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**STATEMENT OF
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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
OCTOBER 22, 2019**

Madame Chair, Ranking Member Bost and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs. As you know, DAV is a non-profit veterans service organization comprised of over one million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. DAV is pleased to offer our views on the bills under consideration by the Subcommittee.

H.R. 592, Protect Veterans from Financial Fraud Act of 2019

This bill would amend title 38, United States Code, § 6107(b) by clarifying the procedures to reissuance benefits to a beneficiary with a fiduciary when there is negligent failure by the Secretary and a misuse of benefits by a fiduciary.

Currently title 38, United States Code, § 5501A notes the beneficiary is entitled to a notice of the proposed adverse decision, a hearing, opportunity to present additional medical evidence, and a witness to the hearing. This bill would clearly add the right to appeal adverse or negative decisions.

DAV strongly supports both amendments of this bill as they are in agreement with DAV Resolution No. 363, calling for improvement of the Department of Veterans Affairs (VA) Fiduciary Program. It suggests improvements to the VA Fiduciary Program by creating a better monitoring system, a timely dispute resolution system when beneficiaries make complaints, initiation of investigations based on suspected reports of fiduciary fraud rather than putting the burden of proof on the vulnerable veteran, and assignment of an outside agency, such as VA Office of Inspector General, responsibility for investigating complaints of VA employees who work in the VA Fiduciary Program and Fiduciary Hubs.

Our most vulnerable veterans must be protected from abuses of fiduciaries and negligent failures by the Secretary and be given the right to appeal adverse competency decisions.

H.R. 628, Working to Integrate Networks Guaranteeing Member Access Now Act

H.R. 628 would allow veterans submitting a claim for benefits, to permit a covered congressional employee in the office of the Member of Congress representing the district where the veteran resides to have access to all of the records of the veteran in the databases of the Veterans Benefits Administration.

The covered congressional employee would have read-only access to the electronic records, similar to accredited veteran service organizations (VSO) and the covered congressional employee would not be considered an attorney or agent.

Recommendations

DAV does not have a resolution on this issue; however, we are concerned that this access could lead to negative consequences for veterans and their families, therefore, we recommend that covered congressional employees be provided training, VA accreditation or similar certification, and have safeguards in place to ensure that a veteran can be made whole.

1. **Training.** If a covered congressional employee in the office of the Member of Congress will have access to a veteran's or claimant's electronic claims folders and be advising veterans and claimants on their claims and appeals, they need to be trained to lessen the potential for misinformation. Accredited VSOs, agents, and attorneys all must go through a training and accreditation process which includes VA's Training, Responsibility, Involvement and Preparation of Claims (TRIP) training and VA's Talent Management System (TMS). Covered congressional employees need to be required to complete the same level of training as accredited VSOs, agents, and attorneys.
2. **Accreditation.** As a covered congressional employee in the office of the Member of Congress will be providing claims and appeals information to a veteran or claimant, they need to be held to the same standard as VSOs, agents, and attorneys. An accredited representative is an individual who has undergone a formal application and training process and is recognized by VA as being capable of assisting claimants with their affairs before VA. Accredited representatives may also work for state or county government entities.

As the covered congressional employee will be providing assistance to veterans and claimants already represented by VSOs, agents, and attorneys, we are concerned that if the congressional employee is not adequately trained or accredited they may provide information or advice counter to their duly appointed representatives.

- 3. Making Veterans and Claimants Whole.** If actions or delayed actions by an accredited VA representative cause financial harm to a veteran or claimant, they retain liability insurance to ensure that a veteran or claimant is made whole if there is a loss of benefits or other financial harm. We are concerned that if a covered congressional employee provides information, advice, or their lack of timely action causes financial harm to a veteran or claimant, the veteran or claimant will not be made financially whole.

The U.S. Supreme Court, in *Gravel v. United States*, held “that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated.” Therefore, the Court held “that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.”

Although the Constitution’s Speech or Debate clause provides Members of Congress and their aides immunity to lawsuits arising out of protected legislative actions, providing assistance to veterans and claimants on VA claims and appeals would not be protected legislative actions, thus, we are concerned on how a veteran will be made financially whole if the covered congressional employee is liable.

