STATEMENT OF

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COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS

WITH RESPECT TO

Preparing for Blue Water Navy Claims – VA Status Update on Implementation

WASHINGTON, DC October 30, 2019

Chairwoman Luria, Ranking Member Bost, and members of the subcommittee, on behalf of the 1.6 million men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide our insight on the Department of Veterans Affairs' implementation of the Blue Water Navy Vietnam Veterans Act of 2019.

First, the VFW applauds this committee and your colleagues across the House and Senate for working to pass the Blue Water Navy Vietnam Veterans Act of 2019, once and for all correcting a horrible injustice for our Vietnam veterans. We also thank the President for his swift action in signing this bill into law. This long-overdue legislation has the potential to truly change lives and you should be commended for taking this up and holding VA accountable for its responsible implementation.

The VFW has been following implementation of the Act very closely and we will address several facets of implementation in our written remarks, focusing on VA Secretary Robert Wilkie's authority to stay claims covered by the Act, VA's creation and execution of its plan to process covered claims, how problems with the Appeals Modernization Act may affect VA's plans to responsibly handle the anticipated workload, and the need for comprehensive toxic exposure reform.

Secretary's Authority to Stay Certain Claims

In light of last week's publication in *Military Times* of correspondence between former VA Secretary David Shulkin and officials within the Trump Administration on continuing to delay new presumptive conditions for Vietnam veterans exposed to Agent Orange, the VFW has a

different perspective on some of the challenges we have seen in VA over the past year in implementing reforms like the Blue Water Navy Vietnam Veterans Act (BWN Act) and the Appeals Modernization Act (AMA). Sadly, some of the roadblocks we have seen over the past year now appear to be deliberate in complicating the process and delaying certain benefit reforms as ways to save money. These earned benefits are not charity – they are a cost of war. As VFW National Commander William "Doc" Schmitz said last week:

"We cannot, and will not, stand by and allow another veteran to lose their life because of the bureaucracy of Washington. The time for waiting is over."

This sentiment holds true not only for expansion of Agent Orange presumptive conditions, but also to the sense of VA toward Blue Water Navy expansion.

After the landmark *Procopio v. Wilkie* decision earlier this year, we continued to hear VA Secretary Robert Wilkie comment that the science did not support expanding presumption to Blue Water Navy (BWN) veterans – a position of his that helped to sink the BWN Act in the previous Congress. Subsequently, Secretary Wilkie directed his department to delay processing any claims and appeals authorized under *Procopio* until the courts ordered VA to start processing its pending BWN workload.

Fast forward to the passage of the BWN Act – no sooner had President Trump's signature dried on the bill that Secretary Wilkie took the drastic step to exercise his authority to stay certain claims and applied it unilaterally to any claim that could be covered under the law – even claims that VA could already grant, like Korean DMZ claims between April 1, 1968 and August 31, 1971.

VA continues to assert that the stay was designed to allow VA the time to create systems to properly process BWN claims. The VFW understands this to an extent. Given the specificity of the law in outlining the geographic boundaries for ships on which eligible veterans must serve, we know that VA needed the time to build a tool for verification.

To his credit, Dr. Paul Lawrence, VA Under Secretary for Benefits, and his team should be applauded for their work on this system in concert with the National Archives and Records Administration (NARA), aggressively scanning Navy deck logs to ensure they have the ability to get to "yes" for certain BWN veterans.

The timeline in developing this tool was very aggressive, and VBA has shared that it is already operational. We look forward to a scheduled demo for VSOs on November 18.

However, aside from this new tool, not much should need to change in the benefits administration process for BWN veterans and other covered veterans under the BWN Act. VA has been processing Agent Orange presumptive claims for years and already has the systems in place to evaluate the extent of these presumptive conditions and to even award retroactive benefits. This is why the VFW and our partner VSOs were so vocal about the blanket stay after the signing of the BWN Act.

