

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

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY
ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

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**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**

Tuesday, April 14, 2015

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL
AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:34 a.m., in Room 334, Cannon House Office Building, Hon. Ralph Abraham [chairman of the subcommittee] presiding.

Present: Representatives Abraham, Lamborn, Zeldin, Costello, Titus, Brownley, Ruiz, Miller, and O'Rourke.

OPENING STATEMENT OF CHAIRMAN RALPH ABRAHAM

Mr. ABRAHAM. Good morning. Thank you for being here. This legislative hearing of the Subcommittee on Disability Assistance and Memorial Affairs will now come to order.

We are going to ask for unanimous consent for Mr. O'Rourke, if you will be the ranking member.

Hearing no objections, today we are here to have a legislative hearing on ten pieces of legislation. In the interest of time, I will forego a lengthy opening statement and just briefly summarize the two bills on the agenda which I am proud to have introduced. The first is H.R. 675, Veterans' Compensation Cost-of-Living Adjustment Act of 2015. This bill provides a cost-of-living adjustment increase to veterans disability compensation rates and other benefits. The amount of the increase will be determined by the Consumer Price Index, which also controls the cost-of-living adjustment for Social Security beneficiaries. As many of us here today know, any cost-of-living increase is beneficial to the veterans and their families who depend on the VA benefits to make ends meet.

And although I am very supportive of this annual legislation, I would like to state that it is unfortunate that we have to pass a bill every year. I, therefore, have also introduced H.R. 677, the American Heroes COLA Act, which would authorize an annual COLA, without requiring congressional action. This would ensure that veterans COLA is not tied to political action or inaction in Washington.

At this time, I would like to thank the committee members who are not on the subcommittee, who are here and have expressed interest in today's hearing. I would like to ask unanimous consent

that Representative O'Rourke and Representative Walz be allowed to participate in today's hearing. Hearing no objection, so ordered.

I appreciate everybody's attendance here at this hearing and now I will call on our ranking member, Mr. O'Rourke for any opening statement.

OPENING STATEMENT OF RANKING MEMBER BETO O'ROURKE

Mr. O'ROURKE. Mr. Chair, I will waive any opening statement. Thank you.

Mr. ABRAHAM. Okay. Thank you.

Are there any other members who would like to make an opening statement? Chairman Miller? Mr. Zeldin? Mr. Costello? Okay.

We appreciate you joining us, Mr. Chair.

We would like to welcome to our witness table at this time, Ms. Chellie Pingree, who is the sponsor of H.R. 1607, the Ruth Moore Act of 2015.

Ms. Pingree, you are now recognized for five minutes.

STATEMENT OF HON. CHELLIE PINGREE

Ms. PINGREE. Thank you very much, Chairman Abraham and Ranking Member O'Rourke. I appreciate you having me here today and for considering the Ruth Moore Act in this morning's legislative hearing.

I want to talk just a little bit about the bill and why we still think it desperately needs to become law. It has been said that the greatest casualty is being forgotten. I can tell you that the hundreds of survivors who have called my office since I first introduced this legislation in the 113th Congress have felt forgotten by the military system they so proudly served. They struggle trying to meet an unfair standard of proof, suffer through years of denials and appeals in a process that re-traumatizes them. It is a system that is broken and I can tell you from the countless stories that I have heard, that it hasn't been fixed.

Ruth Moore, who this bill is named for, is a U.S. Navy veteran from Maine who was raped twice during her military service. When she reported it, she was discharged and labeled as having a personality disorder. She has spent over 23 years fighting the VA to get disability benefits and she battled homelessness and PTSD during that time.

Quite simply, this act ensures that the VA treat our veterans whose PTSD is caused by sexual assault with the same standards and burden of proof that extends to veterans whose PTSD is caused by combat and other particularized claims. We know that fewer people are being assaulted and more are coming forward and that is progress, but still, 19,000 military personnel being sexually assaulted or sexually harassed annually is hardly a cause for celebration.

I want to talk a little bit about approval rates, and I don't mean our political approval rates that we evaluate every day; I want to talk about the rates at which claims for the VA benefits are being accepted. The GAO did find that the overall approval rate for a PTSD resulting from sexual assault is increasing, but it is still lower than the approval rating for the PTSD claim ratings for other factors. And what is most concerning to me is that despite

continued training, the subjective standards used to verify victims' sexual assault meant approval ratings varied wildly depending on where the veteran submitted their claim. In some offices, as few as 14 percent of claims were approved, while others approved 88 percent.

In the GAO report, the VA states that under the current regulation, two adjudicators can interpret a marker in opposite ways and both will be correct. It is simply not acceptable that a veteran faces the roll of the dice of where they live and where their claim is reviewed, nor is it acceptable that 62 percent of the respondents in a recent survey stated that they face retaliation for reporting. This, as well as evidence that 40 percent of assaults were perpetrated by a superior within the veteran's chain of command suggests to me that we cannot train our way out of this problem.

After a court ruling in 2002, the VA changed its policy to allow veterans a wider range of evidence called "secondary markers" to be used in a personal assault disability claim. The VA will tell you that because the current system allows for this alternative evidence for verifying an assault, there is no need for patient parity with evidentiary standards. But every day I hear from vets who detail claim denials due to the vast inconsistencies in the VA application of these standards. What one regional office or adjudicator will accept as proof, another will deny.

In 2010 the VA relaxed the evidentiary standards for veterans who suffer from combat-related PTSD, as you all know. It is the same diagnosis, but a very different evidentiary standard. The VA finally acknowledged that far too many veterans who have deployed into harm's way suffered the emotional consequences of their service but could not, through no fault of their own, locate military documentation that verified the traumatic events that triggered their PTSD. The VA now accepts their statement of traumatic events, along with a PTSD diagnosis and medical link as enough to accept the disability benefits.

The VA's less-favorable treatment of veterans who suffered sexual assault than those who suffered other forms of combat trauma is arbitrary. The VA can articulate no rationale for why a veteran's lay testimony may be adequate to establish combat trauma, but not trauma from sexual assault.

The Ruth Moore Act corrects this injustice. Last congress, it was endorsed by a very long list of organizations including The American Legion, Disabled American Vets, Veterans of Foreign Wars, Vietnam Vets of America, Iraq and Afghanistan Vets of America. It is all detailed in my testimony—I won't give you the whole list—but you can see there is a long list of organizations that support this, and I want to thank them for their support and applaud them for the work they do for veterans.

This bill also requires the VA to report MST-related claims information back to Congress, such as the number of denied and approved MST claims each year and the reasons for denial.

As Members of Congress, we have a responsibility to ensure that the VA is providing timely and accurate decisions to veterans, but we cannot do that without sufficient data. Over the past few years there has been significant public attention to sexual trauma in the military and the VA has re-doubled its training and prevention ef-

forts. But let me reiterate that the problem is not fixed. It is a problem of fundamental fairness. If a medical diagnosis and link to a claimed event is enough for one group of veterans with the same medical diagnosis, it ought to be enough for another.

Critics of this legislation might say that it makes it too easy to get benefits and veterans can say just anything to get those benefits. First of all, that is simply not true. There still needs to be a medical diagnosis of PTSD and a medical link, which are not at all easy to come by, and less easy to live with, and, secondly, we heard that same argument when the VA proposed a similar change for combat veterans, but, in fact, I haven't heard the veterans administration (VA) say they have had big problems with veterans lying about their service.

Mr. Chair, over the last four years, I have heard from dozens and dozens of veterans from all over the country, men and women who volunteered to serve their country, many of them planning on a career in the military, only to have that career cut short by the horror of a violent sexual assault. The survivors were blamed and harassed, crimes were covered up, and the survivors themselves became the subject of further harassment and incrimination. All too often what followed was years of mental health issues, lost jobs, substance abuse, and homelessness.

But these stories don't have to end this way. With the Ruth Moore Act, we can change the VA's policy so veterans who survive sexual assault get the benefits they earned and deserved. Thousands of veterans, survivors of sexual assault have fought for years to get the benefits that are owed them, but they didn't give up, so we are not going to give up in our fight to reform this process to make sure that those brave women and men get the justice that they deserve.

So, thank you again, Mr. Chair, Ranking Member, now Titus, and Members of the committee for considering this legislation. I appreciate your hearing me out today.

[THE PREPARED STATEMENT OF MS. PINGREE APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Ms. Pingree.

We will forego a round of questions for Ms. Pingree, and any questions that anyone may have for our colleague may be submitted for the record.

On behalf of the Committee, I thank you for joining us and you are excused.

Ms. PINGREE. Thank you very much.

Mr. ABRAHAM. The Chair will now ask Chairman Miller to talk about his bill.

Mr. MILLER. Thank you, Chairman Abraham, Ranking Member Titus. I appreciate the opportunity to be here to talk about improving VA's claims process for America's warriors, and I am here to talk about H.R. 1379, which I am proud to have introduced and which would help streamline the VA appeals process.

Our nation's veterans, particularly those who have service-connected disabilities, have a right to have their claims decided accurately and fairly the first time, and if an appeal is necessary, the final decision should not only be accurate and fair, it should be consistent and it should be timely. Unfortunately, that has not been

the case in recent years. As of the first quarter of fiscal year 2015, veterans were forced to wait an average of 1,896 days—that is 1,896 days—for their appeals to be decided by the Board of Veterans' Appeals and that is in addition to the time it took for VA to issue the initial decision.

According to the Board, in fiscal year 2014, 58 percent of all Board decisions contained at least one remandable issue. In those cases, veterans are left in limbo as their cases are bounced back and forth between the Board and the Appeals Management Center without a resolution. Imagine the frustration of a veteran who has waited for over five years for an appeal, only to have the Board remand the case for additional development. Then the veteran must wait over thirteen and a half months, on average, for the VA to reach another decision. If that decision is negative, the appeal will return to the Board where it may be remanded again.

As Chairman Abraham noted in his January 22nd oversight hearing on appeals last year, the court of appeals for veterans claims held the secretary of Veterans Affairs in civil contempt citing the Department's gross negligence in ignoring a veteran who repeatedly raised concerns on an appeal that had been remanded to the Department. The court noted that VA's inaction, quote, "Conjures a vision of a drowning man watched by a life guard in a nearby boat, equipped with life preservers and rescue ropes, who decides to do nothing even though the drowning man is blowing a whistle and firing flares to call attention to his plight," end quote. Our nation's veterans deserve much better and H.R. 1379 aims to do just that.

Now, in cases where there is insufficient evidence, H.R. 1379 would give the Board the authority to obtain all the evidence it needs to issue a fair and accurate decision. This very simple change to the law will help the Board resolve its appeals backlog and give the veterans the finality that they deserve, and I would ask that the members, when given the opportunity to vote, would support H.R. 1379.

And I yield back to you, Mr. Chairman, and humbly thank you for allowing me to present my bill.

Mr. ABRAHAM. Thank you, Mr. Chairman, and thank you for your presence.

The Chair now recognizes Ms. Titus for both opening remarks and to speak about her bill.

Ms. TITUS. Well, thank you very much, Mr. Chairman. I apologize for being late; I was in the office with some veterans who had been reunited with their war dogs and it was kind of hard to leave them.

I will forego opening comments for now, and let me say, one thing that I wanted to mention is the absence of one bill that I had hoped would be in the markup and requested, and that is H.R. 1598, the Veteran Spouses Equal Treatment Act. We have had a hearing on that. We have been talking about that for years. We have had nothing but positive comments and I would hope that we could work together to see that this gets passed so that all our veterans can receive the benefits that they are entitled to, so that one day when they are wearing their uniform they get the benefits, and

the next day when they take it off, they lose them, depending on what state they live in, and we don't think that is fair.

I have got to just flip here—I'm sorry—to talk about my bill; I didn't realize that was coming up next. Can you help me? I apologize. Yeah, I have got everybody else's bill that I was going to address in my opening remarks and I don't even have my own list in front of me. It is a bill that we heard last time that we—okay, thank you, I will just go from here.

Okay. It is H.R. 1414, the Pay As You Rate Act. This would ensure that all veterans and their families receive the benefits they have earned through the military service more expeditiously by directing the secretary to pay our veterans as their individual medical conditions are rated. Now you have to wait until the entire case is analyzed and adjudicated to get any benefits; sometimes that is a long time to wait. We thought that it would make more sense and would help veterans if, as different aspects of the case are rated, you get the benefit for that aspect.

For example, many of the veterans who returned from the Middle East today have a series of problems; they don't have just one claim, it can be eight, nine, up to eleven sometimes, different issues, and some are very complicated and take a long time. So why not give the veteran at least some benefit as they go along waiting for the entire case to be adjudicated.

And thank you, Mr. Chairman, for your patience.

Mr. ABRAHAM. Thank you, Ms. Titus.

The Chair recognizes Mr. Zeldin to talk about his bill.

Mr. ZELDIN. Thank you, Mr. Chairman.

I speak today in favor of H.R. 1569. I appreciate you bringing it up for the Committee's consideration. In our current system, many of our veterans have earned service-related benefits due to injuries sustained on the battlefield. Those benefits, however, can only pass to a small group of individuals should the veteran pass away. If that veteran does not have a qualifying family member and passes away, the VA recoups the benefits that rightfully belong to the veteran.

