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TO THE MEN AND WOMEN WHO SERVED

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STATEMENT OF
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UNITED STATES HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Subcommittee:

I am pleased to testify this morning on the challenges facing veterans when appealing claims decisions by the Veterans Benefits Administration (VBA), as well as the challenges both VBA and the Board of Veterans Appeals (BVA or Board) experience in trying to assure more timely and accurate decisions for veterans, their spouses and survivors. I look forward to working with you to examine the current systems and to improve the processes and outcomes for veterans.

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 for unfavorable decisions. 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 their dependents and survivors 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 entire adjudication process.

For thousands of veterans each year whose claims are not allowed, or who believe their rating or effective dates to be incorrect, our NSOs, along with a team of National Appeals Officers (NAOs), offer free assistance. DAV's NAOs have previously worked as NSOs to gain experience within VA Regional Offices (ROs) in providing both claims and appellate assistance at the local level. Our NAOs, who work directly inside the Board, provided representation in 29.2 percent of all appeals decided by BVA last year, a caseload of approximately 16,224 appeals. In 29.6 percent of the cases, involving 4,810 appellants represented by DAV, the claimants' appeals were allowed and the denial of benefits overturned. In addition, another 47 percent of the cases represented by the DAV last year resulted in remands, which provided the opportunity for additional consideration or development of evidence inadequately performed by the ROs for 7,534 claimants, many of who will ultimately have their appeals allowed as well. In total, approximately 76 percent of the appeals represented by DAV resulted in original decisions being overturned or remanded to ROs for additional development and re-adjudication.

Furthermore, for those denied by the Board, DAV works closely with two private law firms that have agreed to provide *pro bono* services to veterans pursuing their appeals beyond the Board. In 2014, these *pro bono* attorneys offered free representation before the United States Court of Appeals for Veterans' Claims in 2,086 denied appeals and provided representation in over 1,534 of those cases.

Mr. Chairman, as you know, the appeals process is directly related to, and in many ways part of, the claims process. As the volume of submitted and decided claims grows, so too does the volume of appeals of many of those decisions. According to recent VBA data, the number of appealed claims decisions, those for which a Notice of Disagreement (NOD) is filed, has been averaging around 11 to 12 percent of the total number of claims decisions issued. While not all of those will continue to the Board, there is a direct relationship between VBA's claims workload and BVA's appeals workload. Furthermore, the accuracy, timeliness, clarity and credibility of the claims decisions promulgated by VBA can have a direct relationship on the appeals rate. It is our view that veterans (and their representatives) who receive rating decisions in a reasonable and predictable timeframe with understandable and correct decisions are less likely to pursue appellate options. As we and others have said for years, the most important principle of claims processing, and therefore the key to appeals as well, is getting each claim done right the first time.

Over the past four years, VBA has concentrated the great majority of their efforts and targeted almost every available resource towards reducing the backlog of pending claims, all with the intent of reaching the goal set out by then-Secretary Shinseki in 2010 of having all claims completed in less than 125 days with a 98 percent accuracy rate. While it took a couple of years to develop and begin implementing its comprehensive transformation strategy, over the past two years VBA has made significant progress towards both their timeliness and quality goals. The total inventory of pending claims has come down by about 40% and the number in "backlog" status, those pending more than 125 days, has been reduced by 60% over that same period.

Though transformation initiatives such as the Fully Developed Claims (FDC) program have played a significant role in this productivity increase, the primary driver has been VBA's reliance on mandatory overtime for claims processors and the reassignment of other RO employees away from non-rating related work, including appeals, to direct claims processing work. VBA has also seen a slow, but steady rise in their accuracy rate thanks to a number of transformation initiatives, including Disability Benefit Questionnaires (DBQs), the Veterans Benefit Management System (VBMS), and the development of rules-based automation tools, such as IT-based rating calculators. By September 2014, the last month reported on VBA's Aspire webpage, the accuracy rate appeared to have leveled off at 90.4 percent, an increase over the past two years, but far from VA's 98 percent accuracy goal.

However, as VBA's pending inventory has come down, BVA's pending workload has risen almost commensurately. In part, this is a function of the volume of rating decisions issued resulting in a proportionately increasing number of appeals filed. However, it is also partially the result of VBA's "all-hands-on-deck" approach to reducing the claims backlog that has diverted RO employees whose primary function was to do appeals-related work to direct claims

work. In order to reach and then sustain VA's stated claims goals, it will be necessary to develop a system that does not rely on such reallocations of manpower.

