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 be a witness at your hearing titled, "Lost in Translation: How VA's Disability Claims and Appeals Letters Should be Simplified."

DAV is a congressionally chartered and Department of Veterans Affairs (VA) accredited veterans service organization. We provide meaningful claims support free of charge to more than 1 million veterans, family members, caregivers and survivors.

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 VA regional office (VARO) as well as other VA facilities throughout the nation, including the Board of Veterans' Appeals (Board). During 2023, DAV national and transition service officers interviewed over 300,000 veterans and their families, and filed more than 200,000 new claims for over 600,000 specific injuries and/or illnesses. Thanks to the great work of our service officers, those represented by DAV obtained more than $28 billion in earned benefits in 2023.

Based on our decades of direct experience, we are pleased to provide our insight, concerns, and recommendations about VA letters and notices to veterans and their families. Our testimony will address how VA letters got to their current state by providing a brief history of the VA's duty to assist, Standardize Forms and the Appeals Modernization Act, as well as addressing the VA's letters to claimants with our recent survey and VA letters filled with errors compounding the confusion.

Brief History of VA's Duty to Assist, Standardized Forms and the AMA

To truly understand the changes and impacts to VA's duty to assist, duty to notify and required VA forms, appeals language and VA's letters, we will briefly address the significant changes over the past two decades that have caused VA letters and notices to become more complicated and legalistic.

Veterans Claims Assistance Act of 2000

In 2000, the Veterans Claims Assistance Act of 2000 (VCAA) was enacted into law, creating a landmark change in the VA's duties to notify and assist claimants for VA benefits. The enacted version of the VCAA adopted notice and assistance provisions from both the House and Senate bills reads as follows:

> § 5103. Notice to claimants of required information and evidence
> (a) REQUIRED INFORMATION AND EVIDENCE. —Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.
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> (b) TIME LIMITATION.— (1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, if such information or evidence is not received by the Secretary within 1 year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application. (2) This subsection shall not apply to any application or claim for Government life insurance benefits.
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> § 5103A. Duty to assist claimants
> (a) DUTY TO ASSIST.— (1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary. (2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim. (3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.
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> (b) ASSISTANCE IN OBTAINING RECORDS.— (1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain. (2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought,

the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim.

In turn, the United States Court of Appeals for Veterans Claims (CAVC) and United States Court of Appeals for the Federal Circuit (Federal Circuit) issued several significant decisions interpreting the VCAA's obligations upon VA and creating significant changes in VA's claims adjudication process.

Pursuant to statutory edict, the Secretary of VA was tasked with prescribing rules and regulations to carry out the requirements of the VCAA. A notice of proposed rulemaking was published on April 4, 2001 and a final rule was published on August 29, 2001.The final regulations were made effective retroactively from November 9, 2000.They were soon subject to legal challenge in *Paralyzed Veterans of America (PVA) v. Secretary of Veterans Affairs.* In *Disabled American Veterans (DAV) v. Secretary of Veterans Affairs*, the appellants challenged not only VA's regulations, but also their retroactive effect.

Along with addressing the scope of the VCAA and the validity of the regulations enacted to implement it, the courts were to be called upon to clarify such topics as the timing and content of appropriate VCAA notice. In *Pelegrini v. Principi*, the CAVC addressed the issue of the timing of proper VCAA notice. The Federal Circuit more fully addressed the timing of the VCAA in *Mayfield v. Nicholson*, in which it made clear that proper notice must, if possible, be provided prior to initial consideration of the claim by VA, and the duty to notify was not satisfied by "various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation.

As in *Pelegrini*, the CAVC in *Dingess* held that notice concerning all five elements of a service connection claim "must precede any initial adjudication on them." Thereafter, upon the award of service connection, with an accompanying initial disability rating and effective date, 38 U.S.C. § 5103(a) no longer applies, at it has served its purpose and the claim has already been substantiated. Thereafter, 38 U.S.C. §§ 5103A and 7105(d) were created to make certain the claimant was provided assistance throughout the claims process. Next, in *Kent v. Nicholson*, the CAVC considered VCAA notice requirements in the context of an application to reopen a claim pursuant to 38 U.S.C. § 5108.

