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***STATEMENT OF
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COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
MAY 24, 2016***

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this legislative hearing, and to present our views on the bills under consideration. As you know, DAV is a non-profit veterans service organization comprised of 1.3 million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity.

S. 2049 – To establish in the Department of Veterans Affairs a continuing medical education program for non-Department medical professionals who treat veterans and family members of veterans to increase knowledge and recognition of medical conditions common to veterans and family members of veterans

This bill if enacted would establish a web-based Department of Veterans Affairs (VA) Continuing Medical Education Program for non-VA medical professionals. This program would be intended to provide certain private sector medical professionals who treat veterans continuing education credits to learn about and recognize conditions common in veterans and their family members, and would improve outreach to veterans and families.

Under the bill, training would consist of identifying and treating common mental and physical conditions of veterans and their family members. As determined by the VA Secretary, it would also convey educational information about programs and benefits and other matters considered appropriate, available to veterans through VA, the Department of Labor, and other federal and non-federal agencies. If enacted, the program would be authorized for five years, and would be effective on enactment.

The bill would require the Secretary to accredit the program in as many state licensing authorities as possible, and from such medical credentialing organizations as the Secretary considered appropriate. The curriculum and number of hours of credit would be determined by the Secretary. The program would be made available at no cost for those participating.

Under current law, the Committee should be aware that VA does not provide continuing education credits for its own professional workforce, but places the burden on the individuals involved to maintain their qualifications and licensure to practice in VA by obtaining their own continuing education requirements. Current law provides a discretionary authority for VA to reimburse VA physicians not more than \$1,000 per year for obtaining continuing education credits, but does not do so for other professional disciplines, including those listed in this bill. VA

professionals would be barred from participating in this program, which raises an equity and fairness question in policy. Also, if thousands or even tens of thousands of private practitioners decided to use the program proposed by this act, it could become the source of a significant shift in funding from the direct care provided to veterans within the VA, while placing substantial new pressure on VA's already overburdened information technology system. Finally, setting up this national program could be administratively burdensome and costly for VA, diverting human resources and academic activities away from where they are needed now. We ask the Committee to address these issues with respect to this bill.

S. 2487, the Female Veterans Suicide Prevention Act

If enacted, this measure would amend currently required VA evaluations of its mental health and suicide prevention programs by adding a specific focus to include the needs of women veterans. Also, the bill would require an independent contractor to VA to include in its annual reports to VA the mental health and suicide prevention programs that are most effective and have the highest satisfaction rates among women veterans. This bill is in agreement with DAV Resolutions 039 and 040, which support program improvements and enhanced resources for VA mental health programs, and improvements in medical services for women veterans. The bill is also consistent with recommendations from DAV's 2014 Report, *Women Veterans: The Long Journey Home*. For these reasons DAV is pleased to support enactment of this bill.

S. 2520, the Newborn Care Improvement Act

This measure would authorize the Secretary to extend from 7 to 14 days of post-delivery care services, covering all care and services that a newborn child of an enrolled veteran would require. The bill also would require a report on the health services provided to newborns during the preceding fiscal year, including the number of newborns cared for during the period. DAV has received Resolution No. 104 from our membership, which calls for support of enhanced medical services and benefits for women veterans. Consequently DAV supports enactment of this measure.

As a technical matter, the bill's requirement of VA's submission to Congress of a new annual report about the care of newborns not later than 31 days after the end of each fiscal year would likely be administratively daunting; therefore, DAV recommends the Committee consider an amendment to the bill allowing for a more reasonable period to permit orderly data collection and internal review by VA.

S. 2679, the Helping Veterans Exposed to Burn Pits Act

This bill would mandate VA to establish a center of excellence focused on diagnosis, prevention, treatment, rehabilitation, and research of health conditions related to veterans' prior exposures to burn pits and other environmental exposures while they served in Iraq and Afghanistan. The bill would provide criteria and standards for selection of this new center, and would specify a number of required qualifications, abilities, accomplishments and relationships of the VA facility selected to be so designated. The bill would authorize an appropriation of \$30 million annually for the initial five years of operation of this center.

DAV members have approved Resolution No. 112, calling for improvements in care and benefits for veterans exposed to environmental hazards in deployment, and DAV Resolution 222, calling for Congressional support of a robust VA Medical and Prosthetic Research Program.

Therefore, DAV supports the intent of this bill. Nevertheless, we recommend the Committee carefully consider the funding level proposed in light of the statutory limitations applied to start-up funding of other Congressionally mandated VA specialized centers of excellence, such as its Geriatric Research, Education and Clinical Centers, and Mental Illness Research, Education and Clinical Centers. DAV would be deeply troubled should funds for this new center be taken from the Medical and Prosthetic Research appropriation. Finally, DAV recommends the Committee consider an amendment to the bill to provide a Congressional reporting requirement to evaluate the center's operations and effectiveness, given the level of funding this bill would make available to the center, and considering the importance of its mission to veterans who have experienced health consequences from exposure to environmental hazards while serving.

S. 2883 – the Appropriate Care for Disabled Veterans Act of 2016

This bipartisan measure would be intended to ensure VA maintains adequate capacity to deliver the best, comprehensive specialty care services to the most vulnerable veteran populations served by VA. It would reinstate a reporting requirement that expired in 2008 for the VA to report on its capacity to provide specialized services in areas such as blindness, burns, amputation, traumatic brain injury, spinal cord injury and dysfunction, mental illness, and long-term services and supports.

