



National Service & Legislative Headquarters
807 Maine Avenue, S.W.
Washington, D.C. 20024-2410
Phone (202) 554-3501
Fax (202) 554-3581
www.dav.org

**STATEMENT OF
SHANE L. LIERMANN
DEPUTY NATIONAL LEGISLATIVE DIRECTOR FOR BENEFITS
OF THE DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS
UNITED STATES HOUSE OF REPRESENTATIVES
SEPTEMBER 19, 2019**

Chairman Pappas, Ranking Member Bergman, and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at today's hearing on "Preventing Harm to Veterans: Examining VA's Overpayments and Debt Collection Practices."

DAV is a congressionally chartered national veterans' service organization of more than one million wartime veterans, all of whom were injured or made ill while serving on behalf of this nation.

To fulfill our service mission to America's injured and ill veterans and the families who care for them, DAV directly employs a corps of more than 260 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. Together with our chapter, department, transition and county veteran service officers, DAV has over 4,000 accredited representatives on the front lines providing free claims and appeals services to our nation's veterans, their families and survivors. We represent over one million veterans and survivors, making DAV the largest veterans' service organization (VSO) providing claims assistance. This provides us with an expert understanding and direct knowledge in navigating the VA claims and appeals process.

Mr. Chairman, additional overpayment amounts created by VA and the resultant debts owed by veterans often cause severe financial hardships for veterans and their families. In many cases, the burden of repaying these debts can negatively impact a veteran's quality of life, put them at risk of homelessness and affect their access to VA health care. Our testimony will discuss the creation of overpayments, VA mitigating additional overpayment amounts, and debt notification, waiver of overpayments and debt collection.

VETERAN AND BENEFICIARY OVERPAYMENT CREATION & MITIGATING ADDITIONAL AMOUNTS

Veterans are entitled to receive compensation based on injuries and illnesses incurred or aggravated by military service. The amount of compensation a veteran or beneficiary is entitled to may change due to many factors, to include changes in dependency, additional service-connected disabilities, reserve or National Guard service or change in the severity of the service-connected condition. Overpayment of benefits can occur when these changes are reported by the veteran and implemented by VA, due to actions or inactions by VA or the veterans themselves.

We believe that a significant portion of overpayments can be reduced or avoided. VA's lack of timely action causes additional overpayments and that places the resultant debts and financial hardships on veterans and beneficiaries. Some of the most frequent overpayment creations and recommendations the Veterans Benefits Administration (VBA) can take to mitigate their complicity in increasing the amounts are addressed below.

Dependency Changes

Veterans in receipt of VA compensation at 30 percent disabling or higher are entitled to additional monthly benefits based on the number of their dependents. This includes spouses, children, step-children, adopted children and dependent parents.

Veterans are advised by the VA to notify them when their dependency status changes. VA criteria require a reduction of benefits for the loss of a dependent due to marriage, divorce, death or in the case of a child, attainment of age 18 generally, or 23 if attending school. When a veteran is divorced or the spouse is deceased, it is the veteran's responsibility to advise the VA of the termination of the marriage for removal of the former spouse from the veteran's benefits.

Even timely reporting of a removal of a dependent will create at least one month of an overpayment. If VA delays the processing of that request to remove the dependent, it creates an additional amount of debt that the veteran or beneficiary is responsible to repay.

Through VA's eBenefits system, veterans can electronically add dependents and VA will usually make the additions within 48 hours. If the veteran submits the dependency information to add a dependent via paper application there is no set time frame for completion of the work. However to remove a dependent veterans can notify VA through eBenefits about the removal of a dependent but this will only trigger the VA to send paperwork to the veteran. There is not an immediate way to remove dependents electronically.

A review of VA's M21-1 adjudication manual lists all dependency actions as non-rating work end products (EP). EPs are specific codes to identify types of claims or

actions required, and VBA uses this system to monitor and manage its workload. However, non-rating work EPs are not considered part of VBA's backlog management and reporting of days pending for processing. This means that non-rating work EPs are of the lowest priority to VBA and receive the least amount of attention.

By failing to place the appropriate attention to dependency claims, VBA has created additional avoidable amounts of overpayments. The VA Office of the Inspector General (OIG) report of September 28, 2007, "Audit of Veterans Benefits Administration Controls to Minimize Compensation Benefits Overpayments" indicated that between January 2004 and March 2006, an estimated \$50.8 million in overpayments were avoidable. The OIG report also found that the main reason for the delay in processing dependency status changes is due to its classification as non-rating claims and a low priority for VBA.