The VA has struggled to complete timely reviews of claims and if a veteran passes away while the VA is still reviewing the claim, the VA no longer has to award the earned benefits. H.R. 1569 would require the VA to pay certain benefits that were earned by a veteran to the veteran's estate. Currently, only a veteran's spouse, minor child, or dependent parent or parents, are eligible to collect the accrued benefits. By adding the estate to the current list of beneficiaries, adult children can now also receive the benefits earned, should there be no other qualifying family members. Servicemembers should be able to share the benefits they have earned with their families.

This bill ensures that the benefits a veteran earns during his or her service stays with the family. Further, with the addition of this piece of legislation, the VA can no longer avoid awarding a claim to a veteran due to slow processing time. Not only will this bill protect the benefits that our veterans have earned, but it will also help maintain stricter levels of accountability at the VA.

I yield back the balance of my time.

Mr. ABRAHAM. Thank you, Mr. Zeldin.

The Chair now recognizes Mr. O'Rourke.

Mr. O'ROURKE. Thank you, Mr. Chairman.

I will speak briefly about H.R. 800, also known as the Express Appeals Act, and as Chairman Miller's bill intends to do, this is to speed up the appeals process for veterans who are now waiting years instead of months to hear back on an appeal to an originally filed service-connected disability claim. As the Chairman's bill would, this would cut out the remand process, whereby a veteran's case is sent back to the VBA; instead, that would be decided by the Veterans' Board of Appeals. But it would also create a five-year pilot program, an alternative to the current system, that would allow veterans to file a fully developed appeal, and they would, by having an expedited process, forego the ability to add additional information to that appeal during that process. We hope, and it is the intention, as stated in the bill, that that gets the appeal wait-time down to under a year, which is far better than what we are doing today.

And I want to stress to the chairman and to the other members of the committee, that this is a voluntary pilot program. Should the veteran wish to file an appeal under the status quo procedures, he or she is fully able to do that. If at any time that a veteran who chooses to enter the pilot program, which is to add additional information or return to the status quo filing of an appeal, he or she is able to do that as well. So no veteran is forced to do anything different than what they are doing today; they just have the option to enter a pilot program which would expedite their appeal and get them an answer much more quickly than we are able to today.

And I will note that there are many members of the committee, including the committee chairman, who are original cosponsors and additional cosponsors to this bill, so we certainly appreciate the support and I look forward to hearing testimony from those who you have on the second and third panel today.

And with that, I yield back.

Mr. ABRAHAM. Thank you, Mr. O'Rourke.

The Chair now recognizes Mr. Costello.

Mr. COSTELLO. Thank you, Mr. Chairman.

Chairman Abraham, Ranking Member Titus, and fellow Members of the Subcommittee, thank you for the opportunity to speak to you today on behalf of my legislation, H.R. 1067, the U.S. Court of Appeals for Veterans Claims Reform Act; legislation, which is a proactive step to ensure that the U.S. Court of Appeals for Veterans Claims is able to meet the growing demand for review of veterans' claims benefits. H.R. 1067 will ensure that not only do we have an adequate number of appellate judges to handle current and future demand, it also ensures that we continue to attract qualified and capable individuals to serve our veterans on this critical panel.

To provide you with a little background, the U.S. Court of Appeals for Veterans Claims is authorized to have seven permanent judges and two temporary additional judges. Each judge is appointed for fifteen-year terms and each judge has the option to be recall-eligible for further service upon retirement. Absent legislative action, this Court is expected to revert back to its permanent authorization of nine judges in 2016. H.R. 1067 makes sure that

this occurs, as the VA continues to chip away at the appeals backlog.

As you may know, the Court has exclusive appellate jurisdiction over decisions of the Board of Veterans' Appeals and plays a critical role in ensuring the timely and accurate review of veterans' claims. As the VA continues to investigate backlogs, reports of data manipulation and excessive wait times at the VA, there is a potential for our veterans to experience future appeals backlogs; therefore, this legislation would continue the temporary authorization for nine judges through 2020 to ensure that there is no interruption in appellate review and service provided to our veterans. Additionally, as the Court is part of the U.S. Judiciary, this legislation would provide the judges with benefits commensurate to those provided to other federal appellate judges.

I hope my colleagues will join me in supporting this legislation. Thank you for the opportunity to speak on behalf of H.R. 1067 this morning, Mr. Chairman.

Mr. ABRAHAM. Thank you, Mr. Costello.

Okay. We will seat the second panel now. On this panel we will hear from Mr. David McLenachen, the Acting Deputy Under Secretary for Disability Assistance at the Veterans Benefits Administration. He is accompanied by Ms. Laura Eskenazi, the executive-in-charge and vice chairman of the Board of Veterans' Appeals, and Mr. David Barrans, assistant general counsel for the VA. Thank you for joining us.

Mr. McLenachen, you are now recognized for five minutes, sir.

STATEMENTS OF MR. DAVID R. MCLENACHEN, ACTING DEPUTY UNDER SECRETARY FOR DISABILITY ASSISTANCE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY MS. LAURA H. ESKENAZI, EXECUTIVE-IN-CHARGE AND VICE CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS, AND MR. DAVID J. BARRANS, ASSISTANT GENERAL COUNSEL, OFFICE OF GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS.

STATEMENT OF DAVID R. MCLENACHEN

Mr. MCLENACHEN. Chairman Abraham, Ranking Member Titus, and Members of the Subcommittee, thank you for the opportunity to present VA's views on several bills that are pending before the Committee. Joining me today are Ms. Laura Eskenazi, executive-in-charge and vice chairman of the Board of Veterans' Appeals, and Mr. David Barrans, assistant general counsel.

I first want to thank the Committee for the opportunity to testify concerning the cost-of-living adjustment bills, H.R. 675 and H.R. 677, which will ensure the value of veterans' and survivors' benefits will keep pace with consumer prices next year and in the future. VA supports these bills.

We are also pleased to have the opportunity to discuss two bills that address VA's administrative appeals process. VA fully supports H.R. 732 which would allow for greater use of video conferencing hearings by the Board of Veterans' Appeals. We believe this

measure would both decrease hearing wait times and offer convenience for veterans.

We thank Congressman O'Rourke and the veteran service organizations for their efforts related to H.R. 800, which would authorize VA to conduct an express appeals pilot program for veterans seeking a quicker final decision on a compensation claim. VA generally supports the bill and works closely with the veterans service organizations to develop the fully developed appeals concept. Despite the support, we do have a few technical concerns with the approach outlined in the bill, specifically with respect to the provision that would allow a veteran to elect an express appeal at any time during the traditional appeal process and the provision that would limit the optional process to original compensation claims. We hope to work with the Committee to address these and a few other concerns to ensure that VA is able to effectively able to implement the pilot.

VA does not support H.R. 1331. We appreciate the intent of the bill, which seeks to provide benefits to veterans more expeditiously, but VA already has authority to decide claims based upon medical evidence that the claimant submits, provided that the evidence is adequate for rating purposes.

Although VA supports appeals reform such as the Committee's efforts regarding H.R. 732 and H.R. 800, VA does not support H.R. 1379 because it would not result in faster resolution of appeals for veterans who are waiting far too long for a final decision on their claims. While some efficiency might result from avoiding the need to transfer claims between the Board and other VA agencies, the workload itself, developing evidence to support a claim would not change. VA believes that it is important to consider the entire appeals process and institute reforms that will result in overall increased efficiency for all veterans.

VA does not support H.R. 1414 because it already has authority to make intermediate rating decisions and has implemented this authority in its current policies and procedures.

Also, VA cannot support H.R. 1569 because it would require VA to pay taxpayer funds earmarked for veterans disability payments to deceased veterans' creditors and other organizations or non-family members. The bill would also force VA to discontinue its longstanding practice of reimbursing individuals for covering the costs of the deceased veteran's last sickness or burial in cases where there is no surviving spouse, child, or dependent parent.

Regarding H.R. 1607, the Ruth Moore Act of 2015, I assure you this is an important issue for veterans and a high priority for the secretary. It is also an issue that the under secretary, Under Secretary Hickey, is passionate about addressing. As set out in our testimony, we have taken steps on a number of fronts over the past several years including a close review of past MST claims, focused training and outreach to ensure that we take into account the special, sensitive nature of these claims. We have seen grant rates increase for these claims as a result of these focused efforts; thus, we believe H.R. 1607 is unnecessary and do not support it. Also, as stated in our testimony, we believe the bill could cause negative, unintended consequences.

Finally, Mr. Chairman, VA takes no position on H.R. 1067. This bill pertains to the operations of the court of appeals for veterans' claims and we defer to the Court for views on that bill.

This concludes my statement, Mr. Chairman. We are happy to entertain any questions that you or the members of the committee may have.

[THE PREPARED STATEMENT OF MR. MCLENACHEN APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, sir.

Mr. McLenachen, in your written testimony, you do note that the VA supports the American Heroes COLA Act of 2015, and you further note that making permanent, the provision to round down the COLA, would result in a savings of approximately \$39.6 million in fiscal year 2016 and \$3.1 billion over ten years. Please elaborate, then, on the Department's support of this bill.

Mr. MCLENACHEN. Yes, sir. I would be happy to do that. The round-down provision was a part of the COLA formula for many years. It was only within the last few years that that changed. It has also been part of the Administration's baseline budget. With that change to again, go to the round-down provision, it is VA's view, based on the bill, that it would provide VA an opportunity to use those savings to improve benefits for veterans and survivors through other legislative proposals, a few of which are in the present submission this year.

Mr. ABRAHAM. Thank you, sir. One more question for you, sir: Many veterans find themselves stuck in this hamster wheel, as it has been described, in which the Board has to remand the case for development several times before the record is sufficient for a Board member to render a final decision. By way of background information, at a January 22, 2015, DAMA oversight hearing, Ms. Eskenazi testified that 75 percent of the Board's inventory consists of cases that have been previously remanded. Isn't it true that multiple remands substantially increase the Board's workload, as opposed to allowing the Board to develop the evidence needed to issue a final decision?

Mr. MCLENACHEN. Mr. Chairman, I will defer to Ms. Eskenazi on that since it is her workload.

Mr. ABRAHAM. Okay.

Mr. MCLENACHEN. Thank you.

Mr. ABRAHAM. The Chair recognizes you, Laura.

Ms. ESKENAZI. Thank you. Good morning, Dr. Abraham, Ranking Member Titus. I first want to thank you for the opportunity to speak to you this morning and thank you for your continued attention to veterans appeals issues, an area that is greatly in need of attention and some reform, so thank you.

Mr. ABRAHAM. Thank you.

Ms. ESKENAZI. Regarding my testimony in January, I believe what I was speaking to was the rate of remands that return to the Board after remand, and we had a historical figure that showed that when the Board remanded a case back to the Veterans Benefits Administration, about 75 percent of those appeals would return to the Board after the remand, and the reason was that some of those appeals on remand are actually allowed by VBA and they do not return to the Board if the benefits are granted.

That is a data point from a few years ago. I think that the rate may be a little bit different today, but one thing to understand in the remand process is that it is not just the gathering of the evidence, it is the opportunity for the originating agency, VBA in this case, to look at the entire record again and issue a new decision for that veteran. And if the veteran is not happy with that decision, they can come back to the Board, so it provides them with another bite at the apple, so to speak.

Mr. ABRAHAM. Okay. Thank you.

Ms. Titus.

Ms. TITUS. Thank you, Chairman.

Mr. McLenachen, you mentioned that the VA does not support H.R. 1414, which is my bill. You continued to say that the VA has the authority to do this, to pay as you rate, but I don't think that you do it even. But having the authority and doing it are two different things, so it doesn't matter if you have the authority and you are not making it happen.

You say, also, that you—you admit that you need technological improvements to make it happen, so how about telling us how to make it happen if you don't want the legislation passed. What are the improvements that you need? How will they be enacted? And how much are they going to cost?

And I will ask you, if you are using it and I am mistaken about that, how about telling me the result of using it and how many interim decisions have been issued.

Mr. MCLENACHEN. Yes, I would be happy to answer those questions to the best of my ability without additional data. But I assure you that we are doing this in the cases where we can and where we should.

Ms. TITUS. And I am just supposed to take your word for it?

Mr. MCLENACHEN. No, ma'am. I will see what data we can get and I will provide it to you.

Ms. TITUS. I appreciate that.

Mr. MCLENACHEN. But let me just give you a little bit of context for my answer. In the past, when this—and this is not the first time that we have seen this bill introduced, of course.

Ms. TITUS. Correct.

Mr. MCLENACHEN. When it was first introduced in the past, VA was in a lot different situation regarding the backlog of claims and the inventory. Since March, 2013, veterans are now getting decisions on their claims 150 days faster than they were at that point; that is a 150-day improvement with an average day pending now for our—average days pending for our inventory is down to 132 days.

So, although there may have been a need at one point, to look carefully at whether we need to break up our decision-making, as your bill suggests, VA is in a very different place right now, and in our view, a very good place as far as our progress on the backlog. Nonetheless, if there are situations where we have a claim that we can grant, in part, we do that.

Another problem with the bill is that it requires an interim payment with a later reconciliation. We don't do that. If we have an interim rating that we can do, we grant the benefit in whole, regarding that separate piece of the claim.

I would also like to remind you of VA's priority goal, which is to decide all claims within 125 days. We are making progress on that and we are going to achieve that goal. If we can decide all claims within 125 days, in our view, there is less need for those types of intermediate ratings.

Having said that, we are moving towards a national work queue where we are better able to move the work around the nation and get the work done, and that is the technical advances that are mentioned in our testimony. We would be happy to provide you more information on how that will work.

