STATEMENT OF

NATIONAL VETERANS LEGAL SERVICES PROGRAM

AND

STETSON UNIVERSITY COLLEGE OF LAW'S VETERANS LAW INSTITUTE

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS

OF THE HOUSE COMMITTEE ON VETERANS AFFAIRS

APRIL 28, 2016

EXECUTIVE SUMMARY

The proposed legislation contains a far-reaching restructuring of the VA administrative appeals process. It contains many positive features that are likely to decrease appeal times while providing claimants with various options for pursing their appeals. As with any substantial change to a complex system, there will clearly be effects that we cannot now predict. But given that the current appeals process is not functioning well, we have ultimately concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step, with two important caveats.

First, an amendment to the proposed legislation is needed to avoid the litigation and disruption of the appeals process that will be generated by the way VA officials are interpreting the proposed legislation. According to VA officials, including Secretary McDonald, after a Board of Veterans' Appeals decision disallowing a claim, the veteran would be required under the proposed legislation to make a choice between (i) appealing to the Court of Appeals for Veterans Claims and (ii) filing a supplemental claim with the regional office, in order to preserve the date of filing the initial claim as the potential effective date. Before this legislation is passed, Congress should amend the proposal to prevent VA's interpretation, since the choice VA wishes to impose on veterans is contrary to the interests of justice and the pro-claimant process that Congress long ago created.

Second, an amendment is necessary to the wording of the lower threshold standard in the proposed legislation for requiring VA to readjudicate a claim that has previously been disallowed in order to ensure that VA uniformly interprets this standard to be a minor hurdle.

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting us to submit written testimony concerning the reform of the veterans claims and appeals process in the United States Department of Veterans Affairs (VA). We very much appreciate the opportunity to share our views on this important piece of potential legislation. This testimony is jointly submitted on behalf of the National Veterans Legal Services Program, a veterans service organization that has been representing veterans since 1980, and Stetson University College of Law's Veterans Law Institute.

Introduction

We believe the proposed legislation is a welcome attempt to address the serious problems veterans and their dependents face in processing appeals in the VA. We are generally favorable to the proposal, with two very important caveats discussed below. To be clear, we believe the problems we have identified below can be addressed now. If they are, we support this proposal as an innovative means of addressing the systemic delays claimants face in the dealing with their appeals of administrative decision.

Before we address the merits of the proposed legislation in more detail, we begin with a general point that is important to remember. The proposed structuring of the administrative appeals process envisioned under the bill is far-reaching. As with any change to a complex system, there will clearly be effects that we cannot now predict. We have considered this reality quite seriously. If the system were functioning generally well, a concern with unintended consequences might be sufficient to oppose such a comprehensive change in the system. But we are not dealing with a well-functioning system. Given that state of affairs, we have ultimately

concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step. We support it with the two suggested changes we discuss below.

I. POSITIVE FEATURES OF THE PROPOSED LEGISLATION

We briefly highlight the significant positive features of the changes envisioned under the proposed legislation. Taken together, we believe these features of the bill will decrease appeal times while providing claimants with various options for pursing their appeals. The most significant positive features in the proposed legislation are:

- The proposal provides for enhanced "notice letters" to veterans and other claimants concerning the denial of their claims. We believe such enhanced notice will be critically important to veterans as they make determinations about how to proceed when they are dissatisfied with a VA decision.
- The proposal also eliminates the requirements under current law concerning the preparation of a Statement of the Case (SOC), the veteran's corresponding need to complete an additional step to perfect an appeal to the Board (i.e., VA Form 9) and VA's subsequent need to certify the appeal by completing VA Form 8. While there may have been a time at which the SOC served a useful function in this system, the enhanced "notice letters" required by the proposal eliminate the need for an SOC. Thus, the SOC process serves only to delay the processing of claims.
- The proposal lowers the standard necessary for re-opening a claim under Section 5108. The current standard of "new and material evidence" is replaced with "new and relevant evidence." While we address below two concerns – one involving supplemental claims and one involving the wording of the new lower standard -- the lowering of the standard

is critically important. In addition, and as we discuss in more detail below, the revised Section 5108 will allow veterans to obtain earlier effective dates in many circumstances than they would be able to do under the current version of this provision.

