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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY AND MEMORIAL AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

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Good afternoon, Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss pending legislation, including bills pertaining to disability compensation, VA fiduciaries and appeals. Accompanying me today are Mr. Kevin Friel, Deputy Director, Pension & Fiduciary Service, Veterans Benefits Administration and Mr. Kenneth Arnold, Vice Chairman, Board of Veterans' Appeals.

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 require VA to consider service on a female cultural support team (CST) as combat service for purposes of determining whether a Veteran incurred a disease or injury during that period of service.

VA supports the intent of the bill to ensure proper recognition of Veterans' combat service; however, as discussed below, we cite concerns with several specific elements, which we believe may prevent VA from being able to implement the legislation. VA has discussed this bill informally with the Department of Defense (DoD). Further collaboration between VA and DoD is needed to confirm both the number of Veterans who participated in CSTs and whether these Veterans meet the definition of "engaged in combat" for the purposes of 38 U.S.C. 1154(b).

Per VA's procedural guidance in M21-1.VIII.iv.1.D.2.b, there are no limitations as to the type of evidence that may be accepted to confirm engagement in combat. Any evidence that is probative of combat participation may be used to support a determination that a Veteran engaged in combat. The requested list and memo from DoD may be sufficient to satisfy this evidentiary requirement. However, VA notes that a finding that a Veteran engaged in combat for 1154(b) purposes requires that the Veteran "have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as determined [by VA] on a case-by-case basis." *Moran v. Peake*, 525 F.3d 1157, 1159 (Fed. Cir. 2008).

VA also provides the below comments on the bill. To obtain an award of service connection, a claimant must generally establish three elements: (i) a current disability,

(ii) a disease or injury was incurred or aggravated during service (i.e., in-service incurrence) and (iii) a causal relationship between the current disability and the in-service disease or injury (i.e., nexus). By statute, satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of in-service incurrence if that evidence is consistent with the circumstances, conditions or hardships of such service even if the disease, disability or injury is not otherwise documented in the official record. Thus, if a CST Veteran states that a disease or injury was incurred in combat and the same is consistent with the circumstances, conditions or hardships of service, the rating activity and the examiner will accept the lay evidence as satisfying the "in-service incurrence" requirement for an award of service connection, even if there is no other record of the same. This would allow for grant of service connection of a disability, from traumatic brain injury to a musculoskeletal disability from carrying heavy gear, assuming the CST Veteran establishes a current disability and a causal relationship (i.e., nexus) between the current disability and the in-service disease or injury.

The bill contains provisions specific to cases in which a Veteran or survivor (i) prior to the Act's enactment submitted a claim for service-connected disability or death; (ii) had such claim denied for lack of service connection; (iii) submits a claim within 3 years of the Act's enactment for the same disability that was previously denied. In those cases, the bill would specifically require VA to re-adjudicate entitlement to service connection and, if service connection were granted, to apply an unusually liberal effective date rule. Under current law, VA already has an obligation to re-adjudicate entitlement to service connection when the claimant submits another claim seeking service connection for the same condition if, since the last denial, there has been a change in law that would provide a new basis for entitlement. Combat Veterans are afforded a relaxed standard of proof to satisfy the "in-service incurrence" requirement for an award of service connection. Because this bill would enable CST Veterans to avail themselves of the same relaxed standard of proof, it would create a new basis of entitlement for which VA would already be obligated to re-adjudicate. Therefore, VA believes the re-adjudication provision is superfluous and recommends removing it.

As for the effective date provision, H.R. 1753 authorizes an effective date as early as the date of the previously denied claim. Under existing effective date rules, an award of benefits pursuant to a liberalizing law will not be earlier than the effective date of the law or 1 year prior to the date VA receives the supplemental claim, whichever is later. While H.R. 1753 would also place a 3-year time limit for qualifying claimants to file a supplemental claim and have this effective date provision applied, it may nonetheless result in significant retroactive benefits for some claimants, depending on the original date of claim. This bill would carve out an effective date exception for only this small group of Veterans, which may be perceived as inequitable. VA would suggest amending this section of the bill to align with current laws concerning effective dates of claims.

Mandatory costs to the compensation and pension account are estimated to be $69.2 million in 2024, $101.9 million over five years, and $147.1 million over 10 years. There are no discretionary costs may be associated with H.R. 1753.

