

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Prepared Statement

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Before the

Committee on Veterans' Affairs

U. S. House of Representatives

Subcommittee on Disability Assistance and Memorial Affairs

**“H.R. 675, H.R. 677, H.R. 732, H.R. 800, H.R. 1067, H.R. 1331, H.R. 1379,
H.R. 1414, H.R. 1569 and H.R. 1607”**

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On behalf of the National Organization of Veterans' Advocates, Inc. (NOVA), I would like to thank the Subcommittee Chairman and Ranking Member for the opportunity to share our views.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA's disability claims process. In 2000, the United States Court of Appeals for Veterans Claims recognized NOVA's work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

NOVA is pleased to have been invited to offer testimony before the Subcommittee on Disability Assistance and Memorial Affairs on several bills which concern veterans and their families. Our written testimony will address each bill in numerical order, beginning with the lowest numbered bill and ending with the highest numbered bill.

H.R. 675 “Veterans’ Compensation Cost-of-Living Adjustment Act of 2015”

NOVA supports this bill and urges the committee to report this bill favorably to the full committee with a recommendation for passage by the full House.

H.R. 677 “American Heroes COLA Act of 2015”

NOVA supports this bill and urges the committee to report this bill favorably to the full committee with a recommendation for passage by the full House.

H.R. 732 “Veterans Access to Speedy Review Act”

NOVA supports this bill but feels compelled to comment on the potentially misleading title of the bill. NOVA fully supports the intent of this bill to encourage the use of video conferencing for the conduct of hearings before the Board of Veterans' Appeals. However, the title of this bill, which is “Veterans Access to Speedy Review Act,” could cause some veterans to mistakenly assume that electing to have a video conference hearing instead of an in person hearing before the Board will “speed up” the Board's review.

In accordance with the provisions of 38 U.S.C. § 7107(a)(1) “each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.” An appeal is docketed following the certification by the agency of original jurisdiction, the VA regional office which denied the claim. Therefore, whether a veteran has an in person hearing before the Board in Washington D.C., or in person before a traveling Board or by video conference, the speed of the review is dictated by the date the appeal is docketed and the number of appeals previously docketed.

H.R. 800 “Express Appeals Act”

In its present form, NOVA cannot support this bill. A pilot program is not what is needed. What is needed is an immediate change in the VA appeal process which improves an appellant’s opportunity for a faster resolution of appeals while ensuring that the right to submit evidence is not forfeited.

There are three reasons why NOVA cannot support this bill. First, this bill would create two separate tracks for appeals. Second, in order to get an express appeal, the veteran must waive the right to submit additional evidence. Third, because there is a very real possibility that this bill will mislead veterans to believe that if they give up their right to submit further evidence, then their appeal will be heard sooner. As written, this bill conflicts with the provisions of 38 U.S.C. § 7107(a)(1) which states in pertinent part: “each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.” NOVA does not believe that creating a pilot program is the best approach.

However, there are two items in this bill which NOVA does support. They are the elimination of the need for a statement of the case and filing of a substantive appeal and the prohibition of remands for development. Please see NOVA’s January 2015 testimony before this committee on eliminating the statement of the case and filing of a substantive appeal. NOVA believes that a better approach would be the immediate implementation of structural changes to the VA appeal process rather than the proposed pilot program approach. NOVA would like to offer the following as amendments to this bill.

NOVA recognizes the problems created under the current statutory scheme by the repeated submission of evidence following an initial denial and during the pendency of an appeal. These problems deal with the need for new decisions by the agency of original jurisdiction. To be clear, NOVA does not want to see VA relieved of its obligation to fully and sympathetically develop the claim to the optimum before VA decides the claim on its merits. However, NOVA would suggest that if this bill were to make immediate structural changes that the goal of a more efficient decision making and appeal process could be accomplished.

NOVA would suggest that in addition to the elimination of the need for a statement of the case and filing of a substantive appeal and the prohibition of remands for development, this bill incorporate the following changes.

First, amend the provisions of 38 U.S.C. § 5904 to adjust the time for the commencement of representation by an agent or an attorney from commencing after the filing of a notice of disagreement to commencing after VA issues an adverse decision. This would allow veterans and other claimants to secure the assistance and advice of an accredited attorney or agent after VA makes its decision on the merits of the claim or claims made to VA. This statutory change is necessary for veterans and other claimants to be advised concerning the need for the submission of additional evidence to substantiate their claim or claims denied.

Second, NOVA recommends that this bill require that the filing of a notice of disagreement in response to an adverse VA decision affecting benefits would be the sole requirement for appealing a decision of VA. Further, that the VA's *de novo* review by a decision review officer be codified. Finally, that the record before the agency of original jurisdiction be closed one year after the VA's decision on the merits or following a *de novo* review by a decision review officer. This bill would also provide that a veteran or claimant would be allowed to file additional evidence to be considered by the agency of original jurisdiction **only** within the one year following the VA's initial decision. The VA's receipt of such additional evidence would require a supplemental decision from the agency of original jurisdiction. However, thereafter no further decisions will be made by the agency of original jurisdiction.

Third, this bill would permit an appellant to submit additional evidence to VA for consideration by the Board of Veterans' Appeals. There would be no interim decision on such evidence by the agency of original jurisdiction. The Board would make its decision based on all evidence of record at the time of its decision. Additionally, the Board would be authorized to determine if additional evidence development was necessary in order to decide any issue before the Board. The Board would not be permitted to remand to the agency of original jurisdiction for further evidence development. The agency of original jurisdiction would have initial development responsibility to include one decision on evidence received within one year of the initial decision or based on an order for development by a VA decision review officer. Thereafter, any evidence submitted would be considered by the Board.