- The proposal allows veterans a meaningful choice when they appeal to the Board of Veterans' Appeals (Board). A veteran may elect to forgo the submission of new evidence and a hearing in cases in which he or she determines such an approach is best. This would provide for more expeditious treatment of such appeals. On the other hand, a veteran can elect to proceed on a track in which the submission of new evidence and a hearing is allowed. This dual-track approach recognizes the reality that not all appeals are alike.
- The proposal allows a claimant to seek the assistance of a lawyer for pay after an initial denial but before the filing of a Notice of Disagreement (NOD). This is a change from current law in which a lawyer may not charge a fee before the filing of an NOD. While seemingly a small change, we believe this is significant because the structure of the proposed new system provides claimants with myriad ways in which to proceed. Advice to such claimants will be critical and the proposed change allows more options for that advice.
- We believe the proposal also reduces the means in which the VA can be said to "develop to deny." There is a belief in many quarters that the VA will take certain steps to develop evidence for the purpose of denying a claim. Certain aspects of the current proposal – for example, the restriction on the application of the duty to assist at the Board – will likely reduce such actions as well as the perception of many that such actions take place.

II. AN IMPORTANT AND NECESSARY CHANGE: The Need to Clarify the Right to Both Appeal to the CAVC and File a Supplemental Claim Simultaneously to Protect the Claimant's Effective Date

As we have explained above, there are a number of critically important positive changes to the administrative appeals process contained in the proposed legislation. Those positive changes are why we support this legislation. But that support comes with one extremely critical caveat that we discuss in this part of our testimony.

Currently, after a Board decision that disallows a claim, the claimant may file both (i) an appeal with the Court of Appeals for Veterans Claims (CAVC) under Chapter 72 and (ii) a claim with the Agency of Original Jurisdiction (AOJ) under Section 5108 to "reopen the claim" disallowed by the Board "and review the former disposition of the claim," when the claimant submits "new and material evidence." In other words, the claimant does not have to choose between appealing to the CAVC and filing a claim with the AOJ to reopen under Section 5108. The claimant may freely take both actions.

The proposed bill renames a Section 5108 claim as a "supplemental claim" and lowers the threshold requirement to obtain readjudication of the previously disallowed claim by substituting the language "new and relevant evidence" for "new and material evidence." In addition, no language in the proposed bill indicates an intent to change existing law allowing a claimant, after a Board decision that disallows the claim, to file simultaneously both a timely appeal with the CAVC and a Section 5108 claim with the AOJ.

Nonetheless, VA officials have repeatedly represented that if the proposed bill is enacted as currently worded, the options available to a claimant will change. According to these VA

officials, including Secretary McDonald, after a Board decision disallowing a claim, the claimant would now be required by law to make a choice between appealing to the CAVC and filing a supplemental claim with the RO in order to preserve the date of filing the initial claim as the potential effective date if the claim disallowed by the Board is ultimately granted. As background, after a Board decision disallowing a claim, the claimant may file under the proposed bill a Section 5108 supplemental claim within one year of the Board decision disallowing the claim. If that supplemental claim were ultimately granted, the proposed bill's amendment to Section 5110 would enable the claimant to be assigned the date of filing the initial claim, rather than the date of filing the supplemental claim, as the effective date of the award, as long as the other Section 5110 criterion for assignment of that early effective date is satisfied. We strongly support this part of the proposed bill. Nonetheless, VA officials have repeatedly represented that under the proposed bill, if a claimant, after a Board decision disallowing a claim, were to file a timely appeal of the Board decision with the CAVC and lose on appeal, the claimant would incur the following penalty: the claimant could not lawfully be assigned the date of filing the initial claim as the effective date even if the claimant filed a Section 5108 supplemental claim within one year of the Board decision and the VA granted the supplemental claim.

If the proposed bill is enacted without a change in language to clarify this matter, and VA continues to insist that a claimant must choose between an appeal to the CAVC and a supplement claim under Section 5108 in order to preserve the date of filing the initial claim as the potential effective date, this matter will inevitably have to be resolved by the federal courts. Final judicial resolution would likely take many years. To be clear, we believe the VA's currently articulated approach is not consistent with the statute. But we also realize that it is difficult to predict how courts will resolve legal disputes. No matter how this legal dispute is ultimately resolved, during

the years this litigation is pending in court, there would likely be a significant disruption to the VA claims adjudication process and further delays experienced by VA claimants.