H.R. 3790 – Justice For ALS Veterans Act of 2023

Dependency and indemnity compensation (DIC) is a monthly monetary benefit payable to the qualifying survivors of Veterans who die from a service-connected disability or who die while either receiving or entitled to receive VA compensation for a disability that has been continuously rated totally disabling for a period of 8 or more years immediately preceding death. Under current law, a higher rate of benefits is payable to a surviving spouse if two conditions are met for a continuous period of at least 8 years immediately preceding the Veteran's death: the Veteran was married to the individual seeking benefits as a surviving spouse and the Veteran was either receiving or entitled to receive VA compensation for a disability rated totally disabling.

H.R. 3790, the "Justice for ALS Veterans Act of 2023" would authorize payment of the higher DIC rate to surviving spouses of Veterans who die from amyotrophic lateral sclerosis (ALS) regardless of whether the Veteran had a disability rated as totally disabling for a continuous period of at least 8 years immediately preceding death. In addition, the bill would require that, within 180 days of enactment, the Secretary submit a report to Congress that identifies any service-connected disability, other than ALS, that the Secretary determines should be treated in the same manner as ALS for purposes of entitlement to the higher rate of DIC. The report should include a comprehensive list of service-connected disabilities with high mortality rates and detailed information on the average life expectancy for persons with each such disability. We note that the bill recommends that the Secretary of VA identify similar service-connected disabilities with high mortality rates but does not define criteria for what is considered a high mortality rate. VA believes that a clear definition for a high mortality rate should be incorporated within the bill to ensure implementation that is consistent with congressional intent.

We would support this bill, if modified to include criteria for determining whether a disability has a high mortality rate, and subject to the availability of appropriations.

Mandatory costs are estimated to be $847,000 in 2024, $4.9 million over 5 years, and $11.9 million over 10 years. There are no discretionary costs associated with this legislation.

H.R. 4016 – Veteran Fraud Reimbursement Act

H.R. 4016 would streamline reissuance of benefits in fiduciary misuse cases. Where VA finds that a fiduciary has received VA benefits for the use and benefit of a beneficiary's VA benefits, but uses those benefits for another purpose, 38 U.S.C. § 6107 requires VA to reissue the misused benefits to the beneficiary or a successor fiduciary. The Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020 (P.L. 116-315), authorized VA to reissue the amount of funds misused by a fiduciary without regard to whether the misuse was due to VA's failure to exercise proper oversight. However, current law contemplates that VA will

make a determination regarding whether VA failed to exercise proper oversight prior to any reissuance of benefits.

VA supports this proposed legislation and its incorporation of language which would result in a shift of negligence considerations towards program oversight and away from an unnecessary determination tied to the reissuance of benefits that will occur regardless of the outcome of the determination. This proposal will enable timelier reissuance of misused benefits to Veterans and their survivors and enable more effective application of VA resources towards more productive methods of oversight to protect beneficiary funds.

No mandatory or discretionary costs are associated with H.R. 4016.

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

H.R. 4190 addresses reissuance of misused benefits in cases where reissuance did not occur prior to the beneficiary's death. This bill would provide a preferred hierarchy for payment of reissued funds to an individual or entity in a stipulated order of preference. Additionally, the bill would not allow for a reissued payment to be made to a fiduciary who misused the benefits of the beneficiary.

VA supports the bill, if amended. For uniformity, VA suggests the various forms of the term "reissuance" be used in lieu of the various forms of the term "repayment" in 38 U.S.C. § 6107. Existing statutes specifically address the disbursement of VA benefits that were either due and unpaid or paid, but not negotiated prior to the death of the beneficiary. See 38 U.S.C. §§ 5121, 5122. In the reissuance context, however, the payment and negotiation of benefits necessarily occurred before the question of reissuance arose. See 38 U.S.C. § 6107(b) (providing that VA "shall pay to the beneficiary or the beneficiary's successor fiduciary an amount equal to the amount of such benefit"). Existing law does not address disbursement of such funds if the claimant predeceases reissuance. Adding legislative language addressing who may receive payments representing reissued benefits on behalf of a deceased beneficiary would provide greater consistency and clearer legal basis for making such a determination prior to the reissuance of misused funds. Incorporating an order-of-priority would also align this statute with other sections of title 38 United States Code (i.e., 38 U.S.C. §§ 5121 and 5122).