Ms. TITUS. I would appreciate that. Thank you very much. And I know you all have made great improvements and cut down on backlogs and shortened times, but when do you think that you are going to meet that goal?

Mr. MCLENACHEN. It is our position that we are going to meet the goal by the end of the year and we are committed to that and that is what is going to happen.

Ms. TITUS. Okay. Thank you.

I would also like to ask about the outreach on the MST claims. You say that you contacted veterans to inform them to let them know that they can request a review of those claims that were decided before the current reforms were begun. Is there any follow-up to the people that you contacted? Did you contact them a second time? Did you follow-up if you weren't able to find them? How many people have taken advantage of it? Do you have some statistics on that?

Mr. MCLENACHEN. I do have a few that I would be happy to provide you. In 2013, we sent out 2500 outreach letters to potential claimants. We received 627 requests for a second look at those claims; of those, there was approximately a 65 percent grant rate of those that we looked at.

Wanting to do more, in 2014, we sent out 2,000 other letters. We received only 54 requests in response to that second outreach that we did in 2014. Of those that we looked at, the grant rate was approximately 47 percent.

Ms. TITUS. Thank you very much.

Mr. MCLENACHEN. You're welcome.

Ms. TITUS. And I yield back.

Mr. ABRAHAM. Thank you, Ms. Titus.

The Chair recognizes Mr. O'Rourke.

Mr. O'ROURKE. Thank you.

I wanted to get a little bit more feedback from you on the two concerns that you raised with H.R. 800. One, as I understand it from your testimony, was H.R. 800's ability to allow a veteran to elect to pursue an express appeal at any point in the process, and the second one, I believe, deals with the ability to re-open an original claim through this, which, my understanding is that H.R. 800 would limit. So could you describe your concerns with those two and potentially suggest a fix that you think is better than what we have in H.R. 800?

Mr. MCLENACHEN. I would be happy to.

I just want to reassure you that VA is fully committed to doing this pilot. Our concerns are purely technical. We are committed to doing this. We think it is essential to looking for ways to improve

the administrative appeal process; however, what I would like to do to make sure that you get the information that you need is turn it over to Ms. Eskenazi to go into a little bit more detail about those two concerns that we had.

And, again, there are others, but I just want to say that primarily what we are concerned about is making sure that this pilot program is very successful and that is the reason why we raised those concerns.

Ms. ESKENAZI. Thank you, Congressman O'Rourke.

And, again, just to restate the support for the concept of FDA or express appeals, as outlined in H.R. 800, and I echo the comments that our concerns are purely technical and can be resolved.

The first item that you mention is the provision in the bill that allows veterans in the existing appeals process to opt-in to this express appeal concept. That is something that we are not recommending. We are recommending that this be a pilot for new appeals, and the reason is on the hope is, by doing this as a five-year pilot, this will prove as a kind of proof-of-concept to see what another type of appeals process looks like.

And a few things to consider by allowing folks in the existing appeals process to join midstream, for one, when you look at the life of their appeal, if they are already in the appeals process, it will be a much more prolonged process. So start-to-finish, they are not going to have anything that looks express; it will be a lengthy appeal, and that could lead to misperception among the community that it is not a program that offers anything by nature of express. And also, it would provide lots of mixed data as to the success of the program itself. And, again, the hope is that this will model some sort of—it will prove a concept.

And for those veterans that wish to elect into this voluntary program, we can watch this over the period of time during the pilot and hopefully achieve the same types of overall results for veterans as with the current more lengthy process. So that addresses your first point.

The second point concerns the types of claims that could opt into fully developed appeal from the beginning. And VA actually believes that we could leave it open to any type of claim; it wouldn't have to be restricted to just original claims, which is I believe, how it is outlined in H.R. 800. So we would support a broadening of the type of claims that would go in.

Mr. O'ROURKE. Okay. Well, thanks for elaborating on that, and as you have described it, your suggestions sound very reasonable. And, you know, I think our primary goal is to expedite the appeals process and we want to fix the entire system. We hope this alternative, perhaps, illustrates a way to do that. I think it is the reason why you have a pilot program, but I want to make sure that we are focused on getting the best possible outcome for those veterans, including a timely, accurate answer. So I want that to remain the priority.

But I think a secondary goal is to make sure that we have a good data related to this. So I understand your argument on the first point, and I am pleasantly surprised on the second one that you want to make sure that it is open to as many cases as possible.

As you know, we have done a tremendous amount of work with veterans service organizations—I should say that they have done a lot of work in vetting this, providing good suggestions, committee staff, members on the committee. So I want to make sure that we vet these suggestions with them, but they sound reasonable, and if we can incorporate them, we would certainly want to do that and appreciate the VA's support of this bill.

So, thank you. Mr. Chair.

Mr. ABRAHAM. Thank you, Mr. O'Rourke.

The Chair recognizes Ms. Brownley.

Ms. BROWNLEY. Thank you, Mr. Chairman.

I wanted to follow up a little bit on H.R. 732. I am a co-author of that bill, and I am happy to see that the VA is supporting it.

I had a couple questions, though, with regards to current practices, and wanting to know if every VBA office offers videoconferencing for appeals hearings and can the veteran choose the location of his or her video hearing?

Ms. ESKENAZI. Certainly, I am happy to address that question, and, yes, currently, all VA regional offices have facilities for video hearings with the Board of Veterans' Appeals. And what happens when the veteran makes the request for a hearing, it is usually scheduled in the region that the veteran lives, the closest regional office; that is generally how it happens.

Ms. BROWNLEY. So what about for a veteran who lives really far away and doesn't have really easy access to a VBA to office, is there the option to be able to do the teleconferencing in the veteran's home?

Ms. ESKENAZI. Right now, what we do is work with some of the medical centers for some of the areas that are more, you know, have larger jurisdictions and we will hold some video hearings at VA medical centers to offer a little bit more convenience to veterans. At this time, we do not hold hearings in the veteran's home due to logistics and privacy and things of that nature.

Ms. BROWNLEY. And if H.R. 732 is to become law, how would the VA make clear that veterans who prefer an in-person hearing can still receive one?

Ms. ESKENAZI. Certainly. We would have to revise the election form that veterans generally use to request their hearing and make all that very clear on the form. Right now, we have to wait for veterans to choose a video hearing and we have done quite a bit of outreach to encourage more video hearing participation, but we can't schedule them at the outset.

So H.R. 732 permits a default to scheduling video hearings while still permitting veterans to request that face-to-face in-person hearing with the understanding that that may take a little bit longer to actually schedule. But we are very supportive of H.R. 732 as drafted, and it certainly would offer a great deal of efficiency in scheduling and time-saving in terms of the travel that is involved for our 65 or 64 veterans law judges to conduct those hearings.

Ms. BROWNLEY. Thank you. And I also wanted to follow up on Mrs. Titus' questioning on the MST bill and just wondering how and what the VA did to update MST training materials for the VA claims processors.

Mr. MCLENACHEN. Yes, thank you for that question. Because there are a number of initiatives that we put in place over the past few years, let me just list them real quickly for you so you have a better idea of where we have been on this. We developed nationwide training that we delivered to everybody that works on these types of claims. We have dedicated processing teams, what we refer to as our "special operations lanes" where these go into, so our most experienced adjudicators work these claims. Our challenge training for every new adjudicator that comes into VBA and works claims, receives a training module that has been added to the challenge training, regarding working these types of claims. We have established MST coordinators in every VA regional office. We have a certification checklist that must be signed by the service center manager or the assistant service center manager that allows us to do a consistency study of these types of claims to ensure that all regional offices nationally are processing claims it within the acceptable tolerance. We have training that we developed for women veterans coordinators in each of the regional offices. Also, we have quality assurance-focus reviews that our compensation service does on these types of claims, again, to ensure that we keep variance among all the regional offices as low as possible.

So all of those initiatives have gone on since 2011 when Under Secretary Hickey first noted that we needed to pay close attention to this issue.

Ms. BROWNLEY. Thank you. I will yield back.

Mr. ABRAHAM. Thank you, Ms. Brownley.

Well, on behalf of the Committee, we thank you for your time and your testimony. You are excused.

The third panel can come to the table as soon as they can. So, joining us today on the third panel is Mr. Zachary Hearn, the deputy director for Claims, Veterans Affairs and Rehabilitation Division of The American Legion; Mr. Blake Ortner, the deputy director of Government Relations for Paralyzed Veterans of America; Mr. Paul Varela, assistant national legislative director of Disabled American Veterans; Mr. Ronald Abrams, the joint executive director of the National Veterans Legal Services Program; and Mr. Kenneth Carpenter, founding member of the National Organization of Veterans' Advocates. Thanks for coming again, gentlemen, we appreciate you.

Mr. Hearn, you are now recognized for five minutes.

STATEMENT OF ZACHARY HEARN

Mr. HEARN. Thank you. Good morning, Chairman Abraham, Ranking Member Titus, and Members of the Committee. On behalf of National Commander Mike Helm and the 2.3 million members of The American Legion, we are pleased to offer remarks regarding pending legislation. The slate of bills offered covers a wide range of topics, proof that the impact of Department of Veterans Affairs and its benefits are due to the wide range and needs of the veterans community, many of whom have physical and emotional scars related to their service in the Armed Forces.

The American Legion understands the intent of the American Heroes COLA Act of 2015 is to eliminate the political wrangling with veterans benefits annually. While this bill would eliminate the

annual political debates surrounding adjusting veterans disability compensation, it also links the benefit to the chained Consumer Price Index. This bill had been floated in Congress in 2012, and as in 2012, The American Legion remains steadfast against the bill.

We are not the only organization with significant concerns surrounding linking veterans benefits to the chained CPI. Two years ago, AARP reported that, quote, “A 30-year-old veterans of the Iraq or Afghanistan war who has no children and is 100 percent disabled would likely lose about \$100,000 in compensation by age 75 in today’s dollars.” While The American Legion understands the intention of Congress to remove veterans from the annual political debate, hundreds of thousands of dollars potentially lost to some of our most desperate veterans is a serious concern. As a result, The American Legion continues to not support the notion of linking veterans benefits to cost-cutting measures that could have devastating impact in the long run for America’s veterans.

Turning our focus to appeals, a recent review of data provided by VA indicates that the amount of appeals within the appeals inventory has grown by over 55 percent in the last five years. While these figures apply to only veterans awaiting adjudication within the Department, it is reasonable to expect that an increased burden on the Court of Appeals for Veterans’ Claims could occur. VA routinely states that with increased adjudications, you should expect increased appeals.

Using that logic, it would stand to reason that the CAVC should also expect an increased number of claims appealed to the Court. Couple this with the knowledge that within two years, the sequence of retirements could occur and veterans that have experienced years of backlog at regional offices and the Board of Veterans’ Appeals could experience a significant wait prior to having their case heard at the court.

Instead of waiting to see this impact and watch veterans continue to suffer, we ask Congress to act now and expand the number of judges to the court to ensure that veterans have their cases heard in a timely manner. The American Legion supports a notion of expansion of judges within H.R. 1067.

H.R. 1414, the Pay As You Rate Act seeks to get benefits to veterans as soon as the evidence determines they are eligible regardless of other issues that may be pending in their claims. VA’s manual for claims adjudication, the M21-1MR, states with provided exceptions that VA is to, quote, “Decide every issue for which sufficient evidence has been obtained and a benefit can be granted, including service connection at a non-compensable level, even when the issue of service connection for other disabilities or entitlement to a higher evaluation on another issue must be deferred.”

VA already has the capability to do what this bill intends, unfortunately, it has been our experience that veterans’ claims are not adjudicated as they become available for benefits; instead, VA often waits to adjudicate all issues en masse. This practice can be costly to veterans. Not only is a veteran potentially losing hundreds of dollars monthly in compensation benefits, the veteran is also potentially losing the ability to seek treatment for the condition from VA or receive other benefits associated with service connection for the condition. The American Legion fully supports getting these bene-

fits to the veterans as quickly as possible, and as a result, we support the Pay As You Rate Act.

Again, on behalf of National Commander Mike Helm and the members that comprise the nation's largest wartime veterans service organization, we appreciate the opportunity to speak before you this morning to discuss these bills that could have long-lasting effects upon the veteran community.

I will be happy to answer any questions that the Committee may have. Thank you.

[THE PREPARED STATEMENT OF ZACHARY HEARN APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Hearn.

Mr. Ortner, you are recognized for five minutes to provide the testimony of the Paralyzed Veterans of America.

STATEMENT OF BLAKE C. ORTNER

Mr. ORTNER. Chairman Abraham, Ranking Member Titus, Members of the Subcommittee, Paralyzed Veterans of America would like to thank you for the opportunity to testify today on the pending legislation. As identified in our written testimony, PVA supports many of the bills before us today, and in light of limited time, I will confine my testimony to the legislation where we have concerns.

PVA is very pleased with the introduction of H.R. 800, the Express Appeals Act. We see this legislation as a good beginning and a framework for critical changes to the appeals process that may help veterans receive benefits that they have earned more rapidly. One concern we have with the pilot program is the opening of the pilot to existing traditional appeals. PVA believes that for the pilot to be a true test of the express appeals process, it should only allow entrance into the pilot at the initial notice of disagreement stage; to do otherwise may create a flawed process and an imperfect test. In addition, VA should be required to provide more case-specific initial notice to veterans at the time of their denial so they can better understand why their claim was denied and whether election of the pilot program would be advisable.

