

# Bloomberg Businessweek

By Kathleen Miller

September 09, 2013

## Malpractice Payouts to U.S. Veterans Reach 12-Year High

Christopher Ellison went to a veterans medical center in Philadelphia to get eight teeth extracted in 2007. What should have been a routine dentist visit left him permanently incapacitated.

The \$17.5 million Ellison and his family received in a malpractice judgment against the Department of Veterans Affairs was the largest against the agency in a dozen years -- and one of more than 400 payments the U.S. government made last year to resolve VA malpractice claims, according to agency records obtained through a Freedom of Information Act request. The total cost came to \$91.7 million, also the highest sum in at least 12 years.

The cases against the VA have included missed diagnoses, delayed treatment and procedures performed on wrong body parts. U.S. lawmakers and veterans' advocates say they reflect deep flaws in the agency's health-care system even as the department tends to more former troops, including those who fought in Iraq and Afghanistan.

"The rapid rise in malpractice judgments against VA mirrors the emerging pattern of preventable veteran deaths and other patient safety issues at VA hospitals," Representative Jeff Miller, a Florida Republican and chairman of the House veterans committee, said in an e-mailed statement. "What's missing from the equation is not money or manpower -- it's accountability."

### 'Not Warned'

Miller's committee held a hearing in Pittsburgh today to probe lapses that include a Legionnaires' disease outbreak at a VA hospital that killed at least five veterans and also led to malpractice claims. The VA's inspector general is conducting a criminal investigation into the outbreak, which involved bacteria in the hospital system's water, Robert Petzel, the department's undersecretary for health, said during the hearing.

Family members of veterans who died after being exposed to the bacteria said the VA didn't immediately let relatives know there was a potential health problem.

"For sixteen days my father was allowed to shower and drink the water without any warning," said Robert Nicklas, whose father, William, a Navy veteran, died last year after the Pittsburgh VA outbreak. "Why were we not warned?"

### More Patients

More veterans are taking advantage of VA medical care, including those requiring more complex treatment. As many as 1.2 million additional soldiers are due to become veterans in the next four years. Some of the soldiers

from the wars in Iraq and Afghanistan are suffering post-traumatic stress disorder while others are living with injuries that would have been fatal in World War II or the Vietnam War.

The age of recent veterans may be a contributing factor in the rise of claims payments, said W. Robb Graham, an attorney in Cherry Hill, New Jersey, who has represented former troops filing claims against the agency. Younger claimants tend to get larger malpractice payouts, often tied to how long victims will suffer, he said.

The median age range of veterans who served after the Sept. 11, 2001, terror attacks in New York and Washington was 25 to 34 years old, according to a 2011 Labor Department study. That's compared to veterans who served during the World War II, Korean War and Vietnam eras, whose median age range was 65 and older, the study said.

### **Higher Payments**

"If the VA cuts off the wrong leg of a veteran who is 70 years old and his life expectancy is 75, he's entitled to five years of damages," Graham said in a phone interview. "If they cut off the wrong leg of a veteran who is 25, you're now dealing with someone who is entitled to 50 years of damages."

The department has 152 hospitals and about 19,000 doctors. Last year, the VA tended to 5.6 million veterans, a 32 percent increase from fiscal 2002, according to agency data.

"It's the largest health-care system in the U.S., and they do an incredible amount of good work," said Jerry Manar, deputy director of national veterans service at the Kansas City, Missouri-based Veterans of Foreign Wars. "However, there are so many more things they could do in terms of oversight that they don't appear to be doing now. As a consequence, sometimes you wind up with poor results that were avoidable."

The department is "deeply committed to providing the quality care and benefits our nation's veterans have earned and deserve," Gina Jackson, a VA spokeswoman, said in an e-mail. "If employee misconduct or failure to meet performance standards is found to have been a factor, VA will take appropriate corrective action immediately."

### **Taxpayers' Bill**

The 2012 malpractice payments stemmed from both court judgments and administration settlements. The payouts, made by the U.S. Treasury's Judgment Fund, rose 28 percent last year from about \$72 million in 2011, the VA records showed. Taxpayers have spent at least \$700 million to resolve claims filed against the veterans agency since 2001, according to the data.