In partnership with Disabled American Veterans, Vietnam Veterans of America, and others, we called attention to the effects of the stay in a press conference earlier this month. Unfortunately, VA tried to obfuscate the effects of the stay on veterans by asserting that these veterans were not necessarily denied care or implying that survivors could wait a little longer. To the VFW, it was not just about the potential denial of care, but more about the financial ruin that veterans would have to face for their life-saving care that should have been covered by VA all along. For survivors, months without benefits for the loss of their loved ones could mean losing a home or amassing debt to make ends meet. Moreover, for veterans who stand to lose their battles with these illnesses, why would we want them to wait even longer?

With these scenarios in mind, the VFW calls on this Subcommittee to commission a report from VA on the effects of the stay, asking the following questions:

- How many BWN covered veterans requested expedited processing due to financial hardship or terminal illness during the stay?
- How many BWN covered veterans died during the stay?

Next, the Secretary asserted that the bill did not take effect until January 1, 2020. This is only partially true. While the expansion of certain programs like Spina Bifida benefits for Thailand dependents and an earlier presumptive date for certain Korean DMZ claims do take effect in January, VA was already compelled by the courts to grant benefits for BWN veterans under current law through *Procopio*. The only change that we see in the BWN Act is the specificity on geographic boundaries for certain BWN veterans and comprehensive reporting requirements for VA. Otherwise, we view the law as simply a clarification of current laws, compelling VA to grant benefits for a long-overlooked class of Vietnam-era veterans.

The stay was particularly egregious when applied to Korean DMZ claims. While it may have been reasonable to consider staying Korean DMZ claims between September 1, 1967 and March 31, 1968, the Secretary instead decided to halt all work on all Korean DMZ claims – even those that were routinely granted under current authorities.

When looking at the stay authorized in the BWN Act, the VFW has a very different perspective from the Secretary. We believe that the stay did not give him the authority to stop processing all claims possibly covered by the act, but instead gave the Secretary the space to stay claims that required further development under certain authorities of the new law. To the VFW, the stay under the BWN Act should have meant that VA should grant what it could in the interim under *Procopio* and other current VA policies, but stay any potential covered claims that either required further development or would have resulted in denials.

One of our service officers in Virginia, Ken Wiseman, who this Subcommittee knows worked as an architect of this legislation when he served on the VFW National staff summed up the stay in very poignant manner:

"Veterans are dying and that is not a theatrical claim. Their benefits waiting are a slap in the face as the surviving spouse will get the [Dependents Indemnity Compensation] but what about the debts from health care that would have been covered otherwise? Anything that you can get after

death is just a benefit that should have been granted in life. VA has no leg to stand on as this is not a new program to implement, just an expansion of the number of people eligible for the benefits. We saw a similar growth in use of the GI Bill but I do not know that there was a stay on new enrollments into the Montgomery [G.I. Bill] after September 11, 2001."

With this in mind, the VFW recommends that Secretary Wilkie lift the stay on processing these benefits immediately. We know that certain claims can be granted right now. Waiting until January not only harms veterans, but creates an unnecessary backlog for VA at a time we can ill afford it.

VA's Plan to Process Covered Claims

The VFW has worked closely with Dr. Lawrence and his team at every opportunity to provide insight into their aggressive deployment of new policies and procedures. To his credit, Dr. Lawrence has been responsive to the VSOs by offering opportunities to review letters to veterans and, most recently, VA's communications plans to explain the processes to veterans. Despite the stay, our assessment is that Dr. Lawrence and the dedicated staff at VBA have taken this charge very seriously and want VBA to be in the best possible position to grant benefits as soon as possible.

Just last week, we were offered the opportunity to comment on VA's frequently asked questions, training presentations, and decision-making scenarios that will end up communicating to veterans what to expect from the process. Our initial assessment is that these were generally well thought out, and that veterans should easily understand that VA expects previously-denied BWN veterans to file a supplemental claim on VA Form 20-0995 and BWN veterans filing for the first time to file on VA Form 21-526EZ.

VA must move aggressively to get this information in front of veterans and the VFW stands ready to leverage our networks to make sure that our members, our service officers, and the veterans we represent are fully informed of the process.

