments the client raised in their appeal letter. The client argued that despite updates to the Caregiver Recognition Benefit policy to clarify eligibility for Veterans with mental health conditions, their own mental health needs "were not given the same level of consideration […] as physical health conditions," noting that their original decision letter focused on physical needs. They argued that they suffer from mental health symptoms that impede their ability to perform daily tasks and compromise their safety when alone. This argument was supported by a nursing assessment which noted that their spouse is with them "for almost the entire day, only leaving the house to run quick errands," and that this arrangement took effect after the client had an incident in the home that could have become dangerous. We take no position on whether these considerations should have resulted in a favourable decision, but it is clear that they are relevant to the question of Caregiver Recognition Benefit eligibility and the decision letter should address them. As it was, the decision letter lays out the applicable decision-making criteria and notes certain facts of the case (e.g., the client's entitled conditions), but does not address the client's submitted reasons for the appeal nor their relationship to the available facts. Instead, the letter notes without elaborating further: "Based on available information at the time of the original decision, we have determined that there was insufficient medical information to demonstrate you met the above eligibility criteria." Language such as this sentence does not show the decision maker's reasoning in light of the client's submissions, and would not assure a client that they have been listened to.

As a further example of a failure to address client submissions, another N1LA decision letter among our sample upheld an original decision denying an application for a motorized wheelchair under the Treatment Benefits program. Certain strengths of this decision letter are clear: the letter explains the applicable rules, for example that special equipment is approved according to a hierarchy of interventions with simpler interventions considered first. The letter then connects this rule to a fact of the case, that an Occupational Therapist's assessment determined that a simpler piece of equipment would meet the client's health needs. However, the letter does not address the client's submissions that a manual chair would frequently require the assistance of another person and further that it may soon be ineffective given the progressive nature of the client's condition. Again, we are not concerned with whether these considerations ought to have changed the outcome of the

[18] *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019) clarified that the applicable standard for administrative decisions is reasonableness unless an exception applies. The primary way that a decision demonstrates that it meets this standard is through the quality of its reasons as documented in the formal record of the decision.

[19] See Appendix D for a breakdown of our letter analysis.

decision. Rather, we are pointing to the decision maker's obligation to address these submissions in a fair decision letter, including addressing why these submissions may not establish eligibility. Notably, VAC policy governing the review of health care decisions in fact encourages clients "to state the reason(s) for their request for review, as this may allow for a fuller consideration of the issues surrounding the decision under review" (Veterans Affairs Canada, 2012). This policy direction underscores the decision maker's obligation to consider these submissions transparently in their decision letter.

A recent Federal Court review of a VAC decision rested on the Department's obligation to consider the entirety of the evidentiary record including the applicant's submissions. In this review, the court took issue with a VAC decision maker's failure to respond to the issues raised by a Veteran in their requests for review of a decision to deny coverage for personal training. In their request for review, the Veteran explained which sections of the relevant policy they had applied under for the requested coverage, and pointed out that their previous applications had been successful. Noting that VAC did not appear to consider or respond to the issues raised by the Veteran in their decision letters, the court explained:

> First, the decision maker fails to address the fact that the application was brought […] pursuant to sections 17, 18 and 30 of [the policy]. It could be that the decision-maker believed that the application did not fall under those sections, but there is no such finding in the decision. There is not one word in the decision that relates to or addresses those provisions. A decision that completely fails to address the issue raised cannot be said to be a reasonable decision. (*Trachy v. Canada*, 2021, para. 28)

This Federal Court decision is clear about VAC decision makers' obligation to respond to the issues raised by applicants when they request reviews of their decisions. Our letter analysis shows that despite this Federal Court direction to the Department, some gaps persist in this area.

Weighing of evidence

As summarized in the Supreme Court of Canada *Vavilov* decision, the decision maker must consider the entirety of evidence in the record: "The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov*, para. 126). In some cases, this requirement involves considering evidence that may contradict other evidence in the record, for instance when an application includes evidence from a professional that may argue against internal direction from the administrative body's subject matter experts. In decisions such as this, the decision maker must show how they weighed the competing evidence.