Since 2008, there have been continuous reports of bed closures, staffing shortages, and delayed and denied access to these specialized care units. This bill would ensure that VA is held accountable for its mandated responsibility to care for veterans with the most severe disabilities, including catastrophic injuries and diseases.

DAV supports this legislation based on Resolution No. 126, which calls for the preservation of VA's mission and role as a provider of specialized services to veterans ill and injured due to military service.

S. 2888 – the Janey Ensminger Act of 2016

This bill if enacted would require the Secretary, acting through the Administrator of the Agency for Toxic Substances and Disease Registry, under the Public Health Service, to periodically review the scientific literature relevant to the relationship between employment or residence of individuals at Camp Lejeune, North Carolina, for no fewer than 30 days during the period beginning on August 1, 1953 and ending on December 21, 1987, and to list the specific illnesses or conditions incurred by these individuals.

The bill would require the Administrator to determine each illness or condition for which evidence exists that exposure could be the cause of that illness or condition. If found, the Administrator would be required to categorize the connection of exposure to specific illness or condition as "sufficient," "modest," "limited," or "no more than limited." When completed, a listing of all such illnesses and conditions would be published in the Federal Register, accompanied by bibliographic citations, and posted on the Department of Health and Human Services' website. The bill would require the listing to be periodically updated as new conditions or illnesses were shown to be connected to exposure.

For individuals whose illness or condition was determined to be "sufficient or modest" in its connection to prior exposure to a toxic substance as documented by the listing mandated by this bill,

VA would be required to provide the individual hospital care and medical services to treat the illness or condition.

The bill would also authorize continuation of care by VA to any veteran or other person under VA care at the time of enactment who lived, worked, or served at Camp Lejeune during the prescribed period, notwithstanding the absence of evidence the illness or condition being treated was connected to exposure under criteria otherwise required by this bill.

The bill would require a transfer of \$4 million over a period of two fiscal years from VA's Medical Support and Compliance appropriation to the VA's Chief Business Office and Financial Services Center for the purpose of continuing their information technology work associated with the Camp Lejeune Family Member Program.

The delegates to our most recent National Convention adopted two resolutions related to this bill. Resolution No. 112 urges congressional oversight and federal vigilance to provide for research, health care and improved surveillance of disabling conditions in veterans resulting from military toxic and environmental hazards exposure. Also, Resolution No. 114 calls for eliminating VA health care out-of-pocket costs for service-connected disabled veterans. Accordingly, we support the provision in this measure that expands the list of conditions for which veterans may be suffering from due to their exposure to contaminated waters at Camp Lejeune and that these veterans will not be charged a copayment for treatment associated.

However, we remain concerned that the burden of care for affected non-veterans rests with VA through its Chief Business Office Purchased Care as an expanded responsibility in contravention of the requirement that in other cases of significant environmental toxic exposures, the costs of care are the assigned responsibility of the Administrator of the Agency for Toxic Substances and Disease Registry, under the Comprehensive Environment Response, Compensation, and Liability Act of 1980, also known as the "Superfund Act." As the Committee considers this bill, we ask that it also consider requiring the Administrator, the Navy or the Marine Corps to reimburse VA's Medical Services appropriation the cost to carry out the bill's purposes in treating those who were harmed by this environmental exposure at Camp Lejeune.

S. 2896 – the Care Veterans Deserve Act of 2016

Section 2 of this measure would make permanent the Veterans Choice Program, established by Section 101 of the Veterans Access, Choice, and Accountability Act of 2014 (VACAA), Public Law 113–146, and would make all veterans enrolled for VA health care eligible for the Veterans Choice Program.

When the Senate passed VACAA, DAV commended this Committee for quickly passing bipartisan legislation in response to the crisis in accessing VA health care. DAV committed itself to continue working with the Senate, House and VA to help fine tune, strengthen and coalesce around effective administrative, regulatory and legislative changes needed to address VA's capacity and access problems.

We believed then as we do now in strong care coordination provisions to ensure the best health outcomes for all veterans receiving care paid for by VA, regardless of the provider of that care. Equally important then as now, when expanding VA's mandate to provide care through non-

VA providers, Congress must ensure that it appropriates all the additional funding needed without taking away funding from VA's medical centers and clinics that are already at or over capacity.

Our shared goal must be to ensure that VA programs that purchase care in the community function as seamlessly and efficiently together with a robust, safe, efficient, high-quality VA health system that provides the best health outcomes. To accomplish this goal, Congress must address the misalignment among resources, demand and authorities that allow VA to provide hospital care and medical services. Because Section 2 only addresses demand by expanding it into the private sector, we are unable to offer our support.

DAV Resolution No. 105 opposes any legislative proposal that would have the effect of privatizing VA health care and diminishing the VA health care system. In addition, DAV Resolution No. 107 calls on Congress to provide necessary authorities, sufficient resources and staff to reduce waiting times so ill and injured veterans can realize timely access to all medically necessary services from the VA health care system.

Section 3 would require VA to contract with a national chain of walk-in clinics to provide hospital care and medical services to veterans enrolled in VA health care. Information on the care and services provided would be automatically transmitted to VA by such clinics, and no copayment or prior authorization would be required for care veterans would receive.

Notably, the measure does not define a walk-in clinic. If a walk-in clinic were simply a health care provider that allows a patient without an appointment to be seen by a provider, this could be further defined as a retail clinic (such as MinuteClinics), an urgent care clinic, or even a freestanding or hospital emergency department (ED). When considering this measure, we recommend the Committee clarify the term due to considerable cost implications to taxpayers and quality of care implications for veterans who would seek these services.

