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**STATEMENT OF
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COMMITTEE ON VETERANS' AFFAIRS
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, "Does a Total Disability Rating Based on Individual Unemployability (TDIU) Properly Compensate Today's Veterans?"

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.

We are pleased to provide our insight, concerns, and recommendations as we explore the requirements of TDIU, discuss the veteran's age and TDIU, compare it the Social Security Administration's (SSA) Social Security Disability Insurance (SSDI) program and discuss levels of compensation for TDIU.

Total Disability Rating Based on Individual Unemployability

As we discuss and debate TDIU, how it is defined and applied, we must remember whom this impacts; service-connected disabled veterans suffering from mental health disorders such as post traumatic stress disorder (PTSD) from combat or military sexual trauma, cognitive disabilities such as traumatic brain injuries (TBI), amputations and other orthopedic conditions limiting mobility, diseases impacting the ability to breathe, digest, hear, see, as well as the effects of cancers, not to mention the overwhelming disruption of life caused by chronic pain.

For those veterans who are unable to work due to service-connected disabilities but whose disabilities do not meet the requirements for a total rating under VA's regular rating schedule criteria, VA has special provisions for awarding total disability ratings. A total disability rating for compensation based on TDIU may be assigned where the schedular rating is less than total, when it is found that the disabled person is unable to secure or follow a substantially gainful occupation as a result of a single service-connected disability ratable at 60% or more, or as a result of two or more disabilities, provided at least one disability is ratable at 40% or more, and there is sufficient additional service-connected disability to bring the combined rating to 70% or more.

Total disability will be considered to exist when there is present any impairment of mind or body tis sufficient to render it impossible for the average person to follow a substantially gainful occupation. Therefore, total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the veteran is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

The distinction between total disability on a schedular basis and TDIU is that total disability on a schedular basis is founded on an "average person" standard, as are all regular schedular ratings, while unemployability ratings are based on the impact of the disability in the veteran's own circumstances.

Average earning capacity, or average person, is a standard or a single value used to represent a broad universe of persons. Like an average, it is approximately the middle position in a data set or intermediate between the two ends or extremes on a scale. Consequently, while the concept of average impairment in earning capacity is the basis underlying the various percentage evaluations provided for given levels of disability in the rating schedule, unemployability determinations are not based on average impairment and must consider the disability as it affects the individual's ability to follow a substantially gainful occupation in light of his or her attained work skills and educational background.

Substantially Gainful Occupation

Substantially gainful occupation, found in 38 C.F.R. § 4.16, has been clarified by the United States Court of Appeals for Veterans Claims (Court) decision, *Ray v. Wilkie*, 31 Vet. App. 58 (2019). First, there is an economic component, which essentially contemplates an occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person. Second, there is a non-economic component dealing with the individual veteran's ability to follow and secure employment.

For the second component, attention must be given to: (a) the veteran's history, education, skill and training, (b) the veteran's physical ability (both exertional and non-exertional) to perform the type of activities (e.g., sedentary, light, medium, heavy or very heavy) required by the occupation at issue, with relevant factors such as lifting, bending, sitting, standing, walking, climbing, grasping, typing, reaching, auditory and visual, and (c) whether the veteran has the mental ability to perform the type of activities required by the occupation at issue, with relevant factors such as memory, concentration, and ability to adapt to change, handle work place stress, get along with coworkers and demonstrate reliability and productivity.

Marginal Employment

Substantially gainful employment is defined as work that is more than marginal, and that permits the individual to earn a living wage. *Moore v. Derwinski*, 1 Vet. App. 356, 358-59 (1991). The ability to work only a few hours a day or only sporadically does not qualify as an ability to engage in substantially gainful employment. See *id.* Marginal employment shall generally be deemed to exist when a veteran's earned income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person.

VA's Federal Advisory Committee on Disability Compensation was tasked in the January 6, 2014, VA Response to the Committee's 2012 Biennial Report to conduct a study of the issue of Individual Unemployability (IU) and make recommendations based on the earnings and losses study. The Committee expressed concern in the 2016 Biennial Report that there was no plan developed to study economic loss data. VA initiated a limited study in 2017 which identified weaknesses with respect to sample size. VA has engaged contractors for a more robust study which has not been completed. Analysis is still pending access to data bases from other federal agencies. The Committee remains concerned about the approach being taken.