In *Hupp v. Nicholson*, the CAVC addressed VA's 38 U.S.C. § 5103(a) notice obligation in the context of a claim for DIC benefits under § 1310. The CAVC next addressed, in *Vazquez-Flores v. Peake (Vazquez I)*, the question of 38 U.S.C. § 5103(a) notice in claims for increased ratings.

Veterans' Benefit Improvement Act of 2008

Congress acted to more explicitly clarify the notice requirements of 38 U.S.C. § 5103(a), amending it effective October 10, 2008 to require the Secretary to promulgate regulations, which differentiated notice to claimants depending on the type of claim, benefit, or service sought.

In the Committee Report associated with the Veterans' Notice Clarification Act of 2008, Congress took direct aim at both the CAVC and VA, citing the CAVC's decisions in *Dingess and Vazquez I* and VA's interpretation of *Vazquez I*, noting these as instances where the intent of Congress was thwarted and resulted in negative consequences for the claimant. Congress went to multiple ROs and examined the notice letters provided to various claimants. After this review, Congress noted:

> Since the enactment of the VCAA, various actions, including decisions of the [CAVC] and VA's responses to some of those decisions, have led to notices that are not meeting the goal of providing claimants with sufficient, clear information on which they can then act. Instead of simple, straightforward notices that can be easily read and understood by claimants, VA is now routinely providing long, frequently convoluted, overly legalistic notices that do not meet the objective of the VCAA.

Standard Claims and Appeals Forms Regulation

Effective March 24, 2015, VA amended its adjudication regulations. The major provisions included:

- VA standardized the claims and appeals processes through the use of specific mandatory forms prescribed by the Secretary, regardless of the type of claim or posture in which the claim arises. These amendments applied to all benefits within the scope of 38 CFR part 3, namely pension, compensation, dependency and indemnity compensation, and monetary burial benefits.

- Additionally, it eliminated the provisions of 38 CFR 3.157, which allowed various documents other than claims forms to constitute claims; specifically, VA reports of hospitalization or examination and other medical records that could be regarded as informal claims for increase or to reopen a previously denied claim.

- This rule implemented a procedure to replace the non-standard informal claim process in 38 CFR 3.155 by employing a standard form on which a

claimant or his or her representative can file an “intent to file” a claim for benefits.

- Finally, this rule provided that VA will accept an expression of dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction (AOJ) as a Notice of Disagreement (NOD) only if it is submitted on a standardized form provided by VA for the purpose of appealing the decision.

Veteran Appeals Improvement and Modernization Act of 2017

The Veteran Appeals Improvement and Modernization Act of 2017 became law on August 23, 2017 (Pub L. 115-55). It is also known as the Appeals Modernization Act (AMA). Starting in 2015, DAV collaborated with the Veterans Benefits Administration (VBA), the Board, and other stakeholders to improve and streamline the appeals process. The AMA, a veteran-centric appeals process, was the result of those combined efforts and was implemented in February 2019.

AMA created three options, referred to as lanes, for claimants dissatisfied with the initial decisions on their claim. Claimants may seek a higher-level review of the decision based on the same evidence presented to the initial claims processors; they may file a supplemental claim that includes the opportunity to submit additional evidence; or they may appeal directly to the Board.

Claimants appealing to the Board may elect one of three appeal options: 1) a direct review of the evidence that the AOJ considered; 2) an opportunity to submit additional evidence without a hearing; or 3) an opportunity to have a hearing before a veterans’ law judge (VLJ), which includes the opportunity to submit additional evidence.

