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**STATEMENT OF
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OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
OCTOBER 25, 2017**

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this hearing of the Subcommittee on Disability Assistance and Memorial Affairs concerning how the Veterans Benefits Administration (VBA) can effectively prevent and manage overpayments of benefits to veterans, their families and survivors. 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.

DAV represents over one million veterans and their families before the Department of Veterans Affairs (VA) in their claims for earned benefits, primarily for disability compensation. Veterans are entitled to receive compensation based on injuries and illnesses incurred or aggravated by military service. The amount of compensation a veteran or beneficiary is entitled to may change due to many factors, to include changes in dependency, additional service-connected disabilities, Reserve or National Guard service or change in the severity of the service-connected condition. Overpayment of benefits can occur when these changes are not timely recorded and implemented by VA due to actions or inactions by VA or the veterans themselves. The most common changes that lead to overpayments are dependency issues and incarceration. In addition, inadequate information sharing between federal agencies and departments, as well as with state agencies, due to limitations of policies, processes and technology, hinders prompt and proper action on processing overpayments.

Mr. Chairman, overpayments by VA and the resultant debts owed by veterans often cause severe financial hardships for veterans and their families. In many cases, the burden of repaying these debts can negatively impact a veteran's quality of life, put them at risk of homelessness and affect their access to VA health care. We understand that in an imperfect claims processing system, there will be overpayments and that it is

a reasonable expectation that recipients of such overpayments are required to repay that debt. However, we believe that a significant portion of overpayments could have been reduced or avoided if the VA had better policies, processes and oversight of their workforce.

The VA Office of the Inspector General (OIG) report of September 28, 2007, *Audit of Veterans Benefits Administration Controls to Minimize Compensation Benefits Overpayments* indicated that between January 2004 and March 2006, an estimated \$50.8 million in overpayments were avoidable. If VA staff processed compensation benefit adjustments promptly, many veterans would not have been put in the difficult position of having a debt to VA.

In June 2016, the OIG issued a report on the *Audit of Compensation and Pension Payments to Incarcerated Veterans*. It determined that between July 2008 and June 2015, VA's ineffective actions in processing incarceration adjustments resulted in significant improper payments totaling more than \$100 million. If conditions remain the same, it estimated that VA could make additional inaccurate payments of more than \$200 million over the period of fiscal year (FY) 2016 through FY 2020.

DAV is concerned that many debt amounts could have been lessened or completely avoided through greater oversight and control by VBA. While overpayments certainly have a negative impact on the federal budget, we are more concerned that these debts can sometimes result in catastrophic outcomes for financially-stressed veterans and their families. VA must aggressively work to identify ways to correctly process all evidence, information, and reports to eliminate this effect. Improvements to processing dependency changes and incarcerated veterans can minimize the avoidable amounts of debt created by the VA. In addition, VA and other federal agencies, particularly the Department of Defense, Centers for Medicare and Medicaid, the Internal Revenue Service (IRS) and the Bureau of Prisons, must develop seamless and timely ways to exchange information relevant to determinations of veterans' benefits.

Dependency Changes

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

VA criteria require a reduction of benefits for the loss of a dependent due to marriage, divorce, death or in the case of a child, attainment of age 18 generally, or 23 if attending school. An OIG report from September 2007 reviewed 315 cases that had a change in the dependent status, finding that 81 (26 percent) had avoidable overpayments totaling \$1.3 million. The primary cause for overpayments was processing delays which ranged between 60 days and 10 years, averaging two years; in 32 of the 81 overpayments (40 percent), the VA delayed processing adjustments for over a year.

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

If a dependent is removed, this will create an overpayment and subsequent debt for the veteran. If VA delays the processing of that request to remove the dependent, it creates an undue burden and hardship on the veteran, for which they are ultimately responsible. If VA had better policies, processes and oversight of their workforce, these avoidable overpayments caused by the VA could be reduced and even eliminated.

When a veteran is divorced or the spouse is deceased, it is the veteran's responsibility to advise the VA of the termination of the marriage for removal of the former spouse from the veteran's benefits. In some instances, the veteran will not advise the VA directly but will make that change in status known to another federal agency. For example, the veteran may have reported a divorce or death to the IRS, Defense Finance and Accounting Services, Social Security Administration, Centers for Medicare and Medicaid, or TRICARE. Because this information is not currently shared between VA and other federal agencies, the overpayment will be assessed based upon the date VA is notified.

There is a legal concept known as "constructive knowledge" that could be relevant to this problem. The Court of Appeals for Veterans Claims has defined the notice of "constructive knowledge" within the VA. In *Bell v. Derwinski*, 2 Vet. App. 611 (1992), the Court held that the VA is deemed to have constructive knowledge of all VA records and such records are considered evidence of record at the time a decision is made. This concept applies to dependency change of status issues.

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

The OIG reports also found that the main reason for the delay in processing dependency status changes is due to its classification as non-rating claims, which are considered a lower priority compared to rating claims work.

Through VBA's online program, eBenefits, a veteran can submit evidence to add a dependent. While this has increased the timeliness of adding a dependent, this program is still in its infancy. Based on specific data, the system can reject the addition, refer it for traditional processing and provide no notification to the veteran. This program also provides for notification to the VA of removal of a dependent; however, because this is not part of eBenefits' rule-based programming, it is referred for traditional processing. Again, these are not considered rating claims work and have no priority in VBA.