A March 2016 study published in *Health Affairs* examined insurance claims data for three million patients from 2010 to 2012 who were treated for certain simple, acute medical problems. Despite the lower per-visit cost of a retail clinic instead of an ED or physician's office, the researchers found that overall spending for the retail clinic cohort increased.¹ The increased spending from higher use of services outweighed the savings that resulted when patients went to less expensive retail clinics instead of a physician's office or an ED.

Moreover, the RAND Corporation found in 2010 that retail clinics were less likely to be located in medically underserved areas, but were mostly quite urban. We recommend the Committee consider the appropriateness of the provision prohibiting VA from requiring the expansion of walk-in clinic locations, which would limit veterans' access to care.

In reviewing the merits of this bill, in addition to its cost, we urge the Committee consider the formal positions taken on retail clinics of the American Academy of Family Physicians,² American Academy of Pediatrics,³ American College of Physicians, American Academy of Family Practitioners,⁴ and the American Medical Association⁵. Three general concerns emerge: (1) quality

¹"Retail Clinic Visits For Low-Acuity Conditions Increase Utilization And Spending," Ashwood, Gaynor, et al. March 24, 2016, Accessible at: <http://content.healthaffairs.org/content/35/3/449>

² <http://www.aafp.org/about/policies/all/retail-clinics.html>

³ <http://pediatrics.aappublications.org/content/133/3/e794>

⁴ <https://www.acponline.org/acp-newsroom/retail-clinics-best-used-as-backup-to-a-patients-primary-care-physician>

and safety of care, (2) impact on coordination and continuity of care; and (3) scope, oversight, and interaction with traditional primary care providers.

However, if the walk-in clinics referred to by this measure are urgent care clinics, DAV supports the intent of the provision and urges the Committee make urgent care part of VA's medical benefits package. Urgent care fills the gap between emergency care and regular appointment-based outpatient care, by enabling immediate access. Developing a nationwide system of urgent care at existing VA clinics and affording veterans the opportunity to receive urgent care from smaller urgent care clinics around the country would alleviate much of the pressure on outpatient clinics.

As mentioned above, we recommend the Committee consider the appropriateness of the provision explicitly prohibiting VA from requiring the expansion of urgent clinic locations, which would limit veterans' access to care. VA should be afforded the opportunity to tailor access to this type of care that best meets veterans' needs and enhancing the VA health care system.

DAV Resolution No. 114 calls for legislation to eliminate or reduce VA health care out-of-pocket costs for service-connected disabled veterans; thus we support the provision that would not require veterans to pay a copayment for services received under Section 3. However, DAV's primary concern with Section 3 is the proposed policy itself, which could ultimately lead to fragmentation of veterans' health care unless it is coordinated with VA primary care providers. Similar to our position on section 2 above, DAV cannot support this proposal.

Section 4 would enable a health care professional of the VA, including a contract provider, who is authorized to provide health care by or through VA, and who is licensed, registered, or certified in a state to practice his or her profession at any location in any state, regardless of where the professional or veteran is located, to treat a veteran through telemedicine. If enacted the bill would permit telemedicine treatment regardless of whether the professional or the patient were physically located in a federally owned facility.

This section would also require VA to report to Congress one year following its implementation on a variety of aspects of VA's telemedicine program, including patient and provider satisfaction, access, productivity, waiting times and other information related to appointments made and completed through telemedicine.

Delegates to our most recent DAV National Convention approved Resolution No. 126. Among other priorities, this resolution calls on VA and Congress to establish and sustain effective telemedicine programs as an aid to veterans' access to VA health care, particularly in the case of rural and remote populations. Our delegates also approved Resolution No. 226, fully supporting the right of rural veterans to be served by VA. Section 4 of this measure is consistent with these resolutions and DAV policy; therefore, DAV strongly supports this section and appreciates the sponsor's intention to promote the use of telemedicine in the care and treatment of veterans.

S. 2919, the State Outreach for Local Veterans Employment (SOLVE) Act of 2016

This measure seeks to boost proficiency and controls in the pursuit of increasing appropriate and sustainable employment opportunities for our nation's veterans. The bill would increase

⁵ <https://www.ama-assn.org/ssl3/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/DIR/D-160.986.HTM>

individual states' influence and flexibility to maximize existing federal Department of Labor (DOL) veterans' employment grants to support the work of Disabled Veterans' Outreach Program Specialists (DVOPS) and Local Veterans' Employment Representatives (LVERS) to provide greater assistance to veterans seeking employment services.

Specifically, section 3 of the bill would allow state governors to select the particular state agency, such as a state veterans' affairs agency, rather than a state's department of labor exclusively, to administer these programs. It encourages states to co-locate DVOPS and LVERS at one or more of the existing American Job Centers for efficient synchronization.

The bill encourages each state to tailor their annual plan to meet the employment and training needs of veterans in their state. As part of a State Governors annual plan, they would submit proposals for additional individual barriers to employment they view as significant enough for DVOP and LVER access. This would allow additional categories of veterans to receive services. For example, an individual barrier could be proposed in the case of veterans suffering from PTSD who have difficulty negotiating numerous bridges around their locality to obtain employment services, VA health care and job interviews. Administering employment and VA health care services to the increased number of geriatric veterans in Connecticut is a challenge.

The measure also directs DOL to only disapprove certain parts of state plans, rather than rejecting plans in their entirety. In the case where certain sections of a plan receive DOL approval, it directs DOL to submit an explanation to the state for the rejected section.

