



**TESTIMONY OF  
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BEFORE THE  
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL  
AFFAIRS  
COMMITTEE ON VETERANS AFFAIRS**

**U.S. HOUSE OF REPRESENTATIVES**

**“BEYOND TRANSFORMATION: REVIEWING CURRENT STATUS AND  
SECONDARY EFFECTS OF VBA TECHNOLOGY”**

**FEBRUARY 5, 2014**

Chairman Runyan, Ranking Member Titus, and Members of the Subcommittee:

Thank you for holding this hearing relating to VBA technology, and for inviting Wounded Warrior Project (WWP) to provide testimony.

As an organization that works daily with wounded warriors, to include advising and assisting them in securing VA benefits to which they are entitled, we believe we can provide a helpful perspective to your inquiry this morning.

WWP recognizes and appreciates the advances technology can bring to claims adjudication. All of our benefits staff gained adjudication and advocacy experience in an era of paper-filled claims files and manual processes. Yesterday’s development and adjudication processes are not a model for the 21<sup>st</sup> century, and it would be foolish for us to insist that VBA roll back the changes it has instituted and cling to last century’s processes and systems. But as VBA continues to build

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out streamlined, technologically-based systems and capabilities, it must also be mindful of those it serves.

VA's troubled experience with a longstanding claims backlog is an inescapable reminder of the need for changes. The backlog has certainly highlighted both inefficiencies in the system and opportunities for shrinking that backlog through smart use of technology and streamlining. Certainly the system should become much more efficient. But efficiency is not an end in itself. Fundamentally, this system must serve veterans who have incurred disability in service.

And even as the computer and internet-based tools have largely become the predominant mode of communication and commerce, they are not necessarily the means by which each of our veterans communicate or transact business. Some wounded warriors do not have ready access to this technology, some may not be computer-literate, and some may be anxious about or otherwise uncomfortable with using these technologies. It may not “optimize efficiency,” but VBA must accommodate those warriors, not the other way around.

Let me provide some context to amplify the point, by reference to our most recent annual survey, which is based on almost 14 thousand responses (more than 50% of the nearly 27 thousand wounded warriors we surveyed).<sup>1</sup> Nearly all respondents (98.7%) reported that they experienced at least one injury during their post 9/11 service. Almost 60% of these warriors' injuries resulted from blasts, including IEDs, mortar, grenades, and bombs. The survey showed that the most commonly reported injuries were PTSD (75%), anxiety (74%) and depression (69%). More than 44% reported traumatic brain injury (TBI). Among those reporting multiple injuries or health problems, more than two-thirds reported between three and seven injuries or health problems.<sup>2</sup>

My staff and I have found that some warriors who have sustained invisible wounds, like PTSD, anxiety, and TBI have comprehension-difficulty with, or experience anxiety or a high degree of frustration with computer technology. It is also not unusual for warriors with these conditions to have higher levels of concern with, or even serious anxiety relating to, information-security. The recent data-breach on VA's e-Benefits website<sup>3</sup> will very likely heighten that concern, perhaps irreversibly.

We raise these examples to highlight a point. This system must meet these veterans where they are. Even as technology provides VBA the means to do its work with greater efficiency, its highest obligation must be to the veteran. It would follow that VA must accommodate those

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<sup>1</sup> Franklin, et al, 2013 Wounded Warrior Project Survey Report, July 2013.

<sup>2</sup> Id.

<sup>3</sup> See J. Hicks, “VA software glitch exposed veterans' personal information,” Washington Post (Jan. 22, 2014), accessed at <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/01/22/va-software-glitch-exposed-veterans-personal-information/>

who, for whatever reason, cannot or choose not to, employ that technology in filing or appealing claims, even at some modest cost to peak “efficiency.”

Such a principle would seem beyond question in a system long celebrated for its pro-claimant, veteran-friendly policy. But a recent VA notice of proposed rulemaking, “Standard Claims and Appeals Forms,”<sup>4</sup> (hereinafter, “the NPRM”) would abandon a core tenet of that policy.

VA would eviscerate “current rules [which] are meant to minimize the burden associated with initiating a claim, and allow benefits to be paid from the earliest possible date if the claim is ultimately granted.”<sup>5</sup> At the heart of the current system is VA’s longstanding acceptance of an “informal claim” for benefits, that is, “[a]ny communication or action, indicating an intent to apply for one or more benefits.”<sup>6</sup> VA now proposes to redefine what is meant by a claim for benefits. While 38 C.F.R. sec. 3.1(p) currently defines the term “Claim-Application” to include an “informal communication in writing...”, that “informal communication” would no longer be recognized as a “claim,” under VA’s proposal. Instead, VA would require all claims to be filed on standard forms. It proposes to “incentivize” submission of claims to facilitate efficient processing by establishing new rules governing effective dates of awards that for the first time would draw a distinction between “electronic” and “non-electronic” claims. VA’s rule changes would actually penalize veterans who do not submit claims online.