Congress should clarify this matter before passing this bill to avoid litigation and a disruption to the claims adjudication process. We suggest adding the following clarifying language. First, add the following to the end of line 17 on page 6 of proposed Section 5108:

> After a decision of the Board of Veterans' Appeals that disallows a claim, nothing in this title shall be construed to limit the right to pursue at the same time both (i) an appeal of such Board decision to the United States Court of Appeals for Veterans Claims under chapter 72 of this title, and (ii) a supplemental claim under this section seeking readjudication of the claim disallowed by such Board decision.

Second, on line 4 of page 8, redesignate subsection (a)(3) as subsection (a)(4) and add a new subsection (a)(3) containing the following language:

> (3) For purposes of subsection (a)(2), a claim is continuously pursued by filing a supplemental claim under section 5108 of this title within one year of a decision of the Board of Veterans' Appeals without regard to either (i) the filing under chapter 72 of this title of a notice of appeal of such Board decision or (ii) the final decision of the Court of Appeals for Veterans Claims under chapter 72 of this title.

It is contrary to the interests of justice and the pro-claimant process that Congress has created to require claimants to make a choice between filing an appeal with the CAVC and filing a supplemental claim with the RO within one year of the Board decision in order to preserve the date of filing the initial claim as the potential effective date. Each of these two options serves an entirely different purpose. Claimants appeal to the CAVC to correct a prejudicial legal error that they believe the Board made in disallowing the claim, such as a misinterpretation of the law or a violation of the statutory duty to assist by failing to provide the claimant with an adequate medical examination or medical opinion. Claimants file a Section 5108 claim for an entirely different reason. They file a Section 5108 claim in an effort to add positive evidence to the record so that the weight of the positive evidence is equal to or greater than the weight of the

negative evidence of record, in an attempt to convince VA that the claim should be granted even under VA's existing view of its legal requirements.

What VA seeks is to force veterans whose claims are disallowed by the Board to make an unfair choice between two options. Each choice alone has a potentially fatal consequence. If the veteran chooses the option of appealing to the CAVC, the veteran cannot add evidence to the record and is essentially limited to arguing that the Court should vacate and remand the Board's decision due to legal error. There is a fatal consequence if the Court upholds the Board's interpretation of law (as it does in approximately 30% of all appeals). The veteran's right to the date of filing of the initial claim as the potential effective date is lost forever. While the veteran may be able to file a Section 5108 supplemental claim with new and relevant evidence despite the Court defeat, VA's position is that success on that supplemental claim cannot validly lead to an award of benefits retroactive to the date of filing the initial claim that was disallowed by the Board.

On the other hand, if the veteran gives up the right to appeal to the CAVC by choosing the other option of filing a Section 5108 supplemental claim within a year of the Board decision, the veteran enjoys the benefit of being able to add new positive evidence to the record. But the VA's view of what the law requires will most likely be the same as the Board's view of the law when it disallowed the initial claim. Thus, the veteran must shoulder the burden of attempting to convince VA that it should award benefits under an unfavorable view of the law with which the veteran disagrees. Thus, the chance of success is obviously lower than it would be if VA was required to adjudicate the supplemental claim under the veteran's more favorable view of what the law requires.

To be clear then, under the VA's proposed approach, a veteran would need to decide between preserving his or her effective date by filing a supplemental claim or potentially correcting a legal error in the Board's decision through the judicial process. A veteran should not be put in such a position. The interests of justice and maintenance of the pro-veteran claims process that Congress has nurtured for decades should lead Congress to clarify the proposed bill by adding language that makes it plain that after a Board decision disallowing a claim, the veteran has the right to protect the date of filing the initial claim as the effective date by both filing an appeal with the CAVC to correct a prejudicial legal error made by the Board and filing a Section 5108 supplemental claim in an effort to convince VA that the newly added evidence shifts the weight of the evidence so that VA awards benefits even under its unfavorable view of its legal requirements.

III. The Need to Clarify the New Threshold Standard for a Supplemental Claim

The proposal lowers the Section 5108 threshold standard to require VA to readjudicate a claim that was previously disallowed. The proposal lowers the current standard of "new and material evidence" to "new and relevant evidence". It is important that the VA adjudicators, who can sometimes be overzealous, realize that the "new and relevant" standard is a minor hurdle. We therefore suggest that the word "minimally" be inserted before the word "relevant" on both page 2, line 3 and page 2, line 24.

Conclusion

Thank you for this opportunity to present our views, and we would be pleased to respond to any questions that Members of the Subcommittee may have.