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**STATEMENT OF
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COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
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Mr. Chairman and Members of the Committee:

Thank you for inviting DAV (Disabled American Veterans) to testify at this oversight hearing. 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.

The Committee's invitation request that DAV present our views on the standards the Department of Veterans Affairs (VA) uses to determine unemployability; VA's quality assurance approach to ensure decisions are complete, accurate, and consistent; and, VA's process to verify self-reported earnings information provided by veteran applicants and beneficiaries.

For veterans who are unable to work because of service-connected disabilities but whose disabilities do not meet the established threshold for total and permanent 100 percent disability rating under VA's regular rating schedule criteria, VA has established special provisions for awarding total disability ratings.

Congress delegated to the Secretary of Veterans Affairs authority to adopt and apply a schedule for rating veterans' disabilities. For purposes of disability compensation payments, the schedule provides for gradation of disability in increments of 10 percent, ranging from 10 percent to 90 percent for partial disability, and 100 percent for total disability. The ratings are to be based, "as far as practicable, upon the average impairments of earning capacity" from disability in civil occupations..

Title 38, Code of Federal Regulations (C.F.R.), section 4.16, states, "It is the established policy of [VA] that *all* veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled." Therefore, "[t]otal disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities."

The main question at issue for VA in individual unemployability (IU) claims is the inability of a veteran claimant to engage in "substantially gainful employment" because of his or her service-connected conditions. Substantially gainful employment means holding a job that

pays at least an amount equal to the annual poverty level set by the federal government, which currently stands at roughly \$12,000 for an individual without dependents.

In order to qualify for the IU benefit, veterans with service-connected disabilities must meet these minimum rating thresholds:

- If the veteran has only one service-connected disability, it must be rated at least 60 percent disabling or higher;
- If the veteran has two or more service-connected disabilities, at least one of those disabilities must be rated at 40 percent or higher, and, after factoring in the ratings for the other disabilities, the veteran's combined disability rating must be 70 percent or higher;
- Finally, the veteran must be determined unemployable on the basis of one or more of his or her service-connected disabilities.

The distinction between total disability on a schedular basis, i.e., a 100 percent rating, and total disability based on IU is that total disability on a schedular basis is founded on an "average person" standard, as are all regular schedular ratings, while unemployability ratings are based on the impact of the disability in the individual's own circumstances.

Consequently, while the concept of average impairment in earnings capacity is the basis underlying the various percentage evaluations provided for given levels of disability in the rating schedule, IU determinations are not based on average impairment and must, therefore, take into account the disability as it affects the individual's ability to follow a substantially gainful occupation in light of his or her attained work skills and educational background. IU ratings recognize that individuals may be totally disabled for work with less disability than that which would be necessary to totally disable the average person. Sometimes, the extent of disability depends more upon the affected individual than upon the character of the disability. For example, the loss of both legs might totally disable a common laborer with little education, but this loss might have a smaller impact upon the earnings capacity of an accountant.

The Congressional Budget Office (CBO) reported in August 2014, the number of veterans rated totally disabled for IU in 2013 was 310,000, or 9 percent of those in receipt of disability compensation benefits, compared against 112,000 veterans in receipt of IU in 2000, or 5 percent of those in receipt of disability compensation benefits. DAV believes this growth is consistent with a pattern of higher numbers of more seriously disabled veterans from the wars in Iraq and Afghanistan,, increases in claims processing, VA's intense outreach efforts, and expansion of presumptive disabilities and new rules governing claims for PTSD.

An increasing prevalence of service-connected posttraumatic stress disorder (PTSD) and other mental disorders among veterans may also account for the increase in IU ratings. Under its "General Rating Formula for Mental Disorders," the VA rating schedule provides for six different levels of disability assessment: 0 percent, 10 percent, 30 percent, 50 percent, 70 percent, and 100 percent. To be rated 100 percent on a schedular basis under this formula, a veteran must meet the pertinent criteria from among the following:

Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

A person who has a mental condition meeting these criteria would have impairment well beyond a level that would remove any possibility gainful employment. Such a person would be profoundly disabled and nearly helpless or helpless in fact. Few veterans would meet these criteria.

