

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement for the Record

Before the

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

Concerning Pending Legislation

March 29, 2023

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on pending legislation. Our statement will focus on the following bills: (1) H.R. 1139, GUARD VA Benefits Act; (2) H.R. 1329, to amend title 38, United States Code, to provide for an increase in the maximum number of judges who may be appointed to the United States Court of Appeals for Veterans Claims; (3) H.R. 1378, Veterans' Appeals Backlog Improvement Act; and (4) H.R. 1530, Veterans Benefits Improvement Act.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 800 attorneys, agents, and other qualified members nationwide, who are assisting tens of thousands of our nation's military veterans, their surviving spouses, 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 benefits from the Department of Veterans Affairs (VA).

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), United States Court of Appeals for the Federal Circuit, and Supreme Court of the United States. As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari).

The most important facet of NOVA's mission is the education of accredited advocates. NOVA currently conducts two conferences per year, each of which provide approximately 15 hours of continuing legal education (CLE) credit for attendees. NOVA sustaining members must participate in at least one conference every 24 months to maintain eligibility to appear in our public-facing advocate directory. Experts from within and outside the membership present and train on the latest developments and best practices in veterans law and policy. In addition to conferences, NOVA offers webinars, online support, and other guidance to its members to enhance their skills.

H.R. 1139, GUARD VA Benefits Act

NOVA supports H.R. 1139. NOVA testified in April 2022 at a joint hearing before this Subcommittee and the Subcommittee on Oversight and Investigations as to the need for this legislation. National Organization of Veterans' Advocates, *Statement Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs and Subcommittee on Oversight and Investigations, Joint Oversight Hearing, "At What Cost? – Ensuring Quality Representation in the Veteran Benefit Claims Process"* (April 27, 2022),

<https://docs.house.gov/meetings/VR/VR09/20220427/114660/HHRG-117-VR09-Wstate-RauberD-20220427-U1.pdf>. We incorporate this testimony by reference, and we thank Reps. Pappas and Radewagen for reintroducing this important bill.

Over the past several years, there has been a proliferation of predatory companies offering “consulting” services for veterans seeking VA disability benefits. These “claims consultants” are unaccredited by VA and unlawfully charge veterans fees to prepare initial claims – a service that has long been available for free from accredited veterans service organizations throughout the country. In addition to charging veterans thousands of dollars for a service they can get for free, these consultants provide incorrect and harmful advice that often results in the veteran’s forfeiture of months’ or years’ worth of benefits.

For example, while the consulting company prepares and reviews the claim, the veteran submits it on their own or, in some circumstances, the claim is submitted by an employee using the eBenefits log-in information of the veteran. If the veteran’s claim is granted, the company charges a fee based on five to six times the amount that the veteran’s monthly payment increases. Thus, their fee relies on increasing the veteran’s future benefits, and once this increase has been achieved, their work is complete. This practice leaves no incentive for ensuring that the veteran’s award has been assigned a proper effective date. Pursuing a proper effective date would require filing a decision review request, e.g., a higher-level review or appeal to the Board of Veterans’ Appeals (BVA), which entails work for which they would not be compensated. While this practice benefits these unaccredited companies, their failure to ensure that the veteran has been awarded the earliest effective date means that the veteran is forfeiting retroactive compensation that could, depending on the circumstances of the case, be substantial.

VA has issued “cease and desist letters” to these unaccredited consulting firms, but VA states it has no ability to stop their unlawful activity. H.R. 1139 reinstates penalties for those who violate the law and protects veterans and their families from predatory practices. We urge this Committee to advance it.

H.R. 1329, to amend title 38, United States Code, to provide for an increase in the maximum number of judges who may be appointed to the United States Court of Appeals for Veterans Claims

NOVA supports H.R. 1329. Many NOVA members represent veterans before the CAVC, and serve or have served on CAVC committees or as part of the CAVC Bar Association leadership. When Congress passed the Veterans Judicial Review Act in 1988, veterans finally gained the long-denied right to judicial review of final BVA decisions. It is important that Congress continue to ensure the court has the necessary resources to timely administer justice for our nation's veterans.

