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

October 24, 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.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 850 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans, families, survivors, and caregivers seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits.

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC), U.S. Court of Appeals for the Federal Circuit, and the 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 before U.S. Supreme Court); *Van Dermark v. McDonough*, No. 23-178 (September 25, 2023) (amicus in support of petition for writ of certiorari before U.S. Supreme Court). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA also advocates for laws to improve the VA disability claims and appeals process. NOVA participated in the stakeholder meetings that resulted in the development and passage of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, 131 Stat. 1105 (August 23, 2017) (AMA). As VA has implemented the new system over the last several years, NOVA has provided extensive training to our members on the statute, regulations, and practice under the AMA. We have also gathered information from our members across the country on their experiences advocating for clients in the new system. As such, we have a unique view of the strengths and weaknesses of this legislation. Our statement, therefore, will focus on the bills that impact the adjudication of claims and appeals: (1) H.R. 5559: Protecting Veterans Claim Options Act; (2) H.R. 5891: Veterans Appeals Decision Clarity Act; (3) H.R. 5870: Veterans Appeals Transparency Act of 2023; and (4) H.R. 5890: Review Every Veterans Claim Act of 2023.

H.R. 5559: Protecting Veterans Claims Options Act

The first major provision of this bill would amend 38 U.S.C. § 5108 by eliminating the requirement to submit new and relevant evidence with supplemental claims filed within one year of the original decision. The "new and relevant" standard was adopted in the AMA to replace the "new and material" standard required for reopening previously denied claims in the legacy system. The statute makes clear that the "new and relevant" standard is not intended to be a higher standard than the former "new and material" standard. *See* 38 U.S.C. § 5108 note (the new and relevant standard "shall not be construed to impose a higher evidentiary standard than the new and material evidence standard"). NOVA members report, however, that VA frequently rejects supplemental claims due to a purported lack of "new and relevant" evidence. By easing the standard, Congress recognizes the importance of the nonadversarial process before the agency. This amendment also more closely reflects the feedback of stakeholders during discussions of the original legislation, who generally advocated that the threshold requirement should be solely "new" evidence. NOVA supports this amendment.

The second major provision of this bill would amend 38 U.S.C. § 7113 by adding a new subsection (d). This amendment is important to all appellants whose cases are returned to the Board of Veterans' Appeals (Board) after a remand from the CAVC. First, the amendment clearly provides for an appellant to submit additional evidence to the Board for consideration and requires the Board to allow a full 90-day period for such submission. Currently, appellants are sent back to the lane from which they originated. If an appeal was previously adjudicated through the direct review lane, for example, the appeal would be returned to that lane with no opportunity to add additional evidence. Such a restriction may rob the appellant of the benefit of the remand negotiated by the parties or ordered by the CAVC in a decision. It also promotes inefficiency in the system.

But most importantly, by adopting this amendment, an appellant could have the appeal resolved more expeditiously and be spared a return to the agency to endure another multi-year wait if they are not granted the benefit at the agency level. An appellant in the AMA system does not retain their Board docket date when sent back to the agency, so this amendment could be a lifeline for veterans, families, survivors, and caregivers who have already waited years for VA and the Board to adjudicate their appeals. Not only is this amendment more veteran friendly, it promotes efficiency throughout the disability claims and appeals system. NOVA supports this amendment.

NOVA requests that this provision be expanded to allow an appellant to choose to return to the hearing lane if desired.

H.R. 5981: Veterans Appeals Decision Clarity Act

NOVA supports the Veterans Appeals Decision Clarity Act. Under the proposed amendment to 38 U.S.C. § 7104, when the Board declines to consider evidence because it was not received during a period permitted under § 7113, it would be required to "identify[] the time when such evidence was received and provision of section 7113 of this title that establishes that such evidence may not be received at such time." This language codifies the CAVC's intent as expressed in *Cook v. McDonough*, 36 Vet.App. 175 (2023). In that case, the Court stated that "[f]or a claimant to make an informed decision on whether and how to have VA consider any evidence not considered by the Board, the Board must accurately inform the claimant whether it did not consider evidence because it was received during a time not permitted by section 7113, and what options may be available for having VA consider that evidence." *Id*. at 189. Codifying this clarification will reduce confusion and provide important information to an appellant so they can return to the supplemental claim lane if they choose, have the evidence considered, and preserve the earliest possible effective date.

This amendment not only furthers the nonadversarial system intended by Congress, it also promotes agency efficiency. When appellants clearly understand what evidence has or has not been considered, it reduces the need for repetitive claims and appeals and helps to alleviate ongoing churn.

In addition, requiring the Board to provide "a written determination of . . . whether the notice of disagreement was adequate and filed timely under section 7105 of this title" provides a definitive legal finding made by a Veterans Law Judge and not by a VA administrative employee. It is critical that this basic jurisdictional question be answered by the decision maker to ensure there is no confusion about the appellant's ability to challenge such an important decision.

H.R. 5870: Veterans Appeals Transparency Act of 2023

NOVA does not support the Veterans Appeals Transparency Act as written. This bill amends 38 U.S.C. § 5104C, which governs options following a decision by the agency of original jurisdiction. NOVA is concerned about the language added at (B)(ii), which requires the claimant to take the selected action "in response to, and not later than one year after, the date of the **most recent decision** on the claim made by the agency of original jurisdiction."