Approximately one-third of the letters in our N1LA and N2LA samples that we identified as inadequate failed to show how competing evidence was weighed. For example, an N2LA decision among our sample upheld an N1LA decision denying Treatment Benefit coverage of a home traction device recommended by the client's physiotherapist and intended to help with the treatment of the client's entitled condition. The physiotherapist provided a letter to the Department attesting to the evidence-based therapeutic benefit of the device as well as the expected benefit to the Veteran. The client's physician also wrote to the Department supporting the physiotherapist's recommendation. While the decision letter notes that these submissions were reviewed, it

does not explain why they were weighed less heavily than input from a VAC medical consultant[20] who "determined that there is insufficient evidenced based medicine *[sic]* supporting the clinical intervention." The medical consultant's input may indeed be correct; however, a simple assertion that the medical evidence base is insufficient does not satisfy the requirements for fair reasons when the treating health professional has provided counter-evidence supporting the efficacy of the intervention both in general and for the individual client. The decision should explain why the medical consultant found the evidence base to be insufficient, and why the decision maker weighed that input more heavily than the evidence offered by the client's physiotherapist and supported by their physician.

Another recent Federal Court review of a VAC decision pointed to the Department's obligation to show how it weighs evidence. A Veteran sought judicial review of a decision to deny their request for coverage of a neuro-optometry treatment under the Rehabilitation Program. While the Veteran had submitted medical reports from treating medical practitioners, and VAC decision makers listed these on the internal review worksheet, the court determined this was not enough. After reviewing the written reasons, the court found that VAC decision makers failed to show how this evidence was weighed (*Machoun v. Canada*, 2022, para. 39), instead favouring the opinion of an internal specialist without explanation:

> [I]t is not clear why VAC prefers the opinion of their medical consultant over the opinions and recommendations of [the Veteran's] own treating professionals […]. It is not clear if these opinions were considered or weighed in the overall assessment of the request. There is no reference to why these opinions were disregarded or discounted. (*Machoun v. Canada*, 2022, para. 38)

Noting the VAC decision maker's obligation to explain their preference for internal medical opinion over that of the applicant's treating health professionals, this Federal Court decision points clearly to the requirement to explain the weighing of evidence in a fair review process.

Links between decision-making criteria and specific facts of the situation

Whereas the Supreme Court of Canada has set out that for an administrative decision to meet the standard of reasonableness, a reviewing court "must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead […] from the evidence […] to the conclusion'" (*Vavilov*, para. 102), our analysis of VAC review decision letters found weaknesses in linking the decision-making criteria with the specific facts of the client's situation. Many letters contained large sections of copy-pasted statutory, regulatory, or policy language, including in some cases lengthy sections that were not relevant to the decision under review. These boilerplate sections were often followed by variations on language asserting simply that "there is insufficient medical information to demonstrate that you meet the above criteria." Aside from minor variations (e.g., listed facts such as the client's entitled conditions), letters such as these were more or less interchangeable with each other because they were not responsive, or not responsive in a transparent way, to the specific facts of the individual decision. In other words, it was not possible from the decision letter alone to trace the line of the decision maker's reasoning from the specific evidence to the outcome in the context of the applicable rules.

[20] VAC decision makers may consult with subject matter experts, including medical consultants, as necessary. However, the delegated authority to make the decision rests with the decision maker, and any advice gathered through consultation does not bind the decision maker.

We were surprised to see that in many cases the clear reasoning that was not apparent in the decision letters was apparent in the worksheets that decision makers used in rendering the decision, particularly for N1LA letters. Among letters where we found weakness in one or more areas of the decision letter's reasons, we often found better linking and demonstration of the decision rationale in the internal worksheets which are not released to the client with the decision letter. Sometimes, the difference between the unsatisfactory reasons in the decision letter and the much more satisfactory reasons in the associated worksheet was as trivial as one or two additional explanatory sentences – but they were key sentences that made the transparent connection between the relevant rules and the specific facts of the case.

