KEEPING OUR PROMISE TO AMERICA'S VETERANS

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STATEMENT OF
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UNITED STATES HOUSE OF REPRESENTATIVES
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Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at today's legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs.

DAV is a congressionally chartered, VA-accredited, non-profit veterans service organization (VSO) comprised of more than one million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity. 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).

We are pleased to offer our views on the bills impacting service-disabled veterans, their families and the programs administered by VA and the Veterans Benefits Administration (VBA) that are under consideration by the Subcommittee.

H.R. 1753 – to ensure that certain members of the Armed Forces who served in female cultural support teams receive proper credit for such service

H.R. 1753 would recognize the honorable service of women veterans who served in a female cultural support team between January 1, 2010, and August 31, 2021, as engagement in combat with the enemy in course of active military service.

Purely from a VA claims point of view, this would positively impact those women veterans seeking claims related to their combat service. VA regulation 38 Code of Federal Regulations, Section 3.304 (f), specifically relates to the requirements for service connection for post-traumatic stress disorder (PTSD).

Subparagraph (f)(2) states, "if the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's

service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor."

By establishing combat service for the women who served in the recognized female cultural support teams, H.R. 1753 would provide them what is often referred to as a verified stressor for PTSD claims. This would positively impact their ability to establish a claim for PTSD and have it granted based on their combat service.

Additionally, the recognized combat service would make title 38, United States Code, Section 1154 (b) for application. It notes, "in the case of any veteran who engaged in combat with the enemy in active service with a military, naval, air, or space organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran."

In cases where a veteran asserts service connection for injuries or disease incurred or aggravated in combat, title 38, United States Code, Section 1154 (b) and its implementing regulation, 38 Code of Federal Regulations, Section 3.304 (d), are applicable. This statute and regulation ease the evidentiary burden of a combat veteran by permitting the use, under certain circumstances, of lay evidence. If the veteran was engaged in combat with the enemy, VA shall accept as sufficient proof of service connection satisfactory lay or other evidence of service incurrence, if the lay or other evidence is consistent with the circumstances, conditions, or hardships of such service.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that in the case of a combat veteran not only is the combat injury presumed, but so is the disability due to the in-service combat injury. *Reeves v. Shinseki*, 682 F.3d 988, 998-99 (Fed. Cir. 2012). Therefore, the veteran is not only competent to report an in-service injury, but credible.

H.R. 1753 would provide eligible women veterans with the uniqueness of presumption of a combat injury. In accordance with our Resolution No. 010, DAV supports this bill, as it will ease barriers for women who served in combat and assist them in establishing claims and appeals within VBA and the Board of Veterans' Appeals.

H.R. 3790 – the Justice for ALS Veterans Act of 2023

The Justice for ALS Veterans Act would provide the survivors of veterans who die of amyotrophic lateral sclerosis (ALS), the DIC "kicker" amount without meeting the eight-year time period requirement.

Currently, title 38, United States Code, Section 1311(a)(2), allows an additional DIC monthly payment of $331.84 to survivors in the case of a veteran who at the time of death was in receipt of or was entitled to receive compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death. This monetary installment is commonly referred to as the DIC "kicker."

Studies have shown that veterans are twice as likely to develop ALS as the general population. ALS is an aggressive disease that leaves many veterans totally incapacitated and reliant on family members and caregivers. VA already recognizes ALS as a presumptive service-connected disease and due to its progressive nature, automatically rates any diagnosed veteran at 100% disabled. Individuals diagnosed with ALS have an average lifespan of between two to five years. Sadly, many veterans are unable to meet DIC's eight-year requirement.

In accordance with our Resolution No. 162, DAV supports the Justice for ALS Veterans Act, which would provide these increased DIC payments to surviving spouses of veterans who die from ALS, regardless of the current eight-year period.

Earlier this year, our members sent over 24,000 emails to Congress to elicit support for the Justice for ALS Veterans Act. We must ensure veterans' survivors and their families receive the benefits they deserve and are no longer penalized from receiving increased compensation due to the fast progression of ALS.