APPEALS PROCESS OVERVIEW

The appeals process is a complicated multi-step and multi-path process that begins at the moment a claimant determines that they are not satisfied with their rating decision and want to make an appeal. Below is an overview of that process that starts at the RO and may ultimately wind its way to the Board.

1. In order to initiate an appeal of a VBA decision, a claimant must file a NOD within one year of receiving notice of their determination.
2. Once a NOD is filed, an appellant will be issued an Appeals Election Letter, which confirms VBA's receipt of the appeal, solicits information regarding the availability of additional evidence and offers the appellant two options relative to the processing of their appeal. The veteran may opt to have their appeal reviewed under the Traditional Appeals Process or reviewed under the Decision Review Officer (DRO) Post Determination Review Process. An appellant must make an appeals processing election within 60 days of receiving the Appeals Election Letter or it will default to the Traditional Process.
3. In most situations, based on our experience and judgment, but depending on the particulars of the appeal, DAV's NSOs will recommend their clients elect the local DRO review process. The DRO is a senior RO employee with the authority to reverse initial rating decisions, completely or in part, without any new or additional evidence. The DRO process is a *de novo* process, meaning they undertake an independent review of the claim being appealed, with no deference given to the rating board decision being challenged. A DRO has the authority to request medical exams or facilitate hearings to gather additional information from the appellant.
4. After a DRO performs their *de novo* review they may issue a new rating decision favorable to the veteran. However, if the DRO does not grant the benefits sought, or if the maximum evaluation is not authorized, an appellant will be issued a Statement of the Case (SOC).
5. For those who do not elect the DRO process, they will move directly to the SOC stage. On average, it can take up to two years from the time a NOD is received by VBA before an appellant receives a SOC, primarily due to a lack of adequate appellate personnel and the aforementioned practice of shifting existing DROs to rating-related activities.
6. Upon receiving a SOC, an appellant then has 60 days to file a VA Form 9 with the VBA if they want to pursue review by the BVA. Within the Form 9, an appellant can elect a hearing before the BVA at its headquarters in Washington, D.C.; a hearing at the nearest VARO before a traveling member of the Board; a hearing at the nearest RO via satellite teleconference; or the option for no hearing. A hearing election can add as much as two years to an appeal process.
7. Once the Form 9 is received by VBA, the appeal is considered formally filed to BVA and preserves a docket date for processing by the BVA. It then awaits review and certification by RO personnel (Form 8) before the case can be transferred to the BVA, which can take up to two years.

8. Once the appeal is transferred to the jurisdiction of BVA, it is issued a docket number using the Form 9 filing date to determine its place in line, at which point it has traditionally awaited physical transfer to the Board.
9. Once the appeal is physically received at the Board, it can take up to a year to issue a decision. If benefits are granted or previous VBA determinations upheld, the appeal is over, at least in terms of VBA's appeals process.
10. If issues are remanded, meaning that additional development must be undertaken by VBA before the Board can issue their final ruling, the appeal continues. The remand process can add years more to the total timeline of the appeal if benefits remain denied at the RO level and the appeal is then rerouted to the BVA for a second review and disposition. This remand process can be repeated multiple times, leaving some veterans' appeals churning for years.

VBA REQUIRES ADEQUATE RESOURCES TO PROCESS APPEALS

VBA has reported that they completed over 1.3 million claims in FY 2014, a record number. As mentioned above, this increase in claims decisions is likely to result in an ever larger number of appeals filed; if historical patterns hold, that would be on the order of 12 percent or around 150,000 in FY 2015. This will result in more work required by both VBA and the Board and thus require additional resources for both to manage this growing workload. While additional resources alone will neither eliminate the pending inventory of work nor solve future workload problems, based on data we have reviewed, both VBA and BVA will require additional resources as a major part of the solution.

