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***STATEMENT OF
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COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
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Chairman Abraham, Ranking Member Titus and Members of the Subcommittee:

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 1.2 million wartime service-disabled veterans that is dedicated to a single purpose: empowering veterans to lead high-quality lives with respect and dignity.

H.R. 303, the Retired Pay Restoration Act

This bill would repeal legislation enacted in 2004 that created a phased reduction of military retirement offsets to Department of Veterans Affairs (VA) disability compensation in the case of longevity retirees; it also would authorize full disability compensation and a portion of military retirement pay in cases of service members retired under chapter 61 with 20 years or more of service.

DAV strongly supports this bill in accordance with DAV Resolution No. 053, adopted at our most recent national convention. Our resolution calls on Congress to support legislation to repeal the offset between military longevity retired pay and VA disability compensation

We have advocated for years that Congress should enact legislation to repeal the inequitable practice of requiring military longevity retirees pay be offset. Presently these retirees are ineligible to receive their disability compensation when they are rated less than 50 percent disabled.

All military retirees concurrently should be permitted to receive military longevity retired pay and VA disability compensation, also known as Concurrent Retirement Disability Pay (CRDP). DAV and our *Independent Budget* partners believe the time has come to finally remove the current prohibition imposed upon those longevity retirees rated less than 50 percent disabled.

Many veterans who retired from the armed forces based on length of service must forfeit a portion of their retired pay, earned through faithful performance of military duties, as a condition of receiving VA compensation for service-connected disabilities when they are rated less than 50 percent disabled. This policy is inequitable—military retired pay is earned by virtue

of a veteran's career of service, usually more than 20 years of honorable and faithful service performed on behalf of our nation. VA compensation is paid solely because of disability resulting from military service, regardless of the length of service.

If enacted into law, the provisions of H.R. 303 would become effective January 1, 2016.

H.R. 1302, the VA Appeals Backlog Act

This bill would require VA to take such steps as may be necessary to ensure that when a regional office of the VA receives a form known as "VA Form 9, Appeal to Board of Veterans' Appeals," or any successor form, submitted by a veteran to appeal a decision relating to a claim, the regional office would certify such form by not later than one year after the date of its receipt. This bill seeks to reduce the amount of time an appellant must wait for VBA to certify an appeal to the Board of Veterans' Appeals (Board), a period that currently can be up to two years.

The appeals process is a complicated multi-step and multi-path process that begins at the moment a claimant determines they are not satisfied with their rating decision and want to file an appeal. DAV takes this opportunity to describe in detail a typical appellate process, as follows—

Overview of the appeals process that begins at the VA regional office (RO):

- In order to initiate an appeal of a VBA decision, a claimant must file a Notice of Disagreement (NOD) within one year of receiving notice of their determination.
- Once a NOD is filed, an appellant will be issued an Appeals Election Letter, which confirms the Veterans Benefits Administration's (VBA) receipt of the appeal, solicits information regarding the availability of additional evidence and offers the appellant two options relative to the processing of their appeal. The veteran may opt to have their appeal reviewed under the Traditional Appeals Process or reviewed under the Decision Review Officer (DRO) Post Determination Review Process. An appellant must make an appeals processing election within 60 days of receiving the Appeals Election Letter or it will default to the Traditional Process.
- In most situations, based on our experience and judgment, but depending on the particulars of the appeal, DAV's NSOs will recommend their clients elect the local DRO review process. The DRO is a senior RO employee with the authority to reverse initial rating decisions, completely or in part, without any new or additional evidence. The DRO process is a *de novo* process, meaning they undertake an independent review of the claim being appealed, with no deference given to the rating board decision being challenged. A DRO has the authority to request medical exams or facilitate hearings to gather additional information from the appellant.
- After a DRO performs their *de novo* review they may issue a new rating decision favorable to the veteran. However, if the DRO does not grant the benefits sought, or if the maximum evaluation is not authorized, an appellant will be issued a Statement of the Case (SOC).

