

JEFFREY C. HALL
ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
JULY 20, 2011

EXECUTIVE SUMMARY

H.R. 2383 – the *Modernizing Notice to Claimants Act* would make changes to title 38, United States Code, sections 5103 and 5103A altering the Department of Veterans Affairs' current duty to notify and assist claimants seeking disability compensation benefits.

- DAV believes the intent of this legislation is to help streamline and speed the claims process in order to reduce the backlog of claims for disability benefits; however, we are concerned that the new regulatory provisions in the bill might be implemented by VA in a way that could weaken the ability of some veterans to receive the full benefits to which they are entitled.

H.R. 2388 – the *Access to Timely Information Act*, would codify certain procedural steps that VA must follow in response to information requests from certain members of the Veterans' Affairs Committees of the House and Senate. DAV does not oppose enactment of this legislation.

H.R. 2243 – the *Veterans Employment Promotion Act*, would modify title 38, United States Code, section 4212(d) requiring the Department of Labor (DOL) to publicly report via the internet the information contained in the VETS-100 or VETS-100A reports submitted annually by federal contractors to DOL. DAV does not oppose enactment of this legislation.

Draft Legislation – intended to improve the electronic health information systems and capabilities of the Department of Defense (DoD) and the Department of Veterans Affairs (VA). If enacted, this legislation would amend Public Law 110-181 (the "Wounded Warrior Act") to implement a fully interoperable electronic health record to serve both departments. DAV recommends the Subcommittee conduct a study as to its potential unintended effects on the basic functions of this and the authority Congress intended for VA's Chief Information Officer.

***STATEMENT OF
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Chairman Johnson, Ranking Member Donnelly and Members of the Subcommittee:

Thank you for inviting the Disabled American Veterans (DAV) to testify at this legislative hearing of the Subcommittee on Oversight and Investigations. As you know, DAV is a non-profit organization comprised of 1.2 million service-disabled veterans and focused on building better lives for America's disabled veterans and their families. I am pleased to be here today to present DAV's views on legislation being considered by the Subcommittee.

H.R. 2383, the Modernizing Notice to Claimants Act, would make a number of changes to the Department of Veterans Affairs (VA) current duty to notify and assist claimants seeking disability compensation benefits. Specifically, H.R. 2383 would amend Sections 5103 and 5103A of title 38, which were the central provisions of the Veterans Claims Assistance Act (VCAA) of 2000.

Mr. Chairman, while we believe that the intent of your legislation is to help streamline and speed the claims process in order to reduce the backlog of claims for disability benefits, we have serious concerns about whether some of the new regulatory provisions in the bill might be implemented by VA in a way that could weaken the ability of some veterans to receive the full benefits to which they are entitled. As currently drafted, H.R. 2383 would change or eliminate a number of duties and responsibilities that VA is now required to perform in notifying and assisting a claimant when a claim for benefits is received. Taken together, and in the context of the large backlog of claims VA is focused on reducing, these regulatory changes could create opportunities for VA to speed claims through the process, regardless of whether they have provided sufficient notice and assistance to ensure that the veterans receive the maximum benefits to which they are entitled.

Under current law, when a claim for benefits is received by VA, the Secretary is required to send a notice to the claimant, often referred to as a "VCAA notice" (referring to Public Law 106-475, which serves to acknowledge the claim was received, state the issue or issues being claimed, and lists the evidence the claimant wishes to be considered. The VCAA notice also informs a claimant if there is any additional information or evidence VA requires, such as private medical treatment records, and requests that the claimant complete and return a VA Form 21-4142 ("Authorization and Consent to Release Information") so that VA is authorized to obtain such private medical treatment records. The claimant is asked to include detailed information

regarding health provider, facilities, findings and diagnoses. The claimant is also instructed to identify any VA medical treatment, including the dates and specific facilities, so VA can also obtain any such records. Additionally, the claimant is informed he or she may provide their own statement regarding the claimed condition or conditions, as well as any lay statements from persons with knowledge of how the claimed condition or conditions may affect the claimant.

