

STATEMENT OF
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VETERANS OF FOREIGN WARS OF THE UNITED STATES

FOR THE RECORD

COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

WITH RESPECT TO

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

WASHINGTON, DC

APRIL 14, 2015

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and our Auxiliaries, thank you for the opportunity to offer our thoughts on today's pending legislation.

H.R. 675, Veterans' Compensation Cost-of-Living Adjustment Act of 2015:

The VFW supports this legislation which will increase VA compensation for veterans and survivors, and adjust other benefits, by providing a cost-of-living adjustment (COLA) beginning December 1, 2015.

Disabled veterans, along with their surviving spouses and children, depend on their disability and dependency and indemnity compensation to bridge the gap of lost earnings and savings caused by the veteran's disability. Each year, veterans wait anxiously to find out if they will receive a cost-of-living adjustment. There is no automatic trigger that increases these forms of compensation for veterans and their dependents. Annually, veterans wait for a separate Act of Congress to provide the same adjustment that is automatically granted to Social Security beneficiaries.

The VFW continues to oppose the "rounding down" of the COLA increase. This is nothing more than a money-saving device that comes at the expense of veterans and their survivors.

H.R. 677, American Heroes COLA Act of 2015:

The VFW supports this legislation, which would automatically trigger COLA increases for VA benefits, whenever such an increase occurs in benefits payable under title II of the Social Security Act. This would eliminate the need for Congress to pass a standalone bill every year, thus removing the confusion and uncertainty created by the current process.

Once again, the VFW continues to oppose the “rounding down” of the COLA increase.

H.R. 732, Veterans Access to Speedy Review Act:

The VFW supports this legislation which would require the Board of Veterans’ Appeals to determine whether appeal hearings should be conducted in person or through video teleconferencing (VTC) and at which location, in order to schedule hearings at the earliest possible date.

The VFW believes that VTC should be the default method for hearings before the Board of Veterans’ Appeals as it expedites the adjudication of claims and eliminates substantial travel costs. We feel strongly, however, that veterans should maintain the ability to attend their hearings in person, if they so choose. For this reason, we are pleased that this legislation would in all cases require VA to notify the veteran of his or her right to request an in-person hearing and “*shall*” grant such requests.

H.R. 800, Express Appeals Act:

This legislation would direct VA to carry out a five year pilot program to provide veterans with the option to appeal claims for disability compensation through an expedited process. Appeals filed under this program would be known as Fully Developed Appeals (FDA). While the VFW supports the concept of the FDA initiative, we remain concerned that notification letters currently issued by the Veterans Benefits Administration (VBA) contain insufficient information to allow veterans to make educated decisions on whether to participate in the pilot or file through the traditional appeals process. Additionally, we recommend an improvement to the reporting requirement for the program.

Under the Express Appeals Act, the FDA initiative would give the claimant the choice to waive receipt of a Statement of the Case, Decision Review Officer review, a hearing before a Board of Veterans Appeals (BVA) panel and other developmental and review opportunities currently extant in the VA appeals process. The claimant, at the Notice of Disagreement stage, would have a one-time opportunity to submit additional evidence and argument. In exchange for this waiver, the appeal would bypass all regional office activity and move directly to the BVA, where it would be placed on a separate docket to be considered in the order it was received. This approach has the advantage of bypassing nearly three years of delay at the regional office.

However, it must be recognized that a speedy decision by the BVA may not be advantageous to all claimants. During that three year wait at the regional office, claimants have an unlimited opportunity to submit additional evidence, undergo new treatment and examinations, produce fresh argument and in other ways help perfect the record prior to BVA review. Under law favorable to veterans, the record remains open and subject to amendment almost up to the point of decision by the BVA. In addition, the BVA has unrestricted authority to remand appeals to correct deficiencies in development by VA and to acquire new evidence.

To be successful, the FDA initiative must be an avenue for veterans who truly do not need to submit additional evidence, and not simply an expedited path to denial for those who do. The VFW strongly believes that improving the current notification letter is the lynchpin to ensure this

happens. Veterans and other claimants must have sufficient information to understand what VA decided, what specific evidence was used, how it was weighed and the reasons (not conclusions) for the decision. Simply put, without adequate notice, there can be no knowledgeable waiver.

