

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement for the Record**

**Before the**

**House Committee on Veterans' Affairs**

**Concerning**

**Fulfilling Our Pact: Ensuring Effective Implementation of  
Toxic Exposure Legislation**

**December 7, 2022**

Chairman Takano, Ranking Member Bost, and members of the Committee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on effective implementation of the PACT Act.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 750 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans and families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits. In 2000, the U.S. Court of Appeals for Veterans Claims (CAVC) recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA members represent veterans before the Department of Veterans Affairs and the Board of Veterans' Appeals (BVA). Accredited attorneys continue to represent more appeals before BVA than any other service organization or listed category; in FY 2021, attorneys represented appellants in 23.2 percent of decided appeals. With agent representation included, that level reached 25.7 percent. U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2021* at 39 ([https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2021AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf)).

NOVA members also appear before the CAVC, the U.S. Court of Appeals for the Federal Circuit, and the Supreme Court, representing individual appellants and advancing veterans law in the process. As an organization, NOVA also advances important cases and files amicus briefs in others. *See, e.g., NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *National Organization of Veterans' Advocates, Inc., et al., v. Secretary of Veterans Affairs*, 2020-1321 (Sept. 20, 2022) (Federal Circuit invalidated knee replacement rule); *Arellano v. McDonough*, S.Ct. 21-432 (amicus) (case pending); *Terry v. McDonough*, CAVC 20-7251 (amicus) (case pending).

Pursuant to the Committee's stated oversight categories, we will focus on the following: (1) accurate and timely processing of disability claims and (2) information technology upgrades and automation of claims processing.

## **ACCURATE AND TIMELY PROCESSING OF DISABILITY CLAIMS**

The PACT Act established numerous new presumptive conditions for veterans. The benefit of establishing a presumption is that it eliminates the burden on a veteran to

demonstrate individual exposure and that the exposure was “as likely as not” the cause of the disease or disability for which the veteran seeks service connection. Under a presumption, if the veteran served in a particular location within the specified time frame, VA concedes exposure. If diagnosed with any related presumptive condition, that individual is entitled to service connection without further inquiry.

Generally, presumptions make it easier for VA to process and decide a claim, ultimately saving time and resources and delivering earned benefits to the veteran faster. Processing PACT Act claims is not inherently different from processing any other presumptive claim. If VA erroneously denies service connection in the first instance or grants the claim and assigns the wrong rating and/or wrong effective date, the veteran is then forced to continue with the decision review process, i.e., filing a request for higher-level review, a supplemental claim, or an appeal to BVA. **Once in the decision review process, absent eligibility for advancement on the docket, resolution for the veteran is delayed, sometimes significantly, while review is conducted in the lane chosen under the Veterans Appeals Improvement and Modernization Act (AMA).**

Proper processing of claims generally will result in smoother implementation of PACT Act claims specifically. Therefore, Congress must continue to monitor the progress of both the Veterans Benefits Administration (VBA) and BVA in (1) closing out the legacy system appeals and (2) properly adjudicating claims and appeals under the AMA. Below, we highlight several areas deserving of VA focus and continuing Congressional oversight and/or legislative action as PACT Act implementation proceeds.

- 1. VA must ensure the proper effective date is assigned for initial PACT Act claims AND for those pending claims/appeals that include a condition(s) that was deemed presumptive under the legislation.**

NOVA applauds Secretary McDonough’s decision to assign the enactment date of August 10, 2022, as the effective date for all PACT Act disability compensation claims filed within the first year of enactment and on the date of the initial claim thereafter. This decision not only allows deserving veterans to receive their earned benefits faster, it makes adjudication less complicated.