- For those who do not elect the DRO process, they will move directly to the SOC stage. On average, it can take up to two years from the time a NOD is received by VBA before an appellant receives a SOC, primarily due to a lack of adequate appellate personnel and the aforementioned practice of shifting existing DROs to rating-related activities.
- Upon receiving a SOC, an appellant then has 60 days to file a VA Form 9 with the VBA if they want to pursue review by the BVA. Within the Form 9, an appellant can elect a hearing before the BVA at its headquarters in Washington, D.C.; a hearing at the nearest VARO before a traveling member of the Board; a hearing at the nearest RO via satellite teleconference; or the option for no hearing. A hearing election can add as much as two years to an appeal process.
- Once the Form 9 is received by VBA, the appeal is considered formally filed to BVA and its receipt preserves a docket date for processing by the BVA. It then awaits review and certification by RO personnel (Form 8) before the case can be transferred to the BVA, which can take up to two years.
- Once the appeal is transferred to the jurisdiction of BVA, it is issued a docket number using the Form 9 filing date to determine its place in line, at which point it has traditionally awaited physical transfer to the Board.
- Once the appeal is physically received at the Board, it can take up to a year to issue a decision. If benefits are granted or previous VBA determinations upheld, the appeal is over, at least in terms of VBA's appeals process.
- If issues are remanded, meaning that additional development must be undertaken by VBA before the Board can issue their final ruling, the appeal continues. The remand process can add years more to the total timeline of the appeal if benefits remain denied at the RO level and the appeal is then rerouted to the BVA for a second review and disposition. This remand process can be repeated multiple times, leaving some veterans' appeals churning for years.

While we understand that the sponsor is seeking to provide relief for those appellants languishing within the appeals process, this bill may create unintended adverse consequences for appellants. Therefore, DAV must oppose this bill in its current form. Enforcing a hardened time limit for VBA to certify appeals to the Board raises several concerns that we urge the Subcommittee to take into consideration as it evaluates the merits of this bill.

First, the purpose of VBA's certification process is to ensure that all administrative and adjudicative procedures have been completed locally before an appeal is forwarded to the Board. VBA performs this "record review" to ensure that all issues have been properly addressed and that outstanding appeals or interrelated issues have not been overlooked. The purpose is to avoid unnecessary Board remands. If VBA is forced to meet a certain time constraint, more remands could be ordered by the Board for issues that otherwise could otherwise be resolved locally.

If VBA were forced to meet a one-year, arbitrary certification deadline, errors and oversights would likely occur even more frequently and ultimately bring harm to appellants. The incentive for VBA staff could be to simply certify these appeals without performing a thorough record review and fail to address matters locally, resulting in increased Board remand rates and further delaying the appeals process.

Second, if an appellant requested a hearing before the Board in conjunction with an appeal, and made that selection on the VA Form 9, the bill as written might suggest that VBA must certify the appeal to the Board with or without conducting the hearing. As is stands today, an appeal cannot be certified if it carries an outstanding hearing request.

On January 22, 2015, DAV testified before this Subcommittee regarding the dysfunction within the appeals process and provided Congress with several recommendations to improve this process, as follows—

Strengthen the DRO Program. DAV maintains that the DRO program is one of the most important elements of the appeals process, often providing positive outcomes for veterans more quickly and with less burden on VBA. The ability to have local review also allows our NSOs to support the work of the DROs in sorting through the issues involved in the appeal, similar to the way our NSOs help reduce the claims workload on ROs by ensuring more complete and accurate claims are filed by the veterans we represent.

Unfortunately, part of VBA's intense efforts to reduce the claims backlog over the past several years, and even before that, resulted in many ROs diverting DROs from processing appeals to performing direct claims related work. In fact, there have even been some discussions inside VBA about eliminating the DRO program altogether.