For example, consider the difference in how a client-facing N1LA decision letter explains its denial of a request to overturn an unfavourable Income Replacement Benefit decision versus how the internal worksheet explains it. After describing the applicable rules, the decision letter states without explaining further: "Based on the available information, we have determined that there is insufficient information available to establish a relationship between your service in the (CAF) and these conditions." In contrast, the worksheet crucially elaborates that medical reports pointed to specific non-service-related factors as having likely caused and aggravated the conditions, which were supported by the client's own statements to medical practitioners. This additional piece of the decision maker's reasoning transparently connects the rule, that the Income Replacement Benefit can only be considered for Rehabilitation-eligible conditions that resulted primarily from service, or were aggravated by it, to the specific facts of the case. A client can reasonably be expected to recognize their situation in this chain of logic, understand the decision, and take appropriate next steps based on this understanding.

Again, the Supreme Court of Canada in *Vavilov* has set out that "the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party" (*Vavilov*, para. 95). Applied to the VAC internal review process, this direction for administrative decision makers would direct that more content from the internal worksheets be included in the decision letters sent to clients. In addition, over and above the jurisprudence on this question and the requirements for procedural fairness, clear and responsive reasons in decision letters would help clients understand when and on what grounds they should appeal if they wish. And, just as importantly, high-quality reasons in N1LA and N2LA decision letters would help clients understand when their chances of success on further appeal may be low. It would thus serve both Veterans' interests as well as those of the Department to include more of the worksheets' rationale in the decision letters. Equally, showing to clients this greater detail around how decision makers considered evidence, applied the law to the situation, and followed a logical chain of reasoning would demonstrate transparency in VAC decision making. It is our view that such transparency is crucial to building trust between Veterans and the Department.

Greater need for robust reasons where decisions have significant impact

As we have already noted, even if VAC legislation, regulation, or policy did not require decision makers to set out their reasons, common law would impose this obligation, and to a high standard, for decisions that are particularly impactful: "individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm [...]. Where the impact of a decision on an

individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (*Vavilov*, para. 133). In a VAC context, this "principle of responsive justification" means that the documented reasons for a decision denying, for example, a small reimbursement for health-related travel would be held to a lower standard than the reasons for a decision denying lifelong income replacement.

In addition to the greater requirements for reasons that a reviewing court may impose on a high-impact decision versus a lower-impact decision, disparities in the VAC redress system – specifically which decisions have access to counsel – also point to such requirements for robust reasons in impactful N1LA and N2LA decisions. Unlike decisions that go before N1LA and N2LA, under the legislation disability benefit applicants have rights of review before the Veterans Review and Appeal Board, as well as access to representation from the Bureau of Pensions Advocates. VAC legislation thus protects fair process for disability benefit applicants going through reviews and appeals: access to counsel optimizes applicants' meaningful participation in the process.[21] For N1LA and N2LA decisions, there is no free access to counsel, and in that regard applicants' participation rights are less strongly upheld. VAC legislation thus affords disability benefit applicants a higher degree of procedural protection than it affords applicants going through N1LA and N2LA decisions. However, there are many cases where N1LA and N2LA decisions may in fact be more impactful than a disability benefit decision: a Diminished Earning Capacity decision can mean lifelong financial stability for Veterans, and in lifetime value be worth millions of dollars more than a given disability benefit decision. While the Canadian jurisprudence is clear that the greater procedural protection is required for the higher-stakes decision, VAC legislation more strongly protects the procedural rights of disability benefit applicants, regardless of a decision's impact. Including clear and robust reasons in decision letters for N1LA and N2LA applicants, particularly in high-impact decisions, would enhance the procedural protection for these applicants. Accordingly, robust reasons in decision letters may help to mitigate the disparity between the N1LA and N2LA process and the disability benefits appeal process through the Veterans Review and Appeal Board.