Between FY 2017 and FY 2020, BVA nearly doubled the number of issued decisions, from 52,661 to 102,663. Department of Veterans Affairs, Board of Veterans' Appeals, *Annual Report* 40 (2020),

https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf. In 2020, the CAVC received 8,954 appeals, an all-time high. United States Court of Appeals for Veterans Claims, *Annual Report* 1 (2020),

<http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf>. While BVA production has slipped and the corresponding number of CAVC appeals has slightly dropped since FY 2020, the August 2022 passage of the PACT Act is resulting in increased claims and an expectation of increased appeals to BVA and, in turn, the CAVC. The PACT Act also created funding for more positions within the Veterans Benefits Administration, BVA, and VA's Office of General Counsel, which is anticipated to result in increased productivity and, ultimately, more appeals to the CAVC.

Congress has already appropriated the funds necessary to expand the CAVC to 11 judges, i.e., expanding by two permanent positions and retaining two temporary ones. Pub. L. No. 117-328, 136 Stat. 4459, 4971 (Dec. 29, 2022). With these funds in place, Congress should move quickly to authorize additional judges and ensure veterans continue to have prompt access to justice as decisions and appeals increase in the years ahead.

H.R. 1378, Veterans' Appeals Backlog Improvement Act

NOVA supports H.R. 1378, which would establish an internship program within BVA and require a report on improving access to BVA telehearings. In the recently released VA FY 2024 budget, VA stated: "Initial projections after passage of the PACT Act show the Board could receive as many as 78,000 AMA appeals in 2023 and nearly 86,000 in 2024." U.S. Department of Veterans Affairs, FY 2024 Budget Submission, *Burial and Benefits Programs and Departmental Administration, Vol. 3*, 274 (March 2023), <https://www.va.gov/budget/docs/summary/fy2024-va-budget-volume-iii-burial-and-benefits-programs-and-departmental-administration.pdf>. However, the budget further indicated that BVA only anticipates issuing 26,000 AMA appeal decisions in 2023 and

“anticipates 2024 to be the first year in which the number of AMA decisions will be roughly equal to the number of legacy decisions.” *Id.*

According to reports from NOVA members, many veterans are waiting over two years for a decision in the AMA direct review lane, far more than the 365-day goal to which BVA committed in negotiations with its stakeholders and a foundation of the system passed by Congress in 2017. NOVA supports efforts such as these to provide resources for BVA to fulfill its mission of producing timely, accurate decisions for veterans and their families. NOVA also encourages this Committee to conduct oversight on ongoing delays.

Furthermore, BVA continues to run a significant hearing backlog. Veterans are choosing the hearing lane at a 41 percent rate. AMA Appeals Lane Choices FY 2019 – FY 2023, <https://www.bva.va.gov/images/appeals/ama-appeal-lane-choices-large.jpg>. At the end of FY 2022 there were 74,411 hearings pending with 30,089 completed. Legacy and AMA Hearings Held and Pending (FY 2019 – FY 2022), <https://www.bva.va.gov/images/appeals/legacy-and-ama-hearings-held-and-pending-large.jpg>. These statistics, combined with projections for increased appeals, indicate the backlog will continue to grow. NOVA supports efforts to explore how hearings can be better and more efficient, and reduce the long waits veterans endure to be heard.

H.R. 1530, Veterans Benefits Improvement Act

NOVA supports H.R. 1530. In particular, it is critically important that every correspondence regarding the scheduling of a disability examination be communicated to the veteran’s accredited representative. NOVA members report confusion and a lack of clear communication about scheduling to veterans that causes them to miss examinations. When a veteran misses an examination, it needs to be properly and timely rescheduled or there is a strong likelihood VA will deny the claim. Representatives can assist their clients with navigating this process but timely notice is necessary.

Likewise, ensuring veterans have accurate contact information for contractors and can identify who is calling them allows veterans to have more control over this important – and often stressful – part of the disability claims and appeals process.

Finally, while NOVA understands that there may be some Disability Benefits Questionnaires (DBQs) that cannot be published, the language of Section 5105(d)(4)(B) is excessively and unnecessarily broad, as it would essentially allow VA to exclude any DBQ created after January 1, 2022, that has not been previously published. NOVA recommends removing subsection (d)(4)(B). Alternatively, Congress should ensure through oversight that this provision is not overly restrictive in limiting publication of DBQs.

Conclusion

NOVA is committed to working with Congress, VA, and fellow accredited stakeholders to advance this important legislation for our nation's veterans and their families. Thank you again for allowing NOVA to provide our views.

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.