In FY 2014, the Board increased its workforce by 20 percent and saw a 30 percent increase in productivity, resulting in 55,532 appeals dispositions, a record for the Board. BVA also conducted over 10,000 hearings, processed over 50,000 pieces of mail and answered more than 100,000 inquiries from veterans. However, despite these impressive numbers, the total pending inventory of appeals in various stages at both the Board and at VBA has grown to more than 360,000, the vast majority of which is at the RO level. The inventory at the local levels means that further appellate adjudication is required by RO personnel before an appeal can be certified as ready for review by the Board. These local adjudications could lead to the allowance of benefits sought on appeal, thus disposing of the appeal if the benefits sought have been granted, or further development necessitating the issuance of another determination if benefits sought remain denied. It is estimated that ROs traditionally dispose of 50 percent appeals and the remainder continue on to BVA. However, even with a significant number of those being resolved or discontinued at the VBA level and thus never making it to the Board, there is an increasing number of appeals in VBA's pipeline that will.

Currently, there are about 65,000 appeals in BVA's pending inventory, a little more than half are physically at the Board and the balance have been certified to BVA but not yet called up to the Board. In addition, there are almost 300,000 more appeals at various stages within VBA, the majority at the NOD stage and the balance at the SOC, Form 9, certification (Form 8) or remand stage, for a total of about 360,000 pending appeals. Another critical factor in the Board's workload is remands, which have typically been about 50 percent of their dispositions. Since these remands often return one or more times for further review by the Board, they begin to compound the Board future workload. Given the pending appeals inventory, the volume of

future workload from increased claims productivity, the compounding workload due to remands, the Board has set an aspirational goal of disposing of 100,000 appeals annually to manage its workload and address the backlog.

Based on historical data, the Board can typically produce about 90 appeals decisions per FTE. In FY 2010, BVA issued 49,127 decisions with 549 FTE, an average of 89 dispositions per FTE. In FY 2011, they issued 48,558 decisions with 535 FTE, an average of 90.8 dispositions per FTE. In FY 2012, the Board issued 44,330 decisions with 510 FTE, an average of 87 dispositions per FTE. In FY 2013, they issued 41,910 decisions with 532 FTE, an average of 78.8 dispositions per FTE. Finally, in FY 2014, BVA issued 55,532 decisions with 640 FTE, an average of 86.8 dispositions per FTE. In years with significant staffing increases in FTE, productivity often dips due to the time needed to train new Board attorneys before they become fully productive, estimated at about 18 months. However, even projecting for productivity increases due to increased efficiencies and other initiatives, BVA will need further increases in FTE to reach productivity levels necessary to adequately process their appeals workload in a sufficiently timely and accurate manner.

In the final FY 2015 appropriations bill approved in December, Congress recognized the need to supply BVA with additional resources by providing an additional $5 million to hire additional staff. This will allow modest staffing increases; however further increases for FY 2016 will be needed. DAV, along with our partners in *The Independent Budget* (IB) is currently working on specific budgetary recommendations that will be released at the time of the Administration's budget presentation at the beginning of February. It is important to note that VBA will also require additional staff at the RO level to handle its portion of rising appeals-related work. Congress also recognized this need and appropriated VBA $40 million over the Administration's FY 2015 request. The IB will also have specific budgetary recommendations for VBA in our FY 2016 Budget Report.

In addition, the Board also needs to complete IT upgrades to allow them to process appeals using the same type of modern, paperless, rules-based decision support programs that VBMS has provided to VBA's claims processing. Although the VBMS program has long been intended to include the full appeals process through the Board's work, funding to plan, develop and implement a VBMS solution has yet to be put forward in VA's budget requests. As such, the Board has been constrained within the VBMS processing platform because appeals processing is distinct and separate compared to claims processing.

BVA has begun to look at other solutions from other vendors; however, lacking funding they will continue to wait for this long overdue IT modernization, which limits their effectiveness and productivity. Congress must ensure that VBA allocates sufficient funding in FY 2016 to allow the Board to begin this necessary IT upgrade. The IB Budget Report in February will also provide more specific budgetary recommendations in this regard.

STRENGTHEN THE DRO PROGRAM

DAV believes that the DRO program is one of the most important elements of the appeals process, often providing positive outcomes for veterans more quickly and with less

burden on VBA. The ability to have local review also allows our NSOs to support the work of the DROs in sorting through the issues involved in the appeal, similar to the way our NSOs help reduce the claims workload on ROs by ensuring more complete and accurate claims are filed by the veterans we represent.