Last year, DAV undertook an informal survey of a number of our NSO Supervisors to gather their observations of how often DROs were performing direct claims processing work. We found that in most ROs surveyed, a majority of DROs were working at least part of their time on claims work during their standard 8-hour work day, and that a majority were working a significant part of their time on claims during overtime, including mandatory overtime. We shared these findings with VBA leadership who had already begun and have continued to make efforts to ensure that DROs focus on appeals work. Over the past year, we have observed a marked decrease of DROs performing claims work during normal working hours, though there is still significant claims work being performed during overtime hours. In addition to the problem of having appeals work pile up at ROs, having DROs perform claims work, particularly ratings, has secondary negative effects. First, it limits the number of DROs who can review appeals since they cannot review *de novo* an appeal that they helped to rate. Second, the fact that the original rating was adjudicated by a senior DRO may result in a higher standard being applied by a fellow DRO to overturn their colleague's decision.

For these reasons, it is imperative that VA and Congress look for reasonable proposals and measures, such as strict reporting requirements, to ensure that DROs perform only appeals-related work.

Create a new Fully Developed Appeals (FDA) Process. We are pleased to report that subsequent to the hearing on January 22, 2015, Chairman Miller and Representative O'Rourke introduced H.R. 800, the Express Appeals Act. This proposal continues to gain widespread support from Congress and other stakeholders.

Congress recognized that collaboration and innovation would be necessary to make measurable and sustainable headway towards true VA appeal reform. The FDA takes us one step closer to solving the challenges associated with appeal processing, while giving veterans different options in terms of how they choose to have their appeals processed.

The concepts contained within H.R. 800 are a great start. The bill still requires some modifications, but parties on both sides of the aisle are open to accepting feedback to see a FDA option become a reality for wounded, injured and ill veterans, their dependents and survivors.

Improve the rating board decision notification. Rating Board Decision (RBD) notification letters are meant to advise claimants of VA's decision on the issues; whether benefits have been awarded, whether prior ratings have been increased or sustained, the evidence used in reaching the decision, and most critical of all, an explanation to the claimant as to how VBA arrived at its decision. It is the final element of the notification process that requires ongoing improvement.

Well formulated RBD notices should be composed to make it easy for average, non-legal experts to understand. Well written decisions can help to prevent unnecessary appeal filings if they fully explain the rationale for VBA's conclusions. When a veteran understands the legal basis for why the benefits they sought were not awarded and what would be required to obtain them, it allows them to make better decisions about which appeals option, if any, to pursue. More complete and clear decision letters provide veterans and their representatives a better understanding of what is needed to prevail in their appeal, regardless of which option they choose.

We are pleased that subsequent to the January 22, 2015 hearing, VBA created a working group to address issues identified with their Automated Decision Letters (ADLs). The working group, which consisted of VSOs and representatives from the VBA, first met on April 29, 2015. Several ideas and recommendations were put forth during the meeting. Our collective suggestions to improve quality and readability were duly recognized and some are slated to be incorporated within future ADLs.

Although we appreciate the sponsor's intentions to shorten the appellate process, for the reasons outlined above, DAV must oppose this bill in its current form. We look forward to working with the Subcommittee to identify practical solutions to challenges in the VBA appeals process.

H.R. 1338, the Dignified Interment of Our Veterans Act of 2015

This bill would require the VA Secretary to study and report to Congress on matters relating to the interment of veterans' unclaimed remains in national cemeteries under the control of the National Cemetery Administration.

The study would assess the scope of the issues relating to veterans' unclaimed remains, including the estimated number of such remains; the effectiveness of VA procedures for working

with persons or entities having custody of unclaimed remains to facilitate the interment of such remains in national cemeteries; and the state and local laws that affect the Secretary's ability to inter unclaimed remains in such cemeteries.

The report would provide recommendations for appropriate legislative or administrative action to improve areas where deficiencies are identified.