H.R. 1030, Veteran Spouses Equal Treatment Act

H.R. 1030 would amend the definition of a spouse and surviving spouse in title 38, United States Code, § 101 paragraphs (3) and (31) by striking the phrase “of the opposite sex.” This bill would codify VA’s current mandate and practice of recognizing spouses of the same sex without regard to a veteran’s state of residence.

Section 3 of the Defense of Marriage Act (DOMA) defined “marriage” and “spouse” for purposes of federal law to preclude recognition of marriages of same-sex couples. On June 26, 2013, the Supreme Court held, in *United States v. Windsor*, that Section 3 of DOMA violates the Fifth Amendment of the U.S. Constitution by discriminating against same-sex couples who are lawfully married under state law.

For purposes of VA benefits, title 38, United States Code, § 101(3) and § 101(31) define “surviving spouse” and “spouse” as persons “of the opposite sex.” These definitions (codified separately from DOMA) were not specifically addressed in the Supreme Court’s *Windsor* decision. On September 4, 2013, the United States Attorney General announced that the President had directed the Executive Branch to cease

enforcement of title 38, United States Code, §§ 101(3) and 101(31), to the extent they preclude provision of veterans' benefits to same-sex married couples.

This announcement allowed VA to administer spousal and survivors' benefits to same-sex married couples, provided their marriages met the requirements of title 38, United States Code, § 103(c). It states, "[i]n determining whether or not a person is or was the spouse of a Veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued." As such, prior to *Obergefell*, this provision precluded VA from recognizing a veteran's same sex marriage where both the veteran and the veteran's spouse resided in a state that did not recognize same-sex marriage at the time of the marriage, and at the time when the claimant's right to benefits accrued, i.e., when the claimant became eligible for benefits or the date of claim, consistent with GC Precedent Opinion 4-2014.

On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

In order to protect these existing benefits for veterans and spouses from future legal challenges or changes in interpretation of existing practices, DAV supports H.R. 1030, which is consistent with our mandate to resist any efforts to deprive disabled veterans or their dependents of benefits already provided by VA. This bill would codify the U.S. Supreme Court's holdings in *Windsor* and in *Obergefell* and is consistent with VA's current practice of recognizing same sex marriages without regard to a veteran's state of residence.

H.R. 1424, the Fallen Warrior Battlefield Cross Memorial Act

H.R. 1424 would amend title 38, United States Code, § 2403 for the Secretary to permit the Fallen Soldier Display, also known as the battlefield cross. The bill defines the Fallen Soldier Display as a memorial in honor of fallen members of the Armed Forces that may include a replica of an inverted rifle, boots, helmets, and identifications tags.

Battlefield crosses were created to honor the fallen. A deceased soldier's rifle is planted, barrel-first, into their boots (or, in some cases, the ground) and their helmet is placed atop the rifle. Like all things military, this cross is part of a long-standing tradition that has evolved since its first use on the battlefields of the American Civil War. This tradition has found its way into the United States Army Field Manual. Under the Memorial Section, the battlefield cross is advised to be displayed during memorials and demonstrations are provided.

VA initially banned the battlefield cross as it violated their rule about realistic replicas of weapons within National Cemeteries. However at the September 5, 2018, House Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs hearing, Matthew Sullivan, NCA Deputy Under Secretary for Finance and Planning, indicated that VA does not support the Fallen Warrior Battlefield Cross Memorial Act as it would not allow VA any discretion to establish standards for the display of these monuments, which VA refers to as "fallen soldier displays." VA has an existing policy that includes standards, such as those related to size and construction materials that allow these monuments to be displayed in a manner that would enhance the appearance and operation of the national cemeteries. These standards may be rendered unenforceable under this bill as currently drafted.

DAV does not have a resolution on this issue; however, we would not oppose enactment of H.R. 1424.

H.R. 1911, the SFC Brian Woods Gold Star and Military Survivors Act

This bill would strengthen and expand various benefits affecting the survivors of those killed on active duty and disabled veterans who have died due to a service connected condition.

Section 2 would allow survivors of a deceased military member or veteran to continue to have access to on-base facilities once they remarry if they have dependent children. Currently, once a surviving spouse remarries they lose all commissary and exchange privileges. This bill would allow those who still have guardianship of dependent children of the deceased service member to retain their entitlement to use commissary stores and Morale, Welfare, and Recreation (MWR) facilities to the same extent and on the same basis as surviving spouses that have not re-married. While DAV does not have a resolution specific to this issue, we would not oppose its enactment.

