

# Clearinghouse Review

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## *Child Care* Under the Family Support Act

*Plus:*

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Deceptive Practices of Proprietary Schools

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## **Court Approves Class Action Settlement Providing up to \$30 Million in Retroactive VA Benefits to Puerto Rican Veterans**

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### **I. Introduction**

On October 15, 1993, the U.S. District Court for the District of Puerto Rico approved the settlement of a class action brought by Puerto Rican and Virgin Island veterans of the U.S. Armed Forces that opens the door to recovery of over \$30 million in retroactive veterans benefits. /1/ The lawsuit was originally filed in 1987 by the National Veterans Legal Services Project (NVLSP) /2/ to challenge VA's decision to conduct a mass review of the degree of disability of all Puerto Rican and Virgin Island veterans with service-connected psychiatric disabilities who were rated as totally (100 percent) disabled. NVLSP alleged that VA's decision was unconstitutionally motivated by racial and ethnic prejudices against the veterans, and it charged VA with using discriminatory standards and procedures during the mass review in order to reduce the greatest possible number of 100-percent ratings. This column summarizes the events leading up to the filing of the suit and describes the favorable settlement agreement entered into by the parties.

### **II. VA's Conspiracy Allegations**

The actions leading to the lawsuit began innocently enough over a decade ago when VA officials noticed that VA statistics showed that 22 percent of Puerto Rican veterans receiving service-connected disability benefits were rated totally (100 percent) disabled. The national average was much lower: nationwide, only 1 in 20 veterans (5.1 percent) receiving disability compensation from VA was rated totally disabled.

VA's Central Office dispatched an official to Puerto Rico to identify what VA characterized as “the causes for the excessive number” of veterans rated 100-percent disabled. This official determined that there was an “out-of-line situation in the number of psychiatric claims rated 100 [percent].” /3/

In January 1982, as a result of this inquiry, the VA Regional Office in San Juan issued Adjudication Division Memorandum (ADM) 82-3 to all local rating board members, informing them that they had been too liberal in assigning 100 percent psychiatric disability ratings. The memorandum also set forth the criteria that members should be applying—[EPA1] criteria that did not appear in any of VA's regulations. The memorandum ended with the following statement: [EPA2] “[The Chief]'s visit left us with a clear picture of what a 100 [percent] NP [neuropsychiatric] veteran is. . . . As [the Chief] himself described [EPA3] a 100 [percent] NP veteran it is an almost vegetative type of person.” /4/

Six months later, VA's Central Office sent a team of investigators to San Juan to follow up on the investigation. The team reported that it had uncovered a massive conspiracy to defraud VA: over a period of decades. Puerto Rican veterans had allegedly conspired on a mass basis with private sector physicians and physicians who worked either for hospitals under contract to VA or for VA's Medical Center itself to obtain false diagnoses of schizophrenia shortly after the veterans' discharge from the military so that they could fraudulently obtain service-connected disability benefits. George A. Donel, a rating specialist on the team, summarized the team's conclusion: "Puerto Ricans examining Puerto Ricans is not working out." /5/

Another team member, psychiatrist Dr. Henry T. Penley, explained the team's findings: [EPA4]"[In] a very Catholic country such as Puerto Rico one almost never sees a veteran with a presumptive diagnosis of schizophrenia having delusions/or audiovisual hallucinations of a religious nature." /6/

In other words, the investigators concluded that the diagnoses were fraudulent partly because they thought that a true Puerto Rican hallucination should have religious overtones.

The team apparently concluded that the earlier directive, ADM 82-3, was not sufficient to ensure proper ratings. It recommended that Puerto Rican cases be transferred to the "mainland" because such a transfer would prevent Puerto Rican veterans "from getting a chance to submit some medical report" to support their ratings.

