

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement of

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Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Concerning

**Pending Legislation, to include H.R. 697, H.R. 5019, H.R. 5048, H.R. 5487,
H.R. 5639, H.R. 6013, H.R. 6060, H.R. 7443**

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On behalf of the National Organization of Veterans' Advocates (NOVA), I would like to thank Chairman Luria, Ranking Member Bost, and members of the Subcommittee for the opportunity to offer our views on pending legislation. NOVA will focus its testimony on H.R. 7443 and H.R. 5019.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 600 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the United States Court of Appeals for Veterans Claims (CAVC) and United States Court of Appeals for the Federal Circuit. In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

H.R. 7443 – Veterans Claim Transparency Act of 2020

H.R. 7443 would require VA to reinstate a period in which the advocate of record could review a proposed benefits determination and, if necessary, provide feedback on identified errors. NOVA supports reinstatement of this policy for **all** advocates and appreciates Representative Allred's introduction of, and the Subcommittee's interest in, H.R. 7443. Below, NOVA provides background information on the evolution of this policy as it relates to attorneys and claims agents, explains why VA's stated reasons for removing the review policy are invalid, and describes how VA's policies related to electronic access promote representational inequities and harm veterans. NOVA supports passage of H.R. 7443 and offers suggestions for strengthening this bill.

Background

VA recently discontinued its 48-hour review policy. *See Veterans Benefits Administration, Information on Discontinuance of 48 Hour Review Policy for Certain Veterans Service Organizations* (April 7, 2020) (hereinafter *Discontinuance of Review Policy*). VA's policy originated long before the conversion of paper claims files to the current electronic format and corresponding rise of the National Work Queue; officers working for Veterans Service Organizations (VSOs) co-located in a VA Regional Office (RO) were afforded this option starting in 1957. VSOs were able to review provisional decisions in hard copy at the local RO and speak directly with a VA employee if he or she found an error in a decision. If there was agreement about the error, the VA employee could fix it before the final decision was issued, thus sparing the veteran an appeal.

When this process was instituted in 1957, there was no specified time frame for review. In

2004, the Veterans Benefits Administration (VBA) instituted a one-week limit and later reduced it to two days. According to VBA, “due to holidays, weekends, and VSO convention office closures, Veteran claims were pending for longer periods and delays in deciding claims continued.” *Id.* With the creation of the Veterans Benefits Management System (VBMS) and the resulting transition from paper to electronic files, VBA revised this policy in 2017. Specifically, through VBMS, VBA was able to set a 48-hour review window electronically. *Id.*

Of course, in 1957, attorneys did not routinely represent veterans in VA disability claims and appeals, due in large part to the long-standing \$10 limit on attorneys’ fees. *See generally* House Committee on Veterans Affairs, 100th Cong., *Legislative History of the Ten Dollar Attorney Fee Limitation in Claims for Veterans Benefits* (Comm. Print 1987). When Congress created the CAVC in November 1988, the Veterans’ Judicial Review Act provided veterans and their families with the right to retain attorneys and claims agents, and allowed these advocates to charge legal fees with limits. Section 5904 of title 38 governs the ability to charge fees, and Congress has amended this provision over the years, specifically in 2006 and 2017, to allow for the award of fees at earlier stages of the adjudication process. *See* Pub. L. 100-687, § 104, 102 Stat. 4105, 4108 (1988); Pub. L. 109-461, § 101, 120 Stat. 3403, 3405 (2006); Pub. L. 115-55, 131 Stat. 1105, 1110 (2017). These changes have not only allowed veterans to retain private attorneys and claims agents, but also resulted in increased availability of legal representation through legal aid offices, non-profit legal services organizations, and law school veterans clinics. As such, it is no longer rational to continue to treat attorneys, claims agents, and VSOs differently, as articulated by CAVC Chief Judge Davis in 2018: “[A]lthough there is a long history of both a ‘special relationship’ between VA and VSOs and restrictions on attorney practice before VA, the practical differences between VSO and attorney representation are less significant now than they have ever been. . . . The increased involvement of attorneys in the adjudication process, both at the adversarial and nonadversarial stages, suggests that the disparate treatment of VSO representatives and attorneys has perhaps outlived its usefulness and may no longer be rationally justified.” *Rosinski v. Shulkin*, 29 Vet.App. 183, 193 (2018) (per curiam order) (Davis, C.J., concurring opinion).