However, we are concerned about the lack of formal policy guidance on how BWN and other covered claims are to be handled at the VA Regional Office level. To VBA's credit, they have been transparent with the VSOs that formal regulations will not be proposed before January, but that interim policy guidance would be available in mid-October.

Today is the last day of October and we are not tracking on the policy guidance, and neither are our representatives in the field. This is worrisome for two reasons: First, it is very difficult for us to provide our accredited field staff with the training they require in the absence of formal VA guidance. Second, VFW is concerned that the interim policy guidance may differ from the final promulgated regulations, meaning that VA would again need to readjudicate certain covered claims.

To prepare for this hearing, VFW solicited the feedback of our global network of accredited service officers who work with veterans every day to understand their benefits. What we received demonstrated inconsistency across VA.

In Ohio, one of our service officers told us that he was instructed to complete three forms for any BWN claimant – VA forms 20-0995, 20-0996, and 21-526EZ "just to be safe." This highlights another issue that the VSOs have tried to resolve related to AMA, recognizing that it would have dire consequences for veterans covered under the BWN Act.

In Idaho, one of our state partners was tracking a BWN claim that was actually granted in September in spite of the stay, only to discover that the veteran was given an improper effective date.

Finally, in Maine, our service officer reported two veterans whose claims related to BWN were never properly established, even though they were filed on the prescribed 0995 form.

We believe that these examples underscore the critical need for policy guidance in the field for both VA staff and VSO advocates. VA must work aggressively to approve, publish and communicate this guidance as soon as possible.

Despite the lack of policy guidance, the VFW believes that VBA is generally heading in the right direction. VBA informed the VSOs that they planned to start scheduling exams in October, and we do see this happening. As of last week, VBA reported that exams were underway and that they intend to queue claims as "ready for decision," while waiting for the stay to expire. This is positive and commendable for VBA, but VFW believes this again underscores the unnecessary nature of Secretary Wilkie's stay on benefit grants.

Appeals Modernization Implications

We cannot discuss BWN implementation without also discussing certain unintended consequences of AMA implementation. Earlier in our testimony, we pointed to an example of how AMA is impacting VA's workflow in the field, establishing claim review actions for veterans who were previously denied a benefit.

Just before AMA went live, VFW and DAV called VBA's attention to a problematic interpretation of the AMA and VA's plans to only accept claims for reopened conditions on VA Form 20-0995. At the time, we warned VA of a hypothetical scenario where a veteran would meet with one of our advocates for the first time and would not know whether or not they previously filed a claim for a certain condition.

Since we would not have access to the veteran's claim file at this time to verify whether or not a claimed condition was previously adjudicated, our normal, good-faith business practice would be to file a Power of Attorney on VA Form 21-22 and submit a claim on the veteran's behalf on VA Form 21-526EZ.

However, once VA receives this claim, they may determine that some conditions were previously adjudicated by VA. At this point, VA closes out the claim for any previously-denied conditions, and generates a "Request for Application" letter to the veteran, inviting them to file a supplemental claim on a different form.

In our understanding of AMA and VA's own regulations under 38 CFR 3.160, the 526EZ contains all of the information required by VA to establish the claim on a standard claim form prescribed by the Secretary. However, VA makes the arbitrary choice not to establish, creating more bureaucratic hurdles for the veteran.

Though we raised this as a hypothetical in February, we started to see these scenarios play out with real claims over the next couple of months, resulting in lost benefits for veterans. In June, a coalition of many of the largest VSOs with VA-recognized benefits assistance programs asked that Dr. Lawrence look into our concerns over the new forms as well as the lack of applicability of Intent to File (ITF) for supplemental claims after the one-year review period.

To his credit, Dr. Lawrence and his team did review the ITF issue and we expect a revision to this in the coming months. However, VBA has not addressed the forms issue. We worry that under BWN, this situation will only be exacerbated when veterans' claims are turned away.

Though this is not a fatal flaw for BWN veterans, since they will be entitled to an earlier effective date regardless, we still believe that this creates unnecessary confusion and delay for veterans and unnecessary work for VA at a time when VA's resources are already limited.