Many valid VA malpractice claims never get paid, said attorney Graham, who served as a judge advocate general in the Navy in the 1980s. Some are rejected because paperwork isn't filed properly, he said.

"My strong belief is a lot of lawyers don't know how to sue the VA," he said.

Some law firms aren't interested in representing people suing the federal government because of laws that limit attorney fees to 25 percent of malpractice awards, Graham said.

### **'An Alarming Pattern'**

In a May letter, Representative Miller asked President Barack Obama to help address "an alarming pattern of serious and significant patient care issues" at VA medical facilities.

The House panel is reviewing the Legionnaires' outbreak in Pennsylvania, and the department's handling of two overdose deaths and two suicides at an Atlanta veterans hospital. Also under scrutiny are poor sterilization procedures and possible patient exposure to infectious diseases such as HIV at VA locations.

"We are not here as part of a witch-hunt, to make VA look bad or to score political points," Miller said during the hearing. "We simply want to ensure that veterans across the country are receiving the care and benefits they have earned."

The agency isn't holding employees, especially executives, accountable for preventable deaths, Miller said. Department officials also gave bonuses to doctors even if they practiced without a license or left residents unsupervised during surgery, according to a Government Accountability Office report last month.

### **VA Bonuses**

The recipients of \$150 million in bonuses to VA health-care providers in fiscal 2011 included a radiologist unable to read a mammogram and an emergency-room doctor who refused to see patients, the report found.

Miller has said the VA employees should be punished -- not rewarded -- for their incompetence.

The number of malpractice claims filed with the VA has remained at 1,544 for the past two years, said Jackson, the agency spokeswoman. The leveling off came after a 33 percent spike in cases to 1,670 between 2010 and 2005, according to an October 2011 GAO report.

The VA's malpractice payment rates may be similar to national levels, said Anupam B. Jena, an assistant professor at Harvard Medical School and physician at Massachusetts General Hospital.

### **Ellison's Case**

Less than 25 percent of the claims filed against the veterans agency result in payment, according to the VA. About 20 percent of malpractice claims filed with the largest insurer of physicians between 1991 and 2005 resulted in a payment, according to a 2011 study published in the New England Journal of Medicine, said Jena, who worked on the report.

Last year's "noticeable increase" in medical malpractice payments was partly due to an "exceptionally large" \$17.5 million court judgment, Jackson said in an e-mail. Such payments are "highly variable from year to year," she said.

That record judgment went to Ellison, who was honorably discharged from the Marines in 2001. He was a 49-year-old electronics technician from Bridgeport, Pennsylvania, in 2007 when he visited the dentist to have eight teeth extracted because of tooth decay and gum disease.

During the procedure at a VA facility in Philadelphia, Ellison's blood pressure dropped several times to "unusually low" levels, his attorney, Shanin Specter, a partner at Kline & Specter P.C., a law firm in the city, said during a 2011 trial.

### **'Catastrophic' Stroke**

Ellison wasn't sent to the emergency room, and the dentist continued with the extractions, said Specter, son of Arlen Specter, the former senator from Pennsylvania who served as a Republican for more than 28 years and became a Democrat during his last 20 months in office. Arlen Specter died last year.

Ellison had a "catastrophic" stroke while driving his car shortly after leaving the dentist office, Specter said.

The government argued that the veteran's existing health problems caused the stroke, not the care he received at the VA. Ellison had a history of smoking, diabetes, hypertension and many other stroke risk factors, Thomas Johnson, an assistant U.S. attorney, said during the 2011 trial in U.S. District Court in Philadelphia.

After the stroke, Ellison was left with limited vocabulary, "severe and pervasive deficits in all mental abilities," and "negative personality changes," according to court documents.

"He wound up being totally incapacitated, requiring 24-hour-a-day care," Specter said. "This is about as devastating an injury as a person can have, and that's what the award reflects."