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**STATEMENT OF  
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FOR THE RECORD OF THE  
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES  
SEPTEMBER 28, 2023**

Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to submit testimony for the record of your oversight hearing titled, "VA's Fiduciary Program: Ensuring Veterans' Benefits are Properly Managed."

DAV is a congressionally chartered and VA-accredited national veterans' service organization (VSO) of more than one million wartime service-disabled veterans. To fulfill our service mission, DAV directly employs a corps of benefits advisors, national service officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every Department of Veterans Affairs (VA) regional office (VARO) as well as other VA facilities throughout the nation, including the Board of Veterans' Appeals (Board).

Mr. Chairman, based on our experience of providing VA-accredited claims representation and assistance to veterans, their families, survivors and those deemed to warrant a fiduciary, we are enthused to provide our concerns about the VA incompetency process, the Fiduciary Program, oversight of VA appointed fiduciaries and DAV's recommendations.

**VA'S INCOMPETENCY PROCESS**

Under VA regulation 38 C.F.R. 3.353(a), a mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation. The Veterans Benefits Administration (VBA) has sole authority to make official determinations of competency and incompetency for purposes of disbursement of benefits.

In general, most VA incompetency decisions, stem from the VA Compensation and Pension (C&P) examinations. On the VA Disability Benefits Questionnaire (DBQ) for mental health, the examiner must address the question, "Is the veteran capable of managing his or her financial affairs? It comes with a note, "For VA purposes, a mentally incompetent person is one who because of injury or disease lacks the mental

capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.”

The DBQ, however, does not indicate the questions asked by the examiner or how they specifically conclude the veteran not being capable of handling financial issues. There is no requirement that this information be based on an actual review of the veteran’s finances. In addition, the September 13, 2023, VA Office of the Inspector General (OIG) report found that inconsistent DBQs may lead to inaccurate mental competency determinations.

Unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities. Determinations relative to incompetency should be based upon all evidence of record and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization and the holding of incompetency.

Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency.

Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a pre-determination hearing. If the pre-determination hearing is requested within 30 days of the notice, VBA cannot make a final determination on the issue of incompetency until the outcome from the hearing.

Once incompetency is proposed, any retroactive benefits owed to the beneficiary are withheld until a decision is made regarding competency. The beneficiary will still receive their monthly VA disability benefits check. To put this into context, if the beneficiary were granted a 100% rating for PTSD, but the issue of incompetency has been raised, they will receive monthly checks reflecting the 100% rating, but will not receive any of the retroactive benefits until a decision has been made regarding competency.

If the beneficiary is deemed incompetent, the retroactive benefits will be paid to the fiduciary, once the fiduciary is appointed. Once a beneficiary has been determined to be incompetent for VA purposes, VBA’s Fiduciary Program will then start the process to appoint a fiduciary to manage the beneficiary’s financial affairs.

### **VBA’S FIDUCIARY PROGRAM**

VBA's Fiduciary Program provides protection to veterans and other beneficiaries who are unable to manage their financial affairs. This program is managed by Fiduciary

Hubs, currently there are six Fiduciary Hubs, meaning that multiple states will be assigned to the same Fiduciary Hub.

Once incompetency has been determined, the case is provided to the Fiduciary Hub closest to where the veteran resides. The Fiduciary Hub will start the process to assign the veteran a fiduciary.

One of the first steps in the fiduciary process is a home visit with a VA field examiner. The field examiner works for VA and is responsible for choosing a suitable fiduciary for the veteran, as well as supervising the fiduciary once chosen and ensuring that the fiduciary acts in compliance with VA. The field examiner will visit with the veteran in their home to assess their needs and determine how to best proceed with filling the fiduciary role, this is often referred to as the Field Examination.