Unfortunately, as discussed above, as part of VBA's intense efforts to reduce the backlog of pending claims, over the past several years, and even before that, many ROs have diverted DROs from processing appeals to performing direct claims work. In fact, there have even been some discussions inside VBA about eliminating the DRO program altogether. Last year, DAV undertook an informal survey of a number of our NSO Supervisors to gather their observations of how often DROs were performing direct claims processing work. We found that in most ROs surveyed, a majority of DROs were working at least part of their time on claims work during their standard 8-hour work day, and that a majority were working a significant part of their time on claims during overtime, including mandatory overtime. We shared these findings with VBA leadership who had already begun and have continued to make efforts to ensure that DROs focus on appeals work. Over the past year, we have observed a marked decrease of DROs performing claims working during normal working hours, though there is still significant claims work being performed during overtime hours.

In addition to the problem of having appeals work pile up at ROs, having DROs perform claims work, particularly ratings, has secondary negative effects. First, it limits the number of DROs who can review appeals since they cannot review *de novo* an appeal that they helped to rate. Second, the fact that the original rating was adjudicated by a senior DRO may result in a higher standard being applied by a fellow DRO to overturn their colleague's decision. For both of these reasons, it is imperative that VA and Congress look for reasonable proposals and measures, such as strict reporting requirements, to ensure that DROs perform only appeals-related work

CREATE A NEW FULLY DEVELOPED APPEAL PILOT PROGRAM

Given the complexity of and legal parameters of the appeals process, and the primary role that workload and proper resources will play, there are simply no magic bullet solutions to the appeals challenges. Instead, it will require a multipronged approach to make measurable and sustainable headway that must include reform, innovation and stakeholder collaboration. One such idea is the Fully Developed Appeals pilot proposal, which has widespread and growing support in the VSO stakeholder community as well as the full buy-in of both VBA and BVA leadership.

Mr. Chairman, last year, following roundtable discussions on appeals held in the House, the Senate and at DAV's offices, a core group of VSOs who perform significant appeals work agreed to work informally and collaboratively with both VBA and BVA officials to search for practical improvements to the appeals process. The goal of this group was to explore, analyze and develop consensus ideas on how to improve outcomes for veterans that could also free up VBA and/or BVA resources to further benefit the appeals process for all veterans. The core group would then seek further input and support from additional stakeholders while simultaneously reaching out to Congress to review any such proposals, particularly those that

required legislation. Among the ideas that the group focused on were strengthening the DRO program, improving claims decision letters and what has become the Fully Developed Appeals (FDA) pilot proposal.

The FDA program is modeled on the FDC process, in which veterans agree to undertake the development of private evidence in order to enter an expedited processing program of their claim. Similarly, to participate in the FDA program, appellants would agree to gather all the additional private evidence necessary for BVA to make their decision on the appeal, thus relieving both VBA and BVA of that workload. When an appellant elects the FDA program for their appeal, they would be required to submit all the private evidence they want considered at that time, and may not later submit additional private evidence; such supplemental submission would exclude them from the FDA program, with one limited exception. If the Board develops new federal records not part of the claims record, or orders new exams or independent medical opinions, the appellant will not only be given copies of the new evidence but will also have 45 days to submit additional evidence, including private evidence, pursuant to that newly developed evidence.

As part of the FDA program, the appellant would agree to an expedited process at VBA that eliminates the SOC, Form 9, any hearing and the Form 8 certification process. The elimination of these steps alone could save some veterans up to 1,000 days or more waiting for their appeals to be transferred from VBA to the Board. The veteran would retain the absolute right to withdraw from this program at any time prior to disposition by the Board, which would revert their appeal back to the standard appeal processing model, with the option of DRO review as well as both informal and formal hearing options. The FDA pilot program is not a replacement for either the DRO process or the traditional appeals process; it is another option – a fully voluntary one – that the veteran can withdraw from at any point.

However, for those veterans who, in consultation with any representatives they may have, determine that the best option is to have the Board review their appeal, and for which they are confident they have the ability to provide sufficient evidence and argument without hearings, the FDA process can save them significant time, plus save VBA and BVA significant processing work. As such, election of the FDA program could free additional resources at both the Board and VBA to increase productivity for processing traditional appeals and DRO reviews, thus benefiting all veterans. Furthermore, by testing this new model with congressionally mandated reporting requirements, Congress and VA could gain valuable insights on potential system-wide reforms that could bring additional efficiencies to the appeals process.