As an exception to poverty threshold-based marginal employment, which in turn is an exception to the norm of TDIU usually being awarded to veterans who are unemployed, facts found marginal employment, including employment in a protected environment, must be read narrowly so that it does not utterly supplant the general rule that annual income, limited by the poverty threshold, is a key criterion for determining TDIU eligibility. See *Rosy v. Shulkin*, 29 Vet.App. 142, 144-45 (2017).

In the recent decision of *LaBruzza v. McDonough* (2024), the Court held, "for the purposes of ascertaining the meaning of employment in a protected environment, the Court concludes that the phrase limits such employment to lower-income positions that produce earned annual income that exceeds the poverty threshold. And while the fact-specific nature of the protected-environment inquiry, as well as institutional limitations, prevents the Court from setting a bright-line standard for what constitutes a lower-

income position, the extent to which a veteran's earned annual income exceeds the poverty threshold is clearly a key regulatory consideration.”

As can be gleaned by the above descriptions and explanations about substantial gainful employment and marginal employment, the Court has weighed in often on these requirements of TDIU. However, one area we have yet to address is the veteran's age, which cannot be considered in any determination of entitlement to TDIU.

Veteran's Age and TDIU

Although TDIU is based on the effect of disability on the individual, it does not discriminate on the basis of age. If the total rating is based on TDIU, it must be determined that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age. VA is required to determine, without regard to age, whether it is the service-connected disability that renders the veteran unemployable.

Per VA's fiscal year 2025 annual budget submission, in September 2023, 377,108 veterans received TDIU, an increase of 933 cases over September 2022. While TDIU caseload continues to increase at a gradual rate, the percentage of veterans on the compensation rolls receiving TDIU compared to total veteran caseload has been decreasing slightly, from 7.8% in September 2017 to 6.8% in September 2023.

Although the percentage of veterans receiving TDIU has slightly decreased and VA regulations preclude considering the veteran's age, attempts to limit TDIU based on the veteran's age have persisted. For example, the June 2015 Government Accountability Office (GAO) report, "Veterans' Disability Benefits: VA Can Better Ensure Unemployability Decisions Are Well Supported," they recommended to develop a plan to study whether age should be considered when deciding if veterans are unemployable.

Reports from the Congressional Budget Office (CBO) in November 2013, August 2014 and December 2016, provided options to limit TDIU based on age and entitlement to additional earned benefits. In the former administration's 2018 budget, VA proposed to terminate TDIU ratings for veterans at the age of 62 and cut off TDIU benefits for any veteran already in receipt of Social Security benefits.

In the December 2022 CBO report, "Options for Reducing the Deficit, 2023 to 2032," an option was presented to terminate TDIU ratings for veterans at age 67 or older, and cut off TDIU benefits for any veterans already in receipt of TDIU. This is predicated on the veteran being in receipt of SSA based on retirement age. Another

option in the report would require that once a veteran meets the SSA retirement age, all disability benefits would be reduced by 30%.

To be clear, total compensation for TDIU is not a retirement benefit. Many veterans in receipt of TDIU may have not have earned enough work credits to receive SSA retirement. Therefore, cutting off benefits due to obtaining the retirement age or age 67, would take TDIU benefits from veterans with no SSA entitlement or actual retirement benefits.

Today, many people work well beyond what was once considered normal retirement age. Typically, VA awards the benefit when disability forces the veteran to terminate employment. To award TDIU to a veteran age 64 and deny it to a veteran aged 67, for example, would be unfair discrimination, disparate treatment of veterans similarly situated, and wholly unjustified from an equitable standpoint.

Age may not be considered a factor in evaluating service-connected disabilities or in determining entitlement to TDIU as stated in 38 C.F.R. § 4.19. That is why DAV strongly supports H.R. 6362, the Protecting Benefits for Disabled Veterans Act. This legislation would codify entitlement to TDIU and include the provisions of 38 C.F.R. § 4.19, to protect TDIU for all veterans regardless of age. Through our grassroots efforts, DAV members and supporters sent nearly 11,500 emails to the House of Representatives in support of the Protecting Benefits for Disabled Veterans Act.

Although VA cannot consider age regarding TDIU, other programs consider age, such as VA's nonservice-connected pension program and SSA's SSDI program.