DAV has no resolution and no position on the specific issue this measure seeks to address. However, DAV Resolution No. 134 expresses a continuing concern our organization has regarding the diversion of DVOPS/LVERs from their prime mission to assist veterans with their employment and training needs. We are pleased the sponsor is working with us to ensure this measure would avoid or otherwise protect against such occurrences.

Moreover, we are aware DOL is executing a number of initiatives that may be adversely impacted by enactment of the bill as currently written. We urge the sponsor, this Committee and DOL to work together to ensure the final outcome will enhance state programs to better assist veterans with their employment and training needs.

Ensuring that our nation's ill and injured wartime veterans receive proficient opportunities for substantial gainful employment is DAV's concern. Wartime veterans who have sacrificed as a result of their military service need competent guidance and services at all levels to achieve maximum employability

Draft bill, to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs

Mr. Chairman, this draft bill comes as a result of a collaborative effort among VBA, the Board and 11 major stakeholder organizations—including DAV—that assist veterans with their appeals. For the past three months, this workgroup has been meeting intensively with the goal of developing a new structure and system for appealing claims decisions. However, this recent effort actually builds on that of a very similar workgroup involving VSOs, VBA, and the Board that began meeting over two years ago. That workgroup spent over six months examining the cause of and

possible solutions to the rising backlog of appeals. At that time, the claims backlog was finally beginning to drop after years of transformation efforts.

The signature achievement of that first VSO-VA workgroup was the development of and widespread support for the “fully developed appeals” (FDA) proposal. Under the FDA proposal, veterans could have their appeals routed directly to the Board by agreeing to eliminate several processing steps at the regional office level, forego hearings, and take greater responsibility for developing evidence necessary to properly consider their appeals. The FDA was modeled on a similar claims initiative – the “fully developed claims” (FDC) program – which has contributed to dramatic improvement in claims processing times at VBA.

As a result of that VSO-VA collaboration, legislation was drafted and introduced in both the House and Senate. Earlier this year, the House approved a broad benefits bill (H.R. 677) which included the FDA program. The Senate legislation introduced by Senators Sullivan, Casey, Heller and Tester (S. 2473) was approved by this Committee earlier this month as part of the Veterans First Act omnibus bill. We want to thank everyone involved for your efforts in advancing FDA legislation.

As you are aware, the FDA’s premise of eliminating certain appeals processing steps at VBA while providing a quicker route for appeals to the Board has essentially been incorporated into this comprehensive appeals reform bill. Though not as far-reaching as this proposed legislation, the FDA pilot program could reduce the time some veterans wait for their appeals decisions by up to 1,000 days, while lowering the workload on both VBA and the Board.

Building on the work of the earlier VSO-VA workgroup, and particularly its FDA proposal, VA convened the latest workgroup in March of this year to examine whether agreement could be reached on more comprehensive and systemic change. Over a very compressed but intensive couple of months, that included a number of closed-door, all-day sessions, the workgroup was able to reach general consensus on principles, provisions and ultimately the draft legislation before us. DAV and most of the other stakeholders support moving forward with this draft appeals reform legislation, notwithstanding some remaining issues yet to be addressed.

We believe that if all stakeholders continue working together – in a good faith partnership with full transparency – we have a good chance of resolving the remaining issues and achieving an historic reform this year. However, as we have long said, the most important principle for reforming the claims process was getting the decision right the first time; we must also ensure that this appeals reform legislation is done right the first time. Further changes to any part of this draft legislation could affect our ultimate support for the bill; therefore, we urge this Committee and VA to continue working with DAV and other stakeholders in a transparent and collaborative manner.

With that in mind, while the latest workgroup was initially focused on ways to improve the Board’s ability and capacity to process appeals, from the outset we realized that appeal reforms could not be fully successful unless we simultaneously looked at improving the front end of the process, beginning with claims’ decisions. One of the issues that development of the FDA proposal exposed was the importance of strengthening decision notification letters provided by VBA in order to improve decisions about appeals options. A clear and complete explanation of why a claim was denied is key to veterans making sound choices about if and how to appeal an adverse decision. Therefore, a fundamental feature of the new appeals process must also ensure that claims’ decision notification letters are adequate to properly inform the veteran.

The workgroup agreed that decision notification letters must be clear, easy to understand and easy to navigate. The notice letter must convey not only VA's rationale for reaching its determination, but also the options available to claimants after receipt of the decision. The draft legislation would require that in addition to an explanation for how the veteran can have the decision reviewed or appealed, all decision notification letters must contain the following information to help them in determining whether, when, where and how to appeal an adverse decision:

- (1) A list of the issues adjudicated;
- (2) A summary of the evidence considered;
- (3) A summary of applicable laws and regulations;
- (4) Identification of findings favorable to the claimant;
- (5) Identification of elements that were not satisfied leading to the denial;
- (6) An explanation of how to obtain or access evidence used in making the decision; and
- (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation for the benefit sought.

DAV recommends that in order to better inform veterans about this new notification provision and the redesigned claims and appeals process being proposed, the legislation should include a requirement that VA create an online tutorial and utilize other web or social media tools to enhance veterans' understanding of how claims decisions are made and how to choose the best options available in the redesigned appeals system.