Section 3 would allow surviving spouses of service members who die while on active duty to continue to receive their Survivor Benefit Plan (SBP) should they re-marry before the age of 55. Under current law, a surviving spouse of veteran or service member who is in receipt of SBP would lose their benefits if they choose to re-marry before the age of 55. This section would eliminate this bar to benefits. DAV does not have a resolution specific to this issue but would not oppose its enactment.

Section 4 would direct the Pentagon to pay the transportation costs of remains for those killed in the line of duty to their hometown for memorials or services and then to a national cemetery for internment. If a service member passes away while overseas, the Pentagon will only pay for transportation costs to the hometown or a National Cemetery but not both. However, many surviving loved ones choose to have a memorial service or funeral in their hometown prior to internment at a National Cemetery. This provision would require the Department of Defense to transport the remains for the fallen service member from Dover AFB, to the hometown, and then to their final resting place in a National Cemetery if requested by the surviving family

members. DAV does not have a resolution specific to this issue, but would not oppose its enactment.

Section 5 would amend the existing child care service assistance program for civilian providers to include providers serving survivors of service members that die in the line of duty. Currently, this program only gives financial assistance to civilian child care providers of active duty service members and government employees. DAV does not have a resolution specific to this issue, but would not oppose its enactment.

Finally, Section 6 would remove the bar of Dependency Indemnity Compensation (DIC) benefits to the surviving spouses of veterans who have re-married prior to the age of 57. We consider this bar unduly punitive when you consider that federal employee survivors, who are in receipt of Civil Service Retirement System, a similar benefit to DIC and veterans who are signed up for the SBP, both allow the surviving spouse to remarry at 55 without loss of benefits. Section 6 would allow a spouse of a service member who died while on active duty to continue to receive their DIC benefits even if the surviving spouse re-marries. DAV strongly supports this provision in accordance with Resolution No. 360, which supports legislation to improve and reform DIC benefits for survivors to include reducing the age that surviving spouses can re-marry without losing their survivor's benefits.

H.R. 4165, the Improving Benefits for Underserved Veterans Act

This bill would require the VA to publish a report regarding veterans who receive VA benefits disaggregated by sex and minority group status. This report would include those benefits administered through the Transition Assistance Program.

DAV does not have a resolution on this issue; however, we are concerned with the potential reliability of such a report. The VA does not currently track information regarding sex or minority group status and would have to rely on either diagnostic code ratings or be required to review every veteran's case to determine the sex or minority group status.

H.R. 4183, the Identifying Barriers and Best Practices Study Act

H.R. 4183 would require the Comptroller General to conduct a study on disability and pension benefits provided to members of the National Guard and members of reserve components for the period of January 1, 2008, to December 31, 2018.

This bill would require comparisons between the National Guard and members of the reserve to those who served in regular components. The comparisons would include:

- The percentage of each group of veterans with service-connected disabilities;
- The number of veterans in each group with each disability rating;

- The number of veterans in each group with a service-connected disability for pilots, special forces, veterans who participated in the Personnel Reliability Program, veterans who underwent flight physicals and who have muscular-skeletal or mental health conditions.

The bill would further require the identification of barriers for members of the National Guard and members of the reserve components in obtaining disability benefits.

DAV does not have a resolution on this issue; however, such a report will indicate a difference on disability benefits provided to members of the National Guard and members of reserve components versus those who served in the regular Armed Forces, because the statutory requirements for service connection for those who served in the regular Armed Forces versus members of the National Guard and members of reserve components are very different.

For those who served in the regular Armed Forces, VA will award service connection for a chronic disease or the residuals of an injury incurred coincident with service. For members of the National Guard and members of the reserve components VA will award service connection from an injury or covered disease, while performing active duty for training or inactive duty training with a line of duty determination. However, when a member of the National Guard and members of the reserve components are called to active duty, their disabilities and injuries will be considered as the same as those serving in the regular Armed Forces.