The VCAA notice includes specific time periods in which additional information or evidence must be received and informs the claimant of what actions VA has already taken, such as requesting records or a medical examination from the VA medical center. The notice informs the claimant that should the VA medical examination be missed without good cause, VA may move forward and decide the claim based on the evidence of record.

The VCAA notice explains what evidence is needed to support any claim for service connection, secondary service connection, increased evaluations, individual unemployability, or other claims. The claimant is also informed of VA's responsibility to assist them and the reasonable efforts they will take in obtaining evidence, as well as explain the role the claimant can play to ensure all relevant evidence is submitted for consideration. VCAA notice also explains how VA determines a disability rating and determines an effective date. Finally, each VCAA notice contains a VCAA Notice Response Form, which identifies the date of claim and provides a brief explanation regarding the submission of any additional information or evidence. If the claimant has nothing further to submit in support of the claim, he or she may elect to have the claim decided as soon as possible, which may alleviate unnecessary delays in processing; or the claimant may elect to submit additional information or evidence.

While there are certainly improvements that can be made to the current VCAA notice, DAV believes that on balance it provides claimants, especially unrepresented claimants, with valuable information to help them submit stronger claims leading to more accurate results. Prior to enactment of the VCAA, notification to a claimant was generalized and limiting, causing difficulty and confusion for both the claimant in filing and VA in developing and adjudicating claims. The intent of the VCAA was to fully inform a claimant about the process VA would follow deciding their claim. Taken together, the notification and duty to assist requirements have served to temper the tremendous pressure VA and VA employees have been and are currently under to speed claims through the process in order to reduce the backlog, rather than to decide each claim right the first time. For this reason, we urge this Subcommittee and the full Committee to move cautiously in considering changes to these fundamental tenets of veterans' rights.

Mr. Chairman, the bill would remove the requirement that VCAA notices be provided "upon receipt" of a claim, thereby allowing VA greater flexibility in the timing of such notice. Such a change would allow VA to attach general notice statements to claims forms themselves, thereby eliminating one of the first steps taken in the development part of claims processing. However, this revised notice process would eliminate some of the benefits of the current system. For example, current VCAA notices contain not just generic boilerplate language about how claims are substantiated, but also individualized information about exactly what evidence has been submitted, what evidence VA will seek and what evidence the claimant must seek or authorize VA to obtain. As a former National Service Officer (NSO) for DAV, I can attest that

having such information from VA allowed us to better represent veterans. We are concerned that this and other efforts to reduce VCAA notice to generic, nonspecific information will significantly reduce its value in assisting veterans who file claims. We also have concerns about how this would be implemented when filing electronically over the internet, an environment where users have become accustomed to checking the box on license and other disclaimer agreements without first reading them. How such change would be implemented must be spelled out in greater detail in the legislation to meet the variety of circumstances. Finally, the VCAA notice is often the only acknowledgement a veteran may get that his claim has been received by VA, a basic piece of information most veterans want and should have as they navigate their way through the often frustrating process.

Mr. Chairman, DAV agrees that VA must have the ability to fully utilize electronic communication; however we have concerns about the language proposed to achieve this goal. H.R. 2383 would amend Section 5103 to require VA to send notice, "...by the most expeditious means available, including electronic notification or notification in writing." Once again, we believe the only way to reduce the backlog is to create a system designed to get claims done right the first time, not just get them done quickly. As such, we believe that notice should be sent by the most "effective" means, not simply the most "expeditious" means. For many veterans that may well be by way of electronic communication; but others may strongly prefer written communication. We would recommend that this language be changed so that rather than direct VA to use the quickest means, they instead seek to use the most effective means. Further, just as many of us are given such a choice in communicating with our banks and paying bills, so too should veterans be given the choice to elect the best method for VA to communicate with them.

H.R. 2383 also proposes to waive VA's obligation to send a VCAA notice to a claimant who has a pending claim for the same type of issue, such as service connection, and was provided one for that prior claim. This provision seeks to eliminate unnecessary and duplicative notices being sent to a claimant when the previous notice provided the "information and evidence necessary to substantiate such subsequent claim." While we certainly agree with the goal of eliminating redundant mailings, it is not clear how broadly VA might seek to implement this provision and we would recommend that more specific definition or description be added to the legislation to clarify when such notice requirements would be waived. We are particularly concerned about unrepresented veterans who may have failed to fully understand the notice sent for the pending claim and will receive no further information to help guide them how to effectively support their new or additional claim.