In recent years, VBA has significantly restricted the amount of information it provides in decision letters to claimants. Starting with the Simplified Notification Letter initiative by VBA in 2012, VA worked to reduce most notice letters to pattern words and phrases instead of original claims specific content. In testimony before the House Veterans' Affairs Committee at the time, the VFW protested this move in strong terms. While VA made cosmetic changes, the Simplified Notification Letter and its progeny remain largely in place.

The VFW continues to believe that most current notice letters are deficient and certainly inadequate for the purposes of the FDA initiative. In a Simplified Notification Letter, the "summary of evidence" is simply a list of documents, such as treatment records. The "reasons for decision" in the notice letters are almost always simple conclusions that lack an adequate explanation of the evidence considered, how it was weighed and reasons for the decision. VA must improve them in order to provide information which allows claimants to understand the evidence used in making the decision, an explanation of the analysis, and reasons and bases for the decision. Without this information, a claimant does not have the tools necessary to decide what evidence was used, how it was analyzed and why VA made its decision, and therefore cannot knowledgeably waive his or her rights.

Finally, the VFW believes that the reporting requirement must be made more specific to include the rate of appeals granted under the FDA initiative in order to properly evaluate the success of the pilot. Historically, BVA has granted appeals at a rate of approximately 25 percent. If it is found that FDA appeals are granted at a significantly lower rate, we believe that the initiative should be immediately reviewed.

With these changes, the VFW is hopeful that the FDA initiative would be an effective tool to help reduce the backlog of nearly 300,000 pending appeals in a timely and accurate manner, while protecting the due process rights of veterans and other claimants.

H.R. 1067, U.S. Court of Appeals for Veterans Claims Reform Act:

The VFW supports this legislation, which would reauthorize the temporary expansion of the Court of Appeals for Veterans Claims (CAVC), as well as make certain changes related to employee benefits for CAVC judges.

By statute, the CAVC is authorized up to seven active judges, but temporary expansions of two additional judges were authorized in 2001 and again in 2008. These expansions came in an effort to stagger the terms of the judges. The original members of the CAVC all had terms that ended at the same time. The temporary expansion allowed more judges to be appointed within a certain time frame, with the thought that there would then be some judges on the court who had at least a few years of experience when the majority of the judges retired. Unfortunately, since the current cohort also have terms that end around the same time, the Court will soon be in a similar predicament.

The current situation is as follows: Judge Moorman is retiring in August. That will bring the Court down to eight members. The terms of Judge Hagel, Kasold, Schoelen, Davis, and Lance

all expire in 2018 and 2019. Judges Greenberg, Pietsch and Bartley were all appointed in 2012 under the last expansion.

While it is possible for judges to be reappointed, it is unlikely that more than two of the five whose terms expire in the next few years will seek or accept reappointment. The VFW believes that reauthorizing the expansion is necessary to avoid a circumstance where judicial nomination, which can be an intensive and politically fraught process, would reduce the number of members of the court. If the Court is temporarily reduced to five of the seven judges authorized while they wait for the nomination and installation process, the backlog of cases at the Court would almost certainly grow, along with veterans' wait times.

With almost 300,000 appeals pending at VA Regional Offices, the appeals to the Board and the Court will only continue to grow in the foreseeable future. The VFW believes that the CAVC must remain fully staffed in order to handle the coming workload. With this in mind, we believe it is both justified and prudent to temporarily reauthorize the expansion of the CAVC.

H.R. 1331, Quicker Veterans Benefits Delivery Act:

The VFW supports the intent of this legislation, which would mandate that VA accept private medical evidence that is competent, credible, probative, and otherwise adequate for purposes of making a decision on a claim. However, we believe that the bill must also clarify that VA must not order an additional examination unless the veteran is provided with a thorough explanation as to why the private medical evidence proved insufficient for establishing service connection and determining a rating.