Nonetheless, the proposed priority scheme differs from the priority scheme in those statutes in that the proposed priority scheme relies on state law. Where Federal law does not address questions of inheritance, state law applies. The proposed language would specifically direct VA to apply state law. An alternative would be to apply the same priority scheme currently codified in 38 U.S.C. §§ 5121, 5122.

Alternatively, VA suggests some modifications to the proposed prioritization. In the bill, the first priority class is "[t]he estate of the beneficiary" while the third priority class is "[t]he next inheritor determined by a Court of competent jurisdiction. Yet, a

decedent's "estate" typically refers to the individual's collective assets and liabilities at death. ESTATE, Black's Law Dictionary (11th ed. 2019). An inheritor is someone who is entitled to receive any assets remaining in the estate after all liabilities have been satisfied. INHERITOR, Black's Law Dictionary (11th ed. 2019). Therefore, VA recommends consideration of whether the first and third priority classes may be effectively coextensive.

In the bill, the second priority class is "[a] successor fiduciary serving the beneficiary when the beneficiary died." VA notes that existing caselaw establishes that a fiduciary does not have rights beyond the beneficiary himself. Youngman v. Shinseki, 699 F.3d 1301, 1304 (Fed. Cir. 2012). VA is concerned that the bill language would create a disparity between successor fiduciaries in cases of prior misuse and fiduciaries in cases not involving any misuse: because the bill provides for reissuance to the successor fiduciary without directing what the successor fiduciary must do with the funds, the successor fiduciary would obtain a right to some of the Veteran's benefits based on the happenstance of misuse by a prior fiduciary.

VA notes concern over the addition of proposed (c)(2) which provides that "[t]he Secretary may not make a payment under this subsection to a fiduciary who misused benefits of the beneficiary." VA's concern is the wording would preclude a fiduciary who misused benefits, but who is also a member of the estate of the beneficiary as identified under proposed (c)(1)(A) or an inheritor as identified under proposed (c)(1)(C) from receiving payment of reissued funds. VA notes concern this imparts a legislative restriction which surpasses precedential legal estate disposition. This is particularly a concern if the fiduciary who previously misused benefits of the beneficiary is also a member of the beneficiary's estate or an inheritor. In this example, a previous fiduciary who is not the subject of the current misuse matter, but who did misuse benefits at one time, may be entitled to a reissuance payment following misuse by a more recent fiduciary. VA recommends the Committee consider removing the restrictive language within (c)(2) and instead explicitly provide that funds due to be paid to a fiduciary who misused benefits may not be withheld by VA. Ultimately, this would allow VA to reissue misused funds to the appropriate heirs while ensuring that estate administration laws are properly followed.

No mandatory or discretionary costs are associated with H.R. 4190.

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

H.R. 4306, the Michael Lecik Military Firefighters Protection Act, would create presumptions of service connection for Veterans who were trained in fire suppression, served on active duty in a military occupational specialty or career field with a primary responsibility for firefighting or damage control for at least 5 years in the aggregate, and in whom one or more specified diseases manifest to a degree of 10% or more within 15 years of the date on which the Veteran separates from active service. The specified diseases are heart disease, lung disease, certain cancers and each additional disease for which the Secretary determines a presumption is warranted.

VA supports this bill, if amended, and subject to the availability of appropriations. This bill represents a Veteran-centric approach to addressing health effects experienced by Veterans who trained in fire suppression and served on active duty in an occupation with a primary responsibility for firefighting.

VA views the proposed presumption of service connection as a reasonable first step for Congress to address potential health outcomes from firefighting hazards to include exposures to per- and polyfluoroalkyl substances (PFAS), which are synthetic chemicals commonly used as a key ingredient in firefighting foams.

This bill would also provide immediate relief for certain covered Veterans and at a much faster rate than if VA were to consider the same presumption under the new presumptive decision-making process created by the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022.

The establishment of a presumption for firefighters would streamline the claims process, thus reducing the number of claims that would be subject to medical opinions and other time-consuming development of evidence showing exposure to chemicals such as PFAS. However, VA supports a broader-based policy approach. To further enhance administrative efficiency and to ensure fairness and equity, VA recommends removal of the 10% minimum evaluation requirement; the 15-year disease manifestation period; and the requirement of 5 years in the aggregate in an occupation or career field with a primary responsibility for firefighting.

