

STATEMENT OF RONALD B. ABRAMS
JOINT EXECUTIVE DIRECTOR
NATIONAL VETERANS LEGAL SERVICES PROGRAM
BEFORE THE
HOUSE SUBCOMMITTEE ON DISABILITY ASSISTANCE &
MEMORIAL AFFAIRS
APRIL 14, 2015
Legislative Hearing on: H.R. 675, H.R. 677, H.R. 732, H.R.800, H.R.
1067, H.R. 1331, H.R. 1379, H.R. 1414, H.R. 1569, and H.R. 1607

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to submit this testimony on behalf of the National Veterans Legal Services Program (NVLSP). NVLSP is a nonprofit veterans service organization founded in 1980 that has been assisting veterans and their advocates for thirty years. We publish numerous advocacy materials, recruit and train volunteer attorneys, train service officers from such veterans service organizations as The American Legion, the Military Order of the Purple Heart and the Military Officers Association of America in veterans benefits law, and conduct local outreach and quality reviews of the VA regional offices on behalf of The American Legion. NVLSP also represents veterans and their families on claims for veterans benefits before VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts. Since its founding, NVLSP has represented thousands of claimants before the Department of Veterans Affairs (VA) and the Court of Appeals for Veterans Claims (CAVC). NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

H.R. 800

NVLSP must oppose the passage of H.R. 800. As written, H.R. 800 would act as a trap for unwary veterans who are focused on seeking a prompt resolution of their appeals. First, the notice letters sent by the VA regional offices are often lacking in crucial detail. The VA, in its notice letters, does not always inform veterans and other claimants what element of the claim has been proven, what issues have not been decided and what element(s) of the claim have been disproved.

I have been involved with veterans law for over 40 years. On numerous occasions, (as a VA rater and as an advocate) I have encountered veterans who submit evidence that does no more than prove an element of the claim that has already been proven. For example, in cases where the VA denied claims based on Agent Orange exposure because the disease is not linked to Agent Orange, some veterans insist on submitting evidence that shows they were in Vietnam. The issue in these cases is not exposure (that has been conceded) but medical linkage. Yet, in some cases veterans are not told that the evidence they submit is not needed, they are told the evidence is not new and material.

The VA notice letter should tell the claimant the specific reason why the claim was denied and what evidence (if any) might support the claim. For example assume that the veteran is diagnosed with a current left knee arthritic condition and the evidence

shows that the veteran suffered knee trauma in service. Assume that the VA regional office denied the claim based on a VA examination that found it was not as likely as not that the current left knee condition was linked to service. This veteran should not waste time proving he hurt his knee in service or that he suffers from a current left knee disability. The veteran should be told about the negative VA examination and that he needs to obtain a positive medical linkage opinion to have a chance to obtain benefits.

We find there is a great deal of uncertainty among veterans and their survivors regarding their entitlement to VA benefits. Working with The American Legion we have interviewed hundreds of veterans of the last year and discovered that many of these veterans do not know why they are getting benefits or what claims have been denied. Therefore, because H.R. 800 invites veterans to give up important procedural protections without providing adequate information to make an intelligent decision, we cannot support this bill.

Another problem with H.R. 800 is that it invites but does not require involvement of the veteran's representative. No veteran should elect to file a Fully Developed Appeal until his or her representative has been consulted. The VA should send the appellant a form that requires the appellant to affirm that the appellant's representative was consulted before the appellant elected to join the Fully Developed Appeal process.

The section of H.R. 800 that requires the BVA not to remand these cases but to conduct appropriate development itself, is a good idea. We however, request that instead of providing the claimant just 45 days to respond to a possible negative VA examination that the time be extended to 90 days with an automatic 90 day extension. From personal experience, I can tell you that it is very difficult to obtain a medical opinion, especially a medical opinion that contradicts another medical opinion, within 45 days. Veterans who elect the Fully Developed Appeal process have given up important opportunities to submit evidence. The VA should treat them fairly when the BVA obtains negative evidence.

The VA has indicated that it is forming a committee that includes members of service organizations to consider revising and strengthening its notice letters. NVLSP is hopeful that the anticipated changes to the notice letters will permit us to support the Fully Developed Appeal process.

H.R. 1379

NVLSP supports this bill with the following qualifications.

Fifteen years ago, then Secretary of Veterans Affairs Anthony Principi designed an innovative way to diminish the hamster wheel phenomenon and streamline the VA appellate claims process. Then, as now, the Board of Veterans' Appeals determined in over 40% of the appeals it reviewed that the regional office had erred by not complying with the duty to assist the claimant in developing the evidence necessary to substantiate the claim or had erred in some other prejudicial way. As a result, the BVA had to remand

the appeal to the regional office to fix the error, which lengthened by years the time it would take for the VA to issue a final decision. Moreover, the regional office (RO) would often fail to substantially comply with the Board's remand instructions and when the case was returned to the Board, the Board would have to remand the case to the regional office for a second time.

Then Secretary Principi decided that a partial solution to the hamster wheel phenomenon was to amend VA regulations to allow the BVA to develop additional evidence itself, without remanding to the RO, in a case in which the Board determined that a final decision could not be issued because additional development was necessary. Forcing the BVA to remand to the Appeals Management Center (AMC) or the local ROs lengthens the adjudicatory process because the BVA does not have direct authority over the AMC and RO – meaning the BVA cannot control whether the AMC or RO provides expeditious treatment or properly complies with the remand instructions. Allowing BVA development without a remand to the AMC or RO further streamlines the appellate process by eliminating the need for the AMC or RO to review the record and prepare a written supplemental statement of the case (SSOC) before the case is returned to the BVA for another decision. The AMC and ROs currently prepare approximately 22,000 written SSOCs each year on cases remanded from the BVA – efforts that would not be necessary under the proposed legislation. Thus, the duties of the AMC and RO adjudicators who decide cases remanded by the BVA could be transferred to help the ROs decide other cases – thereby decreasing the backlog.