H.R. 4360, the VA Overpayment Accountability Act

H.R. 4360 would amend Chapter 53 of title 38 to add a new section requiring the Secretary to correct any erroneous information submitted to consumer reporting agencies including information submitted by a third party collection agency. It would further require the Secretary to notify the beneficiary of VA's request for correction.

The bill would require VA to improve its information technology to allow beneficiaries to receive notice of any debts through electronic means such as VA's eBenefits system to include any successor programs. This improvement would include adding the ability to track all payments made to beneficiaries, the average debt incurred, as well how frequently waivers of debt or relief are granted. This bill would further require the Secretary to provide reports regarding VA's errors made in payment of benefits.

DAV supports H.R. 4360 as it is in accord with DAV Resolution No. 108, calling for reforms relating to recovery of debts by the VA and would bring necessary reforms to the VA collection and reporting processes. Erroneous reporting to consumer reporting agencies can have serious negative consequences for veterans and their families and this bill would provide protections and corrections to credit reporting.

Discussion Draft, the Justice for ALS Veterans Act of 2019

This draft legislation would extend increased dependency and indemnity compensation (DIC) paid to surviving spouses of veterans who die from amyotrophic lateral sclerosis (ALS), regardless of how long the veterans had ALS prior to death.

Currently, title 38, United States Code, § 1311(a)(2) allows an additional DIC monthly payment of \$246 to survivors in the case of a veteran who at the time of death was in receipt of or was entitled to receive compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death. This is commonly referred to as the DIC “kicker.”

This proposed legislation would amend the statute to provide the DIC kicker to a survivor of a veteran whom the Secretary determines died from amyotrophic lateral sclerosis (ALS) without regard for how long the veteran had such disease prior to death.

Per the ALS Association, “once ALS starts, it almost always progresses, eventually taking away the ability to walk, dress, write, speak, swallow, and breathe, and shortening the life span.” They acknowledge the average life expectancy for a person with ALS is two to five years. VA regulations recognize ALS as a presumptive service-connected disease and due to its progressive nature is automatically rated at 100 percent disabling once service connected.

DAV would support legislation to extend the DIC kicker to survivors of veterans whose cause of death is ALS as it is in agreement with DAV Resolution No. 360, calling for improvement and reform of DIC benefits. The aggressiveness of ALS leaves many veterans totally incapacitated and reliant on family members and caregivers and even in the best scenarios, generally does not allow life expectancy past eight years.

Discussion Draft, Board of Veterans’ Appeals TeleHearings

This proposed legislation would permit appellants to appear in disability compensation cases before the Board of Veterans’ Appeals (Board) by video from locations other than VA facilities.

Title 38, United States Code, § 7107 (c)(2) allows appellants to choose a hearing before the Board at their principal location or a video hearing at a VA facility where the Secretary has provided suitable facilities and equipment to conduct such hearings.

This proposed legislation would amend the statute to allow appellants to have a video hearing at a location selected by the appellant via a secure internet platform established and maintained by the Secretary. This proposal would also require the Secretary to provide biannual reports to the Congress on the number of hearings held under the proposed provision as well as the number of cancellations.

Starting in August of this year, the Board has established a pilot program, the “Board of Veterans’ Appeals Tele-Hearing.” The Board’s user guide states their

mission, “the tele-hearing conference system will provide an opportunity for Veterans to attend a Video conference hearing from any location, rather than traveling to their local regional office.”

The presiding Veterans Law Judge (VLJ) has the ability to control all aspects of the hearing as well as allowing witnesses from locations other than the appellant’s. A voice recording, not a video recording, is made of the hearing for transcription. As of September 19, 2019, the Board reported that 94 such hearings were scheduled, 62 were conducted, four failed and 25 cancelled or opted for a different type of hearing. The Board noted that a tele-hearing was conducted for a paralyzed appellant from their home so they did not have to travel 175 miles to attend a video hearing at the St. Petersburg VA Regional Office.

As the pilot program of the Board has shown to increase appellant hearing participation, it will also increase the efficiency and timeliness of requested hearings. This aligns with DAV Resolution No. 017, calling for meaningful appeals processing reform. DAV would support legislation to amend the statute to allow appellants to have a video hearing at a location selected by the appellant via a secure internet platform established and maintained by the Secretary.

Madame Chair, this concludes my testimony on behalf of DAV. I would be happy to answer any questions you or other members of the Subcommittee may have.