



**STATEMENT OF**  
**DANIEL L. COOPER,**  
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**BEFORE THE**  
**SUBCOMMITTEE ON BENEFITS,**  
**HOUSE COMMITTEE ON VETERANS' AFFAIRS**  
**APRIL 10, 2003**

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on several bills of great interest to veterans.

**H.R. 241**

H.R. 241, the "Veterans Beneficiary Fairness Act of 2003," would eliminate a discrepancy regarding the limitation on the period for which retroactive benefits due and unpaid a claimant may be paid to others after the claimant's death. In the interest of fairness, we support enactment of this bill.

Under 38 U.S.C. § 5121, periodic monetary benefits to which an individual was entitled at death under existing ratings or decisions or based on evidence on file with the Department of Veterans Affairs (VA) at the time of death are paid upon the death of the individual to specified classes of survivors according to a

prescribed order of preference. Prior to a recent court decision, VA had construed section 5121 to limit the payment of any benefits under that section to the retroactive period specified in the statute, regardless of whether the payment was based on an existing rating or decision or on evidence on file at the date of death. The retroactive payment period, originally one year, was extended to two years by Public Law 104-275, the “Veterans’ Benefits Improvements Act of 1996.”

On December 10, 2002, the United States Court of Appeals for Veterans Claims (CAVC) issued its decision in *Bonny v. Principi*, 16 Vet. App. 504 (2002). In that decision, the court held that 38 U.S.C. § 5121(a) specifies two kinds of benefits: benefits that have been awarded to an individual in existing ratings or decisions but not paid prior to the individual’s death, and benefits that could be awarded based on evidence in the file at the time of death. The court held that, in the case of the first type of benefits, the statute requires that an eligible survivor is to receive the entire amount of the award; only the latter type of “accrued” benefits is subject to the two-year limitation in 38 U.S.C. § 5121(a). The court based its interpretation of the statute primarily on the punctuation of section 5121(a).

The CAVC’s *Bonny* decision has resulted in differing entitlements under section 5121 based on the status of the deceased’s claim at the time of his or her death. H.R. 241 would eliminate this distinction by amending section 5121 to eliminate the two-year limitation on payment of retroactive benefits for all classes of beneficiaries under that statute.

The distinction the *Bonny* decision draws between the two categories of claimants—those whose claims had been approved and those whose entitlement had yet to be recognized when they died—is really one without a difference. In either case, a claimant’s estate is deprived of the value of benefits for which he or she was, in life, eligible. H.R. 241 would remove this inequitable distinction, and we support its enactment.

We estimate the cost of complying with the *Bonny* decision for fiscal year (FY) 2004 to be \$1.7 million and \$18.2 million for the period FY 2004 through FY 2013. We estimate the incremental cost to implement H.R. 241, that is, the difference between the cost of complying with the court’s decision and the cost of enactment of H.R. 241, to be \$5.9 million for FY 2004 and \$65.8 million for the period FY 2004 through FY 2013.

In addition, we note one technical change needed in H.R. 241 should it be enacted. The comma in current section 5121(a) following “existing ratings or decisions” should be deleted to clarify, for purposes of 38 U.S.C. §§ 5121(b) and (c) and 5122, that the term “accrued benefits” includes both benefits that have been awarded to an individual in existing ratings or decisions but not paid prior to the individual’s death, as well as benefits that could be awarded based on evidence in the veteran’s file at the time of death.

### **H.R. 533**

H.R. 533, the “Agent Orange Veterans’ Disabled Children’s Benefits Act of 2003,” would amend chapter 18 of title 38, United States Code, to authorize VA to provide a monetary allowance and other benefits to a person suffering from

spina bifida who is natural child, regardless of age or marital status, of a parent who performed “qualifying herbicide-risk service,” if the person was conceived after such service. A parent would be considered to have performed “qualifying herbicide-risk service” if, while performing active military, naval, or air service, he or she “served in an area in which a Vietnam-era herbicide agent was used during a period during which such agent was used in that area; or . . . otherwise was exposed to a Vietnam-era herbicide agent.” The term “Vietnam-era herbicide agent” would be defined by reference to current 38 U.S.C. § 1116(a)(3). VA does not support this bill.