PVA also wants to draw attention to the requirement of the secretary to transfer employees of the Appeals Management Center to the Board. We see this as a critical requirement to ensure that the Board has experts to assist with the program; however, we fear this may become an excuse by the Veterans Benefits Administration for why they are unable to complete traditional appeals. While it can be expected that reducing resources or manpower will have an impact on AMC's processing rate, we ask that the Subcommittee apply detailed oversight to ensure that any reduction is appropriate and acceptable. Furthermore, oversight is critical to ensure transferred staff is properly trained to assist with implementing the pilot.

In addition, PVA wants to ensure that veteran service representatives who are working under a power of attorney for a veteran have the ability to also be notified of actions on the appeal; as such, we believe it should include language that adds "and his or her representative" to ensure that a POA receives copies of whatever

was done as part of the development and get another opportunity to provide argument.

PVA strongly supports H.R. 1331, the Quicker Veterans Benefits Delivery Act of 2015. This bill is a high priority for PVA's members and we have consistently recommended that VA accept valid medical evidence from non-Department medical professionals. The continuing actions of VA to require Department medical examinations does nothing to further efforts to reduce the claims backlog.

PVA would also like to see VA better adhere to its own reasonable doubt provision when adjudicating claims that involve non-VA medical evidence. We still see too many VA decisions where the veteran-friendly rule was not applied properly. More often, it appears VA raters exercise arbitrary prerogatives to avoid ruling in favor of the claimant, adding obstacles to the claimant's path without adequate justification. While due diligence and gathering evidence is absolutely necessary, too often it seems that VA is working to avoid a fair and legally acceptable ruling favorable to a veteran. Both the failure to accept and tendency to devalue non-VA medical evidence are symptoms of this attitude.

PVA cannot support H.R. 1379 as it is currently proposed. While PVA generally supports modifications to the remand process as it currently exists to allow for more expeditious and accurate resolution of appeals, H.R. 1379 is so vague that we believe it is unworkable. While there may be some advantages to oversight of all remands development by the Board, it will require significant investment of resources to ensure quality is better and results in better decisions; however, it raises significant unanswered questions.

The legislation indicates that, quote, "The Board may not remand any appeal case to the Veterans Benefits Administration," unquote, but does not describe what constitutes a remand. Many orders from the Board involve scheduling and completion of an examination by VBA. Is the process for scheduling and quality of examinations going to be improved? Will the process be adequately funded and staffed? Will there be additional emphasis on private and VA treating evidence? Will the entire SSOC process be eliminated? Until these questions are answered, PVA cannot offer its support.

Additionally, there is an absence of language that directs a pre-decisional review of the case by the appellant's designated power of attorney. It will be significantly easier for the Board to shut VSOs out of the process in the name of expediency. Perhaps PVA's greatest concern is that it almost eliminates VBA accountability. It allows for errors and poor initial decisions with no penalty or retribution. In too many cases, AMC ensure the specific orders from the veterans law judge are followed and completed. How much worse will it be when VBA can essentially wash their hands of their claims with no repercussions against the VBA or incompetent adjudicators who already have minimal accountability when they fail?

Mr. Chairman, this concludes my statement. I would be happy to answer any questions.

[THE PREPARED STATEMENT OF BLAKE C. ORTNER APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Ortner.

Mr. Varela, you are now recognized for five minutes for testimony on the Disabled American Veterans.

STATEMENT OF PAUL R. VARELA

Mr. VARELA. Chairman Abraham, Ranking Member Titus, and Members of this Subcommittee, good morning and thank you for inviting DAV to testify at today's legislative hearing. As you know, DAV is a nonprofit veterans service organization comprised of 1.2 million wartime service-disabled veterans dedicated to a single purpose: Empowering veterans to lead high-quality lives with respect and dignity.

For my oral remarks today, I will highlight several bills of particular importance to our organization. First, H.R. 675, the Veterans' Compensation Cost-of-Living Adjustment Act of 2015, the legislation DAV supports that would increase compensation rates for wounded, ill and injured veterans, their survivors, and dependents, commensurate with the rate provided to Social Security recipients effective December 1st, 2015. Customarily, Congress has determined these COLA's in parity with recipients of Social Security benefits to include years in which Social Security recipients received no increased COLA. Consequently, VA beneficiaries also received no increased COLA. DAV has always supported legislation that provides veterans with a COLA, however, DAV is adamantly opposed to the practice of rounding down COLAs to the nearest whole-dollar amount. This bill does contain a round-down provision and we oppose the round-down feature of this bill.

Second, H.R. 677, the American Heroes COLA Act of 2015, a bill seeking to couple COLAs for wounded, injured and ill veterans, their dependents and survivors to that of Social Security recipients. While we do not oppose the automatic adjustment, DAV will continue to oppose legislation that seeks to permanently round-down veteran and survivor compensation payments. H.R. 677 would permanently link VA compensation COLAs to that of Social Security recipients, provide for an automatic adjustment whenever there is an increase, and make permanent the practice of rounding down veteran and survivor COLAs to the nearest whole dollar, again, a provision we adamantly oppose. DAV and our IB partners call on Congress to end, permanently the practice of rounding down COLAs.

Next, H.R. 800, the Express Appeals Acts, a bill supported by DAV and other VSOs. This legislation would provide appellants with alternate appeals options designed to safely bypass some current VBA appeal processing requirements, potentially saving appellants up to 1,000 days of processing time and ensures appellants retain the absolute right to withdraw from the pilot, thus reverting them to the standard appeals process without any penalty at any time prior to the Board's disposition.

On January 22nd, 2005, DAV testified before this Subcommittee and recommended creating a new, fully developed appeals pilot program. Our proposal benefitted from subject matter expert input that spent weeks deliberating the pros and cons of establishing such a pilot. The FDA continues to gain widespread and growing support within the VSO stakeholder community, including full buy-in from both VBA and the Board leadership. The FDA is not envi-

sioned to replace either the DRO or the traditional appeals process; it is another option, a fully voluntary one. Several of the leading VSOs responsible for representing the majority of claims and appeals before the Department of Veterans Affairs believe this pilot to hold real promise.

An FDA pilot that addresses some of the overall workload challenges can be modified during its operational period and will supply Congress and stakeholders with tangible information that has the potential to lead to true appeals process reform. In the pilot, participants voluntarily agree to undertake development of private evidence, if any, in order to enter the FDA program. They may not later submit additional private evidence. Such supplemental submission results in pilot discontinuance, with one exception. When the Board develops any new evidence, appellants would receive copies of said evidence with 45 days to provide supplemental evidence in response to VA's findings.

To ensure the success of the pilot while preserving the best interests of appellants, we have made several formal recommendations that include increased reporting requirements, replacing the word "traditional" with "standard," limiting the FDA entry point, language preserving the DRO process, and enhanced VBA outreach.

Dr. Abraham, we want to take this opportunity to publicly thank the ongoing efforts of Congressman O'Rourke, who introduced similar legislation last year. Congressman O'Rourke and his staff worked closely with DAV and other VSOs on this initiative.

We also want to take this opportunity to thank the Chairman of the House Veterans Affairs Committee, Mr. Miller, who is the lead cosponsor for this bill, for his continued leadership and willingness to reach across party lines to support efforts at improving the lives of our nation's wounded, injured and ill veterans, their dependents, and survivors.

We appreciate the opportunity to present our views on these bills and look forward to answering any questions you or the committee members may have.

[THE PREPARED STATEMENT OF PAUL R. VARELA APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Varela.
Mr. Abrams.

STATEMENT OF RONALD B. ABRAMS

Mr. ABRAMS. Thank you, Mr. Chairman and Members of the Committee.

I want to get right to it and talk about H.R. 800. NVLSP must oppose the passage of this bill. 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 are often lacking in crucial detail. The VA doesn't inform veterans, and other claimants, as to what elements of the claim have been proven, what issues haven't been decided, and what elements of the claim have been disproved. 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. Without this, how can anyone make a knowing decision to give up important procedural and due process protections?

We find there is a great deal of uncertainty among veterans regarding their entitlement to VA benefits. Working with The American Legion we have interviewed hundreds of veterans in the last year and found that many of these veterans don't know why they are getting benefits. They are misinformed as to 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 can't support the bill as written.

Another problem is that while the bill invites the involvement of the service representative, it should require their involvement. The VA should send a form to the veteran that indicates that the veteran has consulted his or her representative and a place on the form to identify the service group and the name of the representative.

It is a good idea to require the Board to conduct appropriate development, but the bill says that the veteran, after giving up the right to submit evidence all through the process, will be given 45 days to respond to a negative medical exam. That is not enough time; they are going to need at least 90 days with an extension of another 90 days. It is hard to get a doctor to give you a medical opinion in 90 days. I have been doing this for a long time, and even when I call family members who are doctors, it can take three, four months to get a good opinion.

I want to shift now to 1379, NVLSP strongly supports this bill; however, we think that H.R. 1379 should prohibit the Board from developing negative evidence against the claim unless the Board explains in writing why the evidence is not sufficient to award benefits. This would eliminate some of the problems caused by what we call the "hamster wheel."

NVLSP supports the package of H.R. 1414, but wants to note that the VA has a manual provision that also calls for the VA to service connect claims that are at a non-compensable level so the veteran can get healthcare treatment. We would like that added to that bill. It is already in their rules, they ought to not have a problem adding that in.

I see I am running out of time, and I will be happy to take any questions. Thank you.

[THE PREPARED STATEMENT OF RONALD B. ABRAMS APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. Abrams.

Mr. Carpenter, you are recognized for five minutes, sir.

STATEMENT OF KENNETH M. CARPENTER

Mr. CARPENTER. Thank you very much, Members of the Committee. NOVA thanks you for inviting us to testify. Because of the limited time, we will address only four bills in our oral testimony.

The first bill we would like to address is the Quicker Veterans Benefits Delivery Act. We believe that this is an opportunity for Congress to codify the treating physician rule that has been adopted by regulation with the Social Security Administration. We believe that this will reduce appeals by getting favorable decisions in the first instance and reduce the appeals backlog by allowing treating physicians to be given deference in their medical judgment of

the veteran's condition based upon their relationship and treatment relationship with the veteran. This rule has been in place with Social Security and veterans should be afforded the same benefit. This bill acknowledges that there is a place for non-VA medical professional opinions and acknowledges that they should be placed upon equal footing with VA medical professionals. We encourage the adoption of the treating physician rule, which we believe will result in the quicker delivery of benefits to veterans.

The second bill we would like to address is the Court of Appeals for Veterans Claims Reform Act. This bill correctly provides for an appropriate salary increase for the judges of that court, and of equal importance, we believe that this bill recognizes the need for the important continuation of the size of the court.

The Ruth Moore Act of 2015 is necessary, in our view, to place a thumb on the scales of justice for those servicemembers who have been victims of sexual assault and need this legislation in order to obtain benefits for their resulting disabilities. The need for this legislation, we believe is obvious and it certainly is to myself, having represented several dozen veterans who have been the victims of sexual assault. If this Congress does nothing else this year, Congress needs to enact this bill in order to do the right thing by the victims of sexual assault in service.

Finally, we would like to address the Appeals Express Act. We believe that this act does not provide the structural change needed in the appeals process and simply delays for five years that necessary structural change. A pilot program is not what is needed to deal with the unacceptable delays in processing. At best, this will deal with one quarter of the appeals process. We believe that immediate and fundamental change is what is needed and with modification, we believe that this act could provide that immediate restructuring of the VA's appeal process.

The Express Appeals Act does contain two very necessary changes. First, the elimination of the statement of the case in the VA 9, as well as the elimination of Board remands for development. This is the type of structural change that is needed and should be in place for the benefit of all veterans who are appealing their cases immediately.

H.R. 1379 authorizes the Board of Veterans' Appeals to develop evidence and this is the kind of structural change that is required and should be incorporated into an overall structural change for the benefit of all veterans. There are currently 29,000 appeals on remand from the Board to the agency of original jurisdiction. Having the Board responsible for evidence development on appeal will result in faster and more efficient decision-making of appeals.

A pilot program, as proposed by the Express Appeals Act and allowing the Board to develop evidence, however, is not enough. NOVA would like to make five specific additional statutory changes. First—and I am not obviously going to be able to get through all of those, as I see my time is expiring—so I will conclude my remarks and make myself available for any questions. Do not interpret my not addressing the other bills as not support, as we have indicated in our written testimony, and we will be willing to respond to any questions on any of the bills.

[THE PREPARED STATEMENT OF KENNETH M. CARPENTER APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Mr. Hearn, in your written testimony, you note that the VA's current organizational structure and remand process creates an awkward relationship whereby the Board, which is independent of the VBA, directs a VBA agency to conduct the necessary development to issue a final decision. As a result the Board members must rely on VBA employees to conduct development over whom the BVA has no oversight. Please describe why this situation leads to inefficiencies and delays in the appeals process.

Mr. HEARN. If you have a lack of oversight, there is no sort of recourse that the Board can take, and as I indicated during the testimony or The American Legion indicated during the testimony, is that you can sense the frustration that the judges are feeling at the BVA. I think one of the questions that should be asked of VA, if the Appeals Management Center is put underneath the Board of Veterans' Appeals, do the Appeals Management Center employees need further training? If the answer is yes, then perhaps that speaks to the nature of training within VBA. If they say no, then the question has to be, why do you have repeated remands and why do you have overturns at the Board of Veterans' Appeals?