Summary of Finding 1

In summary, N1LA and N2LA decision letters are required to include reasons for the decision, and the Supreme Court of Canada has set out the requirements for reasons. We analyzed representative samples of unfavourable N1LA and N2LA decision letters to assess the quality of reasons, and found the following issues: weaknesses in meaningfully addressing applicants' arguments or evidence; weaknesses in showing how competing evidence was weighed; and weaknesses in linking the decision-making criteria to the specific facts of the situation. We also found that for many letters where we found weaknesses in some area of reasons, the associated worksheets included the clear and situation-specific rationale that the letters lacked. We also note that the requirements for reasons are context-specific, and increase according to the impact of the decision. Applicants with high-impact decisions are entitled to a higher standard of reasons, and adhering to this high standard may help mitigate the disparity in procedural protection between the disability benefit appeal process and the N1LA and N2LA process.

Accordingly, we make the following recommendation to the Minister of Veterans Affairs:

[21] Bureau of Pensions Advocates lawyers also advise applicants when chances of success appear to be low: for example, they counselled out approximately 40% of claims from 2018-2019 to 2021-2022 (Bureau of Pensions Advocates, 2022).

Recommendation 1: Ensure National First Level Appeals (N1LA) and National Second Level Appeals (N2LA) decision letters contain reasons for the decision that: a) show that the decision maker considered all relevant client submissions; b) follow an understandable chain of reasoning from the evidence to the decision outcome in the context of the applicable rules; and c) explain how any competing evidence was weighed.

One option that we believe the Department should explore is to encourage decision makers to include in the decision letters more of the rationale content that they currently limit to internal worksheets.

In addition, we include a checklist for reasons in Appendix C that VAC may wish to adapt in its efforts to fulfill this recommendation.

Finding 2: There are important differences in the regulatory authorities for reviews of decisions under the *Veterans Health Care Regulations* and under Part 1, Part 1.1, Part 2, and Part 3.1 of the *Veterans Well-being Act*, and policy and training are not sufficiently clear about some of these differences.

Differences in the grounds for confirming, amending, or rescinding a decision

Section 83 of the *Veterans Well-being Act* provides the legislative authority for reviews of decisions under that Act that flow through N1LA and N2LA, and sections 68 and 69 of the *Veterans Well-being Regulations* set out the applicable regulations. Among other details, these regulations provide that at the first level of review (N1LA), VAC "may confirm, amend or rescind the decision under review" (ss 68(3)). The regulations do not specify any limitation on the basis for confirming, amending, or rescinding a decision at the first level of review. In other words, a first level review decision maker does not need new evidence or to have found an error in the decision under review in order to change it. In contrast, the second level of review (N2LA) is limited.[22] The regulations prescribe that at the second level of review, VAC "may confirm the decision under review or may amend or rescind it on the basis of new evidence or on the Minister's determination that there was an error with respect to a finding of fact or the interpretation of a law" (ss 69(4), emphasis added). For their part, the *Veterans Health Care Regulations* review authorities do not restrict, at either level, the basis on which a review decision can depart from the decision under review: section 36 of those regulations sets out that clients are entitled to request two levels of review and does not make any reference to the grounds on which these reviews can amend or rescind decisions.

In sum, the *Veterans Well-being Regulations* review authorities are broad at the first level and narrow at the second level, while the *Veterans Health Care Regulations* review authorities are broad at both levels. By "broad," we mean that decision makers are free within the bounds of the legislation and regulations to independently consider the entirety of the relevant evidence, infer facts from it, and render a decision without deference to the original decision. This type of review, in which the decision maker is not bound in any way by a previous decision, is the approach that the Veterans Review and Appeal Board takes to its reviews and appeals of disability benefit decisions. According to the regulations, N1LA decision makers, like the Veterans Review and Appeal Board, need not have new evidence or discover an error in the decision they are reviewing to exercise their discretion as a decision maker and arrive at a different decision outcome. Only N2LA decision makers – and for *Veterans Well-being Act* decisions only – are required to point to new evidence or an error of fact or law in the decision under review in order to change its outcome.

[22] The Department's interpretation of these regulations differs from that of OVO.