We offer an illustration of how these proposed rules would work. A warrior who suffered multiple injuries from an IED explosion might have difficulty with the question on VA’s application for compensation, Form 21-526, that asks for a listing of specific disabilities, and might instead simply answer “multiple injuries.” VA would likely deem that an “incomplete claim.” Under the proposed regulation, if the veteran had submitted that claim electronically, VA would allow the veteran to preserve the filing date as the effective date for an award of benefits. But if the veteran had submitted that same incomplete claim on paper, he or she would be penalized. Instead of allowing the veteran that early effective date, VA would defer the effective date until the claim had become “complete,” with the result that the veteran could lose thousands of dollars.

Under the VA’s NPRM, what has long been hailed as “the pro-claimant policy”<sup>7</sup> underlying the veterans’ benefits system would give way to an overriding emphasis on achieving “efficiency,” “speed,” and a “modernized process.” WWP does not contest the challenges facing the Department in managing a claims backlog, nor are we opposed to achieving greater efficiency

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<sup>4</sup> 78 Fed. Reg. 65,490 (Oct. 31, 2013)

<sup>5</sup> Id.

<sup>6</sup> 38 C.F.R. sec. 3.155(a)

<sup>7</sup> See, R. Riley, “The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans’ Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System,” 2 Veterans L. Rev. 77 (2010).

and timeliness of claims processing and appellate review. We certainly appreciate as well that the Department has statutory authority to prescribe rules and regulations and to prescribe forms of application for benefits. But the Department's exercise of that authority must remain faithful to a statutory scheme that is centered on serving the veteran. In our view, if efficiency and modernization are to be given primacy over longstanding rights that have been afforded veterans under the Department's benefits system, Congress must make those changes. Consistent with that view, our comments to the NPRM urged that the Secretary withdraw the proposed rulemaking.<sup>8</sup>

In essence, the proposed rule would upend important principles cemented in law and regulation. Among them, it would abolish a principle and practice that permits a veteran to file an informal claim and receive benefits paid from the date that informal claim is filed. The proposed rule would also for the first time effectively create a two-tier system that distinguishes substantively between veterans who have the capability of interacting with VBA online and those who do not, rewarding one and penalizing the other. (Under the NPRM, a claimant who by reason of disability, lack of computer access, or otherwise is unable to file a claim online would forfeit a statutory entitlement to an early effective date under circumstances where that initial claim was incomplete.) Procedural rules critical to safeguarding appellate rights would also fall under the NPRM. Regulations that now permit any expression of disagreement to be taken as a notice of disagreement would be discarded, to be overtaken by a first-time requirement that a veteran must file any notice of disagreement on a specified form. Moreover, omitting required information would render the veteran's NOD "incomplete," and were the veteran unable to complete the form (or unsuccessful in doing so) within a 60-day "grace period," the veteran would forfeit the right to appeal.

In our view, these changes go much too far, and cannot be squared with the statutory framework the Secretary is charged to administer. Moreover, with the Department's seemingly singleminded pursuit of speed and "efficiency," its rulemaking pays insufficient attention to other critical interests here at stake. Of great concern, the NPRM fails even to acknowledge that applicants for veterans' benefits have a constitutionally protected property interest in their application for benefits and are entitled to constitutionally prescribed procedures in connection with their claims for benefits under the Due Process clause.<sup>9</sup> Rather than protecting that property interest, the NPRM proposes to establish procedures that would literally shrink it.

In striving for efficiency, the proposed rule would create real barriers that risk denying veterans benefits to which they are entitled. While Congress may elect to take steps to streamline claims' and appellate processes, a Department charged with administering the laws providing benefits

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<sup>8</sup> Wounded Warrior Project, Comments on RIN 2900-AO81 – Standard Claims and Appeals Forms (Dec. 24, 2013) at <http://www.regulations.gov/#!documentDetail;D=VA-2013-VBA-0022-0027>.