Now consider the criteria a veteran must meet to be rated 70 percent disabled, the only rating that meets the schedular prerequisite for IU.

Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work like setting); inability to establish and maintain effective relationships.

Few veterans would be able to work with such marked symptoms. If they are to be adequately compensated, a claim for IU is their only resort. Under the general rating formula in effect prior to the total restructuring in 1996, any veteran unable to work because of a service-connected mental disorder was deemed totally disabled under the schedular criteria. Section 4.16(c) of title 38, C.F.R. provided that the IU provisions of section 4.16(a) did not apply to mental disorders:

“The provisions of paragraph (a) of this section are not for application in cases in which the only compensable service-connected disability is a mental disorder assigned a 70 percent evaluation, and such mental disorder precludes a veteran from securing or following a substantially gainful occupation. In such cases, the mental disorder shall be assigned a 100 percent schedular evaluation under the appropriate diagnostic code.”

Paragraph (c) was removed with the promulgation of the new general rating formula for mental disorders. Because that rule no longer applies under the current rating formula, all ratings that would have been 100 percent on a schedular basis under this special rule now are made on the basis of IU, which caused an increase in the number of veterans rated IU. This effect is magnified by the increasing prevalence of claims for mental disorders by veterans. In FY 2013, 3.7 million veterans were in receipt of disability compensation benefits. During this time period, 648, 992 veterans were service-connected for PTSD, 130,155 for major depressive disorder, and 51,043 for generalized anxiety disorder.

Inherently, IU determinations must rely heavily on subjective data, particularly those involving mental disorders. However, that fact is unavoidable in the assessment of disability as it affects an individual because, as stated, the same medical condition affect different individuals quite differently, not only from the standpoint of physical or mental functioning, but also in light of innumerable variables relating to vocational and educational attainment.

A 60 percent or greater disability under the terms of the schedule necessarily means that, for veterans with more demanding occupations, the affected veteran is approaching that minimum level of efficiency or tolerance for the demands, stresses or strains of work which is acceptable to an employer who must confront the realities of a profit-driven, competitive economy. A veteran may struggle and be able to barely satisfy an employer's needs for years and then suddenly be unable to continue meeting those minimum requirements due to a gradual progression of his or her disability. A subtle change in the veteran's physical or mental capacity may reduce work attendance or performance to a level that is unacceptable to an employer. It is to be expected that many of these veterans will become unemployable as their disabilities worsen with age. Age however, is not a factor in the VA's IU determination.

Unlike VA pension benefits and Social Security disability insurance benefits where age is appropriately considered in determining entitlement, consideration of age as a factor of entitlement in a veteran's IU claims would be inappropriate. The purpose of veterans' pensions is "relieving distress from disability or destitution among the aging veteran population." Pension is by definition a benefit paid to a veteran "because of service, age, or non-service-connected disability."

Consistent with DAV Resolution No. 012, adopted at our most recent national convention, DAV would strongly oppose any measure that proposes to tax, reduce, or eliminate benefits. Therefore, DAV would strongly oppose any legislation or recommendation that would restrict entitlement to IU on the basis of age. While compensation is an age-neutral benefit, common sense suggests that age should be a factor in determining whether vocational rehabilitation is feasible, for reason that the effects of age diminish human faculties.

Consistent with DAV Resolution No. 066, DAV would strongly oppose any measure that proposes to offset the payment of any other Federal benefit, or earned benefit entitlement by VA compensation payments made to service-connected disabled veterans. Benefits received from the Department of Veterans Affairs (VA), or under military retirement pay and other Federal programs have differing eligibility criteria as compared with the earned payments of Social Security. Reducing a benefit provided to a disabled veteran in receipt of IU due to receipt of a different benefit offered through separate federal benefit program is an unjust penalty.