DAV has no resolution pertaining to this recommendation, but would not oppose passage of this bill.

H.R. 1380, a bill to amend title 38, United States Code, to expand the eligibility for a medallion furnished by the Secretary of Veterans Affairs to signify the veteran status of a deceased individual

This bill would authorize the Secretary of Veterans Affairs to furnish a medallion or other device to signify the veteran status of a deceased individual, to be attached to a headstone or marker furnished at private expense, regardless of the date of death of such individual.

DAV has no resolution from our membership on this issue, but would not oppose passage of this legislation.

H.R. 1384, the Honor America's Guard-Reserve Retirees Act of 2015

This bill would bestow the designation of “veteran” to any person who is entitled to military retired pay for non-regular (reserve) service, or who would be so entitled but for age.

The bill stipulates that such person would not be entitled to any benefit authorized in title 38, United States Code, by reason of such designation.

DAV has no resolution pertaining to this matter and takes no position.

H.R. 2001 the Veterans 2nd Amendment Protection Act

This bill would prohibit, in any case arising out of the administration of laws and benefits by the VA, any person who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness from being considered adjudicated as a mental defective for purposes of the right to receive or transport firearms without the order or finding of a judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.

DAV has no resolution on this matter and takes no position.

H.R. 2214

H.R. 2214, the Disabled Veterans' Access to Medical Exams Improvement Act, would extend and expand VA's authority to enter into contracts with private physicians to conduct

medical disability examinations as a tool in processing the volume of pending and future claims for disability compensation.

Under this legislation, VA's authority to contract for disability examinations as a pilot program would be extended until December 31, 2017; the authority is currently set to expire at the end of this year. The bill would also expand from 12 to 15 the number of VA Regional Offices (VARO) participating in this pilot program. Finally, the legislation would allow physicians licensed in a state, under a VA contract, to perform disability examinations and conduct such examinations in any state.

Over the past decade, DAV National Service Officers (NSO) have found that the quality and timeliness of compensation examinations conducted by contractors was generally as good, and sometimes better, than disability examinations conducted by VA physicians. Moreover, with demand for VA medical care rising, it is important that VA's treating physicians, especially specialists, remain focused on providing high quality care to their patients.

In addition, the more technologically advanced and user-friendly scheduling and IT systems used by some contractors has also contributed to higher customer satisfaction scores from veterans receiving contract examinations. For these reasons, we recommend the Subcommittee consider extending the authorization for three or more years to ensure that VBA continues to possess this tool to help reach timely claims decisions. We would even recommend that Congress consider whether it might be more cost efficient to extend the authorization even further to help reduce the average annual cost and conserve budgetary resources.

For many of the same reasons stated, we also support expanding the pilot program to more than 12 VAROs; in fact, we do not believe it to be necessary to place an arbitrary cap on the number of VAROs allowed to use contract examinations. The decision to use contract examinations should be determined solely by VAROs based on workloads, local capacity and available resources. If contract disability compensation examinations provide the same or better quality and timeliness, at the same or less cost per examination compared to the actual cost of using VA physicians, we find no compelling reason to limit their use to only 12 or even 15 VAROs. As such, we recommend that the Subcommittee consider removing altogether the limitation on the number of participating VAROs, thereby allowing each individual VARO to determine whether to use contract examinations.

DAV supports expanding the program to additional VAROs and extending the length of the program beyond December 31, 2017. Regarding a licensed physician's ability to conduct medical disability examinations across state lines, we have no resolution from our members on this issue, but would not oppose this provision of the bill.

H.R. 2605, the Veterans Fiduciary Reform Act of 2015

This bill would provide that, when in the opinion of the VA a VA beneficiary requires protection of benefits while a determination of incompetency is being made or appealed, or when a fiduciary is appealing a determination of misuse of such benefits, the Secretary may appoint one or more temporary fiduciaries for up to 120 days.