Unfortunately, Secretary Principi did not have the right to make this change without Congressional action. In *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit held in 2003 that it was beyond the VA Secretary's statutory authority to use the scheme the VA Secretary initiated to streamline the BVA decision-making process. But Congress can and should intervene now by amending the law to allow the BVA to develop evidence itself without remanding to the AMC or RO.

H.R. 1379 should prohibit the BVA, in from developing negative evidence against the claim unless the RO or BVA first explains in writing why the existing record is not sufficient to award benefits. One reason for the existence of the Hamster Wheel phenomenon is that in a case in which the veteran submits adequate positive medical evidence in support of the claim, the BVA sometimes does not simply award the benefits sought. Instead, the BVA extends the life of the claim by remanding the case to the RO to obtain yet another medical opinion from a VHA physician. Often the results of this type of remand is that a negative medical opinion is obtained, which then results in the agency denying a claim which should have been granted months or years earlier.

Veterans advocates call this longstanding VA practice “developing to deny”. In addition to fostering the Hamster Wheel phenomenon, this practice is inconsistent with the pro-claimant VA adjudicatory process and the statutory benefit of the doubt rule. Congress could and should take action to stop this unlawful practice by enacting legislation that would prohibit the BVA (and the ROs), in a case in which there is

positive evidence supporting the award of the benefits sought, from developing additional evidence unless the BVA or RO first explains in writing why the existing record is not sufficient to award the benefits sought.

H.R. 1414

NVLSP supports the passage of H.R. 1414. When claims for disability compensation for two or more disabilities are pending before the VA and the VA awards benefits for one of the disabilities before it adjudicates entitlement to benefits for the other disabilities, H.R. 1414 would require the VA to pay the awarded benefits immediately – without waiting until it adjudicates entitlement to benefits for the other disabilities. This requirement benefits veterans and makes common sense. The bill requires that the award must require the payment of monetary benefits to qualify for the immediate interim payment.

NVLSP suggests that H.R. 1414 be expanded in one respect. The VA Manual M21-1MR, Part III, Subsection iv, Ch. 6.a. currently states: “Make an intermediate rating decision if the record contains sufficient evidence to grant any claim at issue, including service connection at a noncompensable level.” Because some veterans might need to establish service connection for a disability, even if it is assigned a noncompensable rating, in order to obtain VA medical treatment, H.R. 1414 should be amended to require the VA to establish service connection even where the award of service connection does not result in a payment of monetary benefits. Obviously this is not an onerous burden to VA. Their Manual requires them to do this now. But because the VA often ignores the current M21-1MR directive. NVLSP suggests that Congress should codify this requirement.

We also believe that the definition of “a claim for disability compensation” in H.R. 1414 should be clarified. We believe “a claim for disability compensation” should encompass both a claim for service connection and a claim for an increase in the disability rating of a disability for which service connection has already been awarded. The bill should be amended to make it clear that both types of claims are encompassed by the phrase “a claim for disability compensation.”

H.R. 732

Currently the VA and BVA have to deal with over 290,000 appeals awaiting adjudication. Recently, at a Congressional “round-table” the BVA indicated that it would take over five years to adjudicate a newly filed appeal. That is entirely too long. People could graduate from college and possibly earn a Masters degree in the time it takes for the BVA to adjudicate an appeal.

This bill permits the Board to schedule the earliest possible hearing which may be a video conference hearing. The bill, however, preserves the right of the appellant to request a different type of hearing including a hearing in Washington D.C.

While not a complete cure, H.R. 732 should speed up the appellate process and decrease the time it takes to resolve an appeal to the BVA.

NVLSP supports this bill.

H.R. 1331

NVLSP strongly supports passage of H.R. 1331 and suggests one amendment to make the bill more effective.

38 U.S.C. § 1525 currently states: “For purposes of establishing any claim for benefits under chapter 11 or 15 of this title [38 USCS §§ 1101 et seq. or 1501 et seq.], a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.”

H.R. 1331 would change § 1331 to state “a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter **shall** be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.” The bill would also define sufficiently complete to mean “competent, credible, probative, and containing such information as may be required to make a decision on the claim from which the report is provided.”

Based on NVLSP’s experience in appealing thousands of BVA decisions to the CAVC and in reviewing thousands of VA claims files at various VA regional offices as part of our quality review work for The American Legion, we have found that in many cases, VA regional offices and the BVA prolong a claim by seeking additional medical evidence from a VA physician even though there is sufficient medical evidence from private physicians to decide the claim based on the existing evidence. This practice of developing more evidence in an effort to deny the claim is contrary to the pro-claimant VA adjudicatory process that Congress intended. H.R. 1414 would help eliminate this practice, which both wrongly delays the adjudication of claims for benefits and deprives veterans of benefits to which they are entitled.

But to give H.R. 1414 teeth, it should be amended by stating that whenever an agency of original jurisdiction or the BVA seeks additional medical evidence on a medical issue that is addressed by an examination report or statement of a private medical professional that is already part of the administrative record, the agency of original jurisdiction or BVA must explain in writing why it believe the private medical report or statement is not adequate for purposes of making a decision on the claim.

H.R. 1067

NVLSP supports Section 2 of H.R. 1067. Given the increase in the number of appeals the CAVC is receiving and is likely to receive in the future, NVLSP believes that a full complement of nine judges is warranted through the end of 2019.

I would be pleased to answer any questions you may have.

Thank you.