These requirements of H.R. 4306 are more onerous than the fiscal year (FY) 2023 National Defense Authorization Act provision that established a presumption for Federal firefighters under 5 U.S.C. 8143b, which recognizes 16 diseases (mostly cancers) as presumptively related to fire suppression duties. Removing the above requirements would ensure Veteran firefighters do not face a higher standard of proof than other Federal firefighters. It should also be noted that the PACT Act did not include any such requirements for presumptions, and this has significantly streamlined the processing of PACT Act presumptive claims. Relaxing these standards would allow claims processors to process claims more quickly and at a higher accuracy rate. For example, analyzing the exact number of years and days that a Veteran served as a firefighter could involve extensive development and review of a Veteran's military personnel records which may or may not be conclusive regarding time spent in an occupation. Also, a review of firefighter mortality studies by Haas et al. (2003) did not observe an increase in all- or specific-cause mortality with increased time in firefighting occupation. And finally, amending the bill to streamline eligibility requirements would facilitate VBA's ongoing effort to automate disability compensation claims.

Finally, although VA supports the bill, VA also provides the following discussion on the current state of the scientific evidence on health outcomes based on firefighting occupation. Notwithstanding the state of the scientific evidence (below), VA aims to ensure that military firefighters who may have been exposed to toxic substances and

chemicals during military service do not have a higher burden of proof than other toxic-exposed Federal firefighters who may be entitled to compensation for these diseases under comparable Federal statutes (5 U.S.C. 8143b).

The International Agency for Research on Cancer (IARC) published a monograph in 2023 that classifies the firefighter occupation as a Group 1 carcinogen (known to cause cancer in humans). This conclusion is based on sufficient evidence in multiple cohorts for mesothelioma and bladder cancer and limited evidence for colon, prostate and testicular cancers; malignant melanoma; and non-Hodgkin lymphoma. IARC noted that evidence for all other types of cancers in firefighters is inadequate. Additionally, recent studies and authoritative reviews have noted associations between kidney and testicular cancers and PFAS exposure specifically, with less conclusive evidence for breast cancer. In terms of other chronic health outcomes, a cursory review of the literature reveals an association between firefighting and cardiovascular disease risk. There is also evidence for lung diseases, such as sarcoidosis and interstitial lung disease, in firefighters. Further, an association has been noted between exposure to PFAS and the development of thyroid disease, as well as less evidence for an association with ulcerative colitis.

Mandatory and discretionary costs are associated with H.R. 4306; however, additional time would be needed to complete estimates.

H.R. 5559 – Protecting Veterans Claims Options Act

Under existing law, VA must re-adjudicate a previously decided claim if the claimant files a supplemental claim and identifies new and relevant evidence. Subsection 2(a) of H.R. 5559, the Protecting Veterans Claims Options Act, would remove the new and relevant evidence requirement with respect to supplemental claims filed within 1 year of the agency of original jurisdiction's decision on the earlier claim. The bill provides that subsection 2(a) would apply to supplemental claims filed on or after August 23, 2017, and directs VA to prescribe implementing regulations for subsection 2(a) within 180 days of the bill's enactment. Subsection 2(b) would add a new evidentiary window under 38 U.S.C. § 7113(d) for cases that have been remanded by the Court of Appeals for Veterans Claims to include evidence submitted by the appellant and his or her representative, if any, within 90 days following such remand, which the Board of Veterans' Appeals (Board) shall consider in the first instance.

VA cites concerns with subsection 2(a) and does not support subsection 2(b). With respect to subsection 2(a), VA is concerned that eliminating the requirement for new and relevant evidence in support of certain supplemental claims will result in needless re-adjudication of claims based upon identical evidentiary records, which would be unlikely to result in a different decision. VA does not consider such duplication of efforts to be an efficient use of scarce adjudicatory resources. This amendment would essentially collapse any distinction between a supplemental claim filed within 1 year of when the agency of original jurisdiction issued a decision and higher-level review of such a decision under 38 U.S.C. § 5104B.