Insurance against disability from any cause is to be distinguished from compensation for disability from military service. Age is a factor in determining entitlement to disability insurance benefits under Social Security laws on the principle that, where a person is unable to perform his or her customary work, the effects of advancing age reduce a person's ability to adjust to other work for which the person has the necessary skills, education, and physical or mental abilities.

Title 20, C.F.R. section 404.1563, states the Social Security Administration

...will consider your chronological age in combination with your residual functional capacity, education, and work experience. We will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment.

Because the purpose of VA compensation is to make up for the effects of service-connected disability, it should not be tied to factors extraneous to the character of the disability. It would be inappropriate to pay different levels of compensation based on age. It would be inappropriate to deny IU to a younger veteran on the basis of age and award it to an older veteran with the same level of disability, or vice versa.

Total compensation for IU is not a retirement benefit. Just as it should not be denied because of age, it should not be awarded because of age. Properly applied, the rules require a factual showing that the disability is incompatible with a veteran gaining substantial gainful employment, irrespective of age. Today, many people work well beyond what was once considered normal retirement age. Typically, VA awards the benefit when disability forces the veteran to terminate employment. To award IU to a veteran aged 64 and deny it to a veteran aged 66, for example, would be unfair discrimination, disparate treatment of veterans similarly situated, and wholly unjustified from an equitable standpoint. Nonetheless, if Congress or VA chose to make a fundamental change in this compensation principle to allow for the consideration of age in IU claims, as with Social Security disability benefits, such change should make it easier for most veterans to qualify for IU because veterans of service in Vietnam and all earlier periods would be of advanced age.

Under current rules, which do not complicate the decision by applying different rules to different age groups, if a veteran's functional limitations become such that they are incompatible with continuing performance of the veteran's job activities, a factual finding to that effect can be made with an adequately developed record. For decisions on IU, VA should look at the medical evidence, employment evidence, and any available relevant records from the Social Security Administration and VA's Vocational Rehabilitation and Employment Service. Experience has shown that, in many instances, there can be a valid purely medical conclusion that a veteran's disabilities are so severe in their effect upon "ordinary activity" as to obviously be incompatible with all work activities as generally understood and within common knowledge.

Although VA's IU regulations and policies are imperfect we believe the current rules, for the most part, prescribe consideration of the appropriate factors. These decisions do require careful examination of the facts and the exercise of well-informed and well-reasoned judgments. We believe most veterans would prefer to work if they are able, and experience has shown that VA adjudicators are not particularly liberal in awarding total ratings on the basis of IU. This is reflected in the many discussions of arbitrary VA denials by the court.

For these reasons, the increase in numbers of veterans receiving IU benefits as reported by CBO in August 2014 and in the Government Accountability Office's IU Report released July 2015 does not, in the view of DAV, signal a failure or fault in the administration of this benefit program.

The August 2014 CBO report states, "VA reviews the employment history of IU applicants but does not require those veterans to have their employability assessed by the department's vocational rehabilitation program." This suggests that a determination of IU could be made contingent upon a vocational rehabilitation evaluation and determination. Consider that in the cases where a veteran meets the schedular disability requirements as illustrated above for IU and is unemployed, this suggestion would add an additional claims processing component before VA could render a decision in a claim for IU. This additional step would add unnecessary delay and would undoubtedly place a greater burden upon veterans seeking a timely decision for adequate compensation to maintain a basic standard of living.

In the June 2015 GAO IU Report, several options were identified to revise IU eligibility requirements and the structure of the administration of this benefit. These options consisted of discontinuing IU beyond retirement age, consideration of vocational assessments before awarding IU benefits, gradually reducing IU payments, increasing earnings limits, lowering disability rating criteria, adding new IU criteria and the use of a patient-centered work disability measure.