Meanwhile, the chairman of the Board of Veterans' Appeals (BVA), the highest adjudicative body within VA, issued a memorandum to all BVA members alerting them to the Puerto Rican situation. This memorandum listed the names of 16 Puerto Rican psychiatrists considered to have "engaged in questionable conduct" and reminded BVA members that they must[EPA5] "carefully scrutinize all cases where [these psychiatrists] have treated the veteran or submitted statements." /7/

Unfortunately for the Puerto Rican veterans, VA kept this blacklist a secret[EPA6]. The list first came to light in 1989, over VA's objections, when NVLSP sought it. By keeping the document secret, VA prevented the psychiatrists from clearing their names and misled the veterans into believing that BVA would give credit to the diagnoses of the blacklisted psychiatrists. VA never told the veterans that they could have strengthened their claims by seeking treatment from psychiatrists who had not been blacklisted.

Word of the Puerto Rican conspiracy allegations reached members of Congress. In March 1982, Congressman Ronald Mottl, then a subcommittee chairman of the House Committee on Veterans Affairs, asked VA's Office of the Inspector General (IG) for an investigation. Although the IG concluded that there was no merit to the conspiracy theory, by "plac[ing] substantial reliance" on recent VA-Central Office assessments, the IG found that "[p]ast management practices [had] contributed to the statistically abnormal number" of 100-percent psychiatric disability ratings. /8/

The IG calculated that if psychiatric ratings for Puerto Rican veterans were consistent with the VA national average, VA would be saving \$10.8 million annually. The IG considered the possibility of

conducting a mass review of all existing 100-percent ratings but recommended a more thorough assessment of the reasons for the statistical variance before any such review.

### **III. Mass Review of Mentally Ill Hispanics Ordered**

In spite of the IG's recommendation, Dorothy Starbuck, then chief benefits director, did not believe further study was necessary. In March 1983, she ordered the reopening of all 100-percent psychiatric disability ratings established by the San Juan Regional Office. However, she did not stop there—she proceeded to include in this review all Virgin Islands[EPA7] veterans, all veterans then living in Puerto Rico whose 100-percent ratings had been established elsewhere, and all veterans whose 100-percent ratings had been established before the rating practices criticized by the Central Office were initiated. /9/

The Starbuck mass review project engulfed 4,200 veterans living in Puerto Rico and the Virgin Islands. Many had had 100-percent ratings established nearly two decades earlier or had been adjudicated permanently and totally disabled.

From the outset, this mass reopening proved a financial success for VA. Partial figures tabulated by VA before all of the cases had been reviewed showed that, with the aid of ADM 82-3 and its “nearly vegetative” standard, VA was able to reduce the ratings of more than 800 veterans, thereby saving VA over \$8.9 million annually—almost the amount that the IG had predicted would revert to VA.

However, VA was not yet satisfied. Once again, it sent its investigators to San Juan to find out whether all of the erroneous ratings had been eradicated. The team wanted further steps to be taken. Dr. Penley recommended that [EPA8]“Puerto Rican veterans should . . . [be] examined in the U.S. [because it] would remove them from their support system which includes VA Contact men, VA Service Organizations, VA and private psychiatrist, the veteran's family and other veterans.” /10/

### **IV. Cases Transferred to VA's Winston-Salem Office**

Dorothy Starbuck stopped short of this action recommended by Dr. Penley. Instead of sending the veterans to the U.S., she removed their claim files out of Puerto Rico and divested the San Juan Regional Office of jurisdiction over all psychiatric claims. Thus, in January 1984, the claim files of all Puerto Rican and Virgin Islands veterans with psychiatric disorders were shipped 1,500 miles away to the Winston-Salem Regional Office, for new ratings.

By this time, the Puerto Rican veterans were outraged. They staged several demonstrations and took over part of the grounds of VA's Medical Center, where they set up a tent and maintained a 24-hour vigil of protest. Some of the psychiatrically impaired veterans committed suicide.

In July 1984, Starbuck relented and transferred rating jurisdiction back to San Juan, but not before more than 1,000 ratings had already been rendered in North Carolina. The mass review continued.

