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BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS

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EXECUTIVE SUMMARY

The backlog of claims appeals has been continually growing at the VA. The time it takes from the filing of the initial appeal document – the Notice of Disagreement (NOD) -- to the issuance of an initial Board of Veterans' Appeal (BVA) decision is exceedingly long -- 1,255 days in FY 2013 (that is, more than 3 years and 5 months) according to the BVA Chairman.

The time it takes for a final decision to be made on a claim is often much longer because the initial BVA decision often results in a remand of the case to the regional office. Over the last four fiscal years, more than **44%** of the appeals to the BVA have resulted in a BVA remand to the Appeals Management Center (AMC) or the RO for additional development. Moreover, the Court of Appeals for Veterans Claims has set aside and remanded **76%** of the BVA decisions that have been appealed by a VA claimant to the CAVC and over which the CAVC has had jurisdiction.

Part of the reason that the VA appeals process suffers from dysfunction is that there are relatively few objective precedents that guide the ROs and the BVA on the meaning of title 38 statutes and VA regulations. This lack of objective precedents makes it more difficult for claimants and their representatives to understand what type of evidence they should try to obtain to substantiate their claims; increases the time it takes for the adjudicator to reach a decision; and leads to inconsistent decision-making and a greater number of appeals by disappointed veterans.

NVLSP urges Congress to enact the following five reforms to help make the appellate system more efficient and just.

- Authorize BVA to Develop Evidence Itself Without Having to Remand to the AMC or Regional Office
- Provide Veterans Organizations with a Right to Petition the VA General Counsel for a Binding Precedent Opinion on the Proper Interpretation of a Statute or Regulation
- Authorize the Court of Appeals for Veterans Claims to (a) Certify a Case as a Class Action on behalf of Similarly Situated VA Claimants, (b) Require the VA to Stay Proceedings on the Claims of All Similarly Situated Claimants, and (c) Once the Court Finally Decides the Case, Require VA to Apply the Decision to all of the Pending Claims That Were Stayed
- Prohibit The ROs And BVA, In A Case In Which There Is Positive Evidence Supporting the Award Of Benefits, From Developing Negative Evidence Against The Claim Unless The RO or BVA First Explains In Writing Why The Existing Record Is Not Sufficient To Award Benefits
- Require VBA To Change Its Work Credit System for RO Adjudicators So That Raters Do Not Get Work Credit For Denying A Claim Without First Obtaining The Evidence Needed To Comply With The VA Duty To Assist

Mr. Chairman and Members of the Committee:

I am pleased to be here today to present the views of the National Veterans Legal Services Program (NVLSP) on the challenges facing veterans in the appeals system for veterans claims.

NVLSP is a nonprofit veterans service organization that has been representing veterans since 1980. Over the years, NVLSP representation of veterans and their survivors before the VA regional offices, the Board of Veterans' Appeals and federal courts has resulted in VA payment of more than $4.6 billion in retroactive disability and death compensation to hundreds of thousands of veterans and their survivors.

Since Congress created the U.S. Court of Appeals for Veterans Claims (CAVC) in 1988, NVLSP has represented more than 2,000 VA claimants before the Court. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, and in that Program, NVLSP recruits and trains volunteer lawyers to represent veterans who appeal to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications such as the annually updated, 1900-page Veterans Benefits Manual that has been distributed to thousands of veterans advocates to assist them in their representation of VA claimants.

My testimony today is informed by the frustration and disappointment in the claims appeals system experienced by many disabled veterans and their survivors. That system suffers from serious dysfunctions. As I describe below, there are numerous significant problems. NVLSP urges Congress to enact five legislative reforms that will help fix the current appellate system.

The Evidence of Dysfunction

A. The Slow Appellate Process

The backlog of appeals has been continually growing. VA's Monday Morning Workload Reports show that 267,107 appeals were pending one year ago, and as of January 12, 2015, the number of appeals had grown to 289,297. The time it takes from the filing of the initial appeal document – the Notice of Disagreement (NOD) -- to the issuance of a Board of Veterans' Appeal (BVA) decision is exceedingly long. According to the latest Annual Report of the Chairman of the BVA, the average time lapse between the filing of an NOD and an initial decision of the BVA was 1,255 days (that is, more than 3 years and 5 months). The time it takes for a final decision to be made on a claim is often much longer because, as discussed below, the initial BVA decision often results in a remand of the case to the regional office.

The initial part of this 1,255-day time lapse is the period from the filing of an NOD to VA preparation of a Statement of the Case (SOC). The latest (FY2013) Report

of the BVA Chairman states that the average delay from NOD to SOC was 295 days. The January 12, 2015 Monday Morning Workload Report states that the average delay from NOD to SOC has increased to 408 days.