However, many veterans have long-standing direct service connection claims and/or appeals for conditions now recognized as presumptive. Many are likely entitled to an effective date for the now presumptive condition to the date of the original claim. Fortunately, the PACT Act, as well as other VA guidance, recognizes this scenario and emphasizes VA’s obligation to consider an earlier effective date. Specifically, the PACT Act states that nothing prevents the Secretary “from processing claims for benefits . . . for a condition or disease for which this Act establishes a presumption of service connection, as a claim for benefits for a condition or disease with direct service connection” and

further prescribes that the Secretary “shall not deny a claim for benefits . . . for a condition or disease for which this Act establishes a presumption of service connection because the claimant filed the claim prior to the effective date or date of applicability for that particular condition or disease.” *Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022*, Public Law 117-168, 136 Stat. 1785, § 407 (Aug. 10, 2022) (rules of construction). *See also Summary of Relevant Sections Applicable to the Veterans Benefits Administration (VBA) Public Law (PL) 117-168, PACT Act Interim Guidance 9* (Sept. 9, 2022); M21-1, V.ii.4.A.1.i, *Maximizing Benefits With Effective Date Determination* (“In some situations, different theories of entitlement allow for assignment of different effective dates. In such cases, consider each effective date rule when assigning an effective date and assign the most advantageous effective date that applies for the facts of the case.”).

NOVA members are reporting situations where veterans are receiving the automatic August 2022 effective date without due consideration of an earlier effective date based on an alternative theory of entitlement, even when their claims/appeals have been pending for years prior to the enactment of the PACT Act. VBA employees and Veterans Law Judges must consider whether an earlier effective date, to the date of the original claim, is warranted based on the specific facts of each claim or appeal. To ensure proper consideration and the assignment of the most favorable effective date at the outset – and to prevent these cases from unnecessarily adding to the backlog – VBA and BVA leadership must adequately train all employees, to include periodic follow-up training and quality control.

## **2. Problems with the VA examination process continue.**

Generally, adjudication of a PACT Act presumptive claim should not require a VA examination. However, an examination may be necessary in some instances. “When there is a claim for disability compensation or pension but medical evidence accompanying the claim is not adequate for rating purposes, a Department of Veterans Affairs examination will be authorized.” 38 C.F.R. § 3.326. And, of course, while PACT Act claims are being adjudicated, there are other claims being filed and decided that are not presumptive and are more likely to require examinations.

### **a. VA struggles to provide adequate exams.**

The CAVC has repeatedly emphasized VA’s role in obtaining examinations and ensuring those examinations are adequate. *See, e.g., McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (outlining when VA must obtain an examination); *Barr v. Nicholson*, 21 Vet.App. 120, 123 (2007) (when VA seeks an opinion, the Secretary must ensure it is adequate); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (adequate medical report must be based on correct facts and reasoned medical judgment).

During stakeholder discussions leading up to the passage of the AMA, NOVA testified on the importance of adequate examinations and the problems created when claims are sent back time and again for new examinations when the first examination or subsequent ones are deficient. Even with the 2019 implementation of the AMA, NOVA members continue to report a significant number of cases remanded due to inadequate examinations. Current BVA statistics confirm these reports.

Frequently, BVA orders a particular type of examination or provides specific instructions that are ignored by the examiner. Example: The veteran's claims for bilateral knee conditions were remanded back to BVA from the CAVC in 2020. BVA remanded in May 2021 and February 2022 for new medical opinions. In February 2022, BVA specifically ordered the VA examiner to address the veteran's competent lay statements regarding the history and chronicity of his knee symptoms. Because the VA examiner failed to comply with these instructions, BVA recently - yet again - remanded these claims for the examiner to comply with the order, adding untold months of waiting before the veteran receives resolution.

NOVA members report that confusing examination requests contribute to inadequate exams and deficient reports. Many times, the request does not match the veteran's claims or incorporate the remand instructions articulated by BVA or the CAVC. Sometimes, the request is not clear as to whether the veteran must appear for an exam or the examiner can write the report based on a record review. Without clear guidance, examiners burdened with large workloads are bound to conduct inadequate exams and write incomplete reports.

VA exams are conducted by Veterans Health Administration employees and, more often, by contract examiners. In a June 2022 report, the VA Office of Inspector General noted that “[r]esults of medical exams are critical pieces of evidence in supporting veterans’ claims for benefits, and the exams represent a significant investment by VBA.” Department of Veterans Affairs, Office of Inspector General, *Veterans Benefits Administration: Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions* i, June 8, 2022 (<https://www.va.gov/oig/pubs/VAOIG-21-01237-127.pdf>). The report found, among other things, that “[a]ll three vendors failed to consistently provide VBA with the accurate exams required by the contracts” and “vendor exam accuracy has not improved and exam errors have not been resolved.” *Id.* at 8; 10. Contract examiners must comply with the terms of their contracts and be held accountable when they fail to do so. Furthermore, contractors must correct errors and provide adequate examinations to reduce repeated remands, which result in continuing delay and backlogs.