Additionally, the AMA included seven new notice items that must be implemented in VA rating decisions and notices to veterans. This includes:

1) Identification of the issues adjudicated.
2) A summary of the evidence considered by the Secretary.
3) A summary of the applicable laws and regulations.
4) Identification of findings favorable to the claimant.
5) In the case of a denial, identification of elements not satisfied leading to VA’s denial.
6) An explanation of how to obtain or access evidence used in making the decision.
7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

The VCAA changed the VA claims and appeals process in drastic ways; however, it is extremely beneficial to veterans and their families as it enforces VA's duty to assist and duty to notify. As we demonstrated, between the CAVC, the Federal Circuit and the Veterans Benefits Improvement Act of 2008, the demands on the VA to explain these via letters with legal language adds complications and creates confusion with veterans. Couple this with the VA's changes to Standard Claims and Appeals forms in 2015 and the AMA in 2019, VA letters now have a complex legal style which mostly cause frustration with claimants trying to comply with VA to ensure they receive their earned benefits.

VBA Letters

Per the VCAA, VA is required to advise and notify veterans of receipt of their claim, also known as the duty to assist letter, it also provides additional information on VA's development of the benefits sought. Additionally, VBA sends letters to veterans to notify them on wrong forms or incomplete applications, and decision letters in reference to their claims.

Duty to Assist Letters

The duty to assist letter, as required by the VCAA, provides claimants with acknowledgement that the claim was received. VA is required to advise on the evidence they have received or requested and advise the veteran of any additional evidence needed. Additionally, VA advises on what is referred to as the "38 U.S.C. 5103 response." This requires claimants to respond with a form stating they have enclosed additional evidence or have no additional evidence. They can also select that they have additional evidence to submit and request VA to wait 30 days before deciding the claim.

Included with this testimony is Exhibit A, which is a redacted duty to assist letter from March 11, 2024. This letter with attachments is 17 pages, which includes the 38 U.S.C. 5103 Notice and Response, A Statement in Support of Claim and three different releases for information. However, you will notice the VA acknowledges a claim was received but does not list the conditions claimed. Additionally, it does not indicate VA requested any of the veteran's service records.

VBA Incorrect Form Letters

As required by the Standard Claims and Appeals Forms Regulation, all claims must be on the appropriate VA form. If the veteran uses the wrong form, VA sends a letter to acknowledge they received a claim but it was on the wrong form. However, VA is no longer required to provide the correct form to the veteran.

Included with this testimony is Exhibit B, which is a redacted VA incorrect form letter dated March 6, 2024. VA notes they received the claim for a mental health condition that they previously denied and that the veteran submitted the claim on the wrong form. The letter does not indicate the correct form, instead, they list four different forms the veteran could use and provide the link to VA.gov to find the form. The correct form in this case is VA Form 20-0995, a Supplemental Claim; however, the veteran would not know which form to complete and send to the VA. The letter notes that VA is not able to process the request and will establish the claim when they receive the correct form.

VBA Decision Letters

When the VA decides a claim, they are legally required to notify the veteran of the decision as well as comply with the provisions of the VCAA and the AMA in explaining the three ways to reply to a decision as well as the required additional seven items we noted above.

Included with this testimony is Exhibit C, which is a redacted VA decision letter dated March 14, 2024. The notification letter is ten pages with additional explanations. The actual VA decision is 9 pages with another page at the end advising the veteran on fraud protection. This 20-page notification letter is the product of the VCAA and the AMA, which can be difficult for a veteran to navigate and understand the decision.

DAV's Benefits Advocates Survey on VA Letters

Recently, DAV surveyed our national service officers, VA-accredited benefits advocates, who provide veterans and their families with free representation at 63 different locations across the country and Puerto Rico. The survey was focused on the most common complaints and frustrations from claimants on the three VA letters noted above.

Approximately 41% of our offices stated they get the most veteran inquiries and complaints on VA incorrect form letters. 38% of offices stated the duty to assist letters received the most inquiries and complaints and 19% stated they get the most inquiries and complaints on decision letters.

