

**STATEMENT OF
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ASSOCIATE EXECUTIVE DIRECTOR OF VETERANS BENEFITS
PARALYZED VETERANS OF AMERICA
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
CONCERNING
ADJUDICATING VA'S MOST COMPLEX DISABILITY CLAIMS: ENSURING
QUALITY, ACCURACY AND CONSISTENCY ON COMPLICATED ISSUES**

DECEMBER 4, 2013

Chairman Runyan, Ranking Member Titus, and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our views on the adjudication of VA's most complex disability claims to ensure quality, accuracy and consistency on these complicated issues. PVA has a unique expertise in dealing with complex claims because PVA members have complex disabilities as a result of spinal cord injury or dysfunction.

The Department of Veterans Affairs (VA) has fully deployed its new processing model for disability compensation claims, called the Veterans Benefits Management System (VBMS), in order to reduce the number of backlogged claims. This paperless processing model places an emphasis on expediting claims where the supporting documentation is fully developed by the Veteran. But the success of VBMS greatly depends on the process design, like rules-based processes, and supportive technologies like Special Monthly Compensation (SMC) calculators, that undergird the system. Unfortunately, rules-based systems treat all veterans the same and can be flawed by imperfect rulemaking and application. This is the challenge for a rules-based computer system; it does not have the human interaction to fully understand the circumstances of a specific injury. The numerous issues faced by veterans with catastrophic injuries create a complex set of outcomes that cannot be easily reconciled by logic-based systems that cannot appreciate nuance in disability assessments. Calculators used in rules-based systems historically fail to compute the right ratings for persons with multiple issues. This type of decision analysis uses decision trees that attempt to enable the rater to simplify and resolve complex questions. This technique, however, can be problematic when the analysis involves highly qualitative assessments that are reduced to binary choices.

This processing model also handles claims for veterans who have unique circumstances, such as financial hardship, homelessness, or serious injuries or disabilities in special “segmented lanes.” The problem is the growth in the number of claims considered “complex” since September 11, 2001. Complex claims, according to VA, are characterized by the number of issues per claimant filed, which has doubled to 8.5, when

compared with claims from past wartime eras. Also of significance, of the 47,814 complex claims currently in the VA inventory, over half are backlogged. In fairness, this number has steadily decreased over time. But they still take too long to adjudicate in many cases, particularly for our members with terminal ALS.

PVA has developed the unique expertise in dealing with complex claims because PVA membership is predicated on having one of the most complex disabilities one can have: spinal cord dysfunction, whether due to injury or disease. This can occur due to trauma, ALS, MS, and other debilitating causes, and often manifests in both primary and secondary residual losses throughout the bodily systems, including the often under regarded “invisible” aspects of injury like mental impairment, need for attendant care, and helplessness. Complex claims in this regard go beyond the mere number of issues.

Accurately rating these losses for claim purposes requires expertise in neurology, physiatry, urology, psychiatry, and other specialty areas. But during Compensation & Pension (C&P) examinations, it is common to see a general practitioner authoring medical opinions on etiology, nature and extent of dysfunction and cumulative effect of separate yet concurrent disabilities. This is not a problem when the examiner devotes enough time to understanding the disability and its nuances before rendering a conclusion. However, this is not always the case. As a result, when these opinions result in lower ratings than the veteran should have, the ensuing debate takes on a subjective hue when the regulations alone do not persuade a decision reversal.

While VBA has instituted an evaluation system that assigns greater weight to complex claims, these claims are often too esoteric for journeyman raters, full of embedded issues and ambiguities both legal and medical that lead to errors. Moreover, these issues do not lend themselves exclusively to rules-based analysis without inductive, common sense reasoning in many cases, such as reasonable doubt provisions, which seems to have slowly disappeared from training and guidance for new raters. However working these cases requires a combination of experience and open-mindedness to do so correctly.

For example, in one PVA case a veteran with ALS submitted evidence supporting a higher rating for Special Monthly Compensation at the R-2 rate from his treating physician, thus verifying his need for skilled care in his home. Despite substantiating his need with credible medical documentation, he had to subsequently submit to a C&P exam at the VA's direction where the examiner concluded he did not need skilled care on a daily basis because he had little movement. Not only did the examiner improperly contemplate movement as a basis for determining need for care, VA misapplied its own regulation on resolving doubt when two expert opinions conflict. When common sense is applied, there is little doubt on the question of whether a veteran with terminal ALS, an incurable, quickly debilitating condition with foreseeable, inevitable consequences, needs skilled care. This case out of the San Diego VA Regional Office illustrates what happens when a profoundly complicated set of disabilities, a lack of expertise, subjective interpretation of regulations, and rules that do not allow for a "common sense override" option collide in a veteran's claim. In this instance, the veteran presented enough evidence from his VA clinician, yet VA still required a VA examination per inflexible VA

guidance in such cases (see M21-1MR Part IV, Subpart ii, Chapter 2, section H). While PVA commends the Veterans Benefits Administration (VBA) for implementing such initiatives as the Acceptable Clinical Evidence option, which allows a rater to decide based on the record in lieu of a C&P exam, this has not taken root system-wide and needs to be.