As written, this language could codify the Secretary's erroneous position in a case just decided by the CAVC and serve to undermine Congressional intent to provide more choice and control to veterans over the adjudicatory process. *Terry v. McDonough*, No. 20-7251 (October 19, 2023). VA denied Mr. Terry's claim for sleep apnea and he opted

into the AMA via the Rapid Appeals Modernization Program (RAMP) by choosing a higher-level review (HLR). VA again denied service connection for sleep apnea and, within the year of the original denial, the veteran filed a supplemental claim. VA denied the supplemental claim, finding the veteran did not submit new and relevant evidence required to readjudicate the claim. Still within a year of the original decision, the veteran filed a VA Form 10182 seeking Board review. The Board denied the appeal, finding the veteran could not appeal the HLR because it was not the "the most recent decision." On that basis, the Board reviewed the supplemental claim, determined there was no new and relevant evidence submitted, and denied the appeal without ever reaching the merits of the veteran's original claim. Not only was the veteran denied his right to one review on appeal of the claim as required under 38 U.S.C. § 7104(a), the Board misinterpreted § 5104C(a) by rejecting his appeal.

The Court agreed with Mr. Terry, holding that "5104C(a) plainly provides that a claimant may file more than one administrative review request within 1 year of an initial AOJ decision on a claim, provided that such an administrative review request is not pending concurrently with another administrative review request." *Terry*, slip op. at 2.

Because this bill would limit a claimant's options in the AMA, NOVA cannot support the amendments to the statute as written.

NOVA appreciates and endorses the Subcommittee's plan to require more transparency from the Board. We suggest amending subsection (f) to state: "On a weekly basis, for each docket, the Board shall publish the docketing dates of the cases that have been assigned to all Board members for decisions in the AMA system and legacy system and shall publish the docketing dates of all decisions issued by the Board in the AMA system and legacy system that week." Currently, the only way for advocates to obtain this information is by filing a Freedom of Information Act (FOIA) request with the Board, which can be a timely and expensive endeavor. When advocates petition the CAVC to order the Board to issue a decision on an appeal that has been languishing, the Secretary routinely asserts that the Board must adjudicate all non-expedited appeals in docket order and asks the Court to dismiss the petition. Without any substantive information, the Court routinely grants the Secretary's request to dismiss. Amending subsection (f) will promote transparency and provide veterans and advocates with useful information regarding the status of their appeals.

H.R. 5890: Review Every Veterans Claim Act of 2023

NOVA supports the Review Every Veterans Claim Act of 2023. This bill would amend current 38 U.S.C. § 5103A to provide that, "[i]f a veteran fails to appear for a medical examination provided by the Secretary in conjunction with a claim for a benefit under a law administered by the Secretary, the Secretary may not deny such claim on the sole basis

that such veteran failed to appear for such medical examination."

By eliminating denials based solely on the failure to appear for an examination, veterans will stop being unfairly penalized for situations often beyond their control. NOVA members frequently report instances where a veteran tries to communicate an inability to attend an examination for a host of reasons: conflict with work schedules, illness, family responsibilities, continuing concerns related to COVID-19, a lack of transportation, etc. Sometimes they are unable to reach someone to reschedule or that request is not honored. In other cases, the veteran never receives notice of the examination. Veterans who are homeless or at risk of homelessness are particularly vulnerable. Amending this provision reflects a veteran-friendly policy.

VA often schedules unnecessary examinations and reexaminations for veterans, which has been frequently reported by NOVA. *See, e.g.,* National Organization of Veterans' Advocates, *Statement for the Record Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs Concerning "VA Disability Exams: Are Veterans Receiving Quality Services?"* (July 27, 2023); National Organization of Veterans' Advocates, *Statement for the Record Before the Senate Veterans' Affairs Committee Concerning Pending Legislation to Include Discussion Draft, S. __, No Bonuses for Bad Exams Act of 2022* (July 13, 2022); *see also* Department of Veterans Affairs, Office of Inspector General, *Veterans Benefits Administration: Veterans Are Still Being Required to Attend Unwarranted Medical Reexaminations for Disability Benefits* (March 16, 2023), https://www.va.gov/oig/pubs/VAOIG-22-01503-65.pdf. Unnecessary examinations are particularly troublesome considering the statutory requirement for VA to consider private medical evidence. *See* 38 U.S.C. § 5125 ("a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim"). By amending 38 U.S.C. § 5103A and prohibiting VA from denying a claim solely because of a missed examination, VA will be required to conduct a more fulsome review of the record to consider private evidence or ongoing VA treatment before ordering more examinations in a system that is already overloaded with requests.

NOVA urges the Subcommittee to clarify the change in the heading. The current bill would strike "COMPENSATION CLAIMS" and replace it with "CLAIMS FOR BENEFITS." This change appears overly broad as VA "claims for benefits" encompass a broad range of services and awards that do not require an examination as a condition for a grant. By contrast, a heading such as "CLAIMS FOR VA DISABILITY BENEFITS" would be clearer and ensure that this prohibition against denials solely because of a missed examination would extend to all VA disability benefit claims and appeals.

Finally, we ask the Subcommittee to continue to engage stakeholders and consider other amendments to ensure the promise of the AMA is fulfilled. Specifically, NOVA members report continuing high level of remands from the Board, i.e., approximately 40 percent, often due to inadequate examinations and/or remands for additional development/examinations that often are unnecessary. Such a high level of remands was not intended in the AMA. In this new system, if an appeal is not granted on remand, it no longer retains its original docket date and claimants are then forced to start all over at the end of the line if they want to appeal back to the Board. NOVA members report many direct review cases are waiting far in excess of the 365-day intended time frame for a decision. (Delays exceeding three years are now common.) Given these long delays now approaching or surpassing the wait times experienced in the legacy system, a legislative solution should be considered.

CONCLUSION

Thank you again for allowing us to present our views on this important legislation. If you have questions or would like to request additional information, please feel free to contact:

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