And I think this is what the frustration is that the veterans feel. Having worked over at the Board of Veterans' Appeals for several years for The American Legion, this frustration is sensed in conversations that I have had with individuals over there because the AMC is just not responding. There is this disconnect between the independent BVA and the VBA.

Mr. ABRAHAM. Thank you.

This question goes to the whole panel. Although a few members of the panel have expressed some reservations about H.R. 675 and H.R. 677, you are all aware that the annual COLA was held up in the Senate in 2012—and I think you alluded to that, Mr. Hearn. As representatives of veterans, could you please put a face on this issue and provide some real-life examples of how the veterans and their families are impacted when they can't count on this COLA from year to year. Any of you can respond.

Mr. HEARN. You're from Monroe?

Mr. ABRAHAM. Right.

Mr. HEARN. The average income is roughly 19,000 and change, according to census figures.

Mr. ABRAHAM. I agree.

Mr. HEARN. Las Vegas, you are around 25,000.

Sorry, I didn't check El Paso ahead of time.

If you are looking at a hundred thousand dollars worth of benefits in today's dollars, that is five years' worth the benefits in your district and four years' worth of benefits in your district, as far as income is concerned. So that is the face of it. No veteran wants to sit there and be the pawn in this political game, you know, as the winds of change occur in these halls; nobody wants to be in that, and we understand that, but we also recognize that we can't be diluting benefits to veterans simply for the course of expediency.

Mr. ORTNER. Chairman, I think in the case of—I will address 677 because that is the one we kind of had a little bit of problem with, and I think we completely understand why it makes perfect sense

to have it be automatic. DAV had indicated that some of the issues that may come along tying it in the way it is, but until Congress gets to a point where there is not the confrontational or the inability to get things through it, we still see—or the ability to have to go through the process of approving and having that bill passed to raise the COLA as something that provides a vehicle to deal with some of the issues that may get hung up in a more confrontational congressional aspect.

As you say, we concur with the idea that it makes sense to have something be automatic, but unfortunately, removing the ability to have one shot at oversight on what is involved in that COLA just, we are not sure that this is going to be the best benefit to the veteran.

Mr. ABRAHAM. Okay. Thank you.

Mr. Varela.

Mr. VARELA. Dr. Abraham, as having helped veterans directly for over a decade working with DAV, one of the questions that came up regularly as we get closer and closer to December is, are we going to get a COLA? Are we going to get a COLA? Are we going to get a COLA? And there were a couple of years where we didn't get a COLA, where veterans didn't receive a COLA, and that made them feel very sour that the Government couldn't provide them with a small cost-of-living adjustment.

So they feel the strain. They feel the uncertainty. They deal with the doubt. But if we turn around and tell them that we are going to permanently round-down—and that is the issue that DAV has primarily is the permanent round-down provision—if we tell them that we are going to round-down their benefits to the tune of saving the Government \$39 million and whatever the forecasted estimate was in the reports that we received earlier, that is going to make them feel even worse.

Mr. ABRAHAM. Okay. Thank you, Mr. Varela.

Mr. Abrams, did you have a comment?

Mr. ABRAMS. Just that compared to all other people getting, entitlement benefits, veterans, more than others are entitled to a COLA.

Mr. ABRAHAM. Any words, Mr. Carpenter.

Mr. CARPENTER. No.

Mr. ABRAHAM. Okay. Ms. Titus, the Chair recognizes you for five minutes.

Ms. TITUS. Thank you, Chairman.

I appreciate all of your concerns about locking in the automatic increase to Social Security, and something I don't hear you say, but I think might be in the back of some of your minds is what happens if Social Security goes to change CPI like some people have been talking about? And I will ensure you that I would never support having either Social Security or veterans benefits being tied to a chained CPI because that cuts out a lot of needed assistance that veterans have.

Also, I just want to say I appreciate your support for the Pay As You Rate Act, and you seem to have some of the same concerns I do about the fact that the VA has the authority to do it, but they are not doing it or they are not doing much of it. Also, I think you

had good suggestions, especially about putting in the manual, and I appreciate that.

I would just ask you, how can you help us, if we move forward with this, assure that the interim payment doesn't become the ceiling of the claim because we certainly don't want that to happen. I know that this committee has oversight down the road and we can do something through legislation, but how about let's eliminate the tendency to create a change before it happens for once, can stop it from going in the wrong direction at the front end and not deal with it at the back end. Do you have any suggestions for how we might do that, anybody?

Yes, sir?

Mr. ABRAMS. The VA could be proactive and do a study that reviews the subsequent rating after an interim rating has been assigned. For example, if they service-connect a particular condition with a 10 percent rating and then they are going to do an evaluation to evaluate the severity of the particular condition, the VA may want to do a study of those evaluations and you can ask for a report given to Congress as to how that worked out. That would probably ensure that the VA would pay attention to providing the right info, and you would also want to know how long it took to get to the final rating.

Ms. TITUS. Thank you.

Any other suggestions or comments?

Mr. VARELA. Yes, just so I understand the question, though, Ranking Member, so you are saying that the VBA issues an interim decision and then they are done and then we grant a service connection at zero or ten percent and that is the ceiling and we want to avoid that, correct?

Ms. TITUS. Well, if you have a pay as you rate system and you get some kind of benefit for a veteran, maybe there would be a disincentive to look for others if you have already paid that veteran something. We don't want that to happen; we want it to be the opposite, that you get something while you are waiting for the rest, not that you get something and then you are done.

Mr. VARELA. Right. And as was mentioned earlier, the VA has the authority to do that. How often they do it we don't know, but typically, they will grant and then re-examine. And as Mr. Abrams mentioned earlier, you would have to have some kind of pending workload that shows you what was granted on an interim basis so that the VA closes that out and that may require an examination.

And they also have DBQs now, and if the DBQs are simply going to be what the examiners complete anyway, why would we be doing two identical examinations? So we would have to look at that, what type of claims came in with adequate DBQs and what type of evidence came in that wasn't in a DBQ format; that is another component.

Ms. TITUS. Thank you.

Mr. ORTNER. I think you actually have a very big challenge in trying to determine—I mean trying to determine something—you know, correct something in advance before you see what happens. And we have an example of the challenge with it today where VA thinks they are granting interim things and we don't. I guess the greatest concern I have with it is once you establish a rating or a

level or whatever it might be, I think there is somewhat of a tendency to see that as a ceiling, regardless, just, I mean human nature, because now you have got to decide that you are going to go beyond what has already been granted.

And I think that gets you to the point where you are going to have to put much more work into something to try to determine how to argue, well, no, we are already giving them 60 percent, now we have to give them more or a higher rating. And, you know, the challenges that we see in some cases with the VA is that they are not even giving them the first rating to begin with and claims are being denied. So I think that would be a very difficult thing to overcome. Maybe checking it, being able to look at how it is being done over time and seeing, you know, with an outside entity that then reviews what was decided, you know, that might be a technique, but I think it is a very difficult undertaking.

Ms. TITUS. Okay. Thank you.

Mr. HEARN. I think also as we are moving closer and closer to the national work queue, this is something that we need to look at very closely, because what I have said before is let's say that you are brokering a case out to Cleveland and you are talking about a knee situation and that person denies it, but then you have a regional office down in Texas who says, well, no, we are going to grant the service connection for the ankle condition. Well, now you are going to have to backtrack and make the argument for a secondary or aggravated condition.

So by having the national work queue, you are going to have this kind of a bit of a cycle going on there to make sure that all possible situations are exhausted, and the pay as you rate is going to even become a little more complicated with that because it is no longer just going to be a situation where a case is being adjudicated within one regional office; you are talking one of fifty-six, so there is going to have to be some oversight by VA and, you know, history has shown, perhaps by Congress.

But that is where I think where we are going to have to start moving towards in that direction.

Ms. TITUS. Well, thank you. That has been very helpful.

Thank you, Mr. Chairman.

Mr. ABRAHAM. Thank you, Ms. Titus.

Mr. O'Rourke.

Mr. O'ROURKE. Thank you, Mr. Chairman, and I want to thank each of you for your testimony and your response to our questions. That is the reason that I am here, even though I am not a permanent member of this subcommittee, I asked to be here today because I wanted to get your feedback on the legislation that we will be marking up and voting on in committee and hopefully we will see on the floor of the House in the not-too-distant future.

And I also want to thank you, because along with the employees at the VBA, it is your organizations and your members who make a deeply flawed, and I would say under-resourced system, work to the degree that it does today. We all agree that we are not seeing the outcomes in terms of accuracy and wait times that we want, but to the degree that we have success, I think it is largely in part to those who work with your organizations who advocate for veterans who need this kind of help, so I really appreciate that.

Specific to H.R. 800, the Express Appeals Act, I am hearing from Mr. Ortner and Mr. Varela that we have some unanimity with the VA on limiting the point at which a veteran can enter this pilot program, you know, at that point of entry, not allowing somebody to come in at a later point. And I think we are largely on the same page today, and just that in itself has made today's hearing productive, from my perspective.

You also offered some additional suggestions like adding language that includes, quote, "and his or her representative," which I think makes a lot of sense and reflects the work that you all are already doing that you will need to do going forward to make this successful.

To Mr. Abrams, I think you brought a lot of good suggestions to the table. Language that we might want to change or look at from 45 days to potentially 90 days, make sure that a veteran has adequate time to make that necessary response. I agree with your proposal that the response back on an initial claim should provide some specific detailed language so that the veteran can make an informed decision going forward; no one can argue with that.

And so I would certainly love to work with you to see if those kinds of changes are incorporated in the final bill, that we could gain your support. We would love to have it and we would love to make it a better bill.

And for Mr. Carpenter, again, I can't argue with much of what you had to say, which is that this bill does not solve the problem; it certainly doesn't. I agree with you. And we should have a comprehensive solution that completely figures this out. I am with you on that.

In the absence of that, however, I do think that we need to make some progress, and I think there is value in a pilot program that could inform whatever that ultimate solution is. Now, if someone has that, it had been vetted and we have the facts and the figures and the support to get it done, I will get behind that and drop this, because I do agree with you that is the most important thing to do. But I also don't want to allow the perfect to become the enemy of the good, and if we have something that can allow us to make some progress or help us to make a more informed decision on the final product, then I think we should get behind it. But I think you also offered some suggestions on how we could do it, and I am certainly open to those.

So I just really wanted to say thank you to each of you for the feedback, the commentary. And then, Mr. Carpenter, you said, as you were running out of time, that you had some further suggestions that time did not allow you to make, I would love to hear those if you would like to use the last minute and a half of my time.

Mr. CARPENTER. Pardon me. These are things that need to be incorporated, in our view, into the bill as a structural change to the system. The first is to amend 5904 to allow agents and attorneys in after the initial decision—currently it is after the notice of disagreement. The problem that we have with this bill is the limitation on evidence submission. Claimants need to understand what evidence is needed in order to be successful in their claim, and as

Mr. Abrams correctly points out, that that information is not being currently provided by the VA.

Additionally, we believe that this bill needs to specifically state that the appeal is completed with the notice of disagreement. Your bill says that implicitly, but in your view, it needs to say it explicitly, and that results in the elimination of the statement of the case in the VA.

Also, we believe it is critically important to codify the VA's regulation for a decision officer review and allow decision review officers the express authority for evidence development.

Fourth, to allow claimants up to one year from the adverse decision to submit evidence. This would segway back to the first point about being able to get representation and advice on what kind of evidence needs to be submitted.

And then we would propose that there would be a dual system for decision-making; one, appellate decision-making on the evidence in the first instance at the regional office and the second at the Board, by incorporating 1379 into this to allow the Board to make evidence development, allow the submission from the point that the case goes into appeal for one decision on that evidence by the Board.

Thank you very much.

Mr. ABRAHAM. Thanks again for coming.

Mr. McLenachen and Ms. Eskenazi, thank you, again for appearing.

And I think that we all see on the committee, certainly with the VSO organizations, everybody in this room wants to do what is best for the veteran, and as you see, we are certainly willing to listen to suggestions and ideas of things that we may need to tweak or change. We just want to do what is best for veterans, and I think everybody in the room agrees.

So we thank you again. It is good to see you. You are excused.

Any closing remarks, Ms. Titus, from you?

Ms. TITUS. No.

Mr. ABRAHAM. Okay. You are excused, gentlemen.

I now ask unanimous consent that the statements from the Veterans of Foreign Wars and the U.S. Court of Appeals for Veterans Claims be submitted for the record. Hearing no objections, so ordered.

And I ask unanimous consent that all members have five legislative days to revise and extend their remarks and include extraneous material. Having no objection, so ordered.

I thank the members and the witnesses for their attendance, and this hearing is now adjourned. Thank you.

[Whereupon, at 12:07 p.m., the subcommittee was adjourned.]

APPENDIX

PREPARED STATEMENT OF CHAIRMAN JEFF MILLER

Good afternoon.

Dr. Abraham, thank you for holding this hearing focusing on the various proposals to improve the VA's claims appeals process. Our nation's veterans—particularly those who have service-connected disabilities—deserve to have their claims decided accurately and fairly the first time and, if an appeal is necessary, the final decision should not only be accurate and fair, it should be timely.