## V. The Lawsuit

NVLSP produced, as part of the lawsuit, evidence showing that, outside Puerto Rico, VA did not require regional offices to keep their decisionmaking within a “normal” range. In addition, VA admitted to wide disparities among the regional offices in deciding claims for mental disorders and claimed that these disparities could be attributed validly to various local factors. The director of the Department of Veterans Benefits conceded that in some regional offices “the number of claims . . . that are received often [comes][EPA9] from veterans who are seriously disturbed. This might well be part of the explanation of why the average level of disability in PTSD claims is 17 percent for one office but 54 percent for another.” /11/

Indeed, VA's own National Vietnam Veterans Readjustment Study concluded that “Hispanic Vietnam . . . veteran men have experienced more mental health problems subsequent to their service in Vietnam than white/other veterans.” /12/ [EPA10] NVLSP documented that VA's actions in Puerto Rico were virtually without precedent. Even when VA concludes that a regional office has been engaging in erroneous decisionmaking, /13/ VA's practice has not been to reopen past decisions. Instead, VA tries to correct the problem by training rating board members so that their future decisionmaking improves. Moreover, with regard to the manner in which VA reviewed the ratings after the mass reopening had begun, NVLSP submitted a sworn statement from an expert in psychiatry stating that in many respects, the definition of 100 percent disability in ADM 82-3 was less favorable to veterans than VA's national standards, which are published in the Code of Federal Regulations. /14/ The expert stated that during his 11 years at VA's Medical Center in West Haven, Connecticut, he had treated many veterans rated 100-percent disabled who “would not qualify for a 100-[percent] rating under the more onerous standard set forth in [ADM] 82-3.” /15/

In response to the charge that the mass transfer of cases to VA's Winston-Salem office violated the veterans' right to a hearing at a local regional office, VA argued that the veterans could still get a de novo hearing at the San Juan Regional Office after the Winston-Salem office had made a decision to reduce their ratings. However, an accredited Red Cross service representative who represented many Puerto Rican veterans submitted a sworn statement that the San Juan rating board members were under orders not to change any Winston-Salem office decision to reduction decisions, no matter what evidence was presented at a local hearing; so the local hearing was a sham.

## VI. The Decision to Settle

Ultimately, VA decided that the best course of action was to settle the suit substantially in favor of the Puerto Rican veterans. A VA official who spoke to a reporter from *The Veteran*, the monthly publication of the Vietnam Veterans of America, on condition he not be identified, explained:

VA knew it had unfairly singled these people out from the beginning. There was never any review of San Juan cases that came into Winston-Salem. The attitude was that if a claim came from San Juan, it got automatically reduced. Everybody's mission [in the Winston-Salem office] was very well laid-out beforehand because the atmosphere at the time inside the Compensation and Pension Service was really against Puerto Rico. You could say there were at least overtones of racial discrimination. VA knew it would be better for public relations to keep the whole thing out of

court—even if the charges were only half-way proved it could still be harmful. Plus who knows what other things might have come out at trial. /16/

A lawyer in VA's General Counsel's office who worked on the case corroborated VA's difficulties in defending against the discrimination charges in comments he made to the Washington Post. Whether ADM 82-3 differed from the national standard for 100-percent psychiatric disability “could be debated,” he said. “You are dealing with a somewhat nebulous standard.” /17/ [EPA11] The national standard for 100-percent psychiatric disability, he added, is “complete social and industrial inadaptability. What does that mean?” /18/

## **VII. The Settlement**

Pursuant to the 45-page settlement agreement, VA agreed to:

- certify the case as a class action on behalf of all veterans whose 100-percent ratings were reduced at any time after January 8, 1982;
- rescind the discriminatory rules it had been using since 1982 to rate the psychiatric disabilities of Puerto Rican and Virgin Islands veterans;
- invalidate all rating decisions made by VA from the date of the initial reduction to the present, including BVA decisions;
- redetermine the disability rating of each class member from the date of the initial reduction to the present, using rating board members from other VA jurisdictions who were not involved in any of these cases in the past and using national standards;
- guarantee approximately half of the veterans involved a total of over \$1 million by raising their disability ratings to 100 percent during the three-month review period, regardless of the outcome of the review;
- pay benefits retroactive to the date of the initial reduction if the rating board determines that the disability rating should not have been reduced; and
- assure that veterans who are not fully satisfied with these new decisions will have the right to appeal to BVA and the Court of Veterans Appeals.