H.R. 4016 – the Veteran Fraud Reimbursement Act

The purpose of the VA Fiduciary Program, under VBA, is to protect beneficiaries who are unable to manage their VA benefits. VBA appoints fiduciaries to receive direct payments on behalf of beneficiaries and disburse those funds for beneficiaries' care, support, welfare, and needs. VA beneficiaries rely on their appointed fiduciaries to make financial decisions in their best interests.

VA fiduciary staff provide oversight to help prevent fiduciaries from misusing funds. Misuse occurs when a fiduciary spends a beneficiary's benefit payments for something other than the "use and benefit" of the beneficiary. Use and benefit is any expense reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents.

Currently when there are allegations and reports of misuse of funds by the VA-appointed fiduciary, VA is required to investigate a VA negligence determination during misuse determinations. The July 2021 VA Office of the Inspector General (OIG) report found that in 40 cases, beneficiaries faced significant wait times in the processing of misuse determinations, an average of 228 days, negligence determinations, an average of 468 days, and reimbursements of misused funds, an average of 426 days.

At the September 28, 2023, hearing of this Subcommittee, Lisa Van Haeren, Director of Claims and Fiduciary Inspection Division in the Office of Audits and Evaluations of the VA OIG, confirmed that negligence determinations by the VA do not have a specified time period and beneficiaries are waiting more than 400 days for reimbursement of misused funds.

H.R. 4016 would amend title 38, United States Code, Section 6107, by removing paragraph (a) "Negligent Failure by Secretary." It would further add, in any case in which a fiduciary misuse all or part of an individual's benefits paid to a fiduciary, the Secretary would be required to pay the beneficiary or the beneficiary's successor fiduciary an amount equal to the amount of the benefit misused. In addition, the bill would require the Secretary to make a good faith effort to obtain recoupment from the fiduciary to whom the payment was originally made.

H.R. 4016 would remove the requirements of negligent failures investigations by the VA before an issuance is remitted. DAV supports the Veteran Fraud Reimbursement Act in accordance with our Resolution No. 033, which calls for improvements to the VA Fiduciary Program.

Our most vulnerable, veterans and beneficiaries who have fiduciaries, must be protected from fraud and misuse of their earned benefits. When the fraud and misuse is discovered, VA needs to respond with immediate repayment of those earned benefits.

Beneficiaries should never wait for more than a year for the repayment of misused benefits. We are extremely concerned about the financial hardships this creates for veterans and their families.

H.R. 4190 – the Restoring Benefits to Defrauded Veterans Act

There are numerous reports of fraud and misuse by VA-appointed fiduciaries. For example, the VBA FY 2022 Annual Report noted 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.

Under current statute, title 38, United States Code, Section 6107, if a veteran dies before their case with VA concerning misused funds by the fiduciary is resolved, the veteran's family cannot seek reimbursement for these funds.

The Restoring Benefits to Defrauded Veterans Act would require VA to reissue misused benefits to a beneficiary's estate in cases where the beneficiary predeceased reissuance and would provide reissued benefits to either the veteran's estate, successor, or next inheritor. Most importantly, the Restoring Benefits to Defrauded Veterans Act would not allow the VA to make any reissuance to any family member who was the fiduciary and was misusing the veteran's benefits.

DAV supports H.R. 4190, as it is in alignment with our Resolution No. 095, which calls for meaningful claims reform. The Restoring Benefits for Defrauded Veterans Act will not allow family members who defrauded the veteran to receive any of the reissued benefits, which is a significant reform to the claims process. However, DAV is concerned about situations where the family member who misused funds is a part of the estate and will still reap the benefits of the restored funds that they originally misused.

H.R. 4306 – the Michael Lecik Military Firefighters Protection Act

H.R. 4306 would establish presumptive service connection for certain diseases for veterans who were trained in fire suppression and served on active duty with a military occupational specialty or career field with a primary responsibility for firefighting or damage control for at least five years. Additionally, it would require that the disease be at a 10% degree or more within 15 years of the veteran's separating from active military service.

The diseases that would be presumed due to firefighting are listed as:

- Heart disease;
- Lung disease;
- Brain cancer;
- Cancer of the blood or lymphatic systems;
- Leukemia;
- Lymphoma (except Hodgkin's disease);
- Multiple myeloma;
- Bladder cancer;
- Kidney cancer;
- Cancer of the reproductive system (including testicular cancer);
- Cancer of the digestive system;
- Colon cancer;
- Liver cancer;
- Skin cancer;
- Lung cancer; and
- Breast cancer.