Despite this clear difference in the regulations between the two levels of review for *Veterans Well-being Act* decisions that go through N1LA and N2LA, departmental direction offers no guidance on this distinction. In fact, the applicable departmental policy confuses and even omits the distinction. In reference to both levels of review, the policy directs that the "[r]ationale for an amended decision may include new evidence that the previous decision was made on the basis of an error of a finding of fact or the interpretation of the law" (Veterans Affairs Canada, 2019). While it is undoubtedly true that an error of fact or law would be a sufficient basis to amend a decision at the first level of review, this instruction takes the restrictive language around the basis for amending decisions at the second level of review and applies it to both levels. Although the policy does not require that a rationale for an amended decision *must* include these elements, it does not clarify that the first level of review has broader latitude to change decisions – nor that the second level is more restrictive. Indeed, the policy lacks any clarification around the different bases on which the two levels of review may amend or rescind *Veterans Well-being Act* decisions, instructing identically that a "decision under first level review may be confirmed, amended or rescinded," and a "decision under second level review may be confirmed, amended or rescinded" (Veterans Affairs Canada, 2019, paras. 26, 32). Such policy guidance fails to operationalize a clear and significant difference in the regulatory wording. Similarly, we found no internal VAC training that notes these differences between N1LA and N2LA decisions. Instead, we found training that compounds the lack of clarity on the grounds for amending or rescinding decisions by adding *Veterans Health Care Regulations* decisions to the mix,[23] again without distinguishing[24] that the grounds on which these reviews may change decisions are not explicitly restricted at either level.

In our letter analysis, we found evidence that first level review decision makers may lack sufficient guidance that their task is not merely a verification of the original or previous decision. Almost one-fifth[25] of relevant letters or worksheets that we reviewed referred in their reasons to a lack of error in the decision under review, using variations of the following language: "We have found no error in this decision, and are unable to approve your request." This rationale is not sufficient. Because of the broad and unrestricted review authorities, N1LA and all *Veterans Health Care Regulations* review decisions should address questions of eligibility rather than point to a lack of error in the decision under review. Consistent with Finding 1, the worksheets behind the letters often included evidence of a more robust analysis behind the decision than such letter wording suggests; however, an explicit "absence of error" rationale for an N1LA review decision, or a *Veterans Health Care Regulations* review decision at either level, points to the lack of clarity in departmental direction around when and on what grounds VAC may change a decision on review.

No Minister's own motion authority in the *Veterans Health Care Regulations*

There is no lack of clarity in departmental direction around one important difference between the *Veterans Health Care Regulations* review authorities and those under the *Veterans Well-being Act*: the *Veterans Health Care Regulations* contain no authority for a review on the "Minister's own motion." Under the *Veterans Well-*

[23] Veterans Affairs Canada, N1LA Overview Job Aide (internal e-learning module); Veterans Affairs Canada, N1LA: Training Blueprint Appeals Process (internal e-learning module)

[24] Curiously, the treatment of new evidence is one of the only ways in which VAC internal training does distinguish between *Veterans Health Care Regulations* review decisions and *Veterans Well-being Act* review decisions – specifically whether the new evidence relates to the time frame of the decision under review. The training instructs that this question matters for *Veterans Well-being Act* decisions but not *Veterans Health Care Regulations* decisions. This guidance does not appear to derive from the regulations but is instead a restatement of language from the *Review of Part 1, Part 1.1, Part 2 and Part 3.1 Decisions under the Veterans Well-being Act* policy, evidently applied as if authorized by the absence of such language in the *Review of Health Care Decisions* policy.

[25] This proportion excludes instances of this language used to confirm the accuracy of overpayment calculations.

being Act, a review on the Minister's own motion can be requested by VAC staff when they suspect an error of fact or law in a decision (Veterans Affairs Canada, 2019). Clients may not apply for a review on the Minister's own motion; as the name suggests, Minister's own motion reviews are conducted on the Department's initiative and at their discretion. They are essentially a failsafe mechanism to correct errors of fact or law even if such errors are discovered after both levels of review have been exhausted. Without such an authority to re-open the decision, a final decision cannot be corrected. Despite this finality, there is no option for a review on the Minister's own motion or any other mechanism to correct an error of fact or law for decisions made under the *Veterans Health Care Regulations* when both levels of review have been exhausted. This omission means that VAC lacks the ability to correct a decision for, for example, a Veteran who is unsuccessful in appealing a request for special equipment at N1LA and N2LA, even when it is later found that the decision was incorrect due to a factual or legal error by the Department. This gap is a unique unfairness in the *Veterans Health Care Regulations*; the same gap is not found in the *Veterans Well-being Act*, which gives the Department authority to make such corrections at any time for benefits under that legislation.