It would also help to eliminate redundancies such as unnecessary C&P exams that either corroborate the evidence of record or create arbitrary bases for denying a claim. PVA has long criticized VA's overuse of C&P examinations particularly when the evidence of record already substantiates the claim. These exams attempt to provide a snapshot of complex disabilities based on cursory review of the medical history and templates, called Disability Benefits Questionnaires (DBQs), that ask a lot of questions but not always the right ones. For example, "Need for higher level of assistance" is not asked on the ALS DBQ, even though the terminal nature of disease makes constant need for specialized care likely in virtually every case. And with the addition of rules-based calculators that make C&P exams a mandatory step in many instances, these incorrect decisions are given the patina of unassailable faultlessness. PVA is on record stating that rules-based calculators and processing are not conducive to accurate analysis where complex claims, as we describe them, are concerned. They can be adequate starting points. But these claims require experienced raters who, for example, would not conclude that a veteran who can barely stand up due to lost "useful" function should be rated the same as a veteran who can walk but with difficulty. Or that a veteran with paraplegia cannot be

considered in need of aid and attendance because he manages his neurogenic bowel and bladder and dresses independently thus no longer functionally disabled.

Experienced raters, not algorithms, best factor in the nuances of special monthly compensation and areas of subjective interpretation that can lead to an incorrect decision. For this reason, as we asserted in June 2012 hearing testimony, reducing the backlog through the use of technologies cannot come at the expense of accurately rating the most complicated claims in the inventory. This is why PVA trained its service officers to fully develop a claim long before VA idealized the Fully Developed Claim concept. Our service officers know what questions to pose to an examiner, how to reconcile the medical and legal ambiguities, and how to draw a path toward entitlement for the rater from the time the claim is filed. But not every rater, particularly the new ones, can or feel empowered to see past the inflexible rules and seemingly indisputable C&P examinations enough to question or deviate when necessary.

Perhaps that is how it has to be in the grand scheme of the entire backlog and we understand that rules are critical to organizational success. But the exceptions are the rule for PVA. A veteran with terminal ALS died in hospice while his claim was pending before a "Special Ops" lane coach because he needed a DBQ despite the fact that the evidence of record supported entitlement. A utilitarian system that successfully delivers benefits to one million veterans, but overlooks the most vulnerable, is inconsistent with moral obligation derived from Lincoln's promise to those who served our country. As VA celebrates the success in reducing the backlog through the use of new technologies and

innovative processes, more attention now needs to shift toward developing strategies for adjudicating complex claims more timely and accurately.

PVA believes there are several things that can be done to improve support to veterans needing SMC:

- SMC cases should be assigned only to the most experienced raters and VA must ensure that new raters are properly trained on SMC and its applicable regulatory doctrines.
- VA needs to allow for the application of a "common sense" override when rules-based processes limit or preclude necessary subjective analysis such as reasonable doubt or the weight/credibility of evidence, or fail to reconcile ambiguities in the medical evidence or legal applications
- It is critical that if denial of a complex claim is predicated on a C&P exam, particularly in cases of terminal illness or catastrophic disability, the reasons and bases must detail how the weight of all evidence was assigned, whether reasonable doubt applied or not, and whether the acceptable clinical evidence option was considered in lieu of ordering a C&P exam.
- VA must expand acceptable clinical evidence (VHA Directive 2012-025) for nationwide implementation.
- And finally, VA must ensure the rules-based process allows for and encourages the application of 38 CFR §3.102, which defines "Reasonable doubt" doctrine. Accordingly, "When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant.

Reasonable doubt means one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim." (Authority: 38 U.S.C. 501(a))

Historically, due to the nature of our catastrophically disabled membership, PVA has been the subject matter expert for claims involving multiple injuries or conditions. PVA has enjoyed the privilege of providing VA with help in field studies and advice on processes that best meet the unique needs of veterans with catastrophic injuries. PVA National Service Officers have even participated in the training of VA claims processors. This valuable service has tremendously benefited both organizations and illustrates an important, enduring partnership. PVA's success in claims processing has been due to diligence in training our service officers and in understanding the challenges faced by those with the most complex of cases. VA must do the same. Data processing is no substitute for education, training and understanding. We fear that as VA continues to aggressively look to reduce the backlog, complex claims may move further behind. While advances have been made in processing these claims for those most needing, we caution the Subcommittee and VA not to become too satisfied with their own success to not see those still left behind. PVA looks forward to continuing to make VA aware of the need to keep complex claims in the forefront and to ensure they are properly and quickly adjudicated, particularly as they impact our most catastrophically injured veterans.

This concludes my testimony. I will be happy to answer any questions you may have.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2013

National Council on Disability — Contract for Services — \$35,000.

Fiscal Year 2012

No federal grants or contracts received.

Fiscal Year 2011

Court of Appeals for Veterans Claims, administered by the Legal Services Corporation — National Veterans Legal Services Program— \$262,787.

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Sherman Gillums Jr. is the Associate Executive Director of Veterans Benefits at Paralyzed Veterans of America. He has extensive experience in veterans' benefits and health care, beginning his veteran advocacy career in 2004 as a PVA National Service Officer at the San Diego VA Regional Office. He had also served as a member of PVA's National Field Advisory Committee and an Appellate Representative at the PVA National Appeals Office in Washington DC.

In 2011, Mr. Gillums assumed his current position. Since his appointment, he has given voice to PVA's constituents in media, including CNN and Al-Jazeera, and on a number of important committees including the Federal Advisory Committee for Prosthetics & Special Disabilities, the VA Integrated Products Team, and the VA Schedule for Rating Disabilities revision working group. He also authored a number of articles on veterans' benefits and employment for the 2013 VA *Independent Budget*.

Mr. Gillums completed his 12-year military career as a Chief Warrant Officer 2 in the United States Marine Corps after suffering a spinal cord injury in 2002. His personal decorations include the Navy/Marine Corps Commendation Medal (with gold star in lieu of second award), Navy/Marine Corps Achievement Medal, and Global War on Terror Service Medal. He earned his Master's Degree in Global Leadership from University of San Diego in 2010.

He is married to his wife, Tammie, and lives in Virginia with their children.