The legislation would also eliminate the requirement of sending a VCAA notice to a claimant should the VA be able to "...[a]ward the benefit sought based on the evidence of record." Though DAV is supportive of the intent of this section of the legislation—to provide veterans with the benefits to which they are entitled at the earliest stage in the claims process—we have concerns about how this would be implemented in the field. For example, many claims are for conditions that have more than one possible disability rating, and it is important that VA not waive its duty to notify and assist claimants unless they are awarding the full benefit to which the veterans is entitled. In an environment where eliminating the backlog is VA's mantra, we are concerned that such new waiver authority would create incentives and opportunities for claims to be awarded at the minimum level for a condition when justified by current evidence,

even if there is some likelihood that further development might lead to a higher rating. Even when a claim for service connection is granted, the claimant may disagree with the disability percentage assigned and respond with a notice of disagreement seeking a higher rating. A claim for service connection and a claim for increased rating are separate types of benefits sought by claimants. Under the proposed legislation, we feel this could be construed as necessitating a separate claim for a higher evaluation and forfeit entitlement to the effective date of the original claim. Likewise, we have concerns as to how VA will be affected when a claim is received for different types of benefits, such as a claim for service connection and increased rating of an already established service-connected condition.

We are also concerned that such waiver authority might create disincentives to inferring secondary conditions to conditions that are already service connected. Rather than leaving this language open to interpretation, DAV recommends that the language be changed to make clear that such a waiver of VA's obligations should only occur when the “maximum” benefit sought can be awarded, including benefits for inferred and secondary conditions.

Section 3 of H.R. 2383 would similarly allow VA to waive its “duty to assist” in obtaining private records when they can award the benefit sought based on the evidence of record. Questions again arise regarding whether a maximum rating was granted and whether the identified private medical records not obtained might have allowed for a higher evaluation. There are also situations when the claimant is seeking an increased rating and indicates the condition has adversely affected employment. This could lead to an inferred claim for individual unemployability, which might require additional development to establish. However under this new language, the “benefit sought”—i.e., increased rating—could be awarded without further development to determine whether the veteran should be rated for individual unemployability. While our National Service Officers (NSOs) are adept in deciphering such claims and thereby address such inferred conditions from the outset, we are concerned that claimants without representation, and without a strong VA “duty to assist,” may receive less than they are entitled to under the law. We therefore offer the same recommendation as above so that VA’s duty to obtain private records could only be waived when the “maximum” benefit sought, including benefits for inferred and secondary conditions, can be awarded.

Section 3 of the bill would also change the standard for VA’s “duty to assist” a claimant in developing facts pertinent to a claim, which is particularly important for unrepresented claimants. Currently, the duty to assist standard requires VA to seek records, “...that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain,” with respect to any private medical records identified by a claimant. Under the proposed legislation, the new standard would change to, “...**if the claimant requests assistance**, in a manner prescribed by the Secretary.” (Emphasis added.) This seemingly subtle change in language could create a new regulatory process that significantly shifts the burden for obtaining private records from VA to veterans. While we believe that the intent of this provision is to reduce unnecessary development for private records that do not materially impact VA’s decisions on claims, we are concerned that it could create too great a burden on veterans. Oftentimes, a claimant does not have the physical or financial means to obtain private medical records.

The bill also calls for new regulations to “...encourage claimants to submit relevant private medical records...if such submission does not burden the claimant.” We agree with the idea of encouraging veterans to fully participate in supporting their own claims; in fact, DAV’s NSOs make this a routine practice. However, we do not believe that VA needs to open a new regulatory process to do so since current law does not prohibit VA from “encouraging” veterans to submit the most fully developed claims possible; a goal we share with VA.