The confusion over standard forms is unnecessary and we compel VBA to take a hard look at this. We believe it does not require a regulatory change, and in fact, is in direct contradiction to the intent of Congress under AMA.

Finally, even though there are certain actions VA can take to correct this moving forward, any action VA takes would only apply to veterans who apply for future benefits. The VFW is worried about veterans who have already been harmed by these inconsistencies in AMA. To remedy this, we recommend the following: First, VA should report on how many veterans were affected by the ITF and standard forms issues since February 19, 2019. Second, Congress should consider legislation to award retroactive benefits to this select group of beneficiaries affected by this unintended consequence of AMA. The VFW stands ready to work with this Subcommittee on how to best address this issue.

Based on our daily interactions with VBA and the long-standing relationships VFW has built over our first century of advocating for veterans' benefits, we believe that VBA has many hard working and dedicated professionals who want to get this right. The problem, however, comes at other levels of the bureaucracy who seem more interested in political maneuvering than helping veterans.

Historically, when VA implements major reforms, like the BWN Act, they work in close consultation with VA-recognized Veterans Service Organizations like the VFW who interact with veteran clients of VA benefit programs every day. In the meetings I have had with VBA on this, I almost sense a palpable frustration among many VA leaders they cannot share more with the VSOs that help their system function.

Dr. Lawrence has tried to keep VSOs apprised of what VA is thinking in developing its policies – so much so that he personally sought out ideas from the VSOs on how to handle the potential influx of BWN claims from the time the *Procopio* ruling came down. Unfortunately, we still see a stonewall that is seemingly out of Dr. Lawrence's control. After all, this stonewalling seems pervasive across other VA business lines, such as the delayed implementation of the Caregiver expansion or the failure to properly study the health marketplace before implementing MISSION Act access standards – which VA released only days before implementation.

What we ask for as VA-recognized organizations that provide legal representation for our clients in the benefits process is transparency and collaboration. We have been promised time and again that VA will improve in this area and to their credit, we have seen improvement but not consistently. That seems to be hard to find under Secretary Wilkie's leadership. In order for our advocates to properly represent the best interest of our veterans, VA should welcome our feedback in stress testing their systems and providing input on how to best serve our shared constituency.

Comprehensive Toxic Exposure Reform

Finally, the VFW calls on Congress to take up comprehensive toxic exposure reform that proactively addresses the likelihood of presumptive conditions and necessary care for past, current, and future conflicts. In a century of advocating for veterans' benefits, the VFW sees little consistency in how we identify toxic exposures, then offer care and benefits to those affected. We should not need an *Agent Orange Act* or an *Honoring America's Veterans and Caring for Camp Lejeune Families Act* each time we verify a new hazard to military duty. Veterans instead deserve a consistent, proactive process to address toxic exposure concerns that history clearly shows us will emerge in every conflict.

We should not be debating in 2019 whether or not the use of Agent Orange more than 50 years ago was harmful for our veterans. We know it was and so does VA. We worry that this same scenario is already playing out for today's veterans exposed to open air burn pits and other toxins on the modern battlefield. Congress should take up legislation to establish a process for granting care and benefits for verifiable toxic exposures, and the VFW stands ready to work with this Subcommittee to make this a reality.

One hundred years ago this month, the VFW National Veterans Service helped our first veterans navigate a complex veterans' benefits landscape. Ever since, our interest has been to work collaboratively with Congress and VA on ways to improve the process. Today, our cadre of 2,100 professional advocates assist more than half a million veterans in understanding and accessing their benefits. We know the issues, we understand the problems, and we understand the affects these programs have on the lives of our veterans and their loved ones. We hope that the comments and recommendations we have presented today will be valuable to this Subcommittee and to VA leadership in ensuring we deliver timely and accurate benefits to our Vietnam-era veterans who were exposed to Agent Orange.

Madame Chairman, this concludes our remarks and I am eager to answer any questions this Subcommittee may have.