Mr. Chairman, we would be remiss if we did not acknowledge the efforts of Congressman O'Rourke, who introduced similar legislation last year, called the Express Appeals Act. We were pleased to provide our insights to his staff during the drafting of that legislation and greatly appreciate his continued leadership on this issue. That legislation played a role in spurring and guiding much of the initial discussion in our workgroup as we developed the FDA proposal. We also want to thank Congressman Cook, who is the lead cosponsor, for his leadership. Although there are some differences between their legislation and the FDA proposal, both were modeled on the Fully Developed Claims program and share most of the same goals and many of the same features. While there are still more details to work out and improvements

to be made, we look forward to working with this Subcommittee and all members of the House and Senate interested in moving forward with a Fully Developed Appeals pilot program.

IMPROVE RATING BOARD DECISION NOTIFICATION LETTERS

For a number of years, particularly since the inception of VBA's Simplified Notification Letter (SNL) process, DAV and many other VSOs have expressed concerns regarding whether these decisions contained substantive information for claimants to understand how VA arrived at its decision on a claim for benefits. Current regulations state that, "claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision."

This is codified in statute, title 38, United States Code, § 5104) which states, "(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision; (b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include, (1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary."

Rating Board Decision (RBD) notification letters are meant to advise claimants of VA's decision on the issues; whether benefits have been awarded, whether prior ratings have been increased or sustained, the evidence used in reaching the decision, and most critical of all, an explanation to the claimant as to how VBA arrived at its decision. It is the final element of the notification process that requires ongoing improvement.

Well formulated RBD notices should be composed to make it easy for average, non-legal experts to understand. Well written decisions can help to prevent unnecessary appeal filings if they fully explain the rationale for VBA's conclusions. When a veteran understands the legal basis for why the benefits they sought were not awarded and what would be required to obtain them, it allows them to make better decisions about which appeals option, if any, to pursue. More complete and clear decision letters provide veterans and their representatives a better understanding of what is needed to prevail in their appeal, regardless of which option they choose.

As such, we urge VBA to work with Congress and stakeholders to enhance RBD notification letters while preserving and enhancing to the extent possible, any efficiencies gained through automation.

REPLACING THE NEW AND MATERIAL EVIDENCE STANDARD

In order for a claimant to reopen a previously denied claim, more specifically, claims for initial entitlement to establish receipt of benefits, such as in cases of entitlement to service

connection and survivor benefits, new and material evidence must be presented, title 38, United States Code, § 5108. It is a two-part test that VBA must perform to reopen a claim: whether the claimant has supplied evidence that is new and whether it is material to the issue(s) at hand.

The theory behind this evidentiary standard was to prevent VBA from having to unnecessarily re-adjudicate previously denied claims when there is no evidence being presented that will change the decision. While we understand the intent of the new and material evidence standard, it does not function as intended because it fails to deter claimants from reapplying for benefits. Instead, it routinely requires VBA to expend resources to adjudicate the question of whether new and material evidence has been submitted, and only after that effort, does VBA consider whether the evidence changes the underlying rating decision. Moreover, if VBA rules that the submitted evidence is not "new and material," that decision can be appealed to the Board, necessitating further effort to make the procedural decision prior to a substantive decision on whether the evidence changes the underlying rating decision.

Congress could enact legislation that would change the new and material evidence standard to a new definition, or simply eliminate the requirement all together.

Rather than forcing appellants to wait up to three years or more for a BVA finding that "new and material" evidence has been received before considering it on its merits, this action would save claimants considerable claim and appeal processing time and permit VBA to adjudicate on the merits of the claim at the local level. It has the potential to eliminate multiple steps in a process that may involve both VBA and BVA before such substantive determinations are made.

CONCLUSION

Mr. Chairman, the only way to realistically improve the appeals process will be through a combination of resources, reform and innovation to ensure that veterans filing appeals receive timely and accurate appeals decisions. These solutions include providing VBA with adequate resources to manage the claims and appeal workload, maximizing local appeals resolution capacity, eliminating unnecessary impediments to appeals efficiency, and developing and testing new processes, such as the FDA proposal. DAV stands ready to work with you and all members of the Subcommittee in addressing these challenges with practical, commonsense improvements to the appeals process that first and foremost benefit the men and women who have served, their families and survivors.

Mr. Chairman, this concludes my testimony and I would be pleased to answer any questions you may have.