NOVA has long advocated for equal treatment of representatives, to include providing VBMS access for attorneys and claims agents. VBA did not routinely provide VBMS access to attorneys and claims agents until 2016. *See* Department of Veterans Affairs, VBA Letter 20-16-08, *Internal VBA Systems Access for Claimant and Appellant Representatives* (September 22, 2016) (“Users cannot access internal systems without a Personal Identity Verification (PIV) badge; therefore, in order for accredited claims agents, attorneys, and employees of Veterans Service Organizations (VSOs) to gain access to VBA systems, VA must issue them a PIV badge.”). The process to obtain such access, separate from the accreditation process administered by VA’s Office of General Counsel, is a lengthy one and involves, among other things, filing paperwork, submitting

fingerprints, participating in mandatory training, and signing VA's rules of behavior. Contrary to reports and as described further below, upon receiving VBMS access, some NOVA members used the 48-hour rule as a tool to help VA correct erroneous decisions on behalf of their clients.

VA's Reasons for Eliminating the 48-Hour Review Policy Are Flawed

1. Claims and appeals modernization does not erase the benefits of the 48-hour review policy.

According to VA, the ability to track and monitor claims within VBMS, combined with new review options provided under the Appeals Modernization Act (AMA), create efficiencies that make the 48-hour review policy unnecessary. Even assuming all advocates have seamless VBMS and direct upload access, VA's reasoning misses the mark.

First, VA relies on the ability to use "direct upload capability at any point in the claims process" to support its decision. *Discontinuance of Review Policy*. This upload capability is used to submit claims, forms, and evidence to VA for consideration. The stated average time for uploaded documents to reach VBMS is two business days; sometimes documents take longer to reach the VBMS folder. By contrast, the review policy allows a representative to analyze a decision quickly and identify any errors that could be corrected before a decision is finalized and sent to the veteran. It is unclear how having direct upload replaces this function, since submitting something through direct upload would take at least as long as the allotted review period to have any impact.

Second, VA's argument that AMA procedures counterbalance the elimination of the review policy is without merit. The AMA does provide more options for a veteran to challenge a rating decision, i.e., higher-level reviews (HLRs) and supplemental claims (SCs) to VBA and appeals to BVA. VA aims to issue agency decisions within a 125-day window. BVA set a 365-day goal for direct review appeals, and has no time goals for appeals on the hearing or evidence-only dockets. While these time frames are shorter than the wait times experienced by veterans with legacy appeals, they are not insignificant. Why should a veteran be forced to file an HLR, SC, or BVA appeal when his or her advocate could obtain a correction much more expeditiously by seeking it through the 48-hour review process? Such a result would clearly be more advantageous to the veteran and VA. VA's reliance on new procedures in the AMA does not replace the potential benefit of the 48-hour review policy.

Finally, VA states that "discontinuation of the additional pre-decisional review will enable VA to process final claims for Veterans and their families (providing payments) up to 48 hours faster." *Discontinuance of Review Policy*. Of course, if every decision granted

benefits this argument might be logical. However, many decisions are unfavorable and many are reviewed or appealed more than once before errors are corrected. Getting a wrong decision 48 hours sooner in the name of efficiency makes no sense. *See also* Senator Jon Tester, et al., to Honorable Robert Wilkie (April 15, 2020) (“Given that Veterans on average wait 79.9 days for a benefits decision, it’s unclear how removing the 48 hour review would improve outcomes for Veterans.”). There is no question it is better for veterans to wait 48 more hours if there is a chance they could avoid further appeal.