In the event that the Board determines that additional evidence development is required, the Board will be required to notify the appellant and the appellant's representative and explain what evidence the Board has determined needs to be developed and how the Board intends to develop that evidence. Additionally, the Board will provide the appellant and the appellant's representative a copy of all additional evidence developed and give the appellant an opportunity to respond by submitting additional evidence or argument within 90 days of the Board's notice.

With these changes, **all appellants** would be treated the same. Congress will have made immediate structural changes to the appeal process which benefit **all appellants**. These proposed changes would result in faster appeals which would not be conditioned upon a veteran's waiver of the right to submit evidence. Changing this bill from a pilot program to an immediate structural change of the appeal process would benefit **all appellants**.

H.R.1067 "U.S. Court of Appeals for Veterans Claims Reform Act"

NOVA supports this bill. NOVA believes that the proposed salary increase for the judges is both necessary and appropriate. Further, NOVA supports the continuation of the expansion of the size of the court as responsible public policy based on sound planning by Congress.

H.R. 1331 “Quicker Veterans Benefits Delivery Act of 2015”

NOVA supports the intent of this bill to place medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation on an equal basis. NOVA is concerned that VA has become disproportionately dependent on VA examinations and uses VA examinations when the veteran’s file already contains competent medical evidence from VA as well as non-VA medical professionals. Reliance on existing medical evidence is being evaded based on an unnecessary dependency on VA examinations which can be completed by VA as well as non-VA treating medical professionals. This would result in significant savings by obtaining information from the medical professionals who are actually providing treatment to the veteran.

Presently, Social Security claimants under the provisions of 42 C.F.R. § 404.1527 receive the benefit from what is known as the treating physician rule. Under this rule, medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions. *See* 42 C.F.R. § 404.1527(a)(2). Also under this rule, a treating source’s opinion is given controlling weight based upon certain specified factors. *See* 42 C.F.R. § 404.1527(c).

NOVA believes that there should not be two different standards for disability claimants. VA has not adopted this rule. NOVA submits that this rule should be codified by Congress for the benefit of veterans. Because this rule is not currently available to veterans, it is NOVA’s view that too often VA gives greater probative weight to the opinions of VA compensation and pension examiners over the evidence from treating professionals. NOVA believes that the treating physician rule as used by Social Security will result in fewer denials and fewer appeals and represents a consistent public policy in this uniquely pro-veteran scheme.

H.R.1379 Authorize the Board of Veterans’ Appeals to develop evidence in appeal cases.

NOVA supports this bill. NOVA believes that the no remand provision will be an especially valuable provision which will ensure that the record has been adequately developed on appeal. Further, NOVA urges the amendment of this bill to require the Board to provide notice to the veteran of the evidence the Board seeks to develop and how the Board intends to develop that evidence. Also, that the Board provides the appellant and the appellant’s representative with a copy of all additional evidence developed and give the appellant an opportunity to respond by submitting additional evidence or argument within 90 days. *See* 38USC7109

H.R. 1414 “Pay As You Rate Act”

NOVA supports the intent of this bill. However, NOVA believes that this bill will simply require by statute what VA is already required to do.

H.R. 1569 Making the estate of a deceased veteran a qualifying survivor and thereby entitled to receive accrued benefits upon the death of the veteran.

NOVA fully supports this bill and urges in the strongest terms its enactment into law. This bill will allow the non-qualifying survivors of the veteran’s family to obtain from VA those benefits due to the veteran at the time of death instead of VA retaining those benefits. Veterans would rather have their benefits be paid to their family than to be retained by VA.

H.R. 1607 “Ruth Moore Act of 2015”

NOVA cannot emphasize enough how important this bill is to victims of sexual assaults which occurred while serving on active duty. If Congress does nothing else this year for veterans, it must pass this bill. This bill will restore dignity to victims of assault while serving this country. Under the current law, a victim of assault in service who has been diagnosed with post traumatic stress disorder by a mental health professional is also required to provide evidence that the assault actually occurred. As a result, the veracity of these victims is put at issue by VA. This bill correctly recognizes that the lay testimony alone of these victims should be enough to establish the occurrence of the reported military sexual trauma unless there is clear and convincing evidence to the contrary, provided that the reported military sexual trauma is consistent with the circumstances, conditions, or hardships of the veteran’s service.

NOVA hopes that these suggestions will be of assistance to this Committee and to Congress.

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KENNETH M. CARPENTER received a B.A. in History & Political Science and B.A. in Philosophy & Religion, Southwestern College, Winfield, Kansas in June 1970. He received a J.D. from Washburn University, Law School, Topeka, Kansas in 1972; Masters in Adult & Community Counseling from Kansas State University, Manhattan, Kansas in March 1983.

He has been engaged in the private practice of law in Topeka, Kansas since 1973. Admitted to the following courts: Kansas Supreme Court, 1973; Federal District Court for the District of Kansas, 1973; 10th Circuit Court of Appeals, 1984; U. S. Court of Federal Claims, 1987; Federal Circuit Court of Appeals, 1989; Court of Appeals for Veterans Claims, 1990; United States Supreme Court, 1990. The practice of Veterans Law is the exclusive area of practiced by Carpenter, Chartered. He is a founding member of the National Organization of Veterans Advocates.

He is the President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, predominantly veterans with post traumatic stress disorder. The firm also specializes in cases involving total disability ratings and earlier effective dates. The firm also does requests for revisions based on allegations of clear and unmistakable error and survivor claims for dependents of veterans.