For example, a widow receiving dependency and indemnity compensation remarried in 1986 and notified the VA of the marriage in April 1995, and again in March 2003. However, the VA did not terminate benefits until January 7, 2004, altogether resulting in an overpayment of \$179,966. Had VA acted promptly on the first notification, \$104,866 (58 percent) of the \$179,966, overpayment and debt could have been avoided.

The September 2018 OIG report of "Review of Accuracy of Reported Pending Disability Claims Backlog Statistics" stated that the pending backlog could be significantly understated when compared to some definitions VA has used because it does not include all the claims that had been awaiting rating decisions for over 125 days. For example, VBA only counted rating EPs in its reported backlog; however, other EPs also requiring adjudicative actions that impact veteran and beneficiary monthly payments are not counted in the backlog and subsequently not given any priority or incentive for the completion of dependency claims.

The September 7, 2019, VBA workload report provides that there are 374,362 pending rating-work EPs/claims. As of September 13, 2019, VBA noted the current number of pending dependency claims is over 211,000. As dependency claims are not considered rating work EPs, they are not counted in the VBA report on September 7, 2019. Therefore they are considered a very low priority and employees are not provided any incentive to complete these issues timely, thus creating additional amounts of overpayments that are avoidable.

Recommendations

1. **Assign dependency claims as rating work EPs.** Within VBA, rating claims work has a higher priority for the assignment, control, and completion of work. Dependency changes are considered non-rating work EPs and a low priority, which creates delays in VA adding new dependents and increases the amount of overpayments caused by delaying the removal of dependents. Assigning dependency claims as rating work EPs will require VBA to consider all

dependency changes as rating work. While this will increase the number pending claims, by assigning a rating work EP, it will reduce the amount of additional amounts of overpayments created by VA's lack of timely action.

2. **Allow veterans and beneficiaries to remove dependents from their award electronically in real time.** As noted, veterans have the ability to add dependents in real-time via eBenefits. To reduce the amounts of additional amounts of debt created by not prioritizing these claims, the VA must allow veterans to remove dependents as easily as they can be added.
3. **Apply the principle of “constructive knowledge” to automatically waive all additional overpayment amounts created by VA.** There is a legal concept known as “constructive knowledge” that could be relevant to this problem. The Court of Appeals for Veterans Claims has defined the notice of “constructive knowledge” within the VA. In *Bell v. Derwinski*, 2 Vet. App. 611 (1992), the Court held that the VA is deemed to have constructive knowledge of all VA records and such records are considered evidence of record at the time a decision is made. This concept applies to dependency change of status issues.

For example, if the veteran advises a VA Medical Center, Outpatient Clinic, Vocational Rehabilitation and Employment Services, VA Insurance Center, or other VA program and not the VA Regional Office (VARO) of the change in dependency, the VA is considered to have “constructive knowledge” of the change in status. Since the veteran identified the change to the VA, it had knowledge. This can allow veterans to lessen the amount of the overpayment created by the dependency change by reverting back to the date any office in VA was notified of the change. The same logic should be applied to the entire federal government, thereby deeming notice to any federal agency as providing notice to VA.

Drill Pay

Members of the reserves and the National Guard are eligible to receive VA compensation for their illnesses and injuries related to their active military service. Drill pay refers to the monetary amount received by reservists and members of the National Guard for performing active or inactive duty for training. Statutes prohibit the concurrent receipt of drill pay and VA compensation or pension. Thus, veterans who perform active or inactive for duty training must choose the benefit they prefer and waive the other. In most cases, veterans choose to receive drill pay as it is usually the greater benefit. Although veterans or the Department of Defense (DOD) may notify the VA, in many instances, the veteran will receive both and creating the overpayment.

At the end of each fiscal year, the Defense Manpower Data Center (DMDC) sends an electronic file to VA that identifies veterans who received both drill pay and VA disability compensation or pension during that fiscal year. This annual audit will identify

those in receipt of both and acknowledge additional overpayments for the reservist of National Guard Member.

Current 38 C.F.R. 3.103 establishes the procedures for notice of law in the VA benefits system. In particular, § 3.103(b)(2) establishes procedures that VA must follow before an “award of compensation, pension or dependency and indemnity compensation” can be “terminated, reduced or otherwise adversely affected.” Importantly, VA must provide a veteran with notice of a proposed adverse action and 60 days to provide evidence showing why the adverse action should not be taken. VA continues to pay benefits during this 60-day period.

Current regulations provide exceptions for when VA may dispense with the 60-day notice requirement and terminate or reduce benefits at the same time it notifies a veteran of such action. One exception is specific to veterans who inform VA when they return to active duty or participate in training duty. VA may take immediate action to suspend payment of VA benefits when the decision is “based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension.”