But the largest part of the more than 1,255-day time lapse from NOD to initial BVA decision involves the warehousing of appeals at the VA regional offices after the veteran files the last document the veterans needs to file in order to get the appeal to the BVA – that is the Substantive Appeal (VA Form 9). The FY2013 Report of the BVA Chairman states that 725 days (nearly 2 years) is the average delay from the filing of the Form 9 to the date the regional office actually transfers the VA claims file to the BVA.

B. The Hamster Wheel

The foregoing delays are exacerbated by the fact that the initial BVA decision is often not the final decision on a veteran's appeal. For nearly a decade now, those who regularly represent disabled veterans before the VA and CAVC have been using an unflattering phrase to describe the system of justice that veterans face once they appeal a VA regional office decision denying a claim for service-connected disability benefits: "the Hamster Wheel". This phrase refers to the following common phenomenon:

The veteran's appeal to the BVA does not stop once the BVA issues its first decision. Instead, the BVA often remands the appeal back to the regional office to comply with the duty to assist. An additional delay occurs, which the FY2013 BVA Chairman Report states averages 348 days. The case is returned to the BVA, which sometimes remands the claim to the RO a second time because the RO did not comply with the remand instructions in BVA decision #1. Alternatively, the BVA's initial decision is to deny the claim and the veteran appeals to the CAVC. The CAVC finds that the BVA has erred in a prejudicial matter and remands the claim back to the BVA to correct the error, which often results in a subsequent remand by the BVA to the RO. The net result is that frustrated veterans have to wait many additional years – beyond the average 1,255-day delay before an initial BVA decision -- before receiving a final decision on their claims.

The statistics bear out this grim picture of the Hamster Wheel. Over the last four fiscal years, the percentage of appeals to the BVA that have resulted in a BVA remand to the Appeals Management Center (AMC) or the RO are **42.4%, 44.2%, 45.8%, and 45.6%,** respectively. Most of these remands are predicated on the existence of RO error. Since 1995, the Court of Appeals for Veterans Claims has set aside and remanded **76%** of the 42,305 BVA decisions that have been appealed by a VA claimant to the CAVC and over which the CAVC has had jurisdiction. Almost all of these Court remands result from a Court finding that the BVA decision contained one or more prejudicial errors.

The VA often tries to diminish how damning these statistics are by arguing that only a relatively small percentage of VA claimants appeal to the BVA and only a relatively small percentage of those receiving a BVA decision appeal to the CAVC. But

this argument fails to take into account the fact that there are a large percentage of errors in the decisions that are not appealed.

C. **Inconsistent BVA and RO Decision-Making**

Part of the reason that the VA appeals adjudication process suffers from dysfunction is that there are relatively few objective precedents that guide the ROs and the BVA on the meaning of title 38 statutes and VA regulations. One of the benefits envisioned by Congress in 1988 when it created a national court to oversee the VA adjudication process was that this national court would help make VA decision-making more consistent and fair by issuing precedential decisions guiding the ROs and the BVA on the meaning of the law. Unfortunately, over the last 26 years, the Court of Appeals for Veterans Claims has decided to denominate more than 90% of all of its decisions as nonprecedential. This leaves individual ROs and BVA judges with substantial discretion in interpreting statutes and regulations. Moreover, the regulations governing the BVA provide that every single one of the hundreds of thousands of decisions that are issued by the 65 individual BVA judges is nonprecedential.

When the law is not clear as to how it should apply to the facts of an individual case (as is often the case in the VA adjudicatory system), it tends to (a) make it more difficult for claimants and their representatives to understand what type of evidence they should try to obtain to substantiate their claims; (b) increase the time it takes for the adjudicator to reach a decision, (c) lead to inconsistent decision-making; and (d) lead to a greater number of appeals by disappointed veterans.

Legislative Solutions

In the past, some have advocated for a legislative reform in which an unrepresented veteran, or a represented veteran who does not necessarily have the express approval of his or her representative, can, once the RO initially denies the claim, give up the veteran's right to submit additional evidence and the right to a BVA or RO hearing in exchange for a speedy BVA decision. This reform has been dubbed the Fully Developed Appeal.

Given the alternative (that is, waiting 3½ to 8 years to obtain a final BVA decision on a claim), many unrepresented veterans would likely jump at the chance to give up their rights to submit additional evidence and a hearing in exchange for a speedy BVA decision. That many unrepresented veterans would likely choose this option does not necessarily make this reform a wise one. It is significant that the Fully Developed Appeal reform requires the veteran to choose whether to give up the right to submit additional evidence and have a hearing after receiving an initial RO denial that does not fully explain why the claim was denied and what evidence is missing – the type of explanation that would be in an adequate Statement of the Case. How the unrepresented veteran can make a knowing and intelligent decision to give up his rights at this point in the appellate process is not clear to NVLSP. NVLSP believes that there are better

legislative solutions for what ails the appellate claims system. NVLSP urges Congress to enact the following five reforms of that system.