Summary of Finding 2

In summary, there is a lack of alignment among the review authorities that authorize N1LA and N2LA decisions.

First, there are differences in the grounds on which a review may amend or rescind a decision, both among the different levels of review and between the two sets of relevant regulations. Whereas the *Veterans Health Care Regulations* review authorities are broad at both levels, under the *Veterans Well-being Regulations* the grounds for amending or rescinding a decision are narrowed at the second level but broad at the first level. Despite these differences, VAC policy and other internal direction do not refer to these differences, and fail to clarify that N1LA decision makers and all *Veterans Health Care Regulations* review decision makers are free within the bounds of regulation to take a fresh look at the evidence without deference to the decision they are reviewing.

Second, the health care review authorities lack a Minister's own motion provision, with the result that there is no mechanism to correct an error of fact or law in a *Veterans Health Care Regulations* decision after the two levels of review have been exhausted.

Accordingly, we make the following recommendations to the Minister of Veterans Affairs:

Recommendation 2: Clarify in policy and training that the first level review authority for decisions under Part 1, Part 1.1, Part 2 and Part 3.1 of the *Veterans Well-being Act* is broader than its second level review authority, and instruct that the first level review decision maker should take a fresh look at the evidence rather than narrowly verify that the decision under review was free from error.

Recommendation 3: Add a Minister's own motion authority to the *Veterans Health Care Regulations*.

Conclusion

VAC provides two levels of internal reviews for decisions made under the *Veterans Health Care Regulations* and under Parts 1, 1.1, 2, and 3.1 of the *Veterans Well-being Act*. Two units conduct these reviews, National First Level Appeals (N1LA) and National Second Level Appeals (N2LA). Unlike the process for reviews of disability benefit decisions, there is no independent tribunal and applicants do not have free access to counsel. We have

heard from Veterans that the VAC internal review process can be confusing and the reasons for denials can be hard to understand.

Reviewing random representative samples of unfavourable decision letters from N1LA and N2LA, we found that most of these decision letters contained issues that compromised the clarity and quality of the reasons for the decision. Considering the requirements for reasons as set out by Canadian jurisprudence, we noted that these weaknesses included failures to meaningfully address applicants' submissions, to show how competing evidence was weighed, and to link the decision-making criteria to the specific facts of the client situation. Despite these weaknesses, many letters where such issues were evident had associated worksheets that contained a more detailed and understandable rationale than was present in the letters. We also note that adhering to the requirements for reasons, especially for high-impact decisions, would mitigate some of the disparity in procedural protection between the VAC internal review process and the process available to disability benefit applicants.

In addition, we found that there was a lack of clarity in departmental direction regarding the differences between the grounds on which reviews may amend or rescind decisions, specifically first-level versus second-level reviews as well as *Veterans Health Care Regulations* reviews versus *Veterans Well-being Regulations* reviews. Whereas the *Veterans Health Care Regulations* review authorities are broad at both levels, under the *Veterans Well-being Regulations* the grounds for amending or rescinding a decision are narrowed at the second level but broad at the first level. However, departmental direction offers no guidance on these differences, with the result that despite decision makers' broad latitude to take a fresh look at the evidence, the practice appears to skew toward a verification of the decision under review. More broadly, we note the lack of alignment between the two sets of regulations in this regard, as well as in the absence of a Minister's own motion authority in the *Veterans Health Care Regulations*. This omission means that there is no mechanism to correct an error in a health care decision after the two levels of review have been exhausted.