VA also is concerned with the retroactive provision of section 2(a)(3) of the bill. In effect, that retroactive provision would require VA to re-adjudicate every claim decision made after August 23, 2017, upon submission of a supplemental claim without new and relevant evidence, since section 2(a)(1) of the bill eliminates any requirement for new and relevant evidence in support of supplemental claims filed within 1 year "after the date on which the agency of original jurisdiction issues a decision with respect to such claim." The combined effect of these provisions would seem to require that VA re-adjudicate every supplemental claim filed since August 23, 2017, that was in turn filed within 1 year of an initial decision on a claim but denied for lack of submission of new and relevant evidence. Once again, this will result in needless re-adjudication of claims based upon identical evidentiary records. It would also require VA to data mine to identify every claim filed since August 23, 2017, that might be eligible for re-adjudication, including those where claimants expressed no disagreement with VA's decision that the supplemental claim filed within 1 year of the initial decision was not accompanied by new and relevant evidence. VA does not consider such duplication of efforts to be an efficient use of resources.

VA also notes that while the Appeals Modernization Act (AMA) was enacted on August 23, 2017, AMA was not fully implemented until February 19, 2019. Some claims were processed under AMA on an opt-in basis prior to that date, but for most claims, the term "supplemental claim" as characterized in AMA would not have been applied prior to February 19, 2019.

In addition, VA is concerned that section 2(a)(4) of the bill requires VA to develop complying regulations within 6 months following enactment. VA generally estimates 1 year for development and publication of a regulation or regulatory amendment. Therefore, VA anticipates difficulty complying with this timeframe.

With respect to subsection 2(b), VA believes that this newly proposed evidentiary window frustrates current jurisdictional considerations for having a closed appellate record for the Board of Veterans' Appeals (Board) and reviewing Federal Courts to consider. Approximately 6,800-7,700 remanded appeals are returned to the Board each year by the Court of Appeals for Veterans Claims (CAVC) and the majority of those remands require the Board to provide additional "reasons or bases" for why the original, closed record considered by the Board was insufficient to grant the relief sought. This newly proposed evidentiary window would erode the carefully considered relevant evidence windows currently available to Veterans under AMA and may act as an inducement for appellants to file even more appeals with CAVC simply to add additional evidence that would further delay final resolution of the appeals they originally filed. This would contribute to even higher backlogs of pending appeals.

We would welcome the opportunity to discuss the bill in more detail with the Committee.

H.R. XXXX – Veterans Appeals Decision Clarity Act

Under current law, each decision of the Board must include a written statement of their findings and conclusions, and the reasons or bases for those conclusions, on all material issues of fact and law presented on the record; a general statement reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under section 7113 of this title and noting such options as may be available for having the evidence considered by VA; and an order granting or denying relief. The Veterans Appeals Decision Clarity Act would further require that each Board decision includes a written determination as to whether the Notice of Disagreement was adequate and timely, and if there was evidence that was not considered because it was received outside the time limitations in section 7113, identification of the time when such evidence was received and the provision of 38 U.S.C. § 7113 that establishes that it may not be received at such time.

VA believes that the bill would add significant delays to appeals processing timelines and lead to exponential growth in appeals backlogs. At the end of FY 2023, VA began to see a reduction in the number of appeals pending before the Board after AMA went into effect in 2019. However, VA also anticipates an increase in pending appeals due to implementation of the PACT Act. The bill would further delay resolution of appeals and would create an additional burden on the Board because, having identified the evidence received outside the allowable submission window, the Board would then have to provide a written statement of when each piece of evidence was received and the provision of section 7113 that is implicated. From VA's perspective, the closing of the evidentiary record is one of the foundational features of AMA, and one of its most valuable in terms of enabling VA, over time, to process appeals more efficiently. Requiring VA to individually list or summarize each piece of evidence received outside of the window of time permitted by section 7113 would dilute much of the administrative value of closing the record.

The requirement would substantially increase the likelihood that Veterans will inappropriately appeal decisions with allegations that the Board failed to administratively identify each piece of evidence submitted outside the relevant evidentiary window and discuss why it cannot be received at such time. VA feels that this will cause increased confusion and slow the appeals process as Veterans and their representatives appeal Board decisions that fail to meet these new administrative requirements to CAVC, only to end up with a remand that requires the Board to cure the administrative deficiency without any substantive change in the ultimate outcome of the appeal. Under those circumstances, the attorney representing the appellant on such appeals to the Court will receive a substantial attorney fee under the Equal Access to Justice Act while the Veteran receives no better outcome than they had prior to the appeal.

