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**STATEMENT OF
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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
HOUSE OF REPRESENTATIVES
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Chairman Coffman, Ranking Member Kirkpatrick and members of the Subcommittee:

On behalf of DAV, I am pleased to testify this afternoon on ways to improve the processes and outcomes for veterans who appeal incorrect and unfavorable claims decisions. In particular, the Subcommittee today is focused on the Board of Veterans' Appeals (BVA or the "Board") and I am pleased to discuss ways to improve its operations for the benefit of veterans and other appellants.

As the nation's largest veterans service organization (VSO) comprised completely of wartime disabled veterans, DAV is leading the way in providing free assistance to veterans and their families in filing both claims for benefits as well as appeals. In 100 offices throughout the United States and in Puerto Rico, DAV employs a corps of approximately 270 National Service Officers (NSOs) and 34 Transition Service Officers (TSOs) who counsel and represent veterans and their families with claims for benefits from VA, DOD and other government agencies. All of our service officers are themselves wartime disabled veterans who have personally gone through the claims system as well as being thoroughly and continually trained on all of the laws, regulations and procedures of VA's claims adjudication system.

For thousands of veterans each year whose claims were not allowed, or who believe their rating or effective dates are not correct, our team of National Appeals Officers (NAOs) also offers free assistance. DAV's NAOs have previously worked as NSOs to gain experience within Regional Offices (ROs) providing claims and appellate assistance at the local level. Our NAOs have the distinct advantage of being at ground level where all appeals arising from regional office determinations ultimately end up. They are highly trained to prepare written briefs and assist veterans and their family members at formal hearings before the Board.

DAV's National Appeals Office has the highest share of the appellate workload at the BVA, representing 13,381 appellants, close to 30% of the Board's inventory. From October 1, 2013 through July 31, 2014, DAV NAOs obtained 4,017 allowances for benefits sought, 6,138 remands for additional evidentiary development and in 2,605 appeals, denials were upheld by the Board based on prior denials adjudicated at the regional office level. Based on our success, demonstrated competency and capabilities, our NAOs are regularly

consulted and included in discussions and initiatives designed to identify practical and innovative solutions for appeals awaiting their turn in line for review before a Veterans Law Judge (VLJ) at the Board.

Traditional Appeals Process to the Board

In order for an appeal to arrive at the BVA for consideration before a VLJ, an appellant would have exhausted all appellate remedies made available to them at the regional office level. The Notice of Disagreement (NOD) would have been filed within one year of the rating board decision, a Statement of the Case (SOC) would have been issued, the appellant would have completed a VA Form 9 or equivalent within 60 days of the SOC being issued, the appellant may have elected a hearing before a Board member and when the file is certified as being ready for shipment to the BVA for their review, the case would be routed to BVA. In addition, if the veteran submits additional evidence at any time during the appeal process after the SOC has been issued, the VBA may be required to issue a Supplemental Statement of Case (SSOC). The certification process (Form 8) is VBA's practice of ensuring that all procedures have been followed to avoid a remand before a case is sent to the BVA for review and decision.

Although the length of time varies greatly due to circumstances both within and outside the control of VBA, BVA or the veteran, typically it can take anywhere between two to three years from the time a veteran files an NOD until the time VBA certifies the Form 8 to the Board. From the time the Board receives the Form 8 certification, it can take anywhere from one to two years before a VLJ reviews the appeal and issues their determination, depending on whether there will be a hearing and what manner of hearing is requested. If the appeal is remanded, such as for procedural errors or incomplete evidentiary records, it can add several months or even years to the overall process before reaching finality on all issues pending before the Board.

Currently there are over 300,000 "appeals" of claims decisions (NODs filed) in the system, but only about 40,000 that have been certified to the Board for their review and decision. The others are still at VBA awaiting SOCs, local reviews, hearings, development, and certification or for other reasons. Although VBA has made significant progress in addressing the pending backlog of claims awaiting decisions through its multifaceted transformation initiatives underway, the volume of pending appeals remains a staggering problem that will require the support, cooperation and collaboration of all stakeholders.

Getting Claims Decisions Right the First Time

Mr. Chairman, the single most important action that VBA can take to address the backlog of pending appeals is to complete its transformation and reform of the claims process. Quite simply, VBA must perfect a system based on the premise of getting each claim decision right the first time. As the error rate goes down, and as confidence in the claims process increases, the percentage of claimants who go on to become appellants is expected to decrease. However, as VBA increases its productive capacity the number of completed claims increases, so there may still be an overall increase in the number of appeals even if the accuracy rate continues to climb because correct decisions can be appealed when they are unfavorable to the claimant.