- **Authorize BVA to Develop Evidence Itself Without Having to Remand to the AMC or Regional Office**

15 years ago, then Secretary of Veterans Affairs Anthony Principi designed an innovative way to diminish the hamster wheel phenomenon and streamline the VA appellate claims process. Then, as now, the Board of Veterans' Appeals determined in over 40% of the appeals it reviewed that the regional office had erred by not complying with the duty to assist the claimant in developing the evidence necessary to substantiate the claim or had erred in some other prejudicial way. As a result, the BVA had to remand the appeal to the regional office to fix the error, which lengthened by years the time it would take for the VA to issue a final decision. Moreover, the regional office (RO) would often fail to substantially comply with the Board's remand instructions and when the case was returned to the Board, the Board would have to remand the case to the regional office for a second time.

Then Secretary Principi decided that a partial solution to the hamster wheel phenomenon was to amend VA regulations to allow the BVA to develop additional evidence itself, without remanding to the RO, in a case in which the Board determined that a final decision could not be issued because additional development was necessary. Forcing the BVA to remand to the Appeals Management Center (AMC) or the local ROs lengthens the adjudicatory process because the BVA does not have direct authority over the AMC and RO – meaning the BVA cannot control whether the AMC or RO provides expeditious treatment or properly complies with the remand instructions. Allowing BVA development without a remand to the AMC or RO further streamlines the appellate process by eliminating the need for the AMC or RO to review the record and prepare a written supplemental statement of the case before the case is returned to the BVA for another decision. Thus, the duties of the AMC and RO adjudicators who decide cases remanded by the BVA could be transferred to help the ROs decide other cases – thereby decreasing the backlog.

Unfortunately, Secretary Principi did not have the right to make this change without Congressional action. In *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit held in 2003 that it was beyond the VA Secretary's statutory authority to use the scheme the VA Secretary initiated to streamline the BVA decision-making process. But Congress can and should intervene now by amending the law to allow the BVA to develop evidence itself without remanding to the AMC or RO.

- **Provide Veterans Organizations with a Right to Petition the VA General Counsel for a Binding Precedent Opinion on the Proper Interpretation of a Statute or Regulation**

As explained above, part of the reason that the VA appeals adjudication process suffers from dysfunction is that there are relatively few objective precedents that guide

the ROs and the BVA on the meaning of title 38 statutes and VA regulations. Justice is promoted by the existence of clear, specific rules.

NVLSP urges Congress to address this problem by adopting the following reform. Provide stakeholders – the veterans service organizations -- with a right to petition the VA Office of General Counsel (VAOGC) to adopt a particular interpretation of Title 38 statutes or regulations supported by the petitioning VSO as a VAOGC Precedent Opinion that is binding on the ROs and BVA. Currently, the VAOGC has the authority to issue binding precedential opinions (38 U.S.C. § 7104(c) and 38 C.F.R. § 14.507) at its own discretion, but this authority is seldom utilized. For example, in 1989, VAOGC issued 20 precedential opinions; however, by 2012 it issued only three, and it didn't issue any precedent opinions in 2013.

The suggested legislation reform would require the VAOGC to respond to the petition by issuing a binding Precedent Opinion that addresses the validity of the proposed rule of law, and with a right of any VSO to obtain judicial review of that Precedent Opinion by appealing to the U.S. Court of Appeals for the Federal Circuit. Thus, every petition filed by the VSO would result in a precedent one way or the other. Either the VAOGC would issuing a binding Precedent Opinion agreeing with the interpretation proposed by the VSO, or the VAOGC would issue a binding Precedent Opinion stating that the interpretation proposed by the VSO was not an accurate interpretation of the law in whole or in part. Either way, the BVA and the ROs would be provided additional objective guidance on what the law requires.

