



CHISHOLM CHISHOLM & KILPATRICK LTD

**Statement of
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**Before the
House Committee on Veterans' Affairs**

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

Thank you for inviting Chisholm Chisholm & Kilpatrick LTD (CCK) to testify at today's legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs.

CCK is a public interest law firm, with offices in Providence, Rhode Island and Houston, Texas. We serve clients across the nation focusing on veterans disability compensation, bequest management, and long-term disability insurance claims. Since 1999, CCK has represented thousands of veterans and family members before VA and the U.S. Court of Appeals for Veterans Claims. CCK has the most VA-accredited attorneys, practitioners, and claims agents of any law firm in the United States. The firm has been involved in legislative processes and landmark, precedent-setting cases that have benefited the entire veterans' community.

We are pleased to offer our views on these bills impacting service-disabled veterans and their families.

H.R. 1753: Jax Act

H.R. 1753 is an important step in recognizing the honorable service of women veterans who deployed alongside Special Forces in Iraq and Afghanistan, expanding operational and intelligence-gathering capabilities. These veterans shared combat experiences with their male counterparts.

By acknowledging combat service for the women who served as members of Cultural Support Teams, H.R. 1753 would positively impact their ability to establish entitlement to VA benefits.

In cases where a veteran asserts service connection for an injury or disease incurred or aggravated in combat, 38 U.S.C. § 1154(b) and its implementing regulation, 38 C.F.R. § 3.304(d) (2023), apply. These provisions ease the evidentiary burden on combat veterans because VA must accept as sufficient proof of service connection satisfactory lay or other evidence of service incurrence, if the lay or other evidence is consistent with the circumstances, conditions, or hardships of such service.

H.R. 1753 would provide these veterans with the appropriate combat presumptions already articulated in statute, regulation, and caselaw.

H.R. 5890: Review Every Veterans Claim Act of 2023

The Review Every Veterans Claim Act would limit VA's authority to deny a veteran's claim solely based on the veteran's failure to appear for a medical examination associated with the claim.

Thousands of veterans' claims are denied only because the veteran missed a VA examination. In our experience, many of these scheduled examinations are unnecessary to adjudicate the claims. Yet, 38 U.S.C. § 5103A(d)(2) currently says that "[t]he Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes...." This requirement often results in VA regional offices and the Board denying veterans' claims if they did not attend the requested examination, even if the comprehensive record before the VA contains other evidence, including service and private examination reports, supportive of the claim.

The Review Every Veterans Claim Act would strike that language from the statute and replace it with “provide for a medical examination or obtain a medical opinion.” Additionally, this legislation would add a new paragraph to the statute: “If a veteran fails to appear for a medical examination provided by the Secretary in conjunction with a claim for a benefit under a law administered by the Secretary, the Secretary may not deny such claim on the sole basis that such veteran failed to appear for such medical examination.”

These changes would be enormously helpful to veterans seeking VA benefits. Many claimants have already submitted reams of medical evidence, testimony, service records, etc. It serves no purpose for VA to deny claims simply because of a missed VA examination, especially when the evidence is otherwise sufficient to grant a claim.

HR 5938: Veterans Exam Expansion Act of 2023

The Veterans Exam Expansion Act would positively impact VA contract examinations for veterans’ disability claims. It would expand the license portability for psychologists, podiatrists, dentists, and optometrists as well as extend the authority from three years to five years--now expiring in January 2026.

This will give veterans greater access to expert evidence substantiating their claims. This is particularly important under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) because the role of examinations and examiners is heightened due to the need for new and relevant evidence to begin the claims process or continue an option of review in the appeals process. Moreover, the supplemental claim lane has become the most popular selection for veterans seeking benefits due to a host of reasons, including the dramatic delays for appeals adjudication at the Board of Veterans’ Appeals. The PACT Act has also expanded the need for Toxic Exposure Risk Activity examinations. The more professionals VA has on board to serve our veterans, the more streamlined claims processing can be.

H.R. 5891: Veteran Appeals Decision Clarity Act

Under the AMA, claimants submit their notices of disagreement directly to the Board, rather than to the regional office. *See* 38 C.F.R. § 20.203(a) (2023). This is a change from the Legacy system. *See* 38 C.F.R. § 20.300 (2018). A recent case before the Court of Appeals for Veterans Claims, *Kernz v. McDonough*, demonstrates that the Board managed this change by having “administrative professional[s]”—not Board members—review and determine the timeliness of NODs. Vet.App. No. 20-2365, *Secretary’s Response to Request for Class Certification and Class Action*, Exhibit J p. 2 (filed 5/17/21). If the administrative professional determined that the NOD was untimely, VA sent a letter signed by the Vice Chairman notifying the claimant that the appeal would not be docketed. *Id.*

Unfortunately, however, the administrative professionals’ timeliness determinations were often wrong. The result is that the Board erroneously failed to docket the timely appeals of an estimated 2,000 claimants. Vet.App. No. 20-2365, *Request for Class Certification*, p. 5-6 (filed 2/5/21).