Congress has repeatedly acted since 1979 to ensure that the Federal Government investigates the health effects of exposure to herbicides containing dioxin and compensates veterans who served in the Republic of Vietnam during the Vietnam era and suffered disability as a result of that exposure. Because of the “concern and apprehension among veterans regarding the health effects of herbicides,” Congress mandated an epidemiologic study by VA of the effects of exposure to dioxin in the Veterans Health Programs Extension and Improvement Act of 1979. Congress also required VA to review and scientifically analyze literature relating to possible long-term health effects of human exposure to dioxin. In 1981, Congress authorized VA to provide hospital and nursing home care to certain veterans exposed during service to dioxin or ionizing radiation for conditions which, although not shown to have resulted from such exposure, are not found to have resulted from a cause other than such exposure. The Veterans’ Dioxin and Radiation Exposure Compensation Standards Act of 1984

directed VA to issue regulations to establish guidelines and, where appropriate, standards and criteria for the resolution of benefit claims based on exposure to herbicides containing dioxin in service in the Republic of Vietnam during the Vietnam era. The act also required VA to make specific findings, either positive or negative, regarding service connection as to three diseases, chloracne, porphyria cutanea tarda, and soft-tissue sarcoma.

In 1991, Congress added section 1116 (formerly section 316) to title 38, United States Code, establishing a presumption of service connection, applicable to veterans who served in the Republic of Vietnam during the Vietnam era, for three diseases. The act also called for VA to contract with the National Academy of Sciences to perform a review and evaluation of the scientific evidence regarding the association between disease and exposure to herbicides used in connection with the Vietnam War and each disease suspected of association with such exposure. Congress amended section 1116 in 1994 and 2001 by adding five conditions to the list of diseases presumed to be service connected in Vietnam veterans.

More recently, Congress has enacted legislation to provide a monetary allowance and other benefits to the children of Vietnam veterans who were born with spina bifida, as well as to children with certain other birth defects who are the natural children of women veterans who served in the Republic of Vietnam during the Vietnam era.

Congress' legislative enactments indicate its recognition of the unique circumstances of service in Vietnam—circumstances including the special

sacrifices made by veterans of that war, and the great uncertainties regarding exposures of individual veterans to aerially applied herbicides. H.R. 533 would extend benefits Congress bestowed upon the affected children of those veterans to children of veterans who did not serve under those circumstances. In addition, H.R. 533's language is so vague as to be almost impossible to administer.

Under that language, an individual would be considered to have performed "qualifying herbicide-risk service" if he or she, while performing active service, "served in an area in which a Vietnam-era herbicide agent was used during a period when such agent was used in that area." The vagueness of the terms "area," "was used," and "during a period when" is sure to generate substantial litigation over what Congress intended by this language.

VA estimates that enactment of H.R. 533 would result in direct costs of \$60.8 million in FY 2004 and \$760.7 million over the ten-year period FY 2004-2013. In addition, VA estimates administrative costs of \$357,000 for FY 2004 and \$ 1.73 million for the ten-year period FY 2004-2013.

### **H.R. 761**

Mr. Chairman, you also requested our comments on two proposals that would affect the Specially Adapted Housing program authorized by chapter 21 of title 38, United States Code. Under current law, veterans who are entitled to compensation for certain permanent and total service-connected disabilities described in section 2101 of title 38 are eligible for a grant to adapt their homes with features made necessary by the nature of their disabilities.

The first proposal, Mr. Chairman, is H.R. 761, the “Disabled Servicemembers Adapted Housing Assistance Act of 2003,” which would permit VA to provide Specially Adapted Housing assistance to disabled members of the Armed Forces who remain on active duty pending medical separation. VA favors enactment of H.R. 761.

This bill would permit members of the Armed Forces with the service-connected disabilities described in section 2101 to apply for Specially Adapted Housing benefits and permit VA to process their applications and award benefits without having to wait for the servicemembers to be released from active duty. H.R. 761 could provide some affected veterans the opportunity to move into an adapted home as soon as they are separated from active duty, or at least much sooner than is possible under current law. With this accelerated determination of eligibility and assistance, veterans could avoid continued institutional care, thus improving their quality of life and increasing their independence. This could also reduce the cost to VA of in-patient healthcare for some affected veterans.

Because Specially Adapted Housing grants are a one-time-only benefit, the enactment of this measure should not materially increase either the total number of grants provided under this program or the dollar amount of such grants. Rather, H.R. 761 would merely accelerate the payment of this benefit to certain individuals who, under current law, would become entitled to the same benefit upon their release from active duty. Accordingly, VA estimates that the enactment of H.R. 761 would produce insignificant costs or savings.

## **H.R. 1048**

### Specially Adapted Housing

The other Specially Adapted Housing proposal is contained in section 2 of H.R. 1048, the “Disabled Veterans Adaptive Benefits Improvement Act of 2003.” This section would increase the maximum Specially Adapted Housing grants. VA favors such increases, provided offsetting savings may be found.