Furthermore, the length of time it takes to receive a decision and the content of the decision letter can have an influence on the number of appeals filed. Veterans forced to wait up to a year or longer to get an initial decision are probably less likely to have confidence in that decision, particularly when it's denied, than if their claim was decided within a reasonable timeframe that was promised to them. Similarly, the current format of claims decisions, Simplified Notification Letter (SNL) program, too often contains insufficient information to allow veterans and their representatives to fully understand the rating decision, to be certain what evidence was considered, or to know what reasons and bases were used to reach decisions. Without sufficient understanding or confidence in that decision, veterans and their advocates are more likely to pursue appellate options to ensure they have correct decisions on claims.

While we certainly support the use of rules-based decision support tools to simplify the task of composing decision letters, VBA must not use technological automation if it eliminates essential information or explanations to fully inform veterans in their claims' decisions. Raters should provide detailed, plain English explanations of their decisions not only to better inform veterans (and their representatives) but also to produce better-reasoned and more accurate decisions by the raters themselves, and therefore likely fewer appeals.

Local Appeals Processes Can Lead to Quicker Decisions

After a veteran determines that they want to appeal a claims decision, they must notify VBA by filing a timely NOD. Upon receipt of an NOD, VBA will issue what is referred to as an Appeals Election Letter (AEL). This letter, along with requesting information relative to the availability of additional medical evidence, will ask the veteran or their representative to choose between two separate appellate review processes that determine the type of the review the appeal will undergo.

For less controversial issues, where there may be a lack of merit or lack of available evidence, the traditional appeal review process may be recommended but other times the Decision Review Officer (DRO) post determination review process will be recommended. The DRO process can often be the more comprehensive and effective means to resolve appellate-related disputes at the local level.

The importance of the DRO review process cannot be overstated since a DRO has "de novo" authority, meaning they review the entire appeal—the entire case file—with no deference given to the rating board decision being contested. A DRO can overturn or uphold a previous decision on any issue, request or facilitate a hearing to gather additional evidence, or perform any administrative function available to VBA to assemble additional evidence necessary to make a well informed decision, including ordering any medical examinations deemed appropriate. Many times a procedural course of action can be guided by the recommendations of the veteran's advocate, working in conjunction with a DRO to provide the appellant with best possible outcome on the issue(s) under appellate consideration. A DRO has essentially the same administrative authority as that of a Veterans Law Judge presiding on behalf the BVA.

It is important to note that having the ability to resolve appeals at the local level can lead to awarding benefits sought earlier in the appeals process, rather than requiring review

by the BVA, a process that can take years. In addition, even if a DRO is unable to grant the benefit sought on appeal, any additional development work performed during that review could have the effect of limiting the need for the BVA to perform similar administrative actions and potentially shorten the time required to produce a decision. The local review process also can reduce potential remands that would otherwise have been made by a VLJ.

Mr. Chairman, over the years, DAV and other VSOs have continually voiced concerns to VBA and Congress regarding the erosion of the DRO program. The number of DROs around the country is insufficient for the amount of DRO work generated in regional offices. More concerning is the assignment of normal claims processing work to DROs at numerous regional offices for some or all of their time. While the tremendous focus and efforts aimed at eliminating the pending backlog of claims is understandable, having DROs perform claims processing work when there is more than enough appeals work pending is merely shifting the weight of the backlog from one area to another. We recognize that VBA is under tremendous pressure from both within and without to end the backlog by 2015, but it does not benefit veterans generally if the front end of the process is upgraded while the back end is being degraded.

While we have been told that VBA leadership has sought to limit or eliminate the use of DROs to perform claims work, our observations indicate it continues in a significant number of regional offices. Just a couple of months ago, DAV asked our NSO Supervisors to report whether, when and how often the DROs in their regional offices performed claims processing work rather than appeals work. More than half said DROs were working on claims during regular business hours and over two-thirds said DROs did claims work on overtime. Importantly, over two-thirds of those who said their DROs were working on claims said that it had a negative effect on the RO's local appeals resolution and certification to the Board. I would also note that our NSO Supervisors said that in their opinion when DROs were doing appeals work, the DRO process at their RO functioned effectively and was helpful in resolving appeals locally, underlying our strong support for this program.

While we understand that ROs have limited resources but not limited claims, it is imperative that VBA ensure that the DROs focus solely on appeals work. If additional personnel are required to process pending and future claims work in a timely manner, ROs and VBA must request additional resources, not repurpose DROs.

Sufficient Resources at the Board

Unquestionably the availability of sufficient resources, primarily staffing, is one of the most critical factors affecting the length of time it takes to properly process and decide an appeal. More attorneys can review more appeals, and more VLJs can issue more decisions. Based on historical trends, the number of new appeals that go to the BVA has consistently averaged approximately 5 percent of all claims received, even as error rates have risen and fallen over the years. As referenced above, some number of veterans who receive unfavorable decisions will appeal them regardless of the accuracy or quality of their claims decision, and therefore the number of appeals sent to the Board is expected to continue rising in the future.