- **Authorize the Court of Appeals for Veterans Claims to (a) Certify a Case as a Class Action on behalf of Similarly Situated VA Claimants, (b) Require the VA to Stay Proceedings on the Claims of All Similarly Situated Claimants, and (c) Once the Court Finally Decides the Case, Require VA to Apply the Decision to all of the Pending Claims That Were Stayed**

Another legislative proposal that would help decrease dysfunction within the appeals adjudicatory system involves the current inability of veterans or VSOs to bring a class action to ensure the cases of similarly situated VA claimants are all resolved speedily, at the same time, and in the same way. When Congress enacted the Veterans' Judicial Review Act of 1988 (VJRA), it inadvertently erected a significant roadblock to justice. Prior to the VJRA, U.S. district courts had authority to certify a lawsuit challenging a VA rule or policy as a class action on behalf of a large group of similarly situated veterans. See, e.g., Nehmer v. U.S. Veterans Administration, 712 F. Supp. 1404 (N.D. Cal. 1989); Giusti-Bravo v. U.S. Veterans Administration, 853 F. Supp. 34 (D.P.R. 1993). If the district court held that the challenged rule or policy was unlawful, it had the power to ensure that all similarly situated veterans benefited from the court's decision.

But the ability of a veteran or VSO to file a class action ended with the VJRA. In that landmark legislation, Congress transferred jurisdiction over challenges to VA rules and policies from U.S. district courts (which operate under rules authorizing class actions) to the U.S. Court of Appeals for the Federal Circuit and the newly created U.S. Court of Appeals for Veterans Claims (CAVC). In making this transfer of jurisdiction,

Congress failed to address the authority of the Federal Circuit and the CAVC to certify a case as a class action. As a result of this oversight, the CAVC has ruled that it does not have authority to entertain a class action (see Lefkowitz v. Derwinski, 1 Vet.App. 439 (1991), and the Federal Circuit has indicated the same. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1378 (Fed. Cir. 2002).

In those cases initiated in and certified by the Veterans Court as a class action, the proposed legislation would authorize the Court to establish a moratorium on VA decision-making at the RO and BVA level on the claims of all similarly situated VA claimants until the Court makes a final decision – thereby conserving the resources of the VA, veterans, and the veterans service organizations that represent them. During the two years it typically takes the CAVC to decide a precedential case, no similarly situated veteran would need to appeal his VA claim and no RO rater or BVA Judge would have to issue an SOC or decision on the claim of such a veteran. Once the Court's decision became final, the ROs and BVA would then decide the claims subject to the moratorium according to the ruling of the Court. Thus, this legislation would help ensure that the claims of similarly situated veterans are decided in a consistent manner.

- **Prohibit The ROs And BVA, In A Case In Which There Is Positive Evidence Supporting the Award Of Benefits, From Developing Negative Evidence Against The Claim Unless The RO or BVA First Explains In Writing Why The Existing Record Is Not Sufficient To Award Benefits**

One reason for the existence of the Hamster Wheel phenomenon is that in a case in which the veteran submits adequate positive medical evidence in support of the claim, the BVA sometimes does not simply award the benefits sought. Instead, the BVA extends the life of the claim by remanding the case to the RO to obtain yet another medical opinion from a VHA physician. Often the results of this remand is that a negative medical opinion is obtained, which then results in the agency denying a claim which should have been granted months or years earlier. The same scenario occurs at the RO level when the RO receives adequate positive medical evidence in support of the claim.

Veterans advocates call this longstanding VA practice "developing to deny". In addition to fostering the Hamster Wheel phenomenon, this practice is inconsistent with the pro-claimant VA adjudicatory process and the statutory benefit of the doubt rule. Congress could and should take action to stop this unlawful practice by enacting legislation that would prohibit the BVA and ROs, in a case in which there is positive evidence supporting the award of the benefits sought, from developing additional evidence unless the BVA or RO first explains in writing why the existing record is not sufficient to award the benefits sought.

- **Require VBA To Change Its Work Credit System for RO Adjudicators So That Raters Do Not Get Work Credit For Denying A Claim Without First Obtaining The Evidence Needed To Comply With The VA Duty To Assist**

A major reason for the Hamster Wheel phenomenon involves the fact that the ROs often deny claims without first complying with the duty to assist the claiming by attempting to obtain the evidence necessary to substantiate the claim. The fact that the ROs often fail to take this required action is evident from the high rate at which the BVA remands appeals with instructions for the RO to comply with the duty to assist and the high rate at which the CAVC remands appeals to the BVA with instructions for it to remand the case to the RO to comply with the duty to assist.

Why do the ROs so often fail to comply with the duty to assist? The main culprit is not the lack of training – although that is part of the problem. The main reason is the work credit system used by VBA. The work credit system gives the RO adjudicator work credit – which supports promotions and bonuses – for making a decision on a claim **whether or not the adjudicator first attempts to obtain the evidence necessary to substantiate the claim.** Obviously, an adjudicator can accumulate more work credits by deciding claims quickly and prematurely without taking the time to obtain the evidence necessary to comply with the duty to assist. This is what often happens. Congress can and should act to help stop this practice by prohibiting VBA from giving an RO adjudicator work credit for denying a claim unless and until the RO makes an adequate attempt to comply with the duty to assist.