Recommendations

- 1. Assign dependency changes equal priority to rating claims work.** Within VBA, rating claims work has a higher priority for the assignment, control, and completion of work. However, as discussed above, this creates delays in VA adding new dependents and increases the amount of overpayments caused by delaying the removal of dependents. To facilitate this reprioritization, there will need to be enhancements to the VBA online claims system to allow for expedient processing for adding or removing dependents.
- 2. Apply the principle of “constructive knowledge” to automatically waive all additional overpayment amounts created by VA.** When any part of VA has possession of the required evidence to change the dependency status and fails to act timely, VA must waive the amount of additional debt created by the VA's lack of timely action.
- 3. Apply the principle of “constructive knowledge” throughout the entire federal government.** Just as VA should accept “constructive knowledge” of dependency information received within part the Department, VA should also accept that concept for information received by any other federal agency or office.

VA currently receives information and cross matches on income data with the IRS, incarcerations with the Federal Bureau of Prisons, and the Department of Defense, and could apply associated dependency information to more timely make status changes. Further, once a veteran reports his change in status of dependency with any federal agency, such as income tax applications, changes with the Defense Enrollment Eligibility Reporting System (DEERS) program within the Department of Defense or changes noted with TRICARE, this should be considered “constructive knowledge” for VA purposes, thereby lessening any overpayments and debt created by the veteran's change of dependency. VA could receive annual data from the IRS specifically on dependency thus reducing any potential overpayments.

4. **Waive the debt after 90 days of no action by the VA.** DAV Resolution No. 213 states that when VA has receipt of the required information for a dependency status change or notification of the veteran receiving Reserve or National Guard Drill Pay, and does not take any action within 90 days, VA should automatically waive the debt. This change would greatly reduce, and in many situations eliminate, any improper overpayment amounts caused by VA.

Incarcerated Veterans

Federal law requires VBA to reduce Compensation and Pension (C&P) benefits for veterans incarcerated in a federal, state, or local penal institution in excess of 60 days. Effective the 61st day of incarceration, VBA must reduce compensation benefits for veterans convicted of a felony and discontinue pension benefits for veterans convicted of a felony or misdemeanor. VBA reduces compensation benefits to the 10 percent disability rate for veterans rated 20 percent service connected or more. For veterans whose service-connected disability rating is 10 percent, VBA reduces the benefit payment by one-half. VARO and Pension Management Center (PMC) employees are responsible for making incarceration adjustments. Once the veteran is released from the penal institution, VBA will restore C&P benefits.

Based on the June 2016 OIG Report, VARO and PMC staff did not consistently take action to adjust C&P benefits for veterans incarcerated in federal penal institutions. Specifically, based on federal incarceration data ranging from May 2008 through June 2015, VBA did not adjust veterans' C&P benefits, as required, in an estimated 1,300 of 2,500 cases (53 percent), which resulted in improper payments totaling approximately \$59.9 million. Without improvements, VBA was projected to make additional improper benefits payments totaling about \$41.8 million for federal incarceration cases from FY 2016 through FY 2020.

VARO and PMC staff also did not take consistent and timely action to adjust C&P benefits for veterans incarcerated in state and local penal institutions. Based on incarceration notifications received from March 2013 to August 2014, VBA did not effectively adjust veterans' C&P benefits in an estimated 3,800 of 21,600 state and local incarceration cases (18 percent), which resulted in significant delays and improper benefits payments totaling about \$162 million for state and local incarceration cases from FY 2016 through FY 2020.

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

Incarcerated veterans are not entitled to their full VA compensation benefits after the 61st day of incarceration; we do not dispute that this will create overpayments, even

when reported timely. However, the millions of dollars of additional amounts created by VBA's own delays create an unfair and undue hardship on these veterans and their families.

In many instances, VBA did not reduce the veteran's benefits while incarcerated for shorter sentences. After release, the veteran would notify the VA, the overpayment would be recognized and the debt created and recouped. For veterans who rely on compensation, having these benefits cut off for repayment after incarceration puts them and their families at financial risk. The loss of income relied on by the veteran and their family could place many in this vulnerable population at a higher risk for homelessness.

Another negative consequence of VA failing to properly reduce these benefits affects a veteran's family. While a veteran is incarcerated, their dependent family can request an apportionment of benefits and receive the amount of compensation that is withheld from the veteran. However, if the veteran's benefits are not timely reduced by VBA, the family would not be aware of their potential entitlement to the apportionment.

Recommendations

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

H.R. 3705 - Veterans Fair Debt Notice Act of 2017

On September 20, 2017, DAV presented testimony to the Subcommittee on the Veterans Fair Debt Notice Act of 2017, H.R. 3705. This legislation would require the

Secretary of Veterans Affairs to utilize certified mail and plain language in certain debt collection activities.

As we previously testified, consistent with the intent of DAV Resolution No. 213, which calls for alleviating undue financial hardship in processing overpayments and notifying veterans of debt, we support this bill. H.R. 3705 proposes to secure notification to debtors of debt collection actions with a plain language explanation of the debt. We recommended clarifying that the debtor is not required to use certified mail to respond to the VA adding a section to indicate that the date of notification of the debt is the date of signed receipt of certified mail by the debtor.

Mr. Chairman, DAV is concerned that many debt amounts could have been lessened or completely avoided through greater oversight and control by VBA. As indicated, VBA continues to create additional improper overpayment and debt amounts that not only impact the federal budget, but can have horrific consequences for veterans and their families. These discrepancies must be corrected and eliminated to remove the burdens that VA has placed on too many veterans and their survivors.

This concludes DAV's testimony. Thank you for the opportunity to testify at today's hearing. I would be pleased to answer any questions you or members of the Subcommittee may have.