The Current Appeals System

In order to evaluate the new appeals framework in the draft legislation, it must be compared to the existing system. Currently, if a veteran is not satisfied with their claims decision, they may appeal the decision by completing a Notice of Disagreement (NOD) form which provides them two options: a de novo review or a traditional appeal to the Board of Veterans Appeals. The de novo option takes place locally within the VARO, and is performed by a Decision Review Officer. The de novo process allows the introduction of new evidence and a hearing, requires VBA to fulfill its "duty to assist" throughout the process, and provides a full de novo review of the claim. If benefits are granted in the de novo process, the effective date for the award would be the date of the claim, if the facts found support entitlement from that effective date.

The second NOD option is to formally appeal to the Board. When a veteran chooses this option, the VARO must prepare a Statement of Case (SOC) for the veteran and then the veteran must complete the VA Form 9 specifying the issues they are appealing and the reasons supporting their appeal. If new evidence is submitted after the NOD requiring development, a Supplemental Statement of Case (SSOC) may also be issued. A veteran who elected a de novo review but who was not awarded the full benefits sought may also continue their appeal to the Board as described above. As part of the Board process, appellants have the opportunity to request a hearing and introduce new evidence at any time. Throughout its consideration of an appeal, the Board is required to comply with VA's "duty to assist" and performs a de novo review of all the evidence submitted, before and after the date of the NOD filing.

If the Board does not grant the full benefit sought, the veteran's primary recourse would then be to appeal to the Court of Appeals for Veterans Claims ("Court"), which can take many more years before final disposition. Alternatively, the veteran at any time could file a new claim with new evidence, which could be processed under the FDC program in less than 125 days, however the

effective date for this claim would be the new filing date, potentially requiring the veteran to forfeit months or years of entitlement to earned benefits.

In many cases the Board will remand the claim back to VBA for either procedural errors (i.e. – “duty to assist” errors) or for the development of new or existing evidence needed to make a final determination. More than half of all pending appeals will be remanded at least once under the current system, lengthening the time veterans wait for final resolution of their appeals and contributing to the growing backlog of pending appeals.

The current system allows veterans unlimited opportunities to submit new evidence to support their appeals, requires that VA fulfill its “duty to assist” to veterans by securing and developing all potential evidence but requires that the formal appeal be maintained in order to protect the effective date of the original claim. While these features help ensure that veterans rights are protected, they have evolved into a system that incentivizes many veterans to file and maintain formal appeals because there is no other option available to protect their earliest effective dates, which could affect thousands of dollars in earned benefits.

A New Framework for Veterans’ Claims and Appeals

Understanding the benefits and weaknesses of the current system, the workgroup developed a new framework that could protect the due process rights of veterans while creating multiple options to receive favorable decisions more quickly. A critical factor was developing a system that would allow veterans to protect their earliest effective dates while allowing them opportunities to introduce new evidence, without having to be locked into the long and arduous formal appeals process at the Board.

In general, the framework embodied in the draft legislation would have three main options for veterans who disagree with their claims decision and want to challenge VBA’s determination. Veterans must elect one of these three options within one year of the claims decision.

First, there will be an option for readjudication and supplemental claims when there is new evidence submitted or a hearing requested. Second, there will be an option for a local, higher-level review of the original claims decision based on the same evidence at the time of the decision. Third, there will be an option to pursue a formal appeal to the Board – with or without new evidence or a hearing.

The central dynamic of this new system is that a veteran who receives an unfavorable decision from one of these three main options may then pursue one of the other two appeals options. As long as the veteran continuously pursues a new appeals option within one year of the last decision, they would be able to preserve their earliest effective date, if the facts so warrant. Each of these options, or “lanes” as some call them, have different advantages that allow veterans to elect what they and their representatives believe will provide the quickest and most accurate decision on their appeal.

For the first option – readjudication and supplemental claims – veterans would be able to request a hearing and submit new evidence that would be considered in the first instance at the VARO. VA’s full “duty to assist” would apply during readjudication, to include development of both public and private evidence. The readjudication would be a de novo review of all the evidence submitted both prior to and subsequent to the claims decisions until the readjudication decision was

issued. If the veteran was not satisfied with the new decision, they could then elect one of the other two options to continue pursuing their appeal.

For the second option – the higher-level review – the veteran could choose to have the review done at the same local VARO that made the claim decision, or at another VARO, which would be facilitated by VBA’s electronic claims files and the National Work Queue’s ability to instantly distribute work to any VARO. The veteran would not have the option to introduce any new evidence nor have a hearing with the higher-level reviewer, although VBA has indicated it will allow veterans’ representatives to have informal conferences with the reviewer in order for them to point out errors of fact or law. The review and decision would be *de novo* and a simple difference of opinion by the higher-level reviewer would be enough to overturn the original decision. If the veteran was not satisfied with the new decision, they could then elect one of the other two options to pursue resolution of their issue. .

For this higher-level review, the duty to assist would not apply since it is limited to the evidence of record used to make the original claims decision. If a duty to assist error is discovered that occurred prior to the original decision, unless the claim can be granted in full, the claim would be sent back to the VARO to correct any errors and readjudicate the claim. If the veteran was not satisfied with that new decision, they would still have all three options to resolve their issue.

Mr. Chairman, one additional change that we have suggested and VA has agreed to include, but that is not in this Senate discussion draft, would be to add a new section to section 5104B, title 38, United States Code, to clarify that all higher-level reviews would be done as *de novo* reviews, without the veteran having to affirmatively elect a *de novo* review option. We would like to highlight for the Committee the companion bill introduced in the House, H.R. 5083, contains this revision and we strongly recommend this provision be maintained in any legislation moving forward.