Social Security Disability Insurance and Total Disability Based on Individual Unemployability

SSDI was established in 1956 as a component of the Old Age, Survivors and Disability Insurance (OASDI) program. Its primary purpose is to replace a portion of an insured worker's earnings, should a medically determinable illness or injury impede his or her ability to work. For SSDI benefits, an individual must have a sufficient work history and must be unable to engage in any employment that brings income in excess of the substantial gainful activity (SGA) threshold, as a result of one or more medical conditions that is expected to last 12 months or longer, or result in death.

SSDI is an insurance program that replaces a portion of earnings for an eligible worker whose illness or injury, while not necessarily caused by a work-related incident, results in an inability to work. SSDI is one of several federal programs funded through the Federal Insurance Contributions Act (FICA) payroll tax and the Self Employment Contributions Act (SECA) tax to which all workers and employers in covered

occupations (including military personnel) and self-employed individuals make contributions.

Insurance against disability from any cause is to be distinguished from compensation for disability from military service. VA compensation is not an insurance program; it is based on wounds, injuries and illnesses that are related to active military service.

Age is a factor in determining entitlement to SSDI on the principle that, where a person is unable to perform his or her customary work, the effects of advancing age reduces a person's ability to adjust to other work for which the person has the necessary skills, education, and physical or mental abilities. The June 2015 GAO report, "Veterans' Disability Benefits: VA Can Better Ensure Unemployability Decisions Are Well Supported," proposed SSDI's age restriction. It noted the potential strengths:

- Could better target the intended population—older veterans might not be likely to work past retirement age.
- Benefit costs might be reduced due to the reduction in payments to older veterans.

The report noted the following challenges:

- Some veterans might not have income replacement available—especially those who had been on TDIU in advance of reaching retirement age.
- Could be unfair to veterans—older individuals might have the option of working past the retirement age, but older veterans whose service-connected disabilities stop them from working cannot.

Regulatory provisions preclude VA from considering age. Thus, contrasting SSDI with TDIU, considering age restrictions, is clearly not an apples to apples comparison. DAV is firm in our conviction that age restrictions will negatively impact veterans. We remind Congress that age must be ignored because compensation is paid for the effects of service-connected disabilities, not the effects of age.

Disability determinations for SSDI benefits entail a five-step process. First, an applicant files for benefits with the SSA at the agency's website, a field office, or through a toll-free phone line. The responsibility for adjudicating the application then shifts to medical and vocational experts at state-level Disability Determination Services (DDS) agencies.

In the previously noted 2015 GAO report, it considered the results of a mandatory vocational assessment before granting TDIU benefits. It was noted that not all veterans who claim TDIU do not receive a vocational assessment. The vocational

assessment would address whether the veteran could be rehabilitated in order to maintain employment. In addition, rating specialists working on TDIU claims would receive training in how to interpret the findings from the vocational assessment. Rating specialists would then be able to use this assessment, along with the results of medical reports and other information, to help determine the veteran's ability to engage in work activities. The report noted only potential strength of such a requirement:

- Could help provide a more complete appraisal of the veteran's ability to work.

VA has vocational specialists with the Veteran Readiness & Employment (VR&E) program, so if a vocational component was required, it would more than likely fall to VR&E. The report also identified potential challenges as:

- Could require VA to expand its vocational rehabilitation program to address the increase in required assessments.
- Could cause delays in benefit decisions.
- Rating specialists and vocational rehabilitation counselors might need to receive additional training on how to assess the vocational rehabilitation findings.
- Could increase the burden on veterans as they would likely need to submit to an additional assessment.
- By adding a new factor to consider, could possibly increase the subjectivity of claim decision-making, thereby possibly creating more variation in decisions.

Our experience has showed that when a veteran is denied entry into a VR&E plan for employment due to their service-connected disabilities, it has an impact for the veteran to be awarded TDIU. However, we have concerns over making that a requirement, as this could create an additional burden on the veteran to obtain a vocational opinion on their own, which many may not have the means to obtain.

VA's 2025 budget submission indicated that they would be losing approximately 60 FTE. We believe adding a vocational component would lengthen the processing time and place an additional burden on VR&E counselors, even though many have admitted they are currently overwhelmed.

If the requirements of a vocational expert become mandatory, we have concerns as the Court does not find that vocational opinions are equivalent to medical opinions (finding that vocational expertise is not the same as medical expertise). See *Arline v. McDonough* 34 Vet. App. 238 (2021). To take this even farther, the Federal Circuit Court of Appeals has held that the ultimate determination of whether a veteran is capable of substantial gainful employment rests with the VA adjudicator, not a medical examiner. *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013). This means that VA

can discount any vocational or medical opinion that could be potentially beneficial for a veteran seeking TDIU.