H. R. 1379, To amend title 38, United States Code, to authorize the Board of Veterans' Appeals to develop evidence in appeal cases, and for other purposes:

The VFW opposes this legislation for the following reasons:

- Currently the Board of Veterans' Appeals (BVA) has the authority under 38 CFR 19.9(d)(3) to review evidence submitted to it in the first instance only if the claimant, or the claimant's representative, waives consideration by the Agency of Original Jurisdiction (AOJ). This regulation preserves the opportunity for a claimant to obtain a decision considering new evidence by the AOJ. Only if the benefit sought is not granted is it returned to the BVA for appellate consideration. Under this bill, the BVA would make a decision on any new evidence developed by it in every instance, thereby depriving claimants of the opportunity for a decision by the AOJ and, if necessary, the BVA. This is a lost opportunity for claimants to obtain benefits, and is contrary to the generally veteran friendly approach to development and claims adjudication favored by Congress over the last half century.
- In 2002 VA, by regulation, shifted all development on remand to the BVA. BVA established a development unit, as contemplated in this bill. Initial reports from VA were uniformly rosy, painting a picture of efficiency not previously experienced in appeals needing additional development. It was only after a Court of Appeals for the Federal Circuit decision ruled this practice unlawful, forcing VA to create the Appeals Management Center (AMC) in 2003, that it was discovered that development by the

BVA unit was inadequate, untimely, inept and in disarray. In short, this approach was tried by VA and failed. While this bill assumes that VBA would simply transfer elements of the AMC to the BVA, what cannot be transferred is the overall management of the AMC elements. BVA executives, who currently have no expertise whatsoever in the day to day procedures of developing evidence, would be required to manage a unit which does expressly that function. As dysfunctional as the AMC is from time to time, it is our belief that moving elements of the AMC to the BVA would result in a decline of efficiency, thereby worsening the length of time it takes to resolve remands.

- The number of appeals controlled in the Veterans Appeal Control and Locator System (VACOLS) now approaches 300,000. Of those, over 13,000 are at the AMC on remand. It is our belief that VBA leaders would like nothing better than to offload this function and reassign its remaining resources to help VBA address what it views as its core workload - disability claims. In the opinion of the VFW, the development of evidence is an inherently VBA function, one which that administration performs every day in thousands of claims, and that development of evidence on appeal should remain within the operational control of the VBA as that entity has the training, personnel and experience to accomplish it efficiently and effectively. That VBA does not always accomplish development efficiently and effectively at the AMC is the fault of leadership. This defect cannot be cured by transferring this function to the BVA. This defect should be addressed by the VBA in the first instance.

H.R. 1414, Pay As you Rate Act:

The VFW supports this legislation, which would require VA, when adjudicating a claim for two or more disabilities, to make interim payments for any disability for which a decision has already been made. While we recognize that VA already has this authority, we find that it is rarely used, as doing so is inconvenient for VBA. We believe that such interim payments should be made in all cases, as no veteran should be made to wait longer than necessary for any degree of just compensation to which he or she is entitled.

H.R. 1569, To amend title 38, United States Code, to clarify that the estate of a deceased veteran may receive certain accrued benefits upon the death of the veteran, and for other purposes:

The VFW supports this legislation, which would allow payments issued on the date of the veteran's death to be awarded to the veteran's estate, consistent with general principles of estate law.

Sometimes, disability claims are not approved by VA until after the claimant dies. In 2013, the VA paid \$437 million in retroactive benefits to survivors of nearly 19,500 veterans who died while waiting for benefits. This represents a dramatic increase from 2000, when the widows, parents, and children of fewer than 6,400 veterans were paid \$7.9 million for claims filed before their loved one's death. Long wait times are contributing to tens of thousands of veterans being approved for disability benefits only after they are dead.

To make matters worse, under current law, only a veteran's spouse, children under the age of 18, and parents are eligible to receive retroactive VA disability benefits compensation in the event of a veteran claimant's death. This means that veterans, who fought VA until their death over benefits they earned with their service, are unable to pass those benefits to their adult children. In many cases, the adult children act as the veteran's caregiver, and should be entitled to the veteran's disability benefit if the veteran dies before ever receiving compensation from VA.

H.R. 1607, Ruth Moore Act of 2015:

The VFW strongly supports this legislation which would relax evidentiary standards necessary to establish service connection for mental health disorders resulting from military sexual trauma (MST).

Currently, an unreasonable burden is placed on the veteran to produce evidence of MST – often years after the event and in an environment which is often unfriendly - in order to prove service connection for related mental health disorders. This is further complicated by the fact that MST victims have historically underreported sexual assaults due to fear of reprisal by their chains of command. The VFW believes that this culture of victim blaming is changing in the military. Still, many victims of past military sexual assaults continue to suffer in silence because they have no way to provide the evidence necessary for VA to grant their claims. This legislation would begin to address that problem by allowing more MST victims to access the health care and benefits they need and deserve.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, VFW has not received any federal grants in Fiscal Year 2014, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.