Finally, DAV has serious trepidations about inserting language into Section 5103A of title 38 to allow a claimant to waive all or part of VA’s duty to assist requirements. As with many of the changes proposed in this legislation, we are particularly apprehensive about unrepresented veterans who may not have the knowledge or expertise to fully understand the likely ramifications of agreeing to such a waiver. Moreover, it is not clear how VA would seek to use such waiver authority. For example, would VA try to get veterans to “waive” its duty to assist obtaining private records in exchange for a faster decision? With so much emphasis on “breaking the back of the backlog,” could this become a tool to speed claims through the system, even if veterans may not receive the full benefits to which they are entitled? Until such questions are answered, we would have grave concerns about creating such waiver authority.

Mr. Chairman, we agree with the goal of preventing unnecessary overdevelopment of claims and we have proposed and supported legislation to ensure that private medical evidence be provided due deference. Too often, VA orders a medical examination even when a veteran has submitted recent and competent private medical evidence. Furthermore, we believe VA must be required to accept properly completed Disability Benefits Questionnaires (DBQs) from private treating physicians, and that those private treating physicians must be allowed to file DBQs electronically. We would welcome the opportunity to work with you and others on the Committee, in concert with our colleagues in the veterans’ community, to craft comprehensive legislation to achieve our shared goals.

H.R. 2388, the Access to Timely Information Act, would codify certain procedural steps that VA must follow in response to information requests from certain members of the Veterans’ Affairs Committees of the House and Senate. While DAV does not have a resolution on this matter, we are not opposed to enactment of this legislation.

H.R. 2243, the Veterans Employment Promotion Act, would modify Section title 38, United States Code, section 4212(d) requiring the Department of Labor (DOL) to publicly report via the internet the information contained in the VETS-100 or VETS-100A reports submitted annually by federal contractors to DOL.

Currently, the DOL Veterans’ Employment and Training Service (VETS) monitors the reporting requirements of the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) of 1974, requiring federal contractors and subcontractors alike to annually report the number of veteran employees in their workforces by various categories as specified under the affirmative action provisions of VEVRAA. Those with federal contract of \$25,000 or more, that were entered into before December 1, 2003, file a VETS-100 report while those with federal contract of \$100,000 or more, that were entered into on or after December 1, 2003, file a VETS-100A report. The database is used by contracting officers to expeditiously verify reporting compliance

and by DOL to monitor whether contractors are meeting their goals as set forth in their affirmative action plans. While DAV does not have a resolution on this particular matter, we are not opposed to enactment of this legislation.

Finally Mr. Chairman, regarding the draft legislation to improve the electronic health information systems and capabilities of the Department of Defense (DoD) and the VA; if enacted, this legislation would amend title XVI of Public Law 110-181 (the “Wounded Warrior Act”) by sharpening requirements on, and strengthening the functions of, an office established by that Act at section 1635 whose purpose is to implement a fully interoperable electronic health record to serve both departments. This bill would elevate the organizational position of the existing office as a shared appendage of the Office of the Secretaries of Defense and VA, strengthen its responsibilities under existing law and give it new responsibilities and accountabilities to ensure a joint VA-DoD electronic health record is put in place, and that it accomplishes its essential purposes of documenting a veteran’s lifelong relationship to government health care.

As we have consistently urged time and again in the *Independent Budget* (IB), including the IB for fiscal year 2012 (“*The Continuing Challenge of Caring for War Veterans and Aiding them in Their Transition to Civilian Life*,” page 78), both DoD and VA need to accelerate progress in implementing a joint health record that is accessible to each agency, and to the active duty personnel and veterans about whom health records are maintained. Along with our partner organizations in the IB, we believe the absence of a joint records system stymies seamless transition, serves as a barrier to rehabilitation and recovery, and prevents some veterans from gaining the benefits and services they have earned through their sacrifice and loss.

While we agree with the principles of this draft legislation and commend its author for proposing it, we are concerned that giving the joint office broad acquisition authority for major electronic records systems may clash with the preexisting authority Congress granted to the VA Office of Information Technology in Public Law 109-461 (including many of the same responsibilities as outlined in this bill for the joint office). Therefore, should this draft legislation advance, we recommend the Subcommittee conduct a study as to its potential unintended effects on the basic functions and authority Congress intended for VA’s Chief Information Officer.

Mr. Chairman, this concludes my testimony and I would be happy to answer any questions the Subcommittee may have. Thank you.