Unfortunately, that has not been the case. As of 2014, veterans were forced to wait an average of 1011 days—almost 3 years—to get their case on the BVA docket. According to the VA's figures, approximately half of the cases are remanded. Even worse, the VA puts these cases on the backburner in order to focus on certain initial claims. Imagine the frustration of a veteran who has waited almost 3 years only to have the BVA remand the case for lack of evidence and then wait even longer for the VA to reach another decision.

As Dr. Abraham noted in the January 22nd oversight hearing, last year the Court of Appeals for Veterans Claims held the Secretary of Veterans Affairs in civil contempt, citing the Department's gross negligence in ignoring a veteran who repeatedly raised concerns on an appeal that had been remanded to the Department. The court noted that VA's inaction, quote "conjures a vision of a drowning man watched by a lifeguard in a nearby boat equipped with life preservers and rescue ropes who decides to do nothing even though the drowning man is blowing a whistle and firing flares to call attention to his plight," end quote.

Our nation's veterans deserve better.

I introduced HR 1379 to streamline the claims process by reducing the number of remands. In cases where there is insufficient evidence, HR 1379 would require the BVA to develop the evidence necessary to issue a final decision. It would also give the BVA the authority it needs to obtain all the evidence it needs.

There is no reason that the BVA should not be able to develop the evidence in order to have all the information it needs to reach a final decision. This simple change in the law will help the BVA resolve its claims backlog and give the veterans the finality they deserve.

I yield back.

PREPARED STATEMENT OF HON. RAUL RUIZ, M.D.

I thank the Chairman and Ranking Member for including my bill, H.R. 732, the Veterans Access to Speedy Review Act in this hearing, and I appreciate the Chairman's support as a cosponsor of this bill. This simple, bipartisan legislation will provide the Department of Veterans' Affairs (VA) the flexibility they need—and have requested before this committee—to expand the use of video teleconferencing (VTC) for hearings before the Board of Veterans Appeals. This authority will expand VA's capacity to adjudicate appeals, thereby expediting results for waiting veterans. My bill will also eliminate substantial travel costs to the veteran and the administration.

Under current law, veterans may involuntarily encounter an extended wait period for a judge to visit the veteran's region or for the veteran to travel to Washington, DC. Additionally, veterans are required to pay all travel expenses to and from an in-person hearing, even if they would prefer a video teleconference. My bill would center the appeals process on the veteran's needs and save money for all parties involved. Importantly, veterans will retain the right to an in-person hearing, and under my bill the VA must honor the veteran's preference for hearing type—whether in-person or via VTC.

In 2012, the VA Board of Veterans' Appeals submitted a report to Congress highlighting recent activities which include four policy recommendations that seek to expedite or streamline the claims process for our nation's veterans. Video teleconferencing by default was included in these recommendations. In last year's committee report on the amended Veterans Access to Speedy Review Act, the VA committee noted that the Board has historically been able to schedule video conference hearings more quickly than in-person hearings, saving valuable time in the appeals process. As the VA testified before this subcommittee, in FY 2014, on average, video conference hearings were held 124 days sooner than in-person hearings.

This bipartisan solution will get many veterans their appeal results sooner, at no cost, which is why each Veterans Service Organization that testified at this legislative hearing supported my bill, as did the VA. This overwhelming support from both parties, the Administration, and veterans is why this bill passed the VA Committee by voice vote last Congress.

I urge the members of this subcommittee to come together again to advance this essential measure out of committee, and to advocate for the Speaker to bring it to the floor. It is understandable to delay controversial and contentious policy proposals until an agreement is reached, but denying veterans relief when a consensus has been reached is unacceptable.

PREPARED STATEMENT OF CHELLIE PINGREE

Thank you Chairman Abraham and Ranking Member Titus for having me here today, and for considering the Ruth Moore Act in this morning's legislative hearing. I appreciate the opportunity to talk more about this bill and why I think we still desperately need it to become law.

It has been said that the greatest casualty is being forgotten. I can tell you that the hundreds of survivors who have called my office since I first introduced this legislation in the 113th Congress have felt forgotten by the military system they so proudly served. They struggle trying to meet an unfair standard of proof, suffer through years of denials and appeals in a process that re-traumatizes them. It is a system that is broken and I can tell you from the countless stories I've heard that it hasn't been fixed.

Ruth Moore, who this bill is named for, is a US Navy veteran from Maine who was raped twice during her military service. When she reported it, she was discharged and labeled as having a personality disorder. She spent over 23 years fighting the VA to get disability benefits, and she battled homelessness and PTSD during that time.

Quite simply, the Ruth Moore Act ensures that the VA treat our veterans whose PTSD is caused by sexual assault with the same standards and burden of proof that it extends to veterans whose PTSD is caused by combat and other particularized claims.

We know that fewer people are being assaulted and more are coming forward—and that is progress. But still, 19,000 military personnel being sexually assaulted or sexually harassed annually is hardly cause for celebration.

I want to talk a little bit about approval rates—the rates at which claims for VA benefits are accepted.

The GAO did find that the overall approval rate for PTSD resulting from sexual assault is increasing but it's still lower than the approval rating for PTSD claims for other factors.

And what is most concerning to me is that, despite continued training, the subjective standards used to verify victims' sexual assault meant approval ratings varied widely depending on where a veteran submitted their claim. In some offices, as few as 14 percent of claims were approved, while others approved 88 percent. In the GAO report, the VA states that under the current regulation, two adjudicators can interpret a marker in opposite ways and both will be correct. It is simply not acceptable that a veteran faces the roll of the dice on where they live and where their claim is reviewed.

Nor is it acceptable that 62% of respondents in a recent survey stated that they faced retaliation for reporting. This, as well as evidence that 40% of assailants were perpetrated by a superior within a victim's chain of command suggests to me that we cannot train our way out of this problem.

After a court ruling in 2002, the VA changed its policy to allow veterans a wider range of evidence—called secondary markers—to be used in a personal assault disability claim. The VA will tell you that because the current system allows for this alternative evidence for verifying an assault, there is no need for parity with evidentiary standards. But every day I hear from vets who detail claim denials due to the vast inconsistencies in the VA's application of these standards. What one Regional office or adjudicator will accept as proof, another will deny.

In 2010, the VA relaxed the evidentiary standards for veterans who suffer from combat related PTSD—same diagnosis, but different evidentiary standard. The VA finally acknowledged that far too many veterans who have deployed into harm's way suffered the emotional consequences of their service but could not, through no fault of their own, locate military documentation that verified the traumatic events that triggered their PTSD. The VA now accepts their statement of traumatic events, along with a PTSD diagnosis and a medical link, as enough to receive disability benefits.

The VA's less favorable treatment of veterans who suffered sexual assault than those who suffered other forms of combat trauma is arbitrary. The VA can articulate no rationale for why a veteran's lay testimony may be adequate to establish combat trauma, but not trauma from a sexual assault.

The Ruth Moore Act corrects this injustice. Last Congress it was endorsed by the American Legion, Disabled American Veterans, Veterans of Foreign Wars, Vietnam Veterans of America, Iraq and Afghanistan Veterans of America, Service Women's Action Network, Military Officers Association of America, the National Organization of Veterans' Advocates, and the Fleet Reserve Association. I want to take this opportunity to thank them for their support and applaud the work they do for veterans.

This bill also requires the VA to report MST related claims information back to Congress, such as the number of denied and approved MST claims each year, and the reasons for denial. As members of Congress, we have a responsibility to ensure that the VA is providing timely and accurate decisions to veterans, but we cannot do that without sufficient data.

Over the past few years, there has been significant public attention to sexual trauma in the military, and the VA has redoubled its training and prevention efforts. But let me reiterate—this problem is not fixed. This is a problem of fundamental fairness: If a medical diagnosis and link to a claimed event is enough for one group of veterans with the same medical diagnosis, it ought to be enough for another.

Critics of this legislation might say that it makes it too easy to get benefits and veterans could just say anything to get those benefits. First of all, that's simply not true. There still needs to be a medical diagnosis of PTSD and a medical link, which are not at all easy to come by and less easy to live with. And secondly, we heard that same argument when the VA proposed a similar change for combat veterans, and I haven't heard the VA say they've had big problems with veterans lying about their service.

Mr. Chairman, over the last four years, I have heard from dozens and dozens of veterans from all over the country. Men and women who volunteered to serve their country, many of them planning on a career in the military, only to have that career cut short by the horror of a violent, sexual assault.

These survivors were blamed and harassed, crimes were covered up, and the survivors themselves became the subject of further harassment and recrimination. And too often, what followed was years of mental health issues, lost jobs, substance abuse and homelessness.

These stories don't have to end this way. With the Ruth Moore Act, we can change the VA's policy so veterans who survive a sexual assault get the benefits they earned and deserve.

Thousands of veterans—survivors of sexual assault—have fought for years to get the benefits that are owed them. But they didn't give up. So we are not going to give up in our fight to reform this process to make sure these brave women and men get the justice they deserve.

Again, thank you Mr. Chairman, Ranking Member Titus and members of the subcommittee for considering this legislation. I am happy to answer any questions you may have.

STATEMENT OF
DAVID R. MCLENACHEN
ACTING DEPUTY UNDER SECRETARY FOR DISABILITY ASSISTANCE,
VETERANS BENEFITS ADMINISTRATION
BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
April 14, 2015

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to be here today to provide the views of the Department of Veterans Affairs (VA) on pending legislation affecting VA's programs, including the following: H.R. 675, H.R. 677, H.R. 732, H.R. 800, H.R. 1331, H.R. 1379, H.R. 1414, H.R. 1569, and H.R. 1607. We defer to the United States Court of Appeals for Veterans Claims regarding H.R. 1067. Accompanying me this morning are Laura H. Eskenazi, Executive in Charge/Vice Chairman, Board of Veterans' Appeals and David J. Barrans, Assistant General Counsel.

H.R. 675

H.R. 675, the "Veterans' Compensation Cost-of-Living Adjustment Act of 2015," would require the Secretary of Veterans Affairs to increase, effective December 1, 2015, the rates of disability compensation for service-disabled Veterans and the rates of dependency and indemnity compensation (DIC) for survivors of Veterans. This bill would increase these rates by the same

percentage as the percentage by which Social Security benefits are increased effective December 1, 2015. Each dollar amount increased, if not a whole dollar amount, would be rounded to the next lower whole dollar amount. The bill would also require VA to publish the resulting increased rates in the Federal Register.

VA strongly supports this bill because it would express, in a tangible way, this Nation's gratitude for the sacrifices made by our service-disabled Veterans and their surviving spouses and children, and would ensure that the value of their benefits will keep pace with increases in consumer prices.

The cost of the cost-of-living adjustment (COLA) is included in VA's baseline budget because we assume a COLA will be enacted by Congress each year. Therefore, enactment of H.R. 675, which would extend the COLA adjustment through November 30, 2016, would not result in costs. The round-down in increased rates would result in savings of approximately \$39.6 million in fiscal year (FY) 2016, \$261.4 million over five years, and \$568.8 million over ten years.

H.R. 677

H.R. 677, the "American Heroes COLA Act of 2015," would amend 38 U.S.C. § 5312 to permanently authorize the Secretary of Veterans Affairs to implement cost-of-living increases to the rates of disability compensation for service-disabled Veterans and the rates of DIC for survivors of Veterans. This bill would direct the Secretary to increase the rates of those benefits whenever a cost-of-living increase is made to benefits under title II of the Social Security Act.

VA would increase the rates of compensation and DIC by the same percentage as Social Security benefits. This bill would also make permanent the round-down requirement for compensation cost-of-living adjustments. The amendments made by the bill would take effect on December 1, 2015.

VA supports this bill because it would be consistent with Congress' long-standing practice of enacting regular cost-of-living increases for compensation and DIC benefits in order to maintain the value of these important benefits, but would eliminate the need for additional legislation to implement such increases in the future. It would also be consistent with current 38 U.S.C. §§ 1104(a) and 1303(a), which provide that COLAs to compensation and DIC awards, if they are made, will be at a uniform percentage not exceeding the percentage increase to Social Security benefits.

The cost of the COLA is included in VA's baseline budget because we assume Congress will enact a COLA each year. Therefore, making the annual COLA automatic would not result in costs. However, making permanent the provision to round down the COLA would result in savings of approximately \$39.6 million in FY 2016, \$761.9 million over five years, and \$3.1 billion over ten years.

H.R. 732

H.R. 732, the "Veterans Access to Speedy Review Act," would allow for greater use of video conference hearings by the Board of Veterans' Appeals (Board), while still providing Veterans with the opportunity to request an in-

person hearing if they so elect. VA fully supports H.R. 732, as this legislation would potentially decrease hearing wait times for Veterans, enhance efficiency within VA, and better focus Board resources toward issuing more final decisions.

The Board has historically been able to schedule video conference hearings more quickly than in-person hearings, saving valuable time in the appeals process for Veterans who elect this type of hearing. In FY 2014, on average, video conference hearings were held 124 days sooner than in-person hearings. H.R. 732 would allow both the Board and Veterans to capitalize on these time savings by giving the Board greater flexibility to schedule video conference hearings than is possible under the current statutory scheme.

Historical data also shows that there is no statistical difference in the ultimate disposition of appeals based on the type of hearing selected. Veterans who had video conference hearings had an allowance rate for their appeals that was virtually the same as Veterans who had in-person hearings; however, Veterans who had video conference hearings were able to have their hearings scheduled much more quickly. H.R. 732 would still afford Veterans who want an in-person hearing with the opportunity to specifically request and receive one.