Though they are imperfect and have been criticized by the Court and GAO, we believe the current rules, for the most part, prescribe consideration of the appropriate factors. These decisions do require careful examination of the facts and the exercise of well-informed and well-reasoned judgments. Most veterans prefer to work if they are able and we believe they should be afforded those opportunities and not be solely reliant on VA compensation rates.

TDIU Compensation

Currently VA has stated that approximately 5 million veterans are in receipt of VA compensation and as we noted above, roughly 400,000 veterans are receiving TDIU compensation, which is the same compensation rate as 100% disabled. This means approximately 8% are receiving TDIU compensation, which for a single veteran is \$3737.85 a month equaling \$44,854.20 a year.

In the fourth quarter of 2023, the U.S. Bureau of Labor Statistics reported that the national average salary was \$59,384.00. The Forbes Advisor reported that the average annual salary in the United States in 2024 is \$59,428.00 with an average hourly rate of \$28.34. Based on these numbers and the 100% disability compensation rates for a single veteran, which is an approximate difference of \$15,000 less than the national average annual salary.

For those veterans that are unable to work due solely to their service-connected disabilities, they receive compensation that is demonstrably lower than the national average. TDIU compensation is not some lottery windfall amount, it is below average and veterans are required to use this amount for themselves and their families.

We recommend an increase not only in the 100% disability compensation rates, but an adjustment of all rates based on any potential increased rate for 100%. Further, we recommend that more opportunities for education, vocational training and job placement be made available for all veterans and specifically those in receipt of TDIU.

Many veterans have difficulties with the loss of independence and being forced to deal with the aspects of diseases, wounds and injuries, medical appointments, treatments, prosthetics and medications. VA is required to notify a veteran awarded TDIU of the availability of vocational rehabilitation and offer the veteran counseling services and the opportunity for evaluation as to whether the achievement of a vocational goal is feasible.

Although a veteran might have the potential to perform substantially gainful employment in the future upon successful completion of vocational rehabilitation training, entry into a program of vocational rehabilitation, by itself, does not cause a termination of TDIU benefits. A veteran who undertakes a program of vocational

rehabilitation is not considered “rehabilitated to the point of employability” unless he or she has been “rendered employable in an occupation for which a vocational rehabilitation program has been provided, as noted in 38 C.F.R. § 21.72. Additionally, participation in an education program does not mean that a veteran is employable and TIDU cannot be discontinued for that reason.

However, there are provisions that essentially allow for a period of trial work, in which a TDIU rating cannot be reduced where a veteran secures and follows a substantially gainful occupation unless the veteran maintains such an occupation for a period of 12 consecutive months. See 38 C.F.R. § 3.343(c)(2). We agree that it is desirable to provide every reasonable opportunity and encouragement for disabled veterans, including those with very serious handicaps and those found to be unemployable, to have the ability to return to work.

Mr. Chairman, in closing, we must remember that TDIU impacts those service-connected disabled veterans suffering from mental health disorders such as PTSD from combat or military sexual trauma, cognitive disabilities such as TBIs, amputations and other orthopedic conditions limiting mobility, diseases impacting the ability to breathe, digest, hear, see, as well as the effects of cancers, not to mention the overwhelming disruption of life caused by chronic pain.

DAV believes that improvement can be made to the TDIU process; however, our conviction remains with the following:

- Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.
- Unemployability ratings are based on the impact of the disability in the veteran’s own circumstances in light of his or her attained work skills and educational background.
- Total disability compensation for TDIU is not a retirement benefit.
- Age should not be considered a factor in evaluating service-connected disabilities or in determining entitlement to TDIU.
- VA compensation is not an insurance program; It is based on wounds, injuries and illnesses that are related to active military service.
- Veterans in receipt of total disability compensation receive substantially less than the national average salary.
- Mandatory vocational assessments would create a burden on the VR&E program and create delays in claims and appeals.
- Disabled veterans, including those with very serious handicaps and those found to be unemployable, deserve to have a mechanism to return to work.

While we agree that there need to be better paths to employment, education and training, we must be vigilant in protecting those that receive a total disability based on individual unemployability due to the severity of their service-connected disabilities. This concludes my testimony.