

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement for the Record

Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Concerning Pending Legislation

April 10, 2024

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on pending legislation.

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

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC), U.S. Court of Appeals for the Federal Circuit, and the Supreme Court of the United States. As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari before U.S. Supreme Court); *Van Dermark v. McDonough*, No. 23-178 (September 25, 2023) (amicus in support of petition for writ of certiorari before U.S. Supreme Court). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA also advocates for laws to improve the VA disability claims and appeals process. NOVA participated in the stakeholder meetings that resulted in the development and passage of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, 131 Stat. 1105 (August 23, 2017) (AMA). As VA has implemented the new system over the last several years, NOVA has provided extensive training to our members on the statute, regulations, and practice under the AMA. We have also gathered information from our members across the country on their experiences advocating for clients under the AMA before the agency, Board of Veterans' Appeals (Board), and CAVC. Our views as expressed below are informed by our members' feedback.

TERA Examination Bills: Toxic Exposures Examination Improvement Act and Medical Disability Examination Improvement Act of 2024

In the PACT Act, Congress defined a “toxic risk exposure activity” as “any activity” that “requires a corresponding entry in an exposure tracking system,” e.g., ILER, or “that the Secretary determines qualifies for purposes of this subsection when taking into account what is reasonably prudent to protect the health of veterans.” 38 U.S.C. § 1710(e)(4). What the Secretary has generally determined to be a toxic risk exposure activity (TERA) is expansive, and includes (1) air pollutants, e.g., burn pits, sand, dust, particulates, oil well fires, sulfur fires; (2) chemicals, e.g., pesticides, herbicides, depleted uranium with embedded shrapnel, contaminated water; (3) occupational hazards, e.g., asbestos, industrial solvents, lead, paints including chemical agent resistant coating, firefighting foams; (4) radiation, e.g., nuclear weapons handling, maintenance and detonation, radioactive material, calibration and measurement sources, X-rays, radiation from military occupational exposure; and (3) warfare agents, e.g., nerve agents, chemical and biological weapons. *See, e.g.,* All Veterans exposed to toxins and other hazards during military service – at home or abroad – are now eligible for VA health care, <https://www.va.gov/st-louis-health-care/news-releases/all-veterans-exposed-to-toxins-and-other-hazards-during-military-service-at-home-or-abroad-are-now-eligible-for-va/>, March 5, 2024.

NOVA is concerned about how section 303 of the PACT Act governing TERA exams is being translated in the reality of VA’s disability examination process. After much consideration and as discussed below, however, we conclude that both bills being proffered here would unacceptably narrow the intent of TERA exams. That is, when passing the PACT Act, Congress intended that any veteran exposed to toxins during service be eligible for a medical examination when filing a claim for direct service connection of a non-presumptive condition.

NOVA members do report frequent situations where VA requests TERA exams that are exempted from the process, e.g., for a presumptive condition or a condition specifically excluded by VA, e.g., claims based on a physical trauma, claims for mental health disorders. These errors require better training and oversight for VA employees, not narrowing the rights of veterans, particularly veterans who might be proceeding without accredited representation.

On this basis, NOVA does not support either the Toxic Exposures Examination Improvement Act or the Medical Disability Examination Improvement Act of 2024 regarding the threshold changes proposed to the TERA examination process.

We do, however, support other sections of the Medical Disability Examination Improvement Act of 2024. Specifically, we endorse Section 4’s requirement for a study on improvements to VA medical disability examinations in rural areas; Section 5’s

requirements for improvements to training for processing medical disability examinations¹; and Section 6’s requirements for review and priority processing of claims where inadequate or unnecessary examinations were used to decide them. Of particular importance in section 6 is the requirement for VA to provide “another examination, if necessary, on a priority basis” and to provide “priority processing for the entirety of [the] impacted claim.”