Over the past couple of years, BVA has made significant increases to its staffing levels, though not necessarily sufficient to match increased workload. BVA had been

authorized to have up to 544 full-time employee equivalents (FTEE) in FY 2011, but its appropriated budget could support only 532 FTEEs; in FY 2012 that number was further reduced to 510. However, since then, Congress boosted BVA's appropriations to allow for staffing to increase by more than 25%, topping 650 FTEE this year. It will take some time for new attorneys to be fully trained and integrated, but the Board expects to set records for productivity this year to match its increased personnel size. One issue that still remains unresolved is how BVA will provide adequate work space for all of its newly hired staff.

New Initiatives to Improve the Appeals Process

“Rocket Docket”

While expanded resources are increasing productivity, BVA is also exploring ways to increase efficiency, such as the initiative known as the “Rocket Docket,” which operated from November 2013 through May 2014. BVA's “Rocket Docket” initiative was an effort to avoid having appeals languish for years before finally being reviewed at the Board, only to be remanded for reasons that could have been anticipated if the file had been briefly reviewed earlier in the appellate process.

Under the “Rocket Docket” program, cases that met certain criteria were screened outside of their normal docket order, their place in the standard line, in order to see if they would ultimately be remanded once their normal docket date was reached. This process permitted BVA to order additional development earlier in the process, thereby allowing quicker outcomes for veterans, while maintaining the original docket order for each appeal.

“Rocket Docket” remands for additional development of evidence could follow one of three main paths, each of which could be beneficial for veterans. First, after procuring the additional evidence, the Appeals Management Center (AMC) or RO could issue a new and a favorable decision for the veteran, which could be months or even years sooner than a Board decision. Second, the AMC or RO could complete the remand-ordered development prior to the docket date of the appeal, thus preventing further delays that would have been necessitated if the remand occurred at that time. This also would save the veteran time in receiving a Board decision. Third, even if the AMC or RO did not complete the required development by the scheduled docket date, they would still be further ahead in that development work than if they waited for the remand on that date.

During the “Rocket Docket” initiative, BVA would identify cases that met the screening criteria and refer them to the DAV National Appeals Office. Although BVA made preliminary determinations that a case may be remanded, DAV National Appeals Officers nevertheless examined the case and provided written arguments either seeking a decision on the appeal without remand based on the merits of the appeal, or entered an argument to support a remand for necessary development when deemed appropriate as the best means to ensure a fair, adequate and well-reasoned decision.

Overall, the “Rocket Docket” appears to have been a benefit for veterans. BVA estimates that out of approximately 4,700 appeals screened by Board attorneys during the seven months of this program, approximately 1,100 appeals meeting the “Rocket Docket” criteria were remanded. Of those, roughly 300 appeals were ultimately resolved at the local level eliminating return to and additional review by the Board. The other approximately 800

appeals were returned to the Board and await their regularly scheduled docket date, but they are more fully developed and less likely to require further remand.

One other effect of the “Rocket Docket” program would appear to be a reduction of some of BVA’s metrics for appeals waiting and resolution times, since appeals are taken off BVA’s clock when remanded back to VBA, only to start a new clock once returned. Since at least some veterans actually received decisions on their appeals more quickly through local resolution, such reductions in time measures are at least partially legitimate, though such measures only tell part of the story. One concern that we would have is if BVA misused the “Rocket Docket” to remand appeals that had sufficient evidence for an allowance, despite potentially missing evidence or procedural omissions. However, since only about 22% of appeals screened under the “Rocket Docket” program were remanded, compared to almost 45% of appeals that are generally remanded, we have not seen any evidence that such misuse of remands occurred in this initiative.

“Fully Developed Appeals”

Mr. Chairman, for a number of months, a group of leading VSOs—which includes DAV, The American Legion, Veterans of Foreign Wars, AMVETS, Vietnam Veterans of America and Paralyzed Veterans of America—has been discussing potential new initiatives that could help improve the appeals process and outcomes for veterans. During this time we have had frequent discussions with leaders at the Board and at VBA as we have worked to reach consensus among the various stakeholders on proposals that could help veterans get quicker and more accurate decisions, while also reducing the workload and burden on the Board and VBA’s AMC and regional offices. After multiple discussions and consultations, we have found consensus around a proposal modeled after the fully developed claims (FDC) program.

This new proposal, which we are calling the “fully developed appeals” (FDA) program, is built upon the same general construct as the FDC program: require the veteran (or appellant in our proposal) to assume responsibility for gathering all private evidence necessary for the appeal; eliminate some steps and work required by VBA and the Board; and in return provide the veteran a significantly quicker decision with no diminution in the quality or accuracy of that decision.