**b. VA seeks additional development when adequate evidence of record exists.**

NOVA members also report that VA frequently orders additional examinations even when adequate medical evidence of record exists and a favorable opinion has been rendered. VA may not undertake “additional development if a purpose [is] to obtain evidence against an appellant’s claim.” *Mariano v. Principi*, 17 Vet.App. 305, 312 (2003). In some instances, NOVA members report the ordering of additional examinations that appear to be “tie breakers,” e.g., when there is a one negative and one favorable opinion. Such exams are in contravention of VA law and policy requiring adjudicators to grant the claim when the evidence is in relative equipoise.

Example: In February 2022, a VA contract examiner provided a favorable opinion on the veteran’s claim for service connection for an arthritic condition. Despite this favorable opinion, VA obtained a second set of exams, which were unfavorable, and VA’s denial made no mention of the first favorable exam. After a higher-level review, the claim was sent back for more development due to the “difference of opinion.” This time, the original examiner ultimately concluded the condition was “more likely than not” service connected. Nonetheless, VA denied the claim.

Furthermore, VA also routinely rejects favorable, well-rationalized, private medical opinions for improper/unlawful reasons, such as the examiner’s “failure to review the veteran’s claims file” or because the examiner’s opinion “was based on the history reported by the veteran.” The CAVC has repeatedly admonished BVA for rejecting favorable evidence for these reasons, yet these types of rejections continue to occur on a regular basis. *See, e.g., Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (Board may not reject a private medical opinion in favor of a VA opinion solely because the VA examiner reviewed the claims file); *Kowalski v. Nicholson*, 19 Vet.App. 171, 179-80 (2005) (Board may not disregard a medical opinion solely because the opinion was based on a history provided by the veteran); *see also Coburn v. Nicholson*, 19 Vet.App. 427, 432 (2006) (“[R]eliance on a veteran’s statement renders a medical report incredible only if the Board rejects the statements of the veteran.”).

**Generally, failure to fix the VA examination process will hinder smooth adjudication of PACT Act claims.** In July 2022, NOVA filed a statement in support of draft legislation before the Senate Committee on Veterans’ Affairs. This bill would ensure inadequate examinations do not adversely impact veterans’ claims, e.g., by prioritizing new exams and subsequent claims processing when a veteran has received an inadequate examination, by permitting reports of inadequate or unnecessary examinations to be removed from the veteran’s record, and by ensuring inadequate or unnecessary examinations are not used for adjudication, review, or litigation purposes. The House and Senate Committees on

Veterans' Affairs should take up such legislation in the 118<sup>th</sup> Congress and conduct ongoing oversight of the VA disability examination process.

**3. With the authorization to increase VBA staff, VA must provide ongoing, improved training of new and existing employees to ensure better comprehension and execution of claims adjudication procedures.**

On July 7, 2021, GAO publicly released a report entitled, *VA Disability Benefits: Veterans Benefits Administration Could Enhance Management of Claims Processor Training*. GAO-21-348 (June 2021) (<https://www.gao.gov/assets/gao-21-348.pdf>). GAO made several major findings in this report, to include the following: (1) VBA has not established performance goals or fully applied other leading practices to guide its training efforts; (2) VBA has not established links to goals or documented criteria to select training delivery mechanisms; (3) efforts to set minimum training requirements for instructors and monitor completion of all required training are incomplete; and (4) VBA has not comprehensively or systematically evaluated training effectiveness.