Recommendations to the Minister of Veterans Affairs

- Ensure National First Level Appeals (N1LA) and National Second Level Appeals (N2LA) decision letters contain reasons for the decision that: a) show that the decision maker considered all relevant client submissions; b) follow an understandable chain of reasoning from the evidence to the decision outcome in the context of the applicable rules; and c) explain how any competing evidence was weighed.

- Clarify in policy and training that the first level review authority for decisions under Part 1, Part 1.1, Part 2 and Part 3.1 of the *Veterans Well-being Act* is broader than its second level review authority, and instruct that the first level review decision maker should take a fresh look at the evidence rather than narrowly verify that the decision under review was free from error.

- Add a Minister's own motion authority to the *Veterans Health Care Regulations.*

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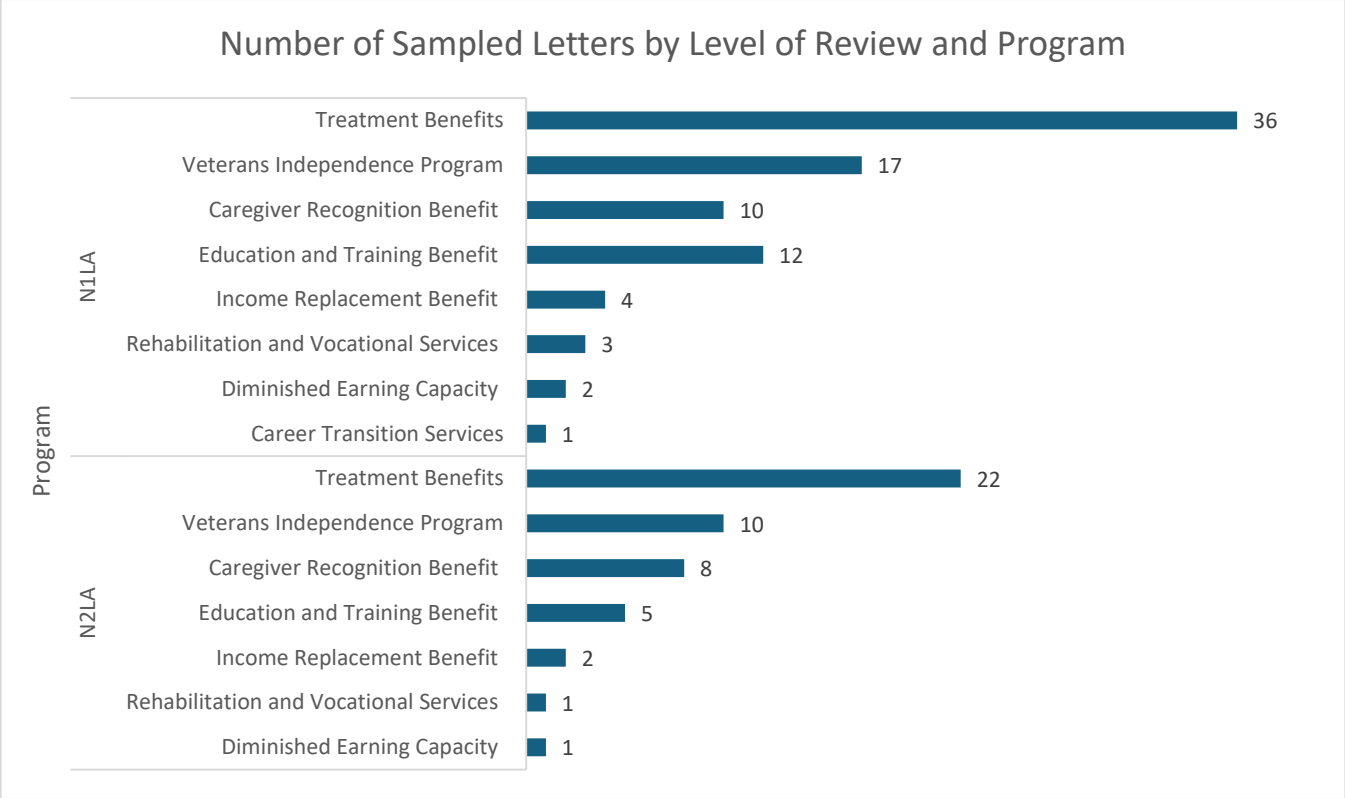
Appendix A: Sampled Decision Letters by Level of Review and Program



Appendix B: Programs Reviewed by N1LA and N2LA

N1LA and N2LA have authority to review decisions for benefits and services under Part 1, Part 1.1, Part 2 and Part 3.1 of the *Veterans Well-being Act*, as well as benefits and services under the *Veterans Health Care Regulations*.