<sup>9</sup> *Cushman v. Shinseki*, 576 F. 3d 1290 (Fed. Cir. 2009).

and other services to veterans<sup>10</sup> may not unilaterally block statutory pathways to veterans' benefits. While the Secretary has authority to prescribe rules and regulations necessary or appropriate to carry out the laws administered by the Department, those rules must be "consistent with those laws."<sup>11</sup>

Those laws are clear. Section 5102 of title 38 codifies the principle of an informal claim, namely a "request made by any person claiming or applying for, or expressing an intent to claim or apply for, a benefit..."<sup>12</sup> (Emphasis added.) Such an expression of intent to apply for or claim a benefit triggers an obligation on the Secretary's part to "notify the claimant and the claimant's representative, if any, of the information necessary to complete the application."<sup>13</sup> Under section 5102(c), the veteran has one year within which to complete that application. Where that veteran ultimately submits a fully developed claim within that year, section 5110(b)(2)(A), (as amended by Public Law 112-154) allows the veteran to preserve the date of submittal of that application as the effective date of an award of benefits. ("The effective date of an award of disability compensation to a veteran who submits an application therefor that sets forth an original claim that is fully-developed (as determined by the Secretary) as of the date of submittal shall be fixed in accordance with the facts found, but shall not be earlier than the date that is one year before the date of receipt of the application.")<sup>14</sup>

The Department's proposal is tantamount to a plan to graft onto this statutory framework an utterly novel distinction between claimants who file completed electronic claims – who would gain the benefit of such earlier effective date – and non-electronic filers who would not. We see no basis in law for such a two-tiered system, or any reasonable basis to discriminate between these two classes of claimants.

The NPRM runs similarly afoul of the law in proposing to limit substantially the manner in which a claimant may initiate appellate review. The statutory provisions governing the initiation of appellate review are prescriptive only insofar they impose a time limit within which a notice of disagreement (NOD) must be filed,<sup>15</sup> and provide that the NOD "must be in writing."<sup>16</sup> The Department, by administrative fiat, would effectively rewrite that clear statutory provision to redefine the phrase "in writing" to mean a completed and timely submitted copy of a mandatory form where (under proposed new section 38 C.F.R. sec. 19.24(c)) "a form may be considered incomplete if any of the information requested is not provided, including...for compensation claims...if it does not enumerate the issues or conditions for which appellate review is sought,

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<sup>10</sup> 38 U.S.C. sec. 301(b).

<sup>11</sup> 38 U.S. C. sec. 501(a).

<sup>12</sup> 38 U.S.C. sec. 5102(a).

<sup>13</sup> 38 U.S.C. sec. 5102(b).

<sup>14</sup> 38 U.S.C. sec. 5110(b)(2)(A).

<sup>15</sup> 38 U.S.C. sec. 7105(b).

<sup>16</sup> Id.

or does not provide other information required on the form to identify the claimant, the date of the VA action the claimant seeks to appeal, and the nature of the disagreement....”<sup>17</sup> The NPRM would convert what is a permissive statutory pathway to appellate consideration into a closed-door policy under which the “VA would not accept as an NOD any other submission expressing disagreement with an adjudicative determination”<sup>18</sup> than the fully completed form.

As with other changes it seeks to institute through the NPRM, VA characterizes the regulations it seeks to revise or abolish entirely as involving time-consuming processes or as barriers to processing cases more expeditiously. We see nothing in the statutory fabric to suggest that speed is an end in itself. While WWP would welcome greater timeliness of claims processing and appellate review, those objectives should not be achieved at the expense of longstanding, statutorily-based procedural safeguards.

VA’s statutory authority to establish online tools to facilitate claims-filing and processing is not in doubt. Its authority to develop standard forms is not questioned. Many veterans may see benefit to employing such tools – at their option. But VA goes much too far in seeking to impose procedural requirements under which some veterans will lose benefits to which they are entitled. It runs that grave risk under circumstances where its rationale is at odds with the very statutes the Secretary is to carry out as well as with a longstanding pro-claimant regulatory framework that it proposes to abandon in significant part in the name of “modernization” and efficiency.

In the final analysis, the Department’s determination to effectively reinvent some of the most fundamental elements of the claims-filing and appellate-review-initiation to achieve greater speed and efficiency are, in our view, simply beyond the Secretary’s powers. Mr. Chairman, we trust you would agree that the Secretary’s duty is to administer the law, not to rewrite it.

Many interests are at stake here: adherence to law; preserving a pro-claimant adjudication system; protecting veterans who -- for reasons including disability, hardship, remoteness, or fear -- do not have effective online computer access or cannot reasonably be expected to communicate through that modality; and preserving congressional prerogatives. Given the importance of each of those interests, we ask the Subcommittee to press VA to withdraw its proposed rulemaking.

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<sup>17</sup> 78 Fed. Reg at 65495 (October 31, 2013).

<sup>18</sup> Id.