These first two options take place inside VAROs and cover much of the work that is done in the current *de novo* process, although it would be separated into two different lanes: one with and one without new evidence and hearings. VA has also proposed eliminating the position of Decision Review Officers and reassigning these personnel to functions that are appropriate to their level of experience and expertise, such as higher-level reviewers.

For the third option – Board review – there would be two separate dockets for veterans to choose from: an “expedited review” that allows no hearings and no new evidence to be introduced; and a more traditional appeal that allows both new evidence and hearings. Both of these Board lanes would have no duty to assist obligation to develop any evidence submitted. For both of these dockets, the appeal would be routed directly to the Board and there would no longer be SOCs, SSOCs or Form 9s completed by VBA or the veteran.

The workgroup established a goal of having “expedited review” appeals resolved within one year, but there was no similar goal for the more traditional appeals docket. While eliminating introduction of evidence and hearings would naturally make the Board’s review quicker, it is important that sufficient resources be allocated to the traditional appeal lane at the Board to ensure a sense of equity between the two dockets. We would recommend that language be added to this bill to ensure the Board does not inequitably allocate resources to the “expedited review” lane.

For the traditional Board appeal lane, veterans could choose either a video conference hearing or an in-person hearing at the Board’s Washington, DC offices; there would no longer be

travel hearing options offered to veterans. New evidence would be allowed but limited to specific timeframes: if a hearing is elected, new evidence could be submitted at the hearing or for 90 days following the hearing; if no hearing is elected, new evidence could be submitted with the filing of the NOD or for 90 days thereafter. If the veteran was not satisfied with the Board's decision, they could elect one of the other two VBA lane options, and if filed within one year of the Board's decision, they would continue to preserve their earliest effective date. The new framework would impose no limits on the number of times a veteran could choose one of these three options, and as long as they properly elected a new one within a year of the prior decision, they would continue to protect their earliest effective date.

If the Board discovers that a "duty to assist" error was made prior to the original claim decision, unless the claim can be granted in full, the Board would remand the case back to VBA for them to correct the errors and readjudicate the claim. Again, if the veteran was not satisfied with the new VBA claim decision, they could choose from one of the three options available to them, and as long as they properly make the election within one year of the decision, they would continue to preserve their earliest effective date.

One additional option becomes available after a Board decision: the appellant would also have the opportunity to file a Notice of Appeal to the Court of Appeals for Veterans Claims ("Court") within 120 days of the Board's decision, which is the current practice today. Decisions of the Court would be final.

The draft legislation would also amend existing statute to change the "new and material evidence" standard to a "new and relevant evidence" standard, as it relates to readjudication and supplemental claims. Under current law, a claim can only be reopened if "new" and "material" evidence is presented, which was designed to prevent unnecessary work reviewing immaterial evidence that would not affect the outcome of a claim. However, in practice this standard has often had the opposite effect, requiring VBA to make a "new and material" determination, which can then be appealed to the Board, often requiring a hearing, and adding years of delay before getting to the core issue of whether the evidence would actually change the claim decision.

The draft bill would replace the term "material" with the term "relevant," and add a definition of "relevant evidence" as "evidence that tends to prove or disprove a matter in issue." While we understand the intention of VBA in trying to deter submission of unrelated evidence, we believe that this revised standard would not be any more effective in preventing submission of truly unrelated and irrelevant evidence. Instead, creating a new and untested standard could result in additional appeals on procedure before the substance was adjudicated, and then it, too, could be appealed.

For this reason, DAV and others involved in the first appeals workgroup had discussed revising this standard by amending section 5108 of title 38, United States Code, to require VBA to review all evidence submitted in order to directly address the substance of the issue rather than be required to first clear a procedural hurdle. The workgroup considered changing section 5108 to read as follows:

§ 5108 Evidence presented for disallowed claims

If evidence is presented with respect to a claim which has been disallowed that adds to or changes the facts as previously found by the Secretary, the Secretary shall develop or adjudicate the claim as appropriate.

For truly unrelated evidence, the determination that such evidence does not “add to or change the facts” underlying the claim decision should not require any more time than a determination of whether such evidence is new or material. Thus, we recommend the Committee consider incorporating this alternative approach as an amendment to this bill.

The draft bill also includes an amendment to section 5104A to require that any finding made during the claims or appeals process that is favorable to the claimant would be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding. In the new structure in which appeals can move back and forth from the Board to VBA, veterans must be reassured that favorable findings cannot be easily overturned by a different adjudicator or reviewer during this process. Thus, we strongly support this section.

Overall the new framework embodied in the draft legislation could provide veterans with multiple options and paths to resolve their issues more quickly, while preserving their earliest effective dates to receive their full entitlement to benefits. The structure would allow veterans quicker “closed record” reviews at both VBA and the Board, but if they become aware that additional evidence was needed to satisfy their claim, they would retain the right to next seek introduction of new evidence or a hearing at either VBA or the Board. If implemented and administered as envisioned by the workgroup, this new appeals system could be more flexible and responsive to the unique circumstances of each veteran’s claim and appeal, leading to better outcomes for many veterans.

Remaining Issues and Questions Related to the Draft Appeals Reform Legislation

Over the past several weeks, DAV and other VSO stakeholders have continued to work with the Board and VBA to resolve and clarify a number of issues, further improving the proposed new appeals structure. While we believe the current draft bill should be moved forward in the legislative process, there are still some critical issues that need to be further explored to ensure that there are no unintended negative consequences for veterans.