Under H.R. 1048, the maximum Specially Adapted Housing grant authorized by section 2101(a) would be increased from \$48,000 to \$50,000. In addition, the maximum Special Housing Adaptations grant authorized by section 2101(b) would be increased from \$9,250 to \$10,000. These grants were last increased by Public Law 107-103, enacted December 27, 2001.

VA estimates that approximately 600 veterans per year will receive specially adapted housing assistance, of which about 92.5 percent will qualify for the grant authorized by section 2101(a). VA estimates the cost of enacting section 2 of H.R. 1048 would be \$1.14 million per year, with a total 10-year cost of \$11.4 million.

### Assistance for Automobile and Adaptive Equipment

Section 3 of H.R. 1048 would increase from \$9,000 to \$11,000 the maximum amount that VA may pay under 38 U.S.C. § 3902(a) to provide or assist in providing an automobile or other conveyance to eligible persons.

The maximum automobile allowance was also last increased to the current \$9,000 on December 27, 2001.

VA estimates the total benefits cost of both provisions of H.R. 1048 would be \$3.3 million for FY 2004 and \$33.3 million for the ten-year period FY 2004-2013. Because these benefits were last increased just 16 months ago, and these costs are not included in the President's budget request, we are unable to support enactment of H.R. 1048. However, we will remain vigilant and recommend increases if there is a significant erosion in the value of these benefits due to inflation.

### **H.R. 850**

#### Special Compensation for Former Prisoners of War

Section 2 of H.R. 850, the "Former Prisoners of War Compensation Act of 2003," would add a new subchapter at the end of chapter 11 of title 38, United States Code, to authorize special compensation for former prisoners of war (POWs). This special compensation would be separate from any service-connected disability compensation or pension to which a former POW may be entitled and is exempted from attachment, execution, or levy in the same manner as special pension paid to recipients of the Medal of Honor pursuant to 38 U.S.C. § 1562(c). The bill would authorize the Secretary of Veterans Affairs to pay monthly to each former POW, including active duty personnel, special compensation at a rate of payment determined by the cumulative length of confinement or internment as a POW. Thirty days would be the minimum period of confinement for which a former POW would be eligible to receive special compensation. The bill would establish three rates of special compensation

based on the length of the period of the former POW's detainment or interment, as follows:

<u>Length of Former POW's Detainment or Interment</u>	<u>Special Compensation Monthly Rate</u>
30-120 days	\$150
121-540 days	\$300
541 days or more	\$450

We estimate that benefit-costs for the POW portion of the bill would be \$134.4 million for FY 2004 and \$839.5 million for FY 2004 through FY 2013. We estimate administrative costs to be an additional one-time cost of \$632 thousand in the first year. These amounts are not included in the President's FY 2004 budget request, and the Department cannot support this provision's enactment. However, we are sensitive to the contributions and needs of former POWs and will consider additional benefits for them in formulating future budget requests.

#### Prohibition Against Compensation for Substance-Abuse Disabilities

Section 3(a) of H.R. 850 would amend 38 U.S.C. §§ 1110 and 1131 to clarify that the prohibition on payment of compensation for a disability that is a result of the veteran's own abuse of alcohol or drugs applies even if the abuse is secondary to a service-connected disability. Section 3(b) would make that amendment applicable to claims filed on or after the date of enactment and to claims filed prior to, but not finally decided as of that date. We strongly support this provision, which is also proposed in the President's budget.

Sections 1110 and 1131 of title 38, United States Code, authorize the payment of compensation for disability resulting from injury or disease incurred or

aggravated in line of duty in active service, during a period of war or during other than a period of war, respectively. Sections 1110 and 1131 also currently provide, “but no compensation shall be paid if the disability is a result of the veteran’s own willful misconduct or abuse of alcohol or drugs.” Before their amendment in 1990, the provisions currently codified in sections 1110 and 1131 prohibited compensation “if the disability is the result of the veteran’s own willful misconduct.” In 1990, they were amended to also prohibit compensation if the disability is a result of the veteran’s own alcohol or drug abuse.

VA had long interpreted those provisions to authorize compensation not only for disability immediately resulting from injury or disease incurred or aggravated in service, but also for disability more remotely resulting from such injury or disease. That interpretation is embodied in 38 C.F.R. § 3.310(a), which provides that, generally, disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. Thus, VA does pay, in specific cases, compensation for primary service-connected disability and for secondary service-connected disability. However, consistent with the plain meaning of sections 1110 and 1131, if a disability, whether primary or secondary, is a result of the veteran’s own alcohol or drug abuse, VA did not pay compensation.