VA Proposed Rule Change April 2019

On April 19, 2019, through the Federal Register, VA issued its proposed rule changes regarding active service pay and active duty for training pay (drill pay). It is VA’s intention to eliminate the burden of additional debts for those who return to active duty or who receive drill pay.

When a veteran proactively notifies VA of his or her receipt of active service pay, VA may suspend benefits without waiting 60 days. VA proposes to expand this exception to include notice of receipt of active service pay from DOD. In other words, if VA is notified about the active duty for training pay from DOD, they will not provide the veteran with due process and start collecting compensation due to the debt creation. This may sound like a remedy; however, it will create confusion for those veterans and will create additional financial hardships by removing due process. We oppose any attempt to remove the due process and for VBA to start collecting the debt without any notice to the veteran.

VA also proposes to amend 38 CFR 3.103 to allow VA to suspend compensation benefits upon receipt of DOD notice that a veteran has received, is receiving, or **will receive active service pay**. We take exception to this proposal. 38 U.S.C. § 5304(c) states that “pension, compensation, or retirement pay on account of any such person’s own service shall not be paid to such person for any period for which such person receives active service pay.” The statute clearly states the veteran must receive the active pay. While this proposal may be well intentioned, it’s proposing to suspend VA compensation without the veteran ever receiving drill or active service pay. This

violates the statute and there will be situations where the orders may change, thus creating circumstances where the veteran will not receive active service or drill pay or VA compensation. This will again place undue financial hardships on veterans and their families. We stand firm against these proposed rule changes made by the VA.

Recommendation

- 1. Require Quarterly the Defense Manpower Data Center to provide Quarterly Reviews.** We recommend VA should **not** institute the proposed changes, but instead should require Defense Manpower Data Center to provide quarterly reports on those veterans receiving drill pay or active service pay at the same time as compensation. This will provide more current updates rather than doing it at the end of each fiscal year, which will prevent and minimize overpayments.

Incarcerated Veterans

Federal law requires VBA to reduce compensation and pension benefits for veterans incarcerated in a federal, state, or local penal institution in excess of 60 days. Effective the 61st day of incarceration, VBA must reduce compensation benefits for veterans convicted of a felony and discontinue pension benefits for veterans convicted of a felony or misdemeanor. VBA reduces compensation benefits to the 10 percent disability rate for veterans rated 20 percent service connected or more. For veterans whose service-connected disability rating is 10 percent, VBA reduces the benefit payment by one-half.

VA Regional Office (VARO) and Pension Management Center (PMC) employees are responsible for making incarceration adjustments. Once the veteran is released from the penal institution, VBA will restore their full benefits. If the VA does not reduce the incarcerated veteran's disability benefits after the 61st day, an overpayment will be created, even when reported timely.

As previously discussed, the importance of timely VA action on reported changes for veterans' benefits can prevent additional amounts of debt. VA also considers incarceration adjustments as low priority and non-rating work EPs.

In June 2016, the OIG issued the report "Audit of Compensation and Pension Payments to Incarcerated Veterans." It determined that between July 2008 and June 2015, VA's ineffective actions in processing incarceration adjustments resulted in significant improper payments totaling more than \$100 million. These improper payments then became the veteran's responsibility to repay.

According to the OIG, VBA did not place priority on processing incarceration adjustments because VBA did not consider these non-rating claims to be part of the disability claims backlog. Both VBA Central Office staff from Compensation Service and the Office of Field Operations as well as VARO service center managers and staff consistently reported that incarceration adjustments were not a high priority.

Recommendations

1. **Assign incarceration adjustments as rating work EPs.** Within VBA, rating claims work has a higher priority for the assignment, control, and completion of work. However, as discussed above, this low priority places incarcerated veterans and their families at an unfair disadvantage.
2. **Automatically apply apportionments to veterans' families at the 61st day of incarceration for a felony.** The dependent family of incarcerated veterans can apply for an apportionment of the amount of compensation withheld from the veteran. If it was completed on the 61st day for veterans' families of record, this would lessen any hardships placed on the family and would help to prevent large overpayments being made to the veteran.
3. **Apply the principle of constructive knowledge throughout the entire federal government.** The VA currently receives information and cross matches on income data with the IRS, incarcerations with the Federal Bureau of Prisons, and the Department of Defense. Once a veteran is identified as an incarcerated veteran with any federal agency, such as income tax applications, changes with the DEERS program within the DOD or changes noted with TRICARE, this would be considered constructive knowledge with the VA and lessen the amounts of additional debts created by VA's lack of timely action.