On December 23, 2022, the Federal Firefighter Fairness Act was signed into law. It creates the presumption that federal firefighters who become disabled by serious diseases, including heart disease, lung disease, certain cancers, and other infectious diseases, contracted the illness on the job. This law is similar to the legislation being discussed here today and is based mostly on exposures to perfluoroalkyl and polyfluoroalkyl substances (PFAS), man-made chemicals found in fire-fighting foams (or aqueous film forming foam; AFFF). However, to date, neither VA nor Congress has conceded exposure to PFAS chemicals found in the drinking supply of over 700 military installations.

DAV, a resolution-based organization, does not have a specific resolution for this legislation and we take no position on H.R. 4306. However, we do have some concerns, thus our recommendations below:

1. **Remove the restrictions for exposure and disease development.** The "Firefighters' occupational exposure: Contribution from biomarkers of effect to assess health risks," study published in the Environmental International, Volume 156, in November 2021, does not cite a required amount of exposure or a timeline for diseases to be manifested. Also, the ongoing "Fire Fighter Cancer Cohort Study," which started in 2016, and aims to collect cancer-related information from US firefighters over 30 years, has not yet yielded any results based on required exposure time frames or disease manifestation.

   The 2018 National Defense Authorization Act authorized the Centers for Disease Control and Prevention (CDC) and the Agency for Toxic Substances and Disease Registry (ATSDR), both agencies of the of the U.S. Department of Health and Human Services, to conduct exposure assessments in communities known to have had PFAS. The study did not provide any time requirements for exposure or time for the diseases to develop. Additionally, the 2022 National Academies of Science, Engineering, and Medicine (NASEM) report, *Guidance on PFAS Exposure, Testing, and Clinical Follow-Up*, found no time restrictions for exposure or disease development.

   It is evident that the time requirement of at least five years as a firefighter and all diseases must be manifested within 15 years are not based on the current findings of the scientific community. Therefore, we recommend that these restrictions be removed from this presumptive legislation. These restrictions will greatly limit the number of veterans who will be eligible for the same exposures and diseases except to an arbitrary time not based on science.

2. **Include PFAS exposure at all military bases with contaminated water supplies.** DAV strongly believes that if there is legislation to address PFAS exposure for firefighters, it must include the PFAS exposure in the contaminated water supplies at potentially more than 700 military installations as well. The previously noted NASEM report found suggestive evidence of an association with PFAS exposure and increased risk of breast cancer; liver enzyme alterations; increased risk of pregnancy-induced hypertension; increased risk of testicular cancer; thyroid disease and dysfunction and increased risk of ulcerative colitis.

The men and women exposed to toxins, whether as a firefighter or through exposure and consumption of contaminated water supplies, must be a priority to ensure they have the benefits and health care they have earned.

H.R. 5559 – the Protecting Veterans Claim Options Act

The Protecting Veterans Claim Options Act would provide needed clarity on Supplemental Claims and specifically, VA's regulatory provision of 38, Code of Federal Regulations, Section 3.2501. This would direct VA to accept any Supplemental Claim within one year of the VA decision in question, based on the evidence of record and not require New and Relevant evidence. Conversely, it points to any Supplemental Claim received after the one-year time frame of the VA decision in question and would require New and Relevant evidence.

The Appeals Modernization Act (AMA) provided the Supplemental Claims section as well as the requirement for New and Relevant evidence. However, the VA regulations do not clarify on the application thereof and has created confusion within VA and the regulation is not following the Congressional intent of Supplemental Claims and the requirement for New and Relevant evidence.

Additionally, H.R. 5559 would require a change regarding remanded cases from the Court of Appeals for Veterans Claims (Court), that evidentiary record before the Board should "include evidence submitted by the appellant and his or her representative, if any, within 90 days following such remand, which the Board shall consider in the first instance."

Without the ability to supplement the record after a Court remand, the veteran is forced to wait until after a decision from the Board to provide favorable evidence that may have changed the outcome of the Board's decision. Currently, the Board's AMA remand rate of appeals is near 40%. Allowing for post-Court remand evidence to be submitted in support of a veteran's Board appeal should serve to reduce the AMA remand rate.