One of the most critical questions is how the introduction of new evidence will be treated by VBA and the Board, and how “duty to assist” requirements will apply. For the higher-level review, no new evidence is allowed; however, there is an informal opportunity for the veteran’s representative to conference with the reviewer to point out errors. If during this conference, the representative identifies evidence not yet submitted as part of their discussion, how will the higher-level reviewer acknowledge or treat this information? Will they refer the claim back to the readjudication option as a supplemental claim, indicating there is evidence that needs to be developed? Will they inform the representative or the veteran directly that if there is new evidence that may affect the decision, the veteran should file a supplemental claim for readjudication to present that evidence directly or through a hearing?

Similarly, there are questions that need to be answered about how the Board will handle new evidence introduced outside the limited opportunities allowed at and 90 days after the filing of an NOD or a Board hearing. What happens if a veteran elects the Board option with a hearing and submits new evidence to the Board prior to the hearing date: will the Board hold the evidence until the hearing and then consider it, or will the Board return or ignore the evidence?

In addition, since there is no “duty to assist” requirement after the NOD filing, what if evidence properly submitted indicates that additional evidence exists which could affect the decision: will the Board ignore that evidence or inform the veteran that there was additional evidence that could have changed the decision but that it was not sought nor considered? Will or should the Board remand the appeal back to the VBA for readjudication to allow for full development of all evidence? In order to protect the veteran’s due process rights, we would recommend that these uncertainties be resolved before final legislation is enacted into law, preferably through clear and unambiguous statutory language.

There are also two critical operational concerns that will effect whether the new appeals structure can be properly implemented as envisioned. First, the Board and VBA must develop and implement a realistic plan to address the almost 450,000 appeals currently pending, most of which are still within VBA’s jurisdiction. Until these pending appeals are properly resolved, no new appeals structure or system can expect to be successful. While we have been in discussion with VBA and the Board about how best to address these legacy appeals, we have yet to agree on formal plans to deal with its current backlog of appeals. We need Congress to perform aggressive oversight of this process to ensure a proper outcome.

Furthermore, since appeals that are filed today can take years to be completed, some will last more than a decade, how will VBA and the Board operate two different appeals systems simultaneously, each with separate rules for treating evidence and the “duty to assist?” How will new employees be trained under both the old and new systems so that there is efficient administration of these two parallel appeals systems? How will the Court view the existence of two different standards for critical matters such as the “duty to assist” veterans? We would recommend that these questions be thoroughly considered by the Committee and discussed with VSOs to avoid future problems.

Finally, as mentioned above, the most critical factor in the rise of the current backlog of pending appeals was the lack of sufficient resources to meet the workload. Similarly, unless VBA and the Board request and are provided adequate resources to meet staffing, infrastructure and IT requirements, no new appeals reform will be successful in the long run. As VBA’s productivity continues to increase, the volume of processed claims will also continue to rise, which has historically been steady at a rate of 10-11 percent of claims decisions. In addition, the new claims and appeals framework will likely increase the number of supplemental claims filed significantly. We are encouraged that VA has indicated a need for greater resources for both VBA and the Board in order to make this new appeals system successful; however, too often in the past funding for new initiatives has waned over time. We would urge the Committee to seriously consider proper funding levels are appropriated as this legislation moves forward.

Mr. Chairman, the draft legislation being considered today represents a true collaboration between VA, VSOs and other key stakeholders in the appeals process. Building on the work first begun two years ago, tremendous progress has been made this year culminating in this draft appeals legislation. There are still a number of improvements and clarifications that must be made to the draft legislation but we remain committed to working with Congress, VA and other stakeholders to resolve them as soon as feasible. Working together, we are hopeful that the Senate and House will enact comprehensive appeals reform legislation before the end of this year to provide veterans with quicker favorable outcomes, while fully protecting their due process rights.

Draft bill, the Veterans Mobility Safety Act of 2016

The Veterans Mobility Safety Act of 2016 would enhance the VA program providing automobiles and adaptive equipment assistance for service-disabled veterans.

Under current law, Congress authorizes financial grants for certain ill and injured veterans and active duty service members to purchase a new or used automobile or other conveyances. This grant may also be paid if disabilities are a result of medical treatment, examination, vocational rehabilitation or compensated work therapy provided by VA. In addition to financial assistance toward the purchase of an automobile or other conveyance, financial assistance is provided for modifications that may be necessary to accommodate these covered service-connected disabilities resulting from an injury or disease incurred or aggravated during active military service.

Currently, grants are paid directly to the seller of the automobile for the total price up to \$20,114.34. A veteran or service member may only receive the automobile grant once in his or her lifetime. Repairs and modifications to a vehicle may also be authorized throughout the veteran's lifetime, subject to predetermined limits.

This legislation would require the Secretary of VA to develop comprehensive quality standards for providers of vehicle modification services under the automobile adaptive equipment program. This new policy would be developed and overseen in consultation with veterans service organizations, the National Highway Transportation Administration, industry representatives, manufacturers of automobile adaptive equipment and other entities with expertise in installing, repairing, replacing, or manufacturing mobility equipment or developing mobility accreditation standards for automobile adaptive equipment.

Although DAV has no resolution from our members concerning this issue, we support the intent of this legislation to help injured and ill veterans lead high quality lives. The legislation would provide an added measure of quality assurance to protect these seriously ill and injured veterans from substandard craftsmanship that could potentially jeopardize their safety, the safety of their families and the general public.