Nonservice-connected Pension Recipients

VBA processes and adjudicates a variety of pension programs for veterans and a death pension program for survivors. Veterans who are age 65 or older or totally and permanently disabled due to illness and injuries not related to military service, who served during a period of war, and who meet the net worth and income requirements are eligible for nonservice-connected pension. While veterans are not able to receive both compensation payments and pension payments; they can elect which to receive.

The maximum rates of pension will be reduced by the amount of the countable annual income of the veteran; however, veterans can offset their income with proof of unreimbursed medical expenses. The VA considers Social Security payments as countable income and in December 2012, the VA started an initiative with the Internal Revenue Service and the Social Security Administration to electronically verify each veteran's continued eligibility for pension. When the additional income or benefits received change the veteran's countable income, an overpayment for that entire reporting period can be created.

DEBT NOTIFICATION, WAIVER OF OVERPAYMENTS AND COLLECTION

When VBA has identified an overpayment for a veteran or beneficiary, they provide written notice that an overpayment has occurred. Once VBA has identified the

debt and notify the claimant, it is sent to a third-party collection agency, the Debt Management Center (DMC).

The DMC collects debts resulting from individuals' participation in VA benefit programs and manages VA's benefit debt portfolio. The DMC is not part of the VA but is overseen by the VA Office of Finance. The DMC manages the entire collection process for VBA. The Veterans Health Administration (VHA) uses the DMC's administrative offset services to refer delinquent first-party medical debts for internal offset against active VA benefits. VHA also uses DMC services to refer debts to Treasury for offset under the Treasury Offset Program.

Statutes provide that when VA has determined that a debt exists, they shall promptly demand, in writing, payment of the debt. VA shall notify the debtor, veteran or beneficiary, of his or her rights and remedies and the consequences of failure to cooperate with collection efforts. As the DMC is the sole collection agency for VBA, the debt is not considered established until the veteran or beneficiary, receives a formal notice of debt from the DMC. The debt notice must include exact amount of the debt, the specific reasons for the debt, in simple and concise language, and the rights and remedies to include requesting a waiver, setting up a payment plan, option for a compromise offer, and that a collection may be made by offsetting their monthly compensation or pension payments.

If the debtor, within thirty days of the date of the notification disputes, in writing, the existence or amount of the debt, offset shall not commence until the dispute is reviewed. If the debtor, within thirty days of the date of notification requests, in writing, waiver of collection, offset shall not commence until the VA has made an initial decision on waiver. If the debtor, within thirty days of the notification requests, in writing, a hearing on the waiver request, no decision shall be made on the waiver request until after the hearing has been held.

VA will pursue collection action once an adverse initial decision is reached on the debtor's request for waiver and/or the debtor's informal dispute concerning the existence or amount of the debt, even if the debtor subsequently pursues appellate relief. The DMC will start collecting the debt after the conclusion of the 30-day period given to debtors. The collection of the debt is usually through recoupment of the entire VA monthly compensation payment.

We understand that in an imperfect claims processing system, there will be overpayments and that it is a reasonable expectation that recipients of such overpayments are required to repay that debt. However, collection of debts via recoupment of the entire monthly payment, causes severe financial hardships for veterans and their families. In many cases, the burden of repaying these debts can negatively impact a veteran's quality of life, put them at risk of homelessness and affect their access to VA health care. Our recommendations below are based on DAV Resolution No. 108, supporting reforms to the recovery of debts by the VA.

Recommendations

- 1. Reduce the amount recouped from monthly compensation payments.** We fully agree that veterans and their families must repay the debts they created. However, currently VA recoups the entire monthly compensation payment until the debt is repaid. In many instances, a veteran's compensation is the majority or sole monthly income. Collecting the entire amount creates a serious financial hardship and can actually cause more harm to the veteran and their family by collecting it via this means. We recommend that VA reduce the recoupment amount to 25 percent or less of the monthly payment.
- 2. Waive all amounts of debt created by VA's lack of timely action.** As noted above, large amounts of additional overpayments are created by VA's low prioritization and lack of timely action. The veteran should be responsible for the amount of debt they created only, and not the additional amounts created by the VA.
- 3. Time limitation on debt discovery.** Every state has a statute of limitations on debt collection to avoid causing financial catastrophe. VA should not collect debts that have been discovered and found to be more than five years old. This would not apply in cases of fraud.

In conclusion, overpayments by VA and the resultant debts owed by veterans often cause severe financial hardships for veterans and their families. In many cases, the burden of repaying these debts can negatively impact a veteran's quality of life, put them at risk of homelessness and affect their access to VA health care. Our recommendations provide avenues to mitigate VA's creation of additional debt as well as discuss reform the debt notification and debt collection process.

Mr. Chairman, this concludes my testimony on behalf of DAV. I would be happy to answer any questions you or other members of the Subcommittee may have.