Enactment of H.R. 732 could also lead to more final decisions for Veterans as a result of increased productivity at the Board. Time lost due to travel and time lost in the field due to appellants failing to show up for their hearing would be greatly reduced, allowing Veterans Law Judges (VLJs) to better focus their time and resources on issuing final Board decisions for Veterans. .

Major technological upgrades to the Board's video conference hearing equipment over the past several years leaves the Board well positioned for the enactment of H.R. 732. This includes the purchase of high-definition video equipment, a state-of-the-art digital audio recording system, implementation of a virtual hearing docket, and significantly increased video conference hearing capacity. H.R. 732 would allow the Board to better leverage these important technological enhancements.

In short, H.R. 732 would result in shorter hearing wait times, better focus Board resources on issuing more decisions, and provide maximum flexibility for both Veterans and VA, while fully utilizing recent technological improvements. VA therefore strongly endorses this proposal.

H.R. 800

H.R. 800, the "Express Appeals Act," would require VA to conduct a Fully Developed Appeal (FDA) pilot program to assess whether it is feasible to expedite appeals by utilizing an alternative appeals process that is elected by the claimant. The proposed legislation provides for two different types of FDA elections: (1) elections by claimants who have already filed a traditional appeal with respect to the claim(s) at issue prior to the date on which the pilot program commences, and (2) elections by claimants who have not yet filed a traditional appeal on that date. Upon FDA election, jurisdiction over the appeal would be transferred directly to the Board, which would retain jurisdiction for FDA processing. The proposed legislation would also require the Board to establish a

Development Unit to develop Federal records, independent medical opinions, or new medical examinations if the Board determined that such development is required to decide an FDA. The proposed legislation would also require VA to report to Congress a recommendation for any changes to improve the pilot program and assess the feasibility of expanding the program, with the first report required not later than 180 days after commencement of the program.

VA generally supports an FDA pilot program. VA's appeal process is lengthy and complex, and an FDA pilot program would afford the opportunity to test a change that could significantly increase efficiency and timeliness for Veterans and their Survivors.

In the present appeal system, a Veteran initiates an appeal of a decision of a claim for VA benefits by filing a notice of disagreement (NOD). The Agency of Original Jurisdiction (AOJ) then determines whether additional development is needed and, if so, undertakes that development and provides the Veteran with a statement of the case (SOC), which contains a summary of the evidence, a summary of the applicable laws and regulations, and a discussion of how such laws and regulations affect the determination. The Veteran can then complete his or her appeal by filing a substantive appeal. If, after issuance of an SOC and before a case is certified to the Board, additional evidence is obtained by VA, the AOJ will generally issue a new decision known as a supplemental statement of the case (SSOC). If more evidence is obtained prior to certification of the appeal to the Board, additional SSOCs may be required. The requirement to issue an SSOC (i.e., a new decision) each time evidence is obtained before an appeal is

certified to the Board adds layers to the appeals process and results in lengthy wait times for Veterans. In fiscal year 2014, the average time between the date the Veteran filed an NOD and the issuance of an SOC was 330 days. The time from issuance of an SOC to filing of a substantive appeal averaged 39 days. The period between the filing of a substantive appeal and certification of an appeal to the Board was 681 days. The FDA pilot program would allow VA to assess whether Veterans may benefit from a significantly streamlined appeal process. By allowing jurisdiction over appeals to move from the AOJ to the Board with an FDA election made at the time of filing of the NOD, there is potential to remove years of wait time for Veterans for a decision from the Board.

While VA supports an FDA pilot program, the proposed legislation as currently drafted does not provide an accurate portrayal of the benefits which may be achieved when Veterans file FDAs. H.R. 800 provides for two different types of FDA elections: elections made at the time of filing of the NOD and elections for appeals where the NOD was filed before commencement of the pilot program (post-NOD elections). In the case of a post-NOD election, the proposed legislation would allow an FDA election to be made at any time during the traditional appeal process. VA appreciates the goal of providing as many Veterans as possible with increased efficiency of appeals processing; however, allowing Veterans who have already begun the traditional appeals process to elect to join the FDA pilot program would put the FDA label on appeals that already have been through lengthy waits in the traditional appeal process. Veterans who make a post-NOD FDA election, after starting a traditional appeal,

would not experience the same time savings as Veterans who make an FDA election at the NOD stage since time will have already been spent in the traditional appeals process. This could lead to the misperception on the part of Veterans that the FDA process is ineffective or somehow does not lead to any significant time savings. Such perception could harm the FDA pilot as a whole and discourage participation.

Mixing post-NOD FDA elections and elections made at the time of filing of the NOD would also make it very difficult to get a clear picture of the effectiveness of the FDA process for new appeals, as timeliness and outcome data would be skewed by post-NOD FDA elections. If the goal of the pilot is to evaluate the effectiveness of a new alternative appeals process, mixing in cases that have already been processed, at least in part, as traditional appeals might make it more difficult to reach accurate conclusions as to the effectiveness of the FDA process.

Therefore, to allow VA and Veterans to accurately evaluate the efficiency of a pilot allowing jurisdiction over appeals to move from the AOJ to the Board at filing of the NOD, the pilot program should be limited to appeals where the election is made at that point in time, as opposed to later in the appeals process. Often, during the lengthy time between an NOD being filed and an appeal being transferred to the Board, significant amounts of additional evidence are added to the record. Transferring jurisdiction over an appeal to the Board at the time of filing the NOD would likely mean a reduction in the amount and complexity of evidence to be considered. Additionally, because of the average extended

period between filing of an NOD and certification of an appeal, medical evidence frequently becomes outdated, requiring further development and, in turn, further lengthening the wait time for a decision. Therefore, allowing post-NOD appeals to opt into the process will make it more difficult to determine how much a streamlined process reduces the need for additional development.

Other challenges would result from allowing a Veteran to elect to change a traditional appeal to an FDA after filing of the NOD. Section 2(b)(3)(A) of the proposed legislation requires that, where a Veteran makes an election to change a traditional appeal to an FDA, VA must inform him or her of whether any time savings will be accomplished through an FDA. This is counter to the goal of streamlining the appeals process for Veterans. VA staff would be required to review a Veteran's file, give an estimate as to whether opting into the FDA pilot would provide any time savings, and provide notice regarding this estimate. This process could lead to questions regarding the estimate provided by VA and the adequacy of the notice given. Section 2(b)(3)(B) instructs that, if the Veteran elects to opt into the FDA pilot, the appeal will be processed as an FDA to the extent practicable. This invites ad hoc judgments regarding the degree of processing appropriate for a traditional appeal converted to an FDA and invites judicial review regarding whether different processing of a Veteran's appeal would have been "practicable." However, were the pilot program limited to FDA elections made at the time of filing of the NOD, these potentially problematic issues would be avoided.

Allowing post-NOD elections to be included in the pilot program would also create challenges in the ability to manage the FDA docket in compliance with the requirements of the proposed legislation. H.R. 800 would require that the Board maintain fully developed appeals on a separate docket from traditional appeals and, to the extent practicable, decide each FDA within one year of filing of the NOD. While this requirement is logical for appeals in which the FDA election is made at the time of filing of the NOD, it is problematic if post-NOD FDA elections are included in the pilot program, as a Veteran may elect to join the pilot program at any point during the traditional appeal process, possibly long after the NOD was filed. In the case of post-NOD FDA elections, it could be extremely challenging (or even impossible if the FDA election was made more than one year after an NOD was filed) to decide the appeal within one year of filing of the NOD.

VA believes the FDA pilot program could be utilized for more types of claims. Section 2(b)(5) of the proposed legislation provides that a Veteran may only make an FDA election with respect to a claim for disability compensation that is not a petition to reopen a claim or a separate claim for an increased rating of an issue previously decided by an FDA. If a Veteran has a disability claim decided through the FDA pilot program and later desires to file another claim with respect to that same disability, VA believes he or she should not be excluded from participation in the pilot program. For example, a Veteran could have a claim for service connection granted via the FDA process, and then file a claim for an increased rating because of worsening of that disability. A Veteran whose

claim for an increased rating is denied should be able to have the increased rating appeal processed via the FDA pilot program if desired. Similarly, a Veteran may have a claim for service connection denied via the FDA process. If that Veteran then files a request to reopen that claim, which VA denies, and he or she wishes to appeal, that Veteran should also have the option to participate in the FDA pilot with regard to that appeal. The pilot program provides for a significantly streamlined appeals process, with the potential to eliminate significant wait time when jurisdiction over an appeal is transferred to the Board with the filing of the NOD. Particularly if a Veteran has a positive experience participating in the pilot program and wishes to make another FDA election with regard to a related claim filed later, VA believes he or she should not be precluded from doing so. Furthermore, determining whether a Veteran had ever previously made an FDA election would consume resources and slow down the FDA process with no obvious benefit to Veterans.

H.R. 800 would allow a Veteran to revert to the traditional appeals process at any time after making an FDA election, with no penalty other than loss of the docket number associated with the FDA. VA supports allowing Veterans who make an FDA election to choose to opt out of the pilot program; however, we suggest revising section 2(b)(4) of the proposed legislation to make clear that, once a Veteran has opted out of the pilot program, he or she cannot then re-enter the program with respect to that appeal. Such clarity is necessary to avoid a Veteran who makes an FDA election from opting out of the program, at which time he or she could then submit additional evidence and/or have a

hearing before RO personnel or a VLJ, and then re-enter the pilot program by making a new post-NOD election. Allowing Veterans to revert to traditional appeal processing and then re-enter the FDA pilot program would defeat the purpose of the pilot program. Such a change would be moot if post-NOD elections were not permitted.

While VA fully supports the FDA pilot program for elections made at the time of filing of the NOD, we suggest some additional revisions to the proposed legislation for clarification.

The proposed legislation contains an inconsistency with regard to the submission of evidence during the pilot program. Section 2(c)(3) states that a claimant may not submit to the Board any new evidence relating to an FDA after filing such appeal unless the claimant reverts to the traditional appeals process. By contrast, section 2(c)(4) provides that, if the Board determines that an FDA requires Federal records, independent medical opinions, or new medical examinations, the Board shall retain jurisdiction, take such actions as may be necessary to develop such evidence, ensure the claimant receives a copy, and provide him or her a period of 45 days after receipt to provide the Board any additional evidence. Thus, a Veteran may submit *any* new evidence to the Board after the Board obtains Federal records, independent medical opinions, or new examinations. VA understands that the intention of the pilot program is that an FDA will be limited to the evidence submitted at the time of the FDA election, unless the Board determines that certain additional development (Federal records, independent medical opinions, and/or new medical examinations) is

warranted. VA suggests revising the proposed legislation to clarify that a Veteran may not submit any new evidence to the Board relating to an FDA after making an FDA election unless he or she reverts to the traditional appeals process or such evidence is provided in response to notice of Federal records, independent medical opinions, or medical examinations obtained by the Board's Development Unit.

The proposed legislation does not currently address evidence identified, as opposed to submitted, by a Veteran. Because VA understands that the intention of the pilot program is that an FDA would be limited to the evidence submitted at the time of the FDA election, VA suggests revising section 2(c)(3) to clearly state that, if a Veteran identifies evidence, at the time of or after making an FDA election, which was not previously identified, VA shall not be required to make any efforts to obtain the identified evidence pursuant to section 5103A of Title 38, United States Code, unless the Veteran reverts to the traditional appeals process. VA believes, however, that this exception to VA's duty to assist should not apply to service treatment records identified at the time of an FDA election.

As noted, the proposed legislation provides a Veteran a period of 45 days after receipt of Federal records, independent medical opinions, or medical examinations obtained by the Board's Development Unit to provide any additional evidence. VA cannot readily determine the date of receipt by the claimant because of differences in mail delivery time. However, for VA to calculate the time limit to submit additional evidence from the date of mailing would be consistent with current time limits in the VA appeals process; for

example, an NOD must be filed within one year from the date VA mails a notice of determination, and a substantive appeal must generally be filed within 60 days of mailing of the SOC or the remainder of the one-year period from the date of mailing of the notification of the determination being appealed, whichever is later. 38 C.F.R. § 20.302.

With the exception for evidence submitted in response to notice of evidence obtained via the Board's Development Unit, an FDA will be limited to evidence submitted with or prior to the FDA election. Therefore, it is important to make clear that the statutory right to "one review on appeal," as provided in 38 U.S.C. § 7104(a), does not apply to evidence associated with the record after issuance of the determination appealed, whether the evidence was submitted by the Veteran at the time of the FDA election, obtained by the Board's Development Unit, or submitted by a Veteran in response to notice of evidence obtained by the Board's Development Unit. Rather, this evidence would be considered in the first instance by the Board. Therefore, VA suggests revising the proposed legislation to clarify that any evidence submitted by a Veteran in conjunction with the FDA election, obtained by the Board's Development Unit, or provided by the claimant in response to such evidence, will be considered by the Board in the first instance, without consideration by the AOJ, and that the right to "one review on appeal" of the newly-submitted evidence is waived.

Section 2(c)(4) of the proposed legislation is titled "PROHIBITION ON REMAND TO REGIONAL OFFICE." We suggest retitling this section as "PROHIBITION ON REMAND FOR ADDITIONAL DEVELOPMENT." Most

remands are sent from the Board to the Veterans Benefits Administration's (VBA) Appeals Management Center (AMC), as opposed to regional offices. Additionally, while the proposed legislation requires the Board to undertake certain development when necessary to decide an FDA (obtaining Federal records, independent medical opinions, and/or new medical examinations), the proposed legislation does not address other instances where remand may be required for non-development reasons, for example, if the AOJ has not yet adjudicated a claim which is inextricably intertwined with the claim on appeal. While this type of non-development remand would likely be rare, VA suggests revising the title of section 2(c)(4) as above.