As discussed above, a claimant currently has two basic options to appeal an unfavorable claims decision: traditional appeal to the Board or DRO review. The FDA would become a third option that the claimant could choose during the NOD phase. An FDA could be elected at any time during the one-year period in which they have to file an NOD. When the veteran makes the FDA election, they would be required to submit any and all additional evidence they want considered as part of their appeal and any argument to support their appeal. They would also be required to certify that they have been fully informed about the FDA program, that they understand what they are required to do and not do, what VBA and the Board are required to do and not do, and that they consent to voluntarily filing their appeals in this program.

With this certification, the veteran’s claims decision and complete file—supplemented by any new evidence or argument submitted by the veteran or their representative at the filing of the FDA—would be transmitted directly to Board and placed on a specially created FDA

docket for date-ordered review and decision after any additional argument submitted by the claimant's representative at the Board. Unlike the traditional appeal process, there would be no SOC created and issued, no Form 9 to complete, no local RO hearings or reviews, no Board hearings, no SSOCs, and no Form 8 certification process. The elimination of these steps alone could save two to three years of processing at the RO compared to a traditional appeals process. Once the FDA is received at the Board it will be routed to the appropriate VSO representative at the Board, if any, for their review and any additional comment, in the same manner as appeals being advanced on the docket.

Similar to the FDC program, the FDA program would require the veteran to certify that there is no additional private evidence relevant to the appeal under consideration and that if the veteran later submitted additional evidence after the date of filing, the appeal would be kicked out of the FDA program and returned to the traditional appeals process. The veteran could also withdraw the appeal from the FDA process at any time for any reason. The Board, however, would still be required to develop for any federal evidence, exams or independent medical evaluations determined necessary for the Board to make their decision. This same general principle of federal development is central to the FDC program as well.

It is important that the FDA program be a time-limited pilot program in order to provide Congress and stakeholders the ability to oversee the program's design, implementation and operation. It must be authorized by statute and contain sufficient details about the critical elements of the proposal to ensure that veterans rights are fully protected.

It is also important to understand that this proposal is not a "magic bullet" that will eliminate the backlog of pending appeals; it is designed to be another option—one of many for veterans seeking to overturn an incorrect or unfavorable claims decision. As discussed above, VSOs continue to strongly support the DRO process; the FDA program is neither a substitute nor replacement for it. It is our expectation that each individual veteran and their representative, if any, will consider this and all other options to determine the most effective and timely process to resolve their appeals.

Mr. Chairman, there are still details of this proposal that will need to be fully flushed out and considered, but that can only occur as legislative language is drafted and reviewed by all stakeholders in this process. To accomplish this, we have reached out to the Committee staffs of the Chairmen and Ranking Members in both the House and the Senate and hope to work collaboratively with all stakeholders as quickly as possible to move this process forward. Although we have not formally received any opinion on this proposal, based on the extensive conversations we have had with leaders at both VBA and the Board, we expect they will be supportive of this proposal.

I also want to note that in developing this proposal we greatly benefited from the work done by Congressmen Beto O'Rourke and Paul Cook -- both members of the VA Committee and both sponsors of H.R. 4616, the Express Appeals Act. Although we did not build or base our proposal solely on that legislation, and there are differences that are important to us, the FDA proposal was informed by their work and strengthened by conversations with their staffs, as well as with the staffs of both Committees.

Focus on Outcomes for Veterans, Not Metrics for BVA

Finally, Mr. Chairman, in evaluating and reviewing the appeals process, it is imperative that we remain focused on outcomes for veterans, not just metrics for the Board, VBA and their employees. There is an expression popularized by Mark Twain that best illustrates the danger of relying solely on numerical metrics for substantive evaluations. Twain said that, “there are three kinds of lies: lies, damned lies and statistics.”

Any data can be arranged or interpreted in many ways, depending on the purpose, experience and expertise of the individual reporting it. When the measure of a program’s success is limited only to easily quantifiable data and metrics, the true purpose of the program can easily be lost behind a flurry of activities to achieve required numerical goals. Unfortunately, this is exactly what happened in the VA health care waiting times crisis, as the metric of “waiting times’ became the goal, instead of the true purpose of ensuring the best health care outcomes for veterans. With this in mind, it is imperative that neither VBA nor the Board be evaluated only by measures of waiting times, cycle times, backlogs or other productivity metrics. Furthermore, It is essential that the entire claims and appeal process be considered in any evaluation, since all parts either contribute or influence the final decisions for veterans. In the end, the only outcome that truly matters is whether and how quickly a veteran can be awarded all the benefits that he or she has earned through their service and sacrifice to this nation.

Mr. Chairman, that completes my testimony and I would be happy to respond to any questions you or the Committee many have.