As for the adequacy and timeliness of a Notice of Disagreement, currently, written docketing notices must be sent to appellants and their representatives, advising them that their appeal was docketed or that there are potential timeliness or adequacy issues with the filing. These notices also provide an opportunity to appellants and

representatives to dispute and/or cure any potential defects well in advance of when the case would be adjudicated. Those final timeliness and adequacy determinations that are disputed and potentially adverse to the appellant are ruled upon by a Veterans Law Judge on detail to the Office of Clerk of the Board. The bill would delay those formal determinations until the time when the Board formally adjudicates the case (which may be months or even years later), which will cause unnecessary delay and potential harm to appellants.

H.R. XXXX – Veterans Appeals Transparency Act of 2023

The "Veterans Appeals Transparency Act of 2023" seeks to clarify which review options are available to claimants within 1 year following a decision by the agency of original jurisdiction (AOJ) and to clarify that only one review option may be selected at a time. In addition, the bill would require the docket dates of cases assigned to a Board member for a decision that week to be published weekly by the Board.

VA does not support the bill unless amended. VA generally supports efforts to clarify or simplify the decision review and appeals process, and to clearly establish that only one decision review option is permissible at a time for any given issue; however, the impact of some proposed language in this bill is unclear absent amendment.

Specifically, VA has concerns with the proposed removal of the phrase "in succession," from 38 U.S.C. §5104C(a)(2)(B) as this may cause confusion, or inadvertently allow multiple, redundant decision or appellate reviews of the same evidence by the same appellate or reviewing body—a practice that is currently prohibited to ensure that each time a claimant exercises a review option it offers either a review of new evidence or a review by a higher-level body. For example, the statute as currently written, with its implementing regulations, prohibits claimants from challenging a higher-level review (HLR) decision by the AOJ by filing an HLR on the same issue with the AOJ; prohibits filing for an HLR by the AOJ of a Board decision and precludes requesting Board review of a Board decision. If such redundant review of the same evidence by the same reviewing authority were allowed under the proposed bill, it would create endless cycles of review by the same body of the same evidence, which would bog down the system and fail to offer a meaningful review process to claimants.

If the bill's intent is to clarify the requirement to only pursue one decision review or appeal option at a time and to clarify in statute which specific review options are available to challenge either an AOJ or a Board decision, then VA suggests either leaving the current statutory language explaining that options may be exercised "in succession" for the reasons above, or adding the following language specifying which particular review options are available within a year following an AOJ, Board or CAVC decision, which mirrors current regulatory language in 38 C.F.R. § 3.2500(c):

> "(1) Following notice of a decision on an initial claim or a supplemental claim, the claimant may file a supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

(2) Following notice of a decision on a higher-level review, the claimant may file a supplemental claim or appeal to the Board of Veterans' Appeals.
(3) Following notice of a decision on an appeal to the Board of Veterans' Appeals, the claimant may file a supplemental claim or file a notice of appeal to the Court of Appeals for Veterans Claims.
(4) Following a decision on an appeal to the Court of Appeals for Veterans Claims, the claimant may file a supplemental claim."

We note that to the extent the Committee opts to model the language on VA's current regulation, the Committee should be aware that VA has committed to change current paragraph (c)(4) to extend to review by the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court, and currently applies this rule pursuant to Policy Letter 20-01. Accordingly, the Committee could consider replacing "a decision on an appeal to the Court to Appeals for Veterans Claims" with "completion of judicial review" or a similar phrase.

With respect to the weekly reporting requirement, VA believes that the requirement will be administratively burdensome to execute and, more importantly, may be misleading to Veterans and representatives because of how variable those docket dates will be. For example, approximately 2,000-2,500 appeals are adjudicated each week at the Board. Approximately 30% of cases adjudicated by the Board each year are Advanced on the Docket (AOD) cases which are automatically moved ahead of other cases which may have been pending much longer. These are cases involving Veterans with serious health conditions, severe financial hardship and advanced age. They will have docket dates that may be years ahead of others waiting. Another 35-40% of cases adjudicated are also expedited because they are legacy cases returned after remands from either the Court or the AOJ and they automatically move to the head of the line either because the law requires it (Court remands) or because the docket dates are much older in comparison to AOD cases or those waiting for first-time adjudication. Finally, original appeals (those getting first-time adjudication) will fall somewhere in between those two extremes. For example, the Board still has over 15,000 original Legacy system appeals that have not been adjudicated previously by a Board judge because so many other appeals (older Legacy remand cases and AOD cases under both AMA and Legacy) move ahead of them in line. It would be impossible for the Board to provide an exact estimate for when a particular appeal may be adjudicated because each appeal place in line is constantly based on which appeals are joining (or re-joining) the appeals queue each day.