This has changed. On February 2, 2001, a three-judge panel of the United States Court of Appeals for the Federal Circuit interpreted section 1110 as allowing compensation for an alcohol or drug-abuse-related disability arising secondarily from a service-connected disability. *Allen v. Principi*, 237 F.3d 1368,

1370 (Fed. Cir. 2001). More specifically, the panel held that section 1110 “does not preclude compensation for an alcohol or drug abuse disability secondary to a service-connected disability or use of an alcohol or drug abuse disability as evidence of the increased severity of a service-connected disability.” *Id.* at 1381. The Government filed a petition for rehearing and rehearing en banc, which the panel and full court denied on October 16, 2001. *Allen v. Principi*, 268 F.3d 1340, 1341 (Fed. Cir. 2001). However, five of the eleven judges who considered the petition for rehearing en banc dissented from the order denying rehearing, opining that the court’s interpretation is wrong. 268 F.3d at 1341-42.

We are concerned that payment of additional compensation based on the abuse of alcohol or drugs is contrary to congressional intent and is not in veterans’ best interests because it removes an incentive to refrain from debilitating and self-destructive behavior.

The Federal Circuit’s interpretation in *Allen* could also greatly increase the amount of compensation VA pays for service-connected disabilities. Under the court’s interpretation, any veteran with a service-connected disability who abuses alcohol or drugs is potentially eligible for an increased amount of compensation if he or she can offer evidence that the substance abuse is a result of a service-connected disability, *i.e.*, that the substance abuse is a way of coping with the pain or loss the disability causes. Under this interpretation, alcohol or drug abuse disabilities that are secondary to either physical or mental disorders are compensable.

The potential for increased costs is illustrated by mental disorders, which are frequently associated with alcohol and drug abuse. Almost 421,000 veterans are currently receiving compensation for a service-connected mental disability. About 324,000 of those disabilities are currently rated less than 100 percent and could potentially be rated totally disabling on the basis of secondary alcohol or drug abuse. Even if the service connection of disability from alcohol or drug abuse does not result in an increased schedular evaluation, temporary total evaluations could be assigned whenever a veteran is hospitalized for more than twenty-one days for treatment or observation related to the abuse. Even the 97,000 cases of a service-connected mental disability evaluated at 100 percent disabling have potential for increased compensation for secondary alcohol or drug abuse if the statutory criteria for special monthly compensation are met.

The potential increase in compensation does not end there. Under the Federal Circuit's interpretation, VA is required to pay compensation for the secondary effects of the abuse of alcohol or drugs. Once alcohol or drug abuse is service connected as being secondary to another service-connected disability, then service connection can be established for any disability that is a result of the service-connected abuse of alcohol or drugs. If alcohol or drug abuse results in a disease, such as cirrhosis of the liver, then that disease would also be service connected and provide a basis for compensation under the court's interpretation.

Of course, an increase in the amount of compensation VA pays for service-connected disabilities will increase the benefit cost of the compensation program. Section 3 of H.R. 850 would avoid those increased costs. Our

estimate of savings that would result from enactment of this provision is based on the payment of only basic compensation for alcohol or drug abuse disabilities secondary to service-connected disabilities. We estimate that this provision would result in benefit cost savings of \$127 million and administrative cost savings of \$44 million in FY 2004 and benefit cost savings of \$4.6 billion and administrative cost savings of \$97 million for the ten-year period FY 2004 through FY 2013. This amount does not include the savings that would be associated with payment of compensation for temporary total evaluations, special monthly compensation, or compensation for the secondary effects of alcohol or drug abuse.

#### Dental Care for Former Prisoners of War

Section 4 of H.R. 850 would require VA to provide outpatient dental services and treatment, and related dental appliances, for any non-service-connected dental condition or disability from which a veteran who is a former POW is suffering. Currently, a veteran who is a former POW may receive dental benefits for non-service-connected dental conditions or disabilities only if the veteran was incarcerated for 90 days or more. By eliminating the 90-day requirement, section 4 would authorize VA to treat all former POWs the same, regardless of their length of captivity, with respect to dental care for a non-service-connected condition or disability. It would also make the eligibility rules for dental benefits for former POWs the same as for other health-care services for former POWs.

VA has strongly supported similar provisions in the past, and we continue our strong support for this provision. We believe this amendment is needed to ensure that former POWs receive all needed care for conditions that may be attributable to the privations of their service.

Costs resulting from enactment of this provision would be insignificant.