In accordance with our Resolution No. 095, DAV supports the Protecting Veterans Claim Options Act, as it will provide VA with needed clarity for Supplemental Claims and allow the Board to take jurisdiction over evidence submitted to the Court subsequent to a remand decision. H.R. 5559 will provide the required reforms to ensure the VA and the Board are adjudicating decisions and accessing evidence in the best interest of veterans and their families.

H.R. 5890 – the Review Every Veterans Claim Act of 2023

The Review Every Veterans Claim Act would limit the VA's authority to deny a veteran's claim solely based on the veteran's failure to appear for a medical examination associated with the claim.

Currently, title 38, United States Code, section 5103A (d) paragraph (2) provides, "the Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes…." This requirement usually results in VBA denying a veteran's claim if they did not attend the requested examination, even if the rest of the

evidence of record contains service medical records, private medical records and lay statements from the veteran.

H.R. 5890 would strike that language from the statute and replace it with "provide for a medical examination or obtain a medical opinion." Additionally, this legislation would add a new paragraph to the statute, "If 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."

Not only would these statutory amendments impact claims for service connection, but would apply to all claims for a benefit under VA's jurisdiction. We agree with this change, as in most claims for increase in an existing disability, VA will deny an increased evaluation solely on the missed examination. Although the evidence of record may contain sufficient evidence for the increased evaluation, VBA will deny based on the failure to appear. Additionally, this would be applied to other benefits claims such as Total Disability Based on Individual Unemployability (TDIU) and Aid and Attendance (A&A).

In accordance with our Resolution No. 095, DAV supports the Review Every Veterans Claim Act, as this is meaningful and significant reform to the duty to assist. As it was allowing VBA to deny a claim based solely on a missed examination, we argue that it is interfering with the veteran's due process of a claim. Thousands of veterans' claims for service connection, claims for increase and for other benefits such as TDIU and A&A are denied solely on the basis of the missed examination. We look forward to the passage of the Review Every Veterans Claim Act and the positive impact it will have for veterans.

H.R. 5891 – the Veteran Appeals Decision Clarity Act

Effective February 19, 2019, the AMA was a historic overhaul of VA's appeals process. It provides claimants with three paths after a final VA decision, a supplemental claim, a higher-level review and an appeal directly to the Board, a Notice of Disagreement.

Additional changes brought by the AMA are specific to the submission of evidence when establishing a Notice of Disagreement to the Board. The choices at this stage include:

- A direct review by the Board without a hearing or the submission of additional evidence.
- A review by the Board including additional evidence that must be submitted within 90 days from the date of the Notice of Disagreement.
- A hearing with a Veterans Law Judge at the Board with the opportunity to submit additional evidence within 90 days after the hearing was held.

If additional evidence is received outside of those time periods, the Board cannot review or use that evidence in their decisions and is not required to note the receipt of such evidence in their decision. This creates confusion for veterans, VSOs, attorneys and claims agents as to when the evidence was received, why it was not considered and who has jurisdiction over said evidence.

The Veteran Appeals Decision Clarity Act would require the Board to identify the time the evidence was received and acknowledge they cannot use it in their determination. Additionally, it would require the Board to state the adequacy and timeliness of the Notice of Disagreement.

In accordance with our Resolution No. 095, DAV supports H.R. 5891, which calls for meaningful appeals reform by clarifying the evidence received outside of the mandated time frames and that it cannot be used by the Board. The Veteran Appeals Decision Clarity Act will help to reduce confusion over evidence submitted during the appeals process. We acknowledge this will increase the requirements of Veteran Law Judges and attorneys in decision writing; however, it will further reform the appeals process while removing doubt of what evidence was considered or why it was not considered, thus providing veterans, VSOs, attorneys and claims agents with clarity on their potential next steps.

H.R. 5938 - the Veterans Exam Expansion Act of 2023

The Veterans Exam Expansion Act would positively impact VA contract examinations for veterans' disability claims as it would expand license portability. In our testimony before this Subcommittee in July 2023, we recommended extending and expanding these authorities.