According to the settlement, each of the nearly 700 veterans whose 100-percent psychiatric disability rating was reduced by VA's San Juan Regional Office on or after January 8, 1982, and each of the nearly 100 survivors of such a veteran are now given a choice. They may either participate in the special settlement review described above or [EPA12]decline to participate, thereby leaving the past and current disability ratings unchanged. The deadline for this decision was to be April 12, 1994.

## VIII. Conclusion

NVLSP estimates that an aggregate of over \$30 million in retroactive veterans benefits is[EPA13] at stake for these VA claimants if they participate in the special settlement review. To help the veterans and their survivors make their choice, NVLSP recently mailed to each class member a package of information in both English and Spanish. /19/

As NVLSP explained in its mailing, many of the veterans and survivors who are members of the class have nothing to lose, and tens of thousands of dollars in retroactive benefits to gain, by participating in the special review. Not surprisingly, over 90 percent of the veterans and survivors who have responded thus far have chosen to participate in the special review. For all those who ultimately choose to participate, VA must complete its review of the disability ratings by October 1994.

### Footnotes

/1/ *Giusti Bravo v. United States Dep't of Veterans Affairs*, Civ. No. 87-0590 (D.P.R. Oct. 15, 1993) (Clearinghouse No. 49,712).

/2/ NVLSP is the successor to Vietnam Veterans Legal Services, which originally filed the lawsuit.

/3/ *Giusti Bravo*, Civ. No. 87-0590, Declaration of Herbert B. Mars attached to Defendants' Motion to Dismiss 4 (Dec. 22, 1987).

/4/ *Id.* Adjudication Division Memorandum 82-3, attached as Defendants' Exhibit 4 to Defendants' Reply Memorandum (filed Mar. 14, 1988).

/5/ *Id.* Defendants' Exhibit E to Declaration of Herbert B. Mars, *supra* note 3, at 1 (summary of C & P Review by George A. Donel at 1).

/6/ *Id.* Evaluation of neuropsychiatric examination by Dr. Henry T. Penley..

/7/ *Id.* Defendants' Exhibit 8 to Defendants' Reply Memorandum at ¶ 2 and ¶ 3 (Mar. 14, 1988).

/8/ *Id.* Defendants' Exhibit G to Declaration of Herbert B. Mars, *supra* note 3, at 3.

/9/ *Id.* Declaration of Herbert B. Mars, *supra* note 3, at ¶ 10; *id.* Defendants' Response to Plaintiffs' Interrogatory 10(c).

/10/ *Id.* Defendants' Exhibit H to Declaration of Herbert B. Mars, *supra* note 3.

/11/ *Id.* Attachment 1 to Declaration of Keith D. Snyder attached to Plaintiffs' Exhibit A to Plaintiffs' Opposition to Defendants' Motion to Dismiss.

/12/ Research Triangle Institute, Contractual Report of Findings from the National Vietnam Readjustment Study, vol. I, pt. A at 3 (1988).

/13/ E.g., in 1983, VA concluded that decisionmaking in the St. Paul Regional Office was a “festering sore.” *Giusti Bravo*, Civ. No. 87-0590, Declaration of Keith D. Snyder, *supra* note 11, at ¶¶ 15-21.

/14/ *Id.* Plaintiffs' Exhibit I to Plaintiffs' Opposition to Defendants' Motion to Dismiss, at ¶ 7.

/15/ *Id.* at ¶ 9.

/16/ William Triplett, *So That Justice Prevails: VVA Scores Puerto Rico Settlement*, *The Veteran* at 15, 18 (Aug.-Sept. 1991).

/17/ Don Phillips, *VA Settles Vietnam-Era Class-Action Suit: Cases of Puerto Rican Veterans Whose Benefits Were Cut Will Be Reviewed*, *Washington Post*, June 29, 1991, at A6.

/18/ *Id.*

/19/ Veterans, and survivors of veterans, who did not receive NVLSP's mailing, but who believe they are class members in this case, should contact NVLSP as soon as possible.