### **H.R. 966**

Mr. Chairman, H.R. 966, the “Disabled Veterans’ Return-to-Work Act of 2003,” would amend provisions of 38 U.S.C. § 1524 to reinstate a program of vocational training for certain pension recipients that was in place between February 1, 1985, and December 31, 1995. That temporary program, established pursuant to the Veterans’ Benefits Improvement Act of 1984, Pub. L. No. 98-543, required the Secretary of Veterans Affairs to determine whether the achievement of a vocational goal was reasonably feasible in the case of certain veterans awarded pension during the program period. If the achievement of such a goal was found to be feasible, these veterans were offered the opportunity to pursue programs of vocational training consisting of vocationally oriented and other services and assistance of the same kind provided under the vocational rehabilitation program authorized under chapter 31 of title 38, United States Code. These services and assistance did not include subsistence allowances, loans, or automobile adaptive equipment. Once a program of training was completed, a veteran could also receive employment assistance. The law limited the number of evaluations to be performed to not more than

3,500 veterans during any 12-month period. The initial program period ran from February 1, 1985, to January 31, 1992.

Initially, the law required that a veteran under the age of 50 who was awarded pension during the program period be evaluated with respect to his or her potential for rehabilitation. It required that the evaluation include a personal interview by a VA employee trained in vocational counseling. If the veteran refused to participate in the evaluation, his or her pension was suspended until he or she participated in an evaluation. Subsequent participation in the vocational training itself was voluntary. For a veteran pension recipient 50 years of age or older, the program of vocational training was totally voluntary. If, upon application by such a veteran-pensioner, VA made a preliminary finding on the basis of information in the application that, with the assistance of a vocational training program, the veteran had good potential for achieving employment, VA was authorized, upon the veteran's request, to evaluate the veteran to further determine whether the achievement of a vocational goal was reasonably feasible.

In 1992, Public Law 102-562 eliminated the limitation on the number of program participants who may be evaluated annually and amended the program for veterans under age 45, rather than under age 50, who were awarded pension during the program period so as to (A) require the Secretary, based on information on file with VA, to make a preliminary finding whether the veteran, with the assistance of a VA vocational training program, had a good potential for achieving employment; (B) if that potential was found to exist, required the

Secretary to solicit from the veteran an application for VA vocational training; and (C) if the veteran applied for training, required the Secretary to provide an evaluation to determine whether the achievement of a vocational goal was reasonably feasible. In addition, the program was opened to veterans age 45 and older who had been awarded pension before the program period. That Public Law also extended the program ending date until December 31, 1995. No further action was taken by Congress, and by operation of law, the program ended on December 31, 1995.

During the period February 1, 1985, through January 31, 1989, VA evaluated approximately 9,468 veterans under the program. Of these, 2,838 were found to be feasible for training. Some 468 veterans participated in programs of vocational training. Sixty-five veterans completed that training. Fifty-eight obtained employment. Between fiscal year 1989 and fiscal year 1992, VA conducted 9,140 evaluations under the program, with 937 veterans participating in training.

H.R. 966 would reinstate the program and provide that a new program period would run for five years beginning on the date of enactment of the Act. In addition, it would require the Secretary to ensure that the availability of vocational training under section 1524 be made known through a variety of means, including the Internet and announcements in VA publications and other veterans' publications. Finally, the bill would require the Secretary, within two years after the date of enactment of the Act, to report to the Committees on Veterans' Affairs of the Senate and House on the operation of the program to include an

evaluation of the vocational training provided and an analysis of the cost-effectiveness of the training provided, as well as data on the entered-employment rate of veterans pursuing such training.

If H.R. 966 were to be enacted, we estimate that VA would conduct approximately 1,300 record reviews each year, based on new accessions to the pension rolls, to determine whether each veteran so evaluated has good potential for achieving employment. We estimate that the achievement of a vocational goal will be determined to be feasible in about 1/3 (433) of those cases. Of that number, it is estimated that approximately 1/3 of these, 144 veterans, will actually end up participating in the program. In addition, because the program is also available to veterans over age 45 on a voluntary basis, we estimate that an additional 25 participants may participate, for a total of 169 cases per year. Based on those numbers, VA estimates that the enactment of H.R. 966 would cost \$3 million for fiscal years 2004 through 2008 and an additional \$3.6 million for fiscal years 2009 through 2013, totaling \$6.6 million.

Mr. Chairman, given our experience in administering the temporary program during its ten-year duration, and the fact that only a small number of veterans benefited from the program, VA believes that the finite resources available to us for program administration would be best used to support our current program of vocational rehabilitation for service-disabled veterans, as authorized under chapter 31 of title 38, United States Code. Thus, the Department does not support the enactment of H.R. 966.

Mr. Chairman, this concludes my statement. I will be pleased to respond to any questions you or the members of the Subcommittee may have.