Pertaining to the suggestion of discontinuing IU beyond the current retirement age, as mentioned earlier in our testimony, DAV is strongly opposed to the notion of limiting a compensation benefit due a veteran's age. We highlight two serious concerns identified by GAO associated with making such a change to administration of this benefit:

1. Some veterans might not have income replacement available—especially those who had been on IU in advance of reaching retirement age;
2. Could be unfair to veterans—older individuals might have the option of working past the retirement age, but older veterans whose service-connected disabilities stop them from working cannot.

Pertaining to the suggestion of lowering the disability rating criteria for IU for veterans with multiple disabilities to a combined disability rating of 60 percent, rather than 70 percent and eliminating the requirement that one of the disabilities have a minimum rating of 40 percent; DAV would be supportive of such a change. We highlight two benefits identified by GAO associated with making such a change to administration of this benefit:

1. Lowering the criteria could make it easier for veterans to qualify for TDIU if they did not have any disabilities above 40 percent, but were still considered unemployable;
2. Could provide consistency in the eligibility criteria since, instead of requiring a 70 percent rating for veterans with multiple disabilities and a 60 percent rating for veterans with a single disability in order for the veteran to be eligible for TDIU, the minimum required rating of a 60 percent disability would be the same for veterans regardless if they had a single or multiple disabilities

Pertaining to the suggestion of adding new IU criteria that would assess “unemployability” to include the veteran’s education, work history, and the medical effects of an individual’s “age” on his or her potential employability; DAV is strongly opposed to the notation of limiting a compensation benefit due a veteran’s age. We highlight two serious concerns identified by GAO associated with making such a change to administration of this benefit:

1. Could be unfair to veterans—veterans who are otherwise similar might not be treated equally when deciding eligibility.
2. By adding multiple new factors to consider, could possibly increase the subjectivity of claim decision-making, thereby possibly creating more variation in decisions.

Pertaining to the suggestion of using patient-centered work disability measures to evaluate IU eligibility that would assess a veteran’s work history, as currently performed, VA would also consider other factors, including a veteran’s motivations and interests when considering entitlement to this benefit. DAV is strongly opposed to the creation new administrative procedures that would delay the delivery of benefits for veterans applying for IU benefits. We highlight two serious concerns identified by GAO associated with making such a change to administration of this benefit:

1. Could delay the benefit decisions while rating specialists collect the additional information required for the measure;
2. Could require VA to make changes to how the agency measures disability, such as through the inclusion of their motivations and interests.

DAV opposes the suggestion that disability compensation should be reduced through gradual elimination of IU payments based on rising income; however, we are in the process of further exploring the impact these changes would have to current and future beneficiaries.

Pertaining to the suggestion of requiring a vocational assessment before awarding IU benefits, DAV is strongly opposed to the creation of a new administrative procedure that would delay the delivery of benefits for veterans applying for IU benefits. We highlight five serious concerns identified by GAO associated with making such a change to administration of this benefit:

1. Could cause delays in benefit decisions;
2. Could require VA to expand its vocational rehabilitation program to address the increase in required assessments;
3. Rating specialists and vocational rehabilitation counselors might need to receive additional training on how to assess the vocational rehabilitation findings;
4. Could increase the burden on veterans as they would likely need to submit to an additional assessment;
5. By adding a new factor to consider, could possibly increase the subjectivity of claim decision-making, thereby possibly creating more variation in decisions;

To expect an elderly disabled veteran to embark upon a new career in his or her final years of life is unrealistic. The demands of training may only make the disability worse. To refuse IU to a veteran who uses good judgment not to undertake such an unwise course would contradict the purpose of veterans' benefits. We therefore believe that mandating or pressuring veterans of advanced age to attempt vocational rehabilitation would be ill-advised and would result in a waste of resources. The option should be left open, to a reasonable age, for those whose individual circumstances make vocational training and regained employability feasible.