We offer the following suggestions to strengthen this legislation:

1. In Section 5(b)(3), a subsection (E) should be added to require training on the acceptance of private physician examinations under 38 U.S.C. § 5125.
2. Congress should provide definitions for what is an inadequate or unnecessary examination for purposes of Section 6.

Veterans Appeals Efficiency Act

NOVA does not support this bill as written, but we support certain aspects of it with additional revisions.

As an initial matter, NOVA supports collection and publication of accurate data that assists veterans and their representatives in making informed decisions about pursuing claims and appeals. Without a clearer picture of how Section 2 will impact VA’s ability to timely issue decisions, however, we cannot support it as written.

Notice of Reason for Certain Assignments. NOVA supports the intent of this provision, but it needs to also include an opportunity for veterans to respond to the notice and waive any additional unnecessary development with safeguards to ensure informed consent.

Authority to Aggregate Certain Claims. NOVA does not categorically oppose the concept of Board aggregation, but does not support this provision as currently written. NOVA members expressed concerns about issues relating to the veteran’s privacy and whether the veteran would be able to opt-out of aggregation. NOVA maintains the objectives sought through Board aggregation might better be achieved through an opinion from the Office of General Counsel on a question of law regarding a recurring issue as

¹ Under Section 5 of this draft bill, subsection (2) should be stricken since the CAVC is able to address recurring issues in precedential opinions and should not be compelled to issue advisory opinions through a reporting requirement. In addition, subsection (2) should be stricken because it is inconsistent with the purpose of 38 U.S.C. § 7288(a), which is to summarize the “workload of the Court.”

provided elsewhere in the bill. In addition, any larger question of law that may be subject to aggregation could also be addressed by Congress through legislation, i.e., creating legal presumptions for veteran with certain types of service and certain conditions.

Requirement to Ensure Substantial Compliance. The CAVC has held that “[a] previous remand confers on the claimant, as a matter of law, the right to compliance with the remand orders.” *Stegall v. West*, 11 Vet.App. 268, 271 (1998). To the extent that Congress seeks to codify this holding to ensure it is not removed in pending or future litigation interpreting the AMA, NOVA supports such codification. We do have concerns, however, regarding what notice and opportunity to respond would be provided. Will the Secretary’s waiver and notation of the exercise contain a reason and allow the appellant to have an opportunity to respond without having to appeal to the CAVC or file a motion for reconsideration? Without a reason and proper due process, NOVA cannot support this provision beyond codification of *Stegall*.

Expansion of the CAVC’s Jurisdiction under 38 U.S.C. § 7252. NOVA does not support this provision as written. We have concerns regarding how supplemental jurisdiction would work in practice. If the Board is given authority to aggregate claims, can the CAVC then take “supplemental jurisdiction” over one or some of those appeals? Would the aggregate cases at the Board be on hold?

Limited remands. To the extent Congress seeks to codify the CAVC’s existing authority to issue limited remands, which it has exercised in some instances, NOVA supports this provision. *See, e.g., Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990) (“We will retain jurisdiction and direct that, upon completion of the remand proceeding, the Secretary supplement the record on appeal to include the further action of the Board.”); *Skaar v. Wilkie*, 31 Vet.App. 16, 18 (2019) (CAVC recognized its limited-remand authority when it retained jurisdiction and remanded to the Board for the limited purpose of addressing the veteran’s challenge to 38 C.F.R. § 3.311); *Mote v. Wilkie*, 976 F.3d 1337, 1345 (Fed. Cir. 2020) (Federal Circuit recognized the CAVC’s “flexibility to fashion appropriate relief in a given case,” which would include limited remands).

Study and Report on Common Questions of Law or Fact Before the Board of Veterans’ Appeals/Independent Assessment of Potential Modifications to Authority of the Board of Veterans’ Appeals. As we discuss below regarding the Clear Communication for Veterans Claims Act, the study and independent report described in these sections need the input of accredited practitioners who regularly appear before the Board. NOVA would support these measures with amendments to provide for such input.