The Field Examination will give the field examiner insight into the veteran's lifestyle, finances, and health care needs. As such, it can be helpful for the veteran to have documentation prepared prior to the visit, specifically lists of expenditures, bills, and outstanding debts. During this examination, the field examiner may make evaluations regarding:

- Physical status of the veteran, such as age, appearance, and physical disabilities or mobility limitations;
- Mental health of the veteran, including any mental conditions, and ability to discern time, place, and events;
- Current medications and specific health concerns;
- Veteran's current capacity to manage finances;
- Inventory of assets;
- Standard of living, with specific regard to the monthly finances and funds used;
- Social adjustment, such as social relationships;
- Industrial adjustment, such as work capability;
- Dependents and needs of dependents;
- Information regarding next of kin; and
- Any changes to benefit entitlement.

Generally, the most common types of fiduciaries are federal fiduciaries and court-appointed fiduciaries. Court-appointed fiduciaries are rarer and only used in instances where a federal fiduciary may not be found. A federal fiduciary may include spouses, family members, or legal custodians.

The goal is finding the fiduciary who best suits the veteran's needs, and, where feasible, preferences. VA has a set of guidelines to choose a fiduciary. VA's internal handbook instructs field examiners to "determine the most effective, practical, and/or economical type of fiduciary appropriate to the situation." As well as "discuss payee selection with the beneficiary to the extent possible" and "take into consideration the beneficiary's request where feasible."

Additionally, field examiners investigate the eligibility of a potential fiduciary candidate by reviewing:

- Identification information, including name, address, date of birth;
- Occupation status;
- Relationship to the veteran;
- Education level;
- Credit report information (this is not necessary if the proposed fiduciary is a spouse or parent);
- Response to criminal background check inquiry; and
- Character witness statements

After the field examiner completes the investigation into potential fiduciary candidates, they will appoint a fiduciary and this requires the field examiner to notify the veteran through an official notification, similar to a VBA rating decision.

If the fiduciary is a spouse, the spouse will receive a packet of paperwork by mail which will need to be filled out. If the fiduciary is someone other than a spouse, the veteran will be provided with the fiduciary's identification information and a meeting will be scheduled for the veteran to meet with the new fiduciary in person. Once this meeting has occurred, the fiduciary will take over all financial responsibilities and obtain all the financial information necessary to do so.

The fiduciary process is designed to protect the veteran and their assets. Veterans have certain rights to ensure that the system is not abused and that the fiduciary is best suited for the veteran's needs. Veterans have the right to:

- Be notified when VA appoints a fiduciary;
- Appeal the appointment of a fiduciary to the Board;
- Request that VA replace a current fiduciary with a new fiduciary; and
- Be assigned a new fiduciary at any time.

According to VBA's Annual Benefits Report for Fiscal Year (FY) 2022, updated in February 2023, the Fiduciary Program is serving more than 108,000 beneficiaries who receive over \$2.6 billion in VA compensation or pension. Given this large amount of beneficiaries with third-party individuals who have access to billions of benefits, DAV is concerned that these veterans and beneficiaries are vulnerable to fraud and misuse of VA funds. Oversight must be priority one.

## **FIDUCIARY OVERSIGHT**

VBA states the Fiduciary Program closely monitors fiduciaries for compliance with program responsibilities to ensure that VA benefits are being used for the sole purpose of meeting the needs, security, and comfort of beneficiaries and their dependents.

Additionally, two offices within VBA share oversight responsibility for the Fiduciary Program. The Pension and Fiduciary Service establishes policy and procedures, provides training, and generally oversees claims processing accuracy. The Office of Field Operations sets production goals and manages the employees who process veterans' claims. Additionally, as noted above, the field examiner is responsible for compliance as well.

DAV is concerned with the amount and levels of oversight for incompetent veterans and beneficiaries, as we feel more oversight is needed to actually protect veterans. There are numerous reports on fraud and misuse by VA-appointed fiduciaries. For example, the FY 2022 Annual Report noted above, reported fraud and misuse indicating that fiduciary personnel conducted 2,067 misuse investigations, of which 817 fiduciaries were removed. Of the cases VA referred to the VA OIG, 25 misuse cases were accepted by OIG for further investigation.

The number of OIG prosecutorial outcomes during fiscal year 2022, so far, resulted in 12 arrests, 16 indictments and 15 convictions. The total amount of restitution ordered in cases arising from the misuse of benefits by a fiduciary was \$1,773,706. The total amount of money recovered by the government in misuse cases was \$299,865. The total amount of benefits reissued to beneficiaries was \$1,346,660.