NOVA members report inconsistent adjudication on both a procedural and substantive basis, which reflects the training deficiencies cited by GAO, particularly as related to AMA procedures. These include, but are not limited to (1) denying supplemental claims due to a lack of “new and relevant” evidence when such evidence clearly has been submitted; (2) continuing confusion regarding AMA opt-ins from Supplemental Statements of the Case (SSOCs), with cases then being erroneously certified to BVA as legacy appeals; (3) failing to understand the claims stream, particularly when a case came through the Rapid Appeals Modernization Program (RAMP) pilot or was an AMA opt-in from an SOC or SSOC; and (4) a failure to properly preserve the correct and earliest effective date.

Inconsistent results, however, are not limited to AMA-specific issues. NOVA members report frequent legal errors that apply in either system, e.g., relying on the absence of evidence as negative evidence, failing to critically assess functional loss in increased rating orthopedic cases, and not properly identifying “inextricably intertwined” issues.

Given this most recent GAO report and VA's ongoing hiring efforts to staff the influx of new PACT Act claims, Congress should provide continued oversight of VA's training programs. Additional VA employees who are not properly trained will not improve the adjudication process.

**4. Without passage of H.R. 8736, GUARD VA Benefits Act, veterans will be charged illegal fees for assistance with PACT Act claims.**

In April 2022, NOVA testified at a hearing before the Disability Assistance and Memorial

Affairs and Oversight and Investigations Subcommittees, which addressed the issue of claims consulting firms with unaccredited employees. *At What Cost? – Ensuring Quality Representation in the Veteran Benefit Claims Process*, Apr. 27, 2022. As addressed at that hearing, in addition to violating 38 U.S.C. § 5904 by preparing claims without accreditation, the companies charge for initial claims, which is prohibited, and assess unreasonable fees.

With numerous benefits added as part of the PACT Act, there is more opportunity for such fees to be charged. For example, a veteran who signs a contract for preparation of an initial claim with one of these companies (which typically charge five to six months of the monthly benefit) and prevails on a new PACT Act presumptive cancer claim with a 100-percent rating could owe \$15,000 to \$18,000 to these unaccredited actors.

After the hearing, Representatives Pappas and Ellzey introduced H.R. 8736, in a bipartisan effort to reinstate criminal penalties to stop predatory practices such as these. This bill currently has 117 co-sponsors. Senators Boozman and Blumenthal recently introduced a companion bill. Congress should pass this legislation to ensure that veterans are not charged these illegal and unreasonable fees.

## **INFORMATION TECHNOLOGY UPGRADES AND AUTOMATION OF CLAIMS PROCESS**

### **1. VA IT systems, such as VBMS and Caseflow, must continue to be improved.**

When advocates request IT enhancements to make VA systems more user friendly and efficient for representatives, VA frequently responds that it must prioritize enhancements to favor delivery of benefits, payments, and services to veterans. The two are not mutually exclusive. Practically speaking, advocates need access to VBMS and other systems, such as Caseflow, to follow the adjudication process; therefore, robust systems are necessary to ensure veterans receive competent representation and obtain all earned benefits.

Competent representation, in turn, promotes efficiency within VA. VA should collaborate with representatives to make its systems more functional for advocates, as well as for VA employees. Example: VA frequently mislabels documents submitted by advocates to the Evidence Intake Center. VA should collaborate to ensure that logical, standard labels are used for documents, and provide a way for veterans and their advocates to alert VA to inaccuracies and/or correct them in VBMS.

### **2. VA must ensure automation includes human-driven quality review.**

VA is implementing Automated Decision Support. VA states that the goal of this program is to improve timeliness and efficiency in claims processing and prevent future backlogs.



As presented, this tool will create an Automated Review Summary Document (ARSD) for certain eligible claims by extracting key terms from specific documents in the eFolder and electronic health record. Draft examinations will be created as well. The ARSD will be visible to the veteran's accredited representative in VBMS.

Harnessing technological advances to improve adjudication of VA claims and appeals is a goal that NOVA supports. However, VA must ensure that any use of automation in the service of improving claims truly achieves that goal and human-driven quality review is an ongoing part of the process. NOVA appreciates VBA's transparency in sharing information about Automated Decision Support with the advocate community. Congress should continue oversight of these, and future, automation efforts.

### **CONCLUSION**

Thank you again for allowing us to present our views on PACT Act implementation. If you have questions or would like to request additional information, please feel free to contact:

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