H.R. XXXX – Review Every Veterans Claim Act of 2023

The Review Every Veterans Claim Act of 2023 would preclude VA from denying a claim for VA benefits solely on the basis that the Veteran failed to appear for a VA medical examination scheduled in connection with the claim. VA has a statutory duty to provide a medical examination or obtain a medical opinion or when such examination or opinion is necessary to decide a compensation claim. A medical examination or opinion is necessary to decide a claim in certain cases in which the evidence of record is

insufficient to support a grant of benefits, but there is a reasonable possibility that the examination or opinion will provide that evidence.

VA notes that while this bill would prohibit denial of a claim on the sole basis that a Veteran failed to appear for a medical examination, there may be cases where, without the examination, there is insufficient evidence to support entitlement. Even if this bill were enacted, claims would still be denied in those circumstances. The only difference would be that the denial would be due to lack of sufficient evidence, not solely the failure to appear for the examination.

VA cites concerns with this bill as written. While VA appreciates the intent, the bill may have the effect of continuing and worsening the practice of those involved in the for-profit Disability Benefits Questionnaire completion industry who often submit inconsistent and questionable disability impairment descriptions in exchange for large fees and a portion of any future VA compensation benefits awarded. These bad actors intentionally and specifically instruct Veterans to not report for their scheduled VA disability examinations.

If a Veteran who fails to report for a VA examination establishes good cause for failing to report, VA will reschedule the examination. Absent good cause, VA action depends on type of claim at issue. If the examination was scheduled in connection with an original compensation claim, VA will decide the claim based on the evidence of record. If the examination was scheduled in connection with any other claim for compensation or a claim for pension or dependency and indemnity compensation, the claim will be denied solely on the basis of the failure to report for the examination. VA recognizes that this distinction may result in inequities. VA intends to consider whether a single rule should apply to all types of claims. Moreover, the bill, as written, is limited to compensation claims. VA recommends that the same principle apply with respect to pension claims. However, expanding the bill as written to include pension claims may have unintended effects.

We would welcome the opportunity to discuss the bill in more detail with the Committee.

H.R. XXXX – Veterans Exam Expansion Act of 2023

The Veterans Exam Expansion Act of 2023 would extend existing temporary licensure rules for contract health care professional who perform medical disability examinations for VA to podiatrists, dentists and optometrists. The bill would also extend the license portability sunset date from 3 years to 5 years. The bill also includes a reporting requirement for the 1-year period following the date of the enactment of this Act.

While VA appreciates the legislation, VA seeks to further expand the definition of a health care professional to include any health care professional deemed appropriate by VA to conduct medical disability examinations. This definition, for example, does not

include advanced practicing nurses. Expanding the definition of a health care professional to any health care professional deemed appropriate by VA to conduct medical disability examinations would provide VA with greater flexibility to complete such examinations.

Additionally, while VA appreciates the extension of the Licensure Requirements (Portability) for Contractor Medical Professionals to Perform Medical Disability Examinations from 3 years to 5 years, VA is seeking to eliminate the Sunset Date on the Licensure Requirements (Portability) for non-physician Contractor Medical Professionals to Perform Medical Disability Examinations altogether. Removing the sunset date and expanding how a health care professional is defined are critical to ensure continuous completion of thorough, accurate and timely medical disability examinations to Veterans, thereby leading to timely and accurate rating decisions associated with VA benefit entitlement. Additionally, these suggested amendments would allow VBA the flexibility to use a wider range of qualified medical professionals and reach more Veterans.

No mandatory or discretionary costs are associated with this proposed legislation. Any additional requirements could be funded under existing budget authority.

Conclusion

Mr. Chairman, this concludes my testimony. My colleagues and I are prepared to respond to any questions you or other Members of the Committee may have.