Examples of these cases can be found in the VA OIG reports, specifically, in their March 2023 Highlights report:

The recent VA OIG report of August 17, 2023, found that, "VBA Did Not Have Adequate Procedures to Ensure Fiduciaries Promptly Returned Deceased Beneficiaries' Funds to VA." The OIG substantiated the allegation that as of June 2022, two fiduciaries under the jurisdiction of the Indianapolis fiduciary hub had not released the funds of four deceased beneficiaries who died in 2010, 2013, 2015 and 2020, respectively. The OIG identified two additional cases in which the fiduciaries had not released funds promptly. Between August 2022 and November 2022, both fiduciaries returned the funds for all six cases to either VA or an heir, but the delay ranged from more than 19 months to 12 years before the funds were distributed. Probate proceedings could cause a delay in disbursement; however, the OIG team reviewed VA electronic records and contacted the fiduciaries involved in these cases and found no evidence that any of the six cases were involved in probate. In total, these six cases involved about \$810,000 of VA-derived funds.

Additional instances of fiduciary fraud are noted below from the VA OIG Highlights Report of May 2022:

Former VA-Appointed Fiduciary Pleaded Guilty for Stealing Benefits from Veterans. VA OIG investigators determined that a former VA-appointed fiduciary stole over \$300,000 that was intended for use by 10 different veterans that he

was appointed to represent. He pleaded guilty in the District of South Carolina to theft of government funds.

Another Former VA Fiduciary Indicted for Fraud. In collaboration with the South Carolina Attorney General's Office, the VA OIG conducted an investigation that resulted in charges alleging that a former VA-appointed fiduciary stole over \$65,000 from a veteran she was appointed to represent. The former fiduciary was indicted in the County of Lexington (South Carolina) Court of General Sessions on charges of breach of trust with fraudulent intent and exploitation of a vulnerable adult.

As a grateful nation honoring service and sacrifice, we provide compensation to veterans, their families and survivors; however, if we are failing to protect the most vulnerable of them, we are not truly honoring them.

### **DAV RECOMMENDATIONS**

Our cumulative experience in providing VA-accredited representation to veterans and their families, has provided us with insight in assisting incompetent veterans and dealing with their fiduciaries. Thus, we make the following recommendations to improve the incompetency process and the thoroughness of the Fiduciary Program:

- **Improve the DBQ question about ability to manage financial affairs.** As we noted above, there are no specific questions asked by the examiner. We recommend the DBQ question be clarified. Additionally, there is no requirement that a finding of incompetency be based on a review of the veteran's finances. We recommend that all determinations of incompetency be based on an actual review of the veteran's finances coupled with their ability to make decisions regarding their financial affairs.
- **Require annual audits with veterans and the VA appointed fiduciary.** VA does require reporting from the fiduciary; however, we recommend an annual in-person interview with the veteran about the fiduciary and then a subsequent in-person audit of the fiduciary. This will assist in identifying potential fraud and misuse. This requirement would have quickly identified those fiduciaries who were collecting veterans' benefits 12 years after their death.
- **All claims of fraud and misuse to be investigated within 72 hours.** In our experience, when incompetent veterans make complaints about their VA-appointed fiduciary, they are not always taken seriously. In some instances, this has had dire results for veterans. We recommend that all complaints from incompetent veterans be taken seriously and investigated within 72 hours.

We acknowledge that most of the VA-appointed fiduciaries provide protection to veterans and follow all VA-mandated requirements. However, when there is this much at stake, we must be vigilant and ensure compliance.

Mr. Chairman, together we must resolve to care for the most vulnerable veterans and protect them from life's worst hazards, specifically fiduciary fraud. DAV believes that with changes to the incompetency process, annual audits with veterans and their fiduciaries, as well as immediately investigating complaints of fiduciary fraud, we will protect and honor these men and women who sacrificed so much for this nation.

This concludes my testimony and we thank you for the opportunity to provide our comments, concerns and recommendations.