Mr. Kernz sought to remedy this by appealing the untimeliness notice he received from the Board to the Veterans Court and requesting the Court certify a class of similarly situated claimants. While Mr. Kernz's appeal was pending before the Veterans Court, the Board took corrective action in his case and docketed his appeal. However, though it was undisputed that other claimants were also wrongly denied their right to a decision by the Board, the Board refused to identify those claimants and take corrective action in those individual claims. According to the Board, it would be too burdensome to identify these claimants. Due to its inadequate mechanisms for tracking the notice letters, it would have to manually identify the claimants who received the letters. Therefore, instead of identifying the injured claimants, the Board published a notice on its website inviting claimants to contact the Board if they received notice and believed it was wrong.

In its decision earlier this month, the Court dismissed Mr. Kernz's appeal as moot because the Board had taken corrective action and docketed his individual appeal. *See Kernz*, -- Vet.App. --, 2023 WL 6459373, *7-9 (Oct. 4, 2023). And it refused to certify the class, citing the mootness of Mr. Kernz's appeal. *Id.* at *12-13. So, the many claimants who were adversely affected by the Board's plainly erroneous actions remain without a remedy, short of identifying the error by themselves and asking the Board to docket their appeals.

This case demonstrates the necessity of passing this Act. It would ensure that Board members no longer delegate their responsibility to make decisions on *all* issues presented on appeal--including the timeliness of an NOD--to "administrative professionals." Claimants would be entitled to a "written determination of the Board whether the notice of disagreement was adequate and timely filed under section 7105 of [Title 38]." While this imposes an additional responsibility on the Board, it will result in a more complete decision from that body. This will place claimants in a better position to understand the decision and the rights it confers on them.

H.R. 5559: Protecting Veterans Claim Options Act

This Act contains a vital change regarding remanded cases from the Veterans Court in 38 U.S.C. § 7113 proposed subsection (d). It would require the evidentiary record before the Board to "include evidence submitted by the appellant and his or her representative, if any, within 90 days following such remand, which the Board shall consider in the first instance."

This change is important because in the AMA, veterans are currently sent back to the lane from which they originally appealed, without the ability to supplement the record. This is harmful because veterans have already waited years to have their day in Court. Without the ability to supplement the record after a Court remand, the claimant will be forced to wait until after a decision from the Board to provide favorable evidence that may have changed the outcome of the Board's decision. Moreover, the benefit that claimants were supposed to receive in exchange for losing the Board's assistance in developing evidence was a significantly lower Board remand rate. Yet, VA's own metrics document that the Board's remand rate in AMA is close to 40 percent, which remains much higher than anticipated.

Allowing for post-Court remand evidence to be submitted in support of a claimant's Board appeal should serve to reduce the AMA remand rate. This is especially critical because Board remands in AMA further harm veterans, who are forced to file new appeals to the Board if those remands are

denied by the regional office. When veterans file appeals again to the Board, they no longer retain their docket numbers before the Board, but are assigned new docket numbers. This means their appeals go to the back of the line for adjudication. So, the veterans fighting the longest are put in the position of waiting the longest, too.

In the spirit of the choice and control the AMA provides veterans, veterans should be able to have a Board member decide their appeals without having to start over. The Protecting Veterans Claim Options Act is a critical correction to ensure veterans are not harmed by the AMA.

Discussion Draft: Veteran Appeals Transparency Act

This Act contains an important provision for veterans and their advocates to increase understanding of where claims are in the Board of Veterans' Appeals process. Requiring that "[o]n a weekly basis, for each docket, the Board shall publish the docket dates of the cases assigned to a Board member for a decision for that week" will allow for greater understanding and oversight of the Board's progress in working its docket.

CCK spent months pursuing a writ of mandamus from the Veterans Court in *Gray v. McDonough*, 36 Vet.App. 117 (2023). While the petition ultimately became moot, it is telling that it took the Secretary's counsel months—and several Court orders—to provide basic information about how it was adjudicating cases in compliance with the laws governing docket order. Should this Act become law, it will help Congress hold the Board accountable and allow for veterans and advocates to have much needed information concerning where cases are in the appeals process.

H.R. 4016: Veteran Fraud Reimbursement Act

The proposed amendments to 38 U.S.C. § 6107 are important to making whole a veteran who has been abused by the fraudulent practices of a fiduciary. Veterans who require the assistance of a fiduciary to manage their funds are, by definition, vulnerable. Often, investigation into fraud is a slow process, which can delay the remedy required to make the victim of the harm whole. This Act prioritizes providing a remedy to the veteran over a determination of whether VA was at fault. These solution-focused revisions are an important step in making defrauded veterans whole. Unfortunately, fraud perpetrated against veterans is prevalent especially as it relates to acquisition of benefits. We support measures aimed at reducing and eliminating fraud perpetrated against veterans and their families in the veterans benefits arena, especially those directed toward actors illegally charging fees or misusing funds belonging to veterans.

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

This Act recognizes the harm claimants experience at the hands of fraudulent actors and provides additional recourse than currently exists to make them whole. The addition of proposed section (c), to reissue amounts when the beneficiary has predeceased resolution, is an important step in redirecting those funds appropriately.

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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