In addition to making successful rehabilitation for a new vocation more improbable for elderly veterans, the infirmities of age, along with the effects of disabilities rated 60 percent or greater may very well cause the veteran to be a hazard to himself or herself and others in some training and work environments. In addition, unlike the evaluation of disability for compensation purposes where the effects of nonservice-connected disabilities must be disregarded, assessment of a veteran's potential for rehabilitation must take into account the effects of all impairments.

Rehabilitation potential for younger veterans is a different matter. We suspect most younger veterans resent the loss of independence and having been forced into the limitations of disability. Title 38 United States Code, section 1163 (c)1, requires the Secretary to notify a veteran awarded total disability for IU of the availability of vocational rehabilitation services and benefits; the law requires VA to offer the veteran counseling services and the opportunity for evaluation as to whether the achievement of a vocational goal is feasible.

Although a veteran might have the potential to perform substantially gainful employment in the future upon successful completion of vocational rehabilitation training, current law recognizes that the veteran and his or her family cannot survive on the level of compensation paid for the existing percentage rating assigned for partial disability while the veteran is training to become employable. Therefore, entry into a program of vocational rehabilitation, by itself, does not cause a termination of IU benefits. A veteran who undertakes a program of vocational rehabilitation is not considered "rehabilitated to the point of employability" unless he or she has been "rendered employable in an occupation for which a vocational rehabilitation program has been provided under [chapter 31, of title 38, United States Code]."

In conjunction with the enactment of provisions requiring VA to notify an IU veteran of the availability of vocational rehabilitation and employment services, Congress included provisions pertaining to periods of "trial work," codified at 38 United States Code, § 1163. Understanding that some IU recipients would seek to return to the workforce, simply returning to work would not constitute renewed employability. Therefore, Congress stipulated that an IU veteran must maintain employment in a substantially gainful occupation for 12 consecutive months before IU could be reduced.

IU is not necessarily a permanent benefit as illustrated in the June 2015 GAO IU Report. VA may periodically require a veteran to undergo medical examinations to verify whether he or she is still unable to work due to a service-connected disability. In instances when a veteran fails to report for such an examination, IU benefits could be terminated and the veteran's disability rating is reduced. Additionally, VA normally sends an employment questionnaire (VAF 21-

4140) annually to veterans in receipt of IU benefits inquiring about their income and employment. To continue receiving benefits, they must certify that they are not earning income over and above the federal poverty threshold. Failure to return this questionnaire could also result in revocation of the IU benefit.

It's important to note that some forms of employment, while a veteran is in receipt of the IU benefit, are not automatically disqualifying. In instances when a veteran's salary is substantially less than the prevailing poverty level, or is employment in a sheltered, or protected work environment, VA may not consider that income to be gainful employment.

Employment where salaries are below the poverty level is called "marginal" employment. Employment exempting veterans from normal work requirements is called a "sheltered" work environment. Both marginal and sheltered employments are exceptions to the unemployment requirement for IU benefits.

The VA defines substantial gainful employment as "that which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides." Marginal employment, such as odd jobs in which the veteran with no dependents earns less than roughly \$12,000 per year, is not considered substantial gainful employment and would therefore not preclude a veteran from receiving IU. Veterans with no dependents who make over \$12,000 per year would generally be deemed to be "engaged in substantial gainful employment," which would likely disqualify them from receiving IU.

In closing, DAV appreciates the opportunity to discuss the merits and our concerns regarding administration of VA's IU benefit. As illustrated within my testimony, more seriously disabled veterans meeting specific numerical rating criteria for service-connected disabilities, who are also unemployed due to these service-connected disabilities, may be offered significant relief through the IU benefit. This benefit establishes payments at the 100 percent rate, providing considerable financial relief for veterans when employment opportunities diminish due to their wounds, injuries or illnesses sustained as a consequence of active military service.

This concludes my testimony Mr. Chairman; I am prepared to answer any questions from you or other members of the Committee.