Clear Communication for Veterans Claims Act

NOVA supports the goal of the Clear Communication for Veterans Claims Act. We

incorporate by reference our recent testimony before this subcommittee that addressed the notice letters VA sends to veterans, family members, survivors, and caregivers. National Organization of Veterans' Advocates, Inc., *Statement of Diane Boyd Rauber, Esq., Executive Director*, Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs Oversight Hearing, "Lost in Translation: How VA's Disability Claims and Appeals Letters Should Be Simplified" (March 20, 2024) (hereinafter NOVA Letters Testimony). In our testimony, we highlighted the lack of readable, understandable, and organized letters sent by VA to claimants and appellants and made suggestions for improvements. With the assistance of a federally funded research and development center to assess current letters and provide solutions for improvement, VA can gain valuable assistance with this process.

What is missing from this legislation as currently written, however, is an important requirement that VA include stakeholders, i.e., accredited advocates and claimants/appellants, in this process. Accredited advocates, as demonstrated at the recent hearing, have extensive experience with providing guidance to veterans as they help them understand letters and make decisions about next steps. Claimants and appellants are the target audience and VA should pilot any proposed improved letters with them. The Subcommittee should include language requiring such collaboration.

Veterans Appeals Options Expansion Act of 2024

NOVA supports aspects of the Veterans Appeals Options Expansion Act of 2024, with additional suggestions for improvements.

Treatment of certain forms as intent to file claims. At the recent Appeals Modernization Act (AMA) Summit held by VA, participating stakeholders uniformly described problems with VA's handling of standardized forms submitted by claimants and appellants. Frequently, VA is rejecting forms where the claimant has submitted an outdated version or a "wrong" form, even though the benefit being sought is clear. Sometimes VA sends confusing instructions, resulting in the claimant being required to resend forms previously sent. *See, e.g., NOVA Letters Testimony 9.*

Requiring VA to accept a "wrong" form as an intent to file under 38 C.F.R. § 3.155 is a welcome improvement. **To make it easier for claimants, however, the bill should include an option for VA to accept the form as a claim for the specific benefit if it can be determined from the submission.** Adding this option would ensure that, wherever possible, VA reduces the claimant's burden. If VA cannot determine what benefit is being sought, it can then accept the form as an intent to file and let the claimant know of the requirement to complete the application within the year.

Modification of certain policy relating to dockets of Board of Veterans' Appeals.

The amendment to 38 U.S.C. § 7107(a)(4) would restore the veteran’s place in line after a remand. This right was relinquished under the AMA, based on the commitment that the Board would adjudicate direct docket decisions within one year and remands would be greatly reduced. Over five years into implementation of the AMA, those expectations have not been met. NOVA testified to these issues in November 2023 and asked Congress to restore the claimant’s right to the same docket number on remand if the Board’s remand does not result in a full grant by the agency. National Organization of Veterans’ Advocates, Inc., *Statement of Diane Boyd Rauber, Esq., Executive Director*, Before the House Committee on Veterans’ Affairs Subcommittee on Disability Assistance and Memorial Affairs Oversight Hearing, “Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans’ Claims on Appeal” 3-4, 5-7 (November 29, 2023). We support this important amendment.

NOVA also supports the amendment to 38 U.S.C. § 7107(d), which would improve the ability of appellants to move dockets and withdraw a claim. Such a policy will need to consider nuances such as what happens if you want to move from the direct review docket to evidence docket, where the evidence window is currently triggered by the date of the *VA Form 10182*.

Notice of untimely evidence. Notice of untimely evidence is critical information needed by appellants to better manage their case. This amendment not only furthers the nonadversarial system intended by Congress, it also promotes agency efficiency. When appellants clearly understand what evidence can or cannot be considered, it potentially reduces the need for repetitive claims and appeals and helps to alleviate ongoing churn.

CONCLUSION

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

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