Veterans Well-being Act

- Part 1 – Career Transition Services
- Part 1.1 – Education and Training Benefit
- Part 2 – Rehabilitation Services and Vocational Assistance Program, the Income Replacement Benefit, and Canadian Forces Income Support
- Part 3.1 – Caregiver Recognition Benefit

Veterans Health Care Regulations

- Health Care Benefits (treatment benefits, supplementary benefits, treatment allowances, miscellaneous benefits, mental health benefits)
- Veterans Independence Program
- Long Term Care

Appendix C: Checklist to Ensure N1LA and N2LA Letters Contain Adequate Reasons for the Decision

To ensure internal review decision letters contain adequate reasons for the decision,[26] letters should:

1. Explain the relevant criteria (law, regulations, policies)
    a. Are the relevant criteria explained in a clear and easy-to-understand way?
    b. Can any irrelevant information be removed to simplify the explanation of the relevant criteria?
    c. If the decision is for exceptional coverage, has the rule for exceptional coverage been explained?
2. Explain how the criteria were applied to the specific facts of the applicant's situation
    a. Is the information reviewed for the appeal fully and transparently referenced in the letter?
    b. Are the findings of fact transparent, understandable, and specific to the applicant's situation?
    c. Does the letter contain a clear explanation of the decision maker's reasoning including each of the key steps in their chain of analysis?
    d. Does the letter evaluate the applicant's eligibility according to every possible pathway?
3. Address the applicant's relevant representations
    a. Have the applicant's relevant arguments been directly and adequately responded to even if they would not impact the outcome of the decision?
4. Explain how any competing evidence was weighed
    a. Does the letter clearly explain why one piece of evidence was preferred over another?
5. Clearly state the decision outcome
    a. Is the decision outcome easy to understand?
    b. If there are two decisions or outcomes in one letter, is it clear that there are two separate decisions and/or courses of action?

[26] This checklist was developed using our rubric for the letter analysis, our internal frontline fairness checklist, and the Canadian Council of Parliamentary Ombudsman (2022) *Fairness by Design: An Administrative Fairness Assessment Guide.*

Appendix D: Breakdown of Letter Analysis[27]

Sampled letters by adequacy of reasons for the decision and level of review

Adequacy of Reasons for Decision	N1LA Count	N1LA %[28]	N2LA Count	N2LA %
Adequate	26	31%	19	39%
Inadequate	59	69%	30	61%
Total	85		49	

Sampled letters with inadequate reasons by type of inadequate reason and level of review

Inadequate Reasons	N1LA Count[29]	N1LA %	N2LA Count	N2LA %
Does not address the applicant's arguments and/or evidence	49	83%	25	83%
Decision-making criteria not linked to client's situation	23	39%	14	47%
Does not explain how competing evidence was weighed	17	29%	10	33%
Does not accurately or adequately refer to decision-making criteria	19	32%	8	27%

Sampled letters with inadequate reasons by whether they had a better rationale in the worksheet and level of review

Better Rationale in Worksheet for Letters with Inadequate Reasons	N1LA Count	N1LA %	N2LA Count	N2LA %
Yes	38	64%	10	33%
No	21	36%	20	67%
Total	59		30	

[27] The sample sizes were both calculated with a 95 percent level of confidence and a 10 percent sampling error with the finite population correction (Dean et al., 2013).
[28] All percentages have been rounded to the nearest whole number.
[29] These numbers do not add to the total number of letters with inadequate reasons because each letter could be assigned multiple types of inadequate reasons.