2. Providing the review policy to all advocates does not create legal risk and is the most veteran-friendly policy.

Simply put, VA decided to punish veterans by eliminating the 48-hour review period, citing the need to eliminate “legal risk” and “representational inequities.” This action followed litigation in the CAVC brought by an attorney seeking access to provisional decisions during the review period. When the CAVC instructed VA to provide the attorney with a written, appealable decision explaining why he was not allowed such access, VA decided instead to eliminate the option for all advocates.

VA just as easily could have decided to continue the 48-hour review process within the VBMS platform for **all** advocates. Such a decision certainly is more veteran friendly. And, in fact, it appears the electronic review option was available to attorneys and claims agents, as some NOVA members report using it. When applying a specific filter to cases in VBMS, a 48-hour review “button” appeared and allowed for review. Several NOVA members report having an erroneous effective date fixed or pointing out evidence missed by an adjudicator that made the difference between a denial and a grant. Therefore, it is unclear what legal risk is created.

3. IT enhancements benefiting attorneys, claims agents, and VSOs ultimately benefit veterans.

While advocates do request IT enhancements to make VBMS more user friendly and efficient, it is unclear what “infrastructure” needs to be built out to allow attorneys and claims agents to have access to the 48-hour review “button.” As noted above, some attorneys and agents used this feature before its elimination, so it does not appear additional enhancements are required to reinstate it.

Furthermore, VA states: “VA must prioritize its information technology enhancements to favor the delivery of benefits, payments and services to Veterans, over those of creating additional access for VA-accredited individuals.” *Discontinuance of Review Policy*. The two are not mutually exclusive. Practically speaking, advocates need access to VBMS to follow the adjudication process; therefore, a robust system is necessary to ensure veterans receive competent representation and obtain all earned benefits. Competent

representation, in turn, promotes efficiency within VA. VA should work with representatives to make VBMS more functional for **all** advocates, as well as for VA employees. Congress should support VA's budgetary requests to facilitate this process.

Congress Should Pass H.R. 7443 to Restore The 48-Hour Review Policy

NOVA supports passage of H.R. 7443 and makes the following suggestions to clarify the current bill.

1. The term “notification in writing” should be defined.

H.R. 7443 indicates that “[t]he Secretary shall submit notification in writing to a representative of record that a proposed determination is ready for review.” Will the representative be emailed a copy of the decision or notice that the decision is available on VBMS? Will the 48-hour button be reinstalled and the representative be responsible for finding the decision on VBMS? Is some other method intended by this term? If the review period is still limited to 48 hours, notification in writing – via mail – will not be possible. This phrase needs to be clarified.

2. The period of review must be within regular business hours.

If the review period is limited to 48 hours, the bill should provide that the review period must encompass normal business hours. For example, if the decision is provided at 5 p.m. on a Friday, the review clock should not start to run until Monday morning at 9 a.m., so that an advocate has a sufficient period to review a decision.

3. The decision should clearly indicate an available contact who will respond to any follow-up initiated by the advocate.

Finally, there should be a meaningful way for the representative, upon review of the proposed decision, to provide feedback regarding any errors or omissions identified. The bill should require that the proposed determination includes contact information for an individual at VA who is responsible for considering advocate input and responding accordingly.

Congress should continue to ensure VA does not perpetuate representational inequities

In deciding to eliminate the 48-hour review period, VA states: “VBA must ensure that its practices do not create representational inequities for any Veteran, unnecessarily.” *Discontinuance of Review Policy*. Unfortunately, VA's methods of providing electronic access do create representational inequities for veterans because VA provides broader

access for VSOs than it does for attorneys and claims agents.

NOVA has elaborated on these inequities in comments recently filed in response to VA's proposal to limit representative access to VBMS. National Organizations of Veterans' Advocates, Inc., to Director, Office of Regulation Policy and Management (April 16, 2020) (comments on RIN 2900-Q81, Department of Veterans Affairs, *Individuals Accredited by the Department of Veterans Affairs Using Veterans Benefits Administration Information Technology Systems to Access VBA Records Relevant to a Claim While Representing a Claimant Before the Agency*, 85 FR 9435 (February 19, 2020)) (hereinafter *NOVA Comments*). Specifically, VA is removing the ability for law students, legal interns, paralegals, and VSO support staff to have "read-only" access to the electronic claims file. These individuals, whose access to records has typically been agreed upon by a claimant at the start of the representation, are critical to assisting the representative of record manage the claim or appeal. And, as noted by Senator Tester and some of his colleagues, "[l]imiting access in the name of efficiency or privacy is unnecessary in a veteran-friendly system, especially when it is the veteran who grants access to their case file to these specific individuals for assistance." Senator Jon Tester, et al., to Honorable Robert Wilkie (April 15, 2020).