The consistent complaint from veterans about the duty to assist letters is that they are too long, they don't understand much of the language used, and they are not clear what actions they need to take or why they are being sent so many additional forms. One veteran provided the following comments:

> The letter is headed "Important—reply needed within 30 days," and it says "We need additional evidence from you." I'm not entirely clear

> from the letter's wording, but it sounds like they are encouraging me to submit "buddy letters" in support of my claim, and giving me a 30 day window to do so. From our last conversation, it didn't sound as if "buddy letters" were all that necessary. Can you please advise me as to what I should do in response to this letter?

In reference to wrong or incomplete forms letters, the common complaint is that veterans are being advised that they either submitted the wrong form or the form was not complete. Our service officers review the electronic claims folders and discover in most cases, the correct form was submitted and they did indeed sign the form. However, one of our offices noted:

> The veteran was advised by VA that there was a missing page to the 21-526ez application for benefits. The veteran responded with the missing page from the application. Then VA cancelled the claim, as they indicated the veteran only provided one page of the 21-526ez and submitted an incomplete claim.

The survey showed that a major complaint on VA decision letters is they are too long and contain information that may not apply directly to them or their recent decision. Another key point about veterans' confusion with VA decision letters is due to the favorable findings' requirement. Per the AMA, VA must provide favorable findings on facts or information provided; however, this does not result in a grant of the benefits sought, as other information is missing which results in the denial. One of our offices provided:

> What frustrates veterans the most is reading the favorable findings and believing the favorable findings means they should have been granted the benefit sought. The reason for the denial is buried in the written narrative.

Additionally, we asked for specific comments and complaints about VA letters. Below are some of those comments directly from our benefits advocates:

> An example of frustration is that veterans don't understand the letter because it's not clear or explained in layman terms.

> Many veterans call frustrated because they feel that VA is requesting documents that they have already submitted.

> Earlier today a veteran came in with his decision letter and asked why does VA send all this information as it is confusing to understand what was granted or denied.

VA letters and notifications not only comply with law, but inform claimants on specific information and fulfill VA's duty to assist and notify. However, it is evident that these letters speak a language that veterans cannot always translate. It becomes even more stressful when the VA letters are filled with errors.

Compounding the Confusion

As our survey notes, claimants are being confused and frustrated by VA letters and it is greatly compounded when these letters are filled with inaccurate information and errors. One of our supervisors noted they are finding errors in approximately 30% of all VA letters they review. Attached to this testimony are redacted VA letters that show a few of the errors found in VA letters that were sent to claimants.

Exhibit D

Included with this testimony is a redacted VA letter, noted as Exhibit D, dated March 7, 2024. VA indicates they received a claim *"for left lower extrem; right lower extremely; restless les syndom; res. of pratectomy -; incresse : lumbar that we previously denied. VA regulations require you to file this request on the proper form."*

It is obvious that this letter is filled with spelling errors. Our service officer reviewed this claim and determined the veteran submitted the correct form, 21-526ez, for the left lower extremity and right lower extremity. We do note that the veteran did not ever file a claim for restless leg syndrome, residuals of a prosectomy or a lumbar spine condition. However, VA indicates the veteran did claim those conditions, notes two different forms he could use and that it is waiting for the correct form to be sent before they process the claims. Since the veteran never filed for these three conditions, he will not be submitting the "correct form."

Exhibit E

Included with this testimony is a redacted VA letter, noted as Exhibit E, dated January 23, 2024. The VA notifies the veteran they received his claim for a back condition and left Achilles tendon injury. Further, they indicate the veteran must specify what disability he is claiming, although they acknowledge he did claim two specific conditions.

This letter caused confusion with the veteran and our service officer spoke to the VA development clerk who wrote the letter. The VA employee agreed he did not need to include the left Achilles tendon issue but then questioned the service officer about the back condition. DAV reminded the VA employee that it is part of their duty to assist with development and the VA employee agreed and rescinded the letter.