Under this bill, VA would be required to provide a written statement to a beneficiary when VA determines mental incompetence justifies appointment of a fiduciary. It would require the written statement detail the reasons for reaching such a determination and afford the beneficiary with the opportunity to appeal.

The bill would allow a beneficiary for whom the Secretary appoints a fiduciary, at any time, to request in good faith that the Secretary remove such fiduciary and appoint a new one. Under the bill, removal of or appointment of a new fiduciary would not delay or interrupt the beneficiary's receipt of benefits.

Under this bill veterans would retain the ability to pre-designate a fiduciary. If a beneficiary did not designate a fiduciary, the Secretary would appoint, to the extent possible, a fiduciary who is a relative, a guardian, or authorized to act on behalf of the beneficiary under durable power of attorney. The bill would provide for fiduciary commissions when necessary, and would authorize the temporary payment of benefits to a person having custody and control of an incompetent or minor beneficiary, to be used solely for the benefit of the beneficiary.

The Secretary would be directed to maintain a list of state and local agencies and nonprofit social service agencies qualified to act as fiduciary. Any certification of a fiduciary would be made on the basis of an inquiry or investigation of his or her fitness and qualifications, including face-to-face interviews and a background check.

A person convicted of a federal or state offense could serve as a fiduciary only if the Secretary found such person to be appropriate under the circumstances. Each fiduciary would be required to disclose the number of beneficiaries that the fiduciary represents. The Secretary would be required to maintain records of any person who has previously served as a fiduciary and had this status revoked, and notify the beneficiary within 14 days after learning that the fiduciary was convicted of a crime.

If there were a reason to believe that a fiduciary may be misusing all or part of a beneficiary benefit, the Secretary would be required under this bill to conduct a thorough investigation, and report the findings to the Attorney General and the head of each federal department or agency that pays a beneficiary benefit to any such fiduciary.

The bill also would require that each Veterans Benefits Administration regional office maintain specified fiduciary information. A fiduciary would be required to file an annual accounting of the administration of beneficiary benefits. The Secretary would be required to conduct annual random audits of fiduciaries who receive commissions for such service, and would require fiduciaries to repay any misused benefits.

The Secretary would be required to complete a report to the Congressional veterans committees on the implementation of this section.

DAV does not have a resolution from its members pertaining to this issue and takes no position on this bill.

H.R. 2691, the Veterans' Survivors Claims Processing Automation Act of 2015

This bill would authorize the Secretary of Veterans Affairs to pay benefits to a qualified survivor of a veteran who did not file a formal claim, provided the veteran's records contained sufficient evidence to establish entitlement to survivor benefits to a qualified survivor. Additionally, the bill would require VA to associate the date of the receipt of a claim under this authority as the date of the survivor's notification to VA of the death of the veteran.

Providing a reasonable exemption from standard form filing requirements is one way to streamline the claims process, as well as ease some of the processing burdens a survivor would otherwise experience. DAV supports this bill in accordance with Resolution No. 192, adopted at our most recent National Convention. Resolution No. 192 calls on Congress to support meaningful reforms in the Veterans Benefits Administration's disability claims process, and the draft bill is consistent with that goal.

H.R. 2706, the Veterans National Remembrance Act

This bill would amend title 38, United States Code, section 2404, to establish requirements for the Secretary when selecting sites for new national cemeteries.

This bill would direct the Secretary to evaluate such factors as veteran population and the preexistence of national cemeteries within a particular state when considering the establishment of a new national cemetery in the same state.

The bill would provide that if after two cemeteries are established in any one state the Secretary could waive the priority provisions for placing a cemetery in a state without a cemetery, if establishing a third cemetery within a particular state would serve a larger veteran population.

Although we do not have a resolution on this issue, DAV would not oppose passage of this legislation.

Mr. Chairman, this concludes my testimony. DAV appreciates your request for this statement. I would be pleased to answer any questions from you or members of the Subcommittee dealing with this testimony.