On its face, because VA is removing the right for VSO support staff to have access in addition to paralegals, interns, and law students, the proposal appears to treat all representatives equally. However, under 38 U.S.C. § 5904, attorneys and agents represent veterans in their individual capacity. VA has interpreted this statutory provision to only allow one person to sign its power of attorney form, VA Form 21-22a. The proposed regulation would limit electronic access to the one attorney or agent who has signed the 21-22a. With no access available outside that one individual, an attorney or agent is greatly restricted in running his or her practice and, in essence, becomes tethered to VBMS as the only individual with access to the electronic claims file. *See NOVA Comments* at 4-6.

By contrast, under section 5902, a veteran seeking VSO representation names the organization as his or her representative. This model allows for much greater flexibility in representation as multiple individuals within the named VSO have the ability to access a veteran's electronic claims file. For example, a VSO representative based in the metropolitan DC area could be assisting a veteran with a BVA appeal, while a VSO representative in the veteran's hometown across the country could be assisting with a claim before the agency. Both would be able to see the electronics claims file.

NOVA seeks Congressional action to solve the representational inequity that VA is perpetuating through its proposed regulation. Law students, legal interns, paralegals, and VSO support staff should be allowed "read-only" access under the supervision of their firm, organization, or clinic. In addition, multiple non-VSO representatives working for a

firm or organization should be permitted to share access within that firm or organization similar to the VSO model.

H.R. 5019, Veterans Legal Support Act of 2019

NOVA supports the passage of H.R. 5019, which would provide financial support to university law school programs that offer legal assistance to veterans. In the past decade, there has been a growth of specialized clinical programs at law schools around the country. These programs offer vital outreach and critical legal services to veterans, including assistance with VA benefits, criminal cases, and civil matters.

In addition, these clinics educate students in VA law and policy, some of whom choose to practice in the field after graduation. Advocates trained in veterans law provide invaluable service in private practice, in legal aid organizations and clinics, for VA, and as law clerks at the CAVC.

Such support, while important at any time, becomes more necessary in light of the current COVID-19 pandemic. Law school clinics frequently are underfunded and have to rely on outside donations to operate. Given the loss of revenue to educational institutions as the result of pandemic-related restrictions, coupled with potential financial constraints on outside donors, this bill could provide an important infusion of funds to clinics and ensure legal services to veterans are not interrupted. We urge Congress to pass this bill and consider additional funding in the future.

Conclusion

NOVA is committed to working with this Subcommittee, VA, and fellow stakeholders to ensure representational inequities are eliminated and veterans receive all the benefits they have earned. Thank you again for allowing NOVA to provide our views on this legislation, and I would be happy to answer any questions the Subcommittee members might have.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA's office at (202) 587-5708 or by emailing Diane directly at drauber@vetadvocates.org.

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Prior to joining NOVA in September 2015, Ms. Rauber worked as the Associate General Counsel for Appeals with Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (Board), provided support and training to PVA's service officers, and analyzed cases for potential appeal to the United States Court of Appeals for Veterans Claims (CAVC).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before the Board and the CAVC. She has presented at numerous veterans' law conferences, on topics including successful advocacy and military history research.

She also served as a consultant to the American Bar Association (ABA) Center on Children and the Law. In this capacity, she wrote and edited numerous ABA publications on an array of child welfare issues, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communication Disorders from the Pennsylvania State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, the CAVC Bar Association, and the Maryland Bar Association Veterans Affairs and Military Law Section, as well as a trustee for the CAVC Historical Society.