We recommend the stakeholders identified within this proposal be involved throughout this entire process, to include rule and policy development and implementation. Furthermore, we recommend that all efforts be made to ensure that any policy that is created does not adversely impact a veteran's ability to receive vehicle modifications. If standards are not implemented carefully, some manufactures or installers may be unable, or unwilling, to comply with the new requirements. In this scenario, a veteran's options could become increasingly limited when they seek out installation and repairs of their automobile adaptive equipment.

Draft bill, to expand eligibility for hospital care and medical services under section 101 of the Veterans Access, Choice, and Accountability Act of 2014 to include veterans in receipt of health services under the pilot program of the Department of Veterans Affairs for rural veterans

Section 1 of this bill would make veterans who have received care under the Access Received Closer to Home (Project ARCH) pilot program eligible to participate in the Veterans Choice Program. Section 403 of the Veterans' Mental Health and Other Care Improvements Act of

2008 (Public Law 110-387; 38 U.S.C. 1703 note), provided VA with authority to conduct this pilot in five sites in Kansas, Montana, Virginia, Arizona and Maine.

Project ARCH sites became operational on August 29, 2011, and the three-year pilot program, which was set to expire on August 29, 2014, was extended to August 7, 2016 by section 104 of the Veterans Access, Choice, and Accountability Act of 2014 (VACAA), Public Law 113-146. Moreover, the VA is required to ensure that medical appointments for those veterans eligible to participate in Project ARCH be scheduled not later than five days after the date on which the appointment is requested and occur no later than 30 days after such date.

DAV has supported the extension of Project ARCH beyond its initial authorization. This pilot project has shown promising results in achieving a more patient-centered, coordinated, cost-effective delivery model for fee-basis care. We believe this is primarily due to the dedicated VA Care Coordinator at each participating site who works closely with veterans and community providers to ensure continuity of care and that veterans no longer need to travel hundreds of miles to receive acute or tertiary care.

DAV has previously testified in support of provisions making veterans enrolled in Project ARCH eligible to receive care in the community as part of the overall effort to fix the misalignment of resources, demand and, in particular, existing authorities that hamper VA's ability to purchase or directly provide health care to ill and injured veterans.

While we welcome the intent of the bill to extend eligibility to participate in the Veterans Choice Program to veterans who have received care under Project ARCH, we are concerned veterans who are current participants in Project ARCH will experience disruptions in care as this transition occurs. We have already heard from VA Care Coordinators who have expressed concern for the veterans they care for under Project ARCH who experienced unwarranted disruptions in their care due to parallel VA programs that purchase care in local communities.

Discussion Draft, including provisions from the Construction Reform Act of 2016, a bill to make certain improvements in the administration of Department medical facility construction projects

This bill would build on a prior statutory reform of the management of VA major medical facility construction projects (including "super construction projects") by establishing a new, mandatory requirement that VA follow industry standards, standard designs, and best practices in constructing VA facilities. The bill also would require forensic audits by a qualified outside federal auditor in cases in which the final cost of a major medical facility construction project exceeded its statutory appropriation by more than 25 percent.

This bill would amend VA's notice requirements to Congress with regard to accounting for bid savings on major projects, with specifications.

Finally, this bill would require a quarterly report to Congress on super construction projects, including progress being made, planning variances and budgetary matters.

Delegates to our most recent National Convention approved Resolution No. 100, urging the Administration and Congress to properly support VA's construction and infrastructure needs. This

bill is consistent with the intent of our resolution; therefore, DAV supports this bill and urges its enactment.

Discussion Draft, including VA proposal to modify requirements under which the Department is required to provide compensation and pension examinations to veterans seeking disability benefits

The proposed discussion draft bill would change the standards for determining when VA is required to provide a disability compensation examination or obtain medical opinions.

Currently, VA's "duty to assist" veterans with disability compensation claims includes requirements for providing disability compensation examinations or medical opinions in order for VA to reach a fully informed and proper entitlement determination. VA is required to provide these examinations or medical opinions when a veteran's record does not contain sufficient medical evidence for VA to make a decision and there is competent evidence of a current disability, or persistent or recurrent symptoms of a disability; or when the record suggests that a disability, or symptoms, may be associated with active military service.

The discussion draft bill adds a new requirement that the veteran's claim record contain "objective evidence" that an injury or disease was incurred, or aggravated while performing active military service; or that the injury, or disease became manifest during the applicable presumptive periods; or that the veteran experienced an event in service, capable of causing a particular injury or disease. The effect of this draft proposal would raise the evidentiary threshold for when VA would be required to provide a VA examination or medical opinion.

Enactment of such legislation would make it more difficult for veterans seeking to establish entitlement to benefits derived from injuries or illnesses acquired as a result of their active military service. Disability compensation examinations play a vital role in helping to develop the evidence necessary to support a veteran's claim. Creating more stringent requirements before VA has an obligation to order an examination or opinion would impose a significant new barrier for many veterans to overcome as they attempt to prove the validity of their claims.

Further, as VA denies more veterans the ability to have an examination or receive a medical opinion, there would likely be an increase in the number of appeals, forcing many veterans to endure a lengthy appeals process in order to have their claims properly developed.

DAV strongly opposes this draft legislation consistent with DAV Resolution No. 008, which opposes any proposals that would reduce, add limitations on, or eliminate benefits for service-connected disabled veterans or their families. Because the changes contemplated within this draft bill would make it more difficult for veterans to prove meritorious claims, we oppose the legislation.

Mr. Chairman, DAV appreciates the opportunity to provide testimony. I would be pleased to address any questions you, or members of the Committee may have on the topics covered in this statement.