Enacted in 2016, Public Law 114-315, section 109, "Improvements To Authority For Performance Of Medical Disabilities Examinations By Contract Physicians," notes that a physician may conduct an examination pursuant to a contract, at any location in any state, the District of Columbia, or a Commonwealth, territory, or possession of the United States, so long as the examination is within the scope of the authorized duties under such contract. A physician is defined as one who has a current unrestricted license to practice the health care profession of physician.

This allows contract exam vendors to provide examining physicians to rural areas that may not have examining physicians available in their state or territory. The provision speaks only to physicians and psychiatrists; however, it did not include other licensed health care professionals such as nurse practitioners, clinical psychologists, and other clinical health care professionals that are qualified to conduct VA examinations.

In January 2021, the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, granted certain types of VBA-contracted

examiners temporary authority for three years, until January 2024, to conduct exams in states other than those in which they hold a license.

The GAO report of June 2023, “Actions Needed to Clarify Program Requirements Regarding Examiners,” looked specifically at this temporary portability used by contracted examiners. VBA officials and vendors said that the temporary expansion of license portability expanded access in underserved areas.

The report noted that the guidelines VBA provided to its contracted exam vendors included inaccuracies and VBA conducted inadequate monitoring of the vendors. This contributed to vendors allowing ineligible examiners to conduct exams using license portability. For example, VBA incorrectly listed dentists as eligible for license portability in the guidelines it provided to vendors. This contributed to two of VBA’s three vendors using dentists to conduct exams in states other than where they were licensed.

Additionally, GAO’s review found that one vendor used optometrists to conduct exams in states other than where they were licensed, which VBA officials said was not permitted. VBA acknowledged these errors and agreed with the GAO recommendations for correction.

The report also showcases the impact of the expanded license portability. Vendors were able to send examiners to rural and high-need areas that did not have enough examiners to meet local demand. One vendor said license portability allowed them to continue serving veterans when natural disasters disrupted the availability of examiners in the affected states. For example, this vendor reported using license portability to send mobile clinics to Florida following Hurricane Ian in September 2022.

Another vendor said license portability helped them serve more veterans living on tribal lands. All three vendors said expanded license portability helped them serve incarcerated veterans. Officials from one vendor said reaching these veterans historically has posed a challenge because not all examiners are willing to physically enter a prison, and license portability allowed them to use examiners willing to do so.

In July 2023, information from VBA’s Medical Disability Examination Office indicated that this license portability expansion in January 2021 had resulted in 1,462 providers completing over 150,000 medical appointments and nearly 425,000 disability benefits questionnaires (DBQs). The provision of license portability has had a positive impact for veterans living in rural areas and tribal lands, and for incarcerated veterans, all while assisting in reducing the backlog of exams, which has a direct impact on the backlog of claims.

H.R. 5938 would expand the license portability for psychologists, podiatrists, dentists and optometrists as well as extend the authority from three years to five years, now expiring in January 2026.

DAV strongly supports the Veterans Exam Expansion Act, which will provide VA exams in all areas, specifically for rural and underserved veteran populations. Additionally, it addresses the deficiencies noted by the GAO report and will enable VA and contract examiners to provide more exams to more veterans than ever before. However, as we noted in our testimony of July 2023, we recommend that the license portability be made permanent and that all medical professionals that are able to conduct VA exams within the Veterans Health Administration be included in the permanent extension of license portability.

Draft Bill – the Veteran Appeals Transparency Act of 2023

The Veteran Appeals Transparency Act would amend Title 38 United States Code section 5104C(a) language to make it consistent with VA's interpretation in their regulatory provision of 38 Code of Federal Regulations Section 3.2500.

Additionally, the Veteran Appeals Transparency Act would require "[o]n a weekly basis, for each docket, the Board shall publish the docket dates of the cases assigned to a Board member for a decision for that week."

In accordance with our Resolution No. 095, DAV supports the Veteran Appeals Transparency Act. The changes in language will provide consistency between the statute and regulatory provisions, resulting in more reliable and consistent VA decisions and appeals. By requiring the Board of Veterans' Appeals to weekly publish docket dates of cases being worked, this provides veterans, their families and representatives with greater understanding and transparency as to the status of the pending appeal, not to mention it will help Congress hold the Board accountable concerning appealed cases.

This concludes my testimony on behalf of DAV. I am happy to answer any questions you or members of the Subcommittee may have.