Exhibit F

Included with this testimony is a redacted VA letter, noted as Exhibit F, dated March 6, 2024. VA notifies the veteran they have received his claim for increase for his back condition and his private medical examination.

VA wrote, “The examiner provided a new diagnosis. We need to clarify if the new disability is a progression of your service connected disability received, on January 9, 2024. We are returning this application to you because it was incomplete.” The letter directs the veteran to contact his physician and ask her to provide a reply.

Any claim for increase for an existing condition automatically requires VA to provide a new medical examination and to develop the claim. This letter tells the veteran to contact his private examiner and VA returns this as an incomplete claim. Our service officer reviewed the claim and discovered the veteran is claiming an increase for the service-connected fractures of L2, L3, and L4 vertebrae. The veteran submitted a Disability Benefits Questionnaire (DBQ) completed by his private physician. VA failed to comply with their duty to assist, failed by advising the veteran to get his private doctor to explain, and they failed by rejecting this as a complete claim, which was on the proper form and provided all required information.

Exhibit G

Included with this testimony is a redacted VA letter, noted as Exhibit G, dated March 7, 2024. VA indicates they received a claim for *“hypokalemia; chondromalacia athritk; bilateral fearing loss; scarssternum bilaterm lees; conjunctivitis; sinusitis; hypertension that we previously denied. VA regulations require you to file this request on the proper form.”*

The letter is filled with spelling errors. Our service officer reviewed this claim and determined the veteran submitted the correct form, 21-526ez, for increased evaluations for the already service-connected sinusitis and hypertension. However, VA indicates the veteran did not submit the correct form.

Recommendations

The VCAA positively changed the VA claims process by ensuring that the VA’s duty to assist and duty to notify are provided to all claimants. However, the many precedent CAVC decisions along with the Veterans Benefits Improvement Act of 2008, and the additional requirements imposed by the VA’s changes to Standard Claims and Appeals forms in 2015 and the AMA in 2019, VA letters and notices to veterans and their families have become bogged down with legal language.

Our attached exhibits provide examples of the VA's duty to assist letter, VA's wrong or incomplete form letter and VA decision letters. After their review, it is clear that letters are too long, too complex and frustrate veterans attempting to access their earned benefits. This is displayed by the additional information provided by our survey of DAV benefits advocates and comments directly from them and the veterans we represent.

DAV recommends VBA take a new look at their letters by concentrating on the language for the reader and not the legal requirements. We suggest the use of focus groups populated with veterans and veterans service organizations to assist in developing language that is understood and clearly conveys information and the intent of the letter.

As our survey indicated, the major complaint from veterans was the incorrect VA form letters. We understand the reason for VA's regulation on standardized forms was to streamline the claims process for the use of information technology to include scanning and populating the electronic claims folder and establishing claims. However, we have clearly demonstrated that many of these letters for correct forms are confusing and can have a negative impact on effective dates.

DAV believes there should never be a wrong door at VA and we recommend that VA reconsider the standardized forms requirement or take an approach that will either accept the wrong form as an Intent to File or if all of the needed information is provided VA should process and decide the claim. We remind VA of Omar Bradley's quote while serving as the Administrator of the Veterans Administration, "We are dealing with [veterans], not procedures; with their problems, not ours."

In addressing the numerous errors in letters to veterans we provided, we noted many were errors made by VA employees and some appear to be auto-filled from other VA applications. We recommend VA to either create and/or improve the quality assurance of all letters before they are being released. These errors are compounding the inability to understand what is being relayed and what is being requested.

Mr. Chairman, in closing, VA letters should not be structured in a way that induces confusion, anxiety and frustration from veterans. VA should utilize resources in a way that actually aids veterans and their families in substantiating their VA claims, which may be done with clearly worded, concise notice letters that are relevant to the submitted claim. VA must do better. This concludes my testimony.