VA also suggests clarifying that a Veteran who makes an FDA election will not be afforded a hearing, either before the Board or the AOJ. Section 2(c)(6) of the proposed legislation states that the Board may not provide hearings with respect to FDAs. In traditional appeals, however, a Veteran may elect to testify at a hearing before RO personnel. 38 C.F.R. § 3.103(c)(1). For clarification, VA suggests making clear that a Veteran will not be afforded a hearing, either before the Board or the AOJ, with respect to an FDA. To further clarify this point, VA suggests revising section 2(c)(2)(A)(ii), which states that the Board will hear FDAs in the order that they are received on the FDA docket, to state that the Board shall *decide* these appeals.

The proposed legislation also states that VA will carry out the pilot program for a five-year period beginning one year after the date of enactment of the legislation. We suggest revising section 2(d) so that the pilot program would

begin not later than one year after the date of enactment, to allow the program to start sooner than one year from the date of enactment. VA looks forward to working with Congress to help further refine this initiative to maximize its effectiveness and efficiency.

No mandatory costs are associated with this legislation. It is very difficult to quantify GOE costs or savings associated with the proposed legislation. Because an FDA election is an individual choice, it is impossible to predict how many Veterans would choose to enter the pilot program. Some VBA savings resulting from the reduction of evidence gathering and decision making would be offset in additional costs to the Board. VA is unable to determine what additional staffing the Board may require as a result of this proposed legislation. If a significant number of Veterans elect to participate in the pilot program, the Board would have an increase in the already growing number of pending appeals, which would likely require increased staff. However, because jurisdiction would be transferred at the time of filing of the NOD, appeals processed via the FDA pilot program would likely have less evidence than appeals processed via the traditional appeals process, as the pilot program would eliminate the years that an appeal waits before transfer to the Board, during which time additional evidence is added to the record. Therefore, the Board may be able to process FDA appeals more quickly than traditional appeals.

H.R. 1067

H.R. 1067, the "U.S. Court of Appeals for Veterans Claims Reform Act," would extend the temporary expansion of the U.S. Court of Appeals for Veterans Claims (Veterans Court), authorize recall for further service of retired judges of the Veterans Court, add a life insurance program relating to Veterans Court judges, and allow for voluntary contributions to enlarge survivors' annuity to Veterans Court judges.

As noted above, VA respectfully defers to the Veterans Court for views on this bill.

H.R. 1331

H.R. 1331, the "Quicker Veterans Benefits Delivery Act of 2015," would revise statutes pertaining to adjudications and payment of disability benefits.

Section 2 of this bill would prohibit VA from requesting a medical examination when the claimant submits medical evidence or an opinion from a non-VA provider that is competent, credible, probative, and adequate for rating purposes. Sections 3 and 4 would require VA to report to Congress on the progress of VA's Acceptable Clinical Evidence (ACE) initiative and, for each VA regional office, data on the use by claimants of private medical evidence in support of compensation and pension claims.

VA does not support H.R. 1331. VA appreciates the intent of the bill, which seeks to provide benefits to Veterans more expeditiously. However, as

written, the bill is, in some respects, unnecessary, unclear, and problematic to implement.

Section 2 of the bill is duplicative of existing law. This section prohibits VA from requesting a medical examination when evidence that is submitted is adequate for rating purposes. Section 5103A(d)(2) of title 38, United States Code, notes that an examination or opinion is only required when the record does not contain sufficient medical evidence to make a decision. Furthermore, section 5125 of title 38, United States Code, explicitly notes that private examinations may be sufficient, without conducting additional VA examinations, for adjudicating claims. VA regulations are consistent with these statutory requirements. Therefore, this section is unnecessary and duplicative. VA is already allowed to adjudicate a claim without an examination if the claimant provides evidence that is adequate for rating purposes. There are no costs associated with section 2.

VA does not support section 3 or 4. VA maintains data concerning the number of examinations in which ACE is used, but VA does not track when the evidence is supplemented with a telephone interview, data that VA would be required to report under the bill. In addition, VA does not track when private medical evidence is sufficient or insufficient for rating purposes, as this is not a formal determination. This determination depends on the receipt and evaluation of each piece of evidence and may change at any time in the process. When a VA examination is requested after the submission and review of private medical evidence, VA has made a determination that the evidence is insufficient for rating

purposes, as it is VA policy to evaluate a condition without an examination when the evidence of record is adequate to decide the claim. GOE costs associated with sections 3 and 4 are insignificant.

H.R. 1379

H.R. 1379 would require the Board to develop evidence when necessary to make a decision in an appealed case and would prohibit the Board from remanding cases to VBA. VA does not support H.R. 1379. VA supports the goal of increasing efficiency of the VA appeals process to more timely serve our Nation's Veterans; however, H.R. 1379 would not achieve that goal. It is imperative to consider VA's complex appeals process in its entirety and institute change that will result in overall increased efficiency for Veterans, rather than simply moving control of part of the existing appeals process to another part of the Department with no identifiable gain for Veterans.

H.R. 1379 would prohibit Board remands to VBA. In doing so, the legislation would create statutory conflict by failing to address the fact that, by law, Veterans are entitled to "one review on appeal." See 38 U.S.C. § 7104(a). Under the current legal framework, the Board cannot make a decision based on evidence it develops without depriving a Veteran of this statutory right. Presently, if the Board reviews an appeal and determines that additional evidentiary development is required, the case is remanded to accomplish that development. The overwhelming majority of Board remands (99 percent in fiscal year 2014) are to VBA. Following a Board remand, the AOJ, usually VBA,

develops the evidence and, if a claim cannot be granted, provides the Veteran an SSOC, a document which informs him or her of any material changes in or additions to the information previously of record, and the reasons why the claim remains denied. The Veteran is then provided 30 days to respond. In the current system, the additional evidence is considered first by the AOJ, which renders a decision via an SSOC, and then by the Board. If the Board were to obtain additional evidence and make a decision, without remanding for AOJ consideration of that evidence, the Veteran would be left without an ability to have the evidence reviewed administratively on appeal.

Currently, there are some limited situations in which the Board can consider evidence which was not previously considered by the AOJ. For example, where the Board determines that the benefit or benefits sought on appeal can be granted in full, the Board is not required to remand the case to allow the AOJ to consider in the first instance evidence submitted after the appeal was certified to the Board. Alternatively, if a claimant waives AOJ consideration of any evidence added to the record after certification of the appeal, the Board may consider the additionally submitted evidence in the first instance. 38 C.F.R. § 20.1304(c). Congress also amended 38 U.S.C. § 7105 to provide for an automatic waiver of initial AOJ review of evidence submitted by the Veteran to the AOJ or the Board unless the claimant or claimant's representative requests in writing that the AOJ initially review such evidence at the time of or after the AOJ receives the substantive appeal filed on or after February 2, 2013. *Honoring America's Veterans and Caring for Camp Lejeune Families Act of*

2012, Pub. L. No. 112-154, § 501, 126 Stat. 1165, 1190. Even under the automatic waiver provision, however, a Veteran may still choose to have evidence considered by the AOJ before it is considered by the Board.

H.R. 1379, by contrast, does not allow for this option, and thereby deprives Veterans of appellate rights.

The proposed legislation would not result in faster resolution of appeals. In the present system, the AOJ that adjudicates the claim develops the evidence. If a Veteran feels aggrieved by the decision, he or she can initiate an appeal by filing an NOD. The AOJ then determines whether additional development is needed and, if so, undertakes that development and provides the Veteran with an SOC, which contains a summary of the evidence, a summary of the applicable laws and regulations, and a discussion of how such laws and regulations affect the determination. The Veteran can then complete his or her appeal by filing a substantive appeal (usually a VA Form 9). Generally, any time additional evidence is obtained by VA after issuance of an SOC, but before the case is certified to the Board, the AOJ will issue an SSOC.

If the Board was required to develop evidence, it would dramatically slow down the Board's ability to issue decisions for waiting Veterans, as, after developing evidence, the Board would be required to take additional steps to protect a Veteran's right to due process of law. To protect a Veteran's due process rights, the Board would be required to provide the Veteran a copy of the evidence developed and an opportunity to respond, adding time to Board processing of appeals.

In addition to slowing Board processing of appeals, the proposed legislation would not significantly increase the overall efficiency of VA's appeal process. While some efficiency might result from avoiding the need to transfer claims between the Board and the AOJ, the bill would primarily only shift the responsibility for the same action to a different organization within VA. The action itself, developing the evidence, would remain the same. Board development of evidence would necessarily be accomplished using the same infrastructure that is presently used by VBA. For example, in a situation where additional VA treatment records were required to decide the case, those records would be obtained from the same database, whether by the Board or VBA. Similarly, in a situation where a VA medical examination was required to decide the appeal, the examination request would be made to the Veterans Health Administration (VHA), regardless of who requested the examination. This could actually increase processing time as the Board would be competing for priority with numerous examination requests from VBA for claims processing. Shifting the same work to a different organization would not reduce the appellate workload and, therefore, would not increase efficiency of the VA appeal process. The end result for the Veteran would be largely the same.

The proposed legislation would also require a significant increase in Board resources, which are already strained as it faces a growing number of appeals. While many remands are handled by VBA's Appeals Management Center (AMC), remands are also processed by VBA regional offices. The resources the Board would need to replicate the current remand function would be greater than

the existing AMC staff. Board resources would need to be devoted to not only developing evidence necessary to decide a case, but also to providing Veterans with either a new decision like the SSOC presently issued by the AOJ (prior to the Board decision), or a copy of the evidence with a period of time to respond and rebut with new evidence.

Further, requiring the Board to develop evidence necessary to decide an appeal on a large scale and high volume as contemplated by H.R. 1379 is also inconsistent with its role as an appellate body. The Board is “primarily an appellate tribunal” of VA that decides appeals from denials of claims for Veterans’ benefits. *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003) (quoting *Scates v. Principi*, 282 F.3d 1362, 1366-67 (Fed. Cir. 2002)). The principal functions of the Board are to make determinations of appellate jurisdiction, consider all applications on appeal properly before it, conduct hearings on appeal, evaluate the evidence of record, and enter decisions in writing on the questions presented on appeal. 38 C.F.R. § 19.4. To enable Veterans to understand the bases for the Board’s decision and also to facilitate judicial review, each Board decision must include a written statement of reasons and bases for its findings and conclusions, which can require lengthy and complex analysis. Simply moving the evidence development function from VBA to the Board without incorporating comprehensive process reform to increase efficiency would dilute the appellate nature of the Board and transform it into another layer of claims adjudication.

The proposed legislation addresses only one piece of the VA appeal process: appeals which require remand for additional development of the evidence in order for the Board to render a decision. However, H.R. 1379 fails to address situations where the Board may be required to remand an appeal for reasons unrelated to development of evidence. Remand may be required for procedural reasons, such as adjudication of issues which are inextricably intertwined with the issue(s) on appeal, issuance of an SOC or SSOC, proper notice, or other due process reasons. It is unclear how these procedural problems would be resolved if the Board were precluded from remanding cases to VBA.

VA supports the goal of increasing efficiency of the VA appeals process; however, more comprehensive legislative reform is required. The current VA appeal process has developed over time and has grown in complexity, with multiple stages and multiple layers of review. Rather than attempting to reform the appeal process one piece at a time, which may result in unintended consequences, it is imperative to consider the process in its entirety and institute change that will result in overall increased timeliness and efficiency for Veterans and their Survivors.

No mandatory costs are associated with H.R. 1379. It is very difficult to quantify GOE costs associated with this bill, as savings resulting from the reduction of evidence gathering and re-adjudication on VBA's part would be offset by costs incurred by the Board. However, VA is unable to determine what additional staffing needs the Board may require as a result of this proposed

legislation. In addition to the costs associated with developing evidence, the Board would be required to undertake additional action to protect a Veteran's right to due process of law by providing the Veteran with a copy of the evidence and an opportunity to respond and submit further new evidence. Because of the need for additional Board action, additional staff would likely be required.

H.R. 1414

H.R. 1414, the "Pay As You Rate Act," would establish a new section 5127 in title 38, United States Code, requiring VA, with regard to claims for disability compensation, to make "interim" payments of monetary benefits for any disability for which the Secretary can render a decision resulting in the payment of a monetary benefit, even if the Secretary cannot yet make a decision with respect to all disabilities claimed. The new section would further provide that, upon "adjudication" of the claim, VA would pay the claimant any monetary benefits awarded for the period of payment under 38 U.S.C. § 5111 less the amount of any interim benefit paid under new section 5127.

VA currently has authority to issue decisions on individual disabilities within the same claim. VA uses this practice and further believes technological improvements underway will allow VA to increase the use of this practice. Current law allows VA to issue a decision on any claimed disability for which benefits can be granted, even if VA cannot yet render a decision on other disabilities that are the subject of the Veteran's claim, and it is VA's policy to do so. No statute or regulation requires VA to decide all of a Veteran's claimed

issues in a single decision. *See Elkins v. Gober*, 229 F.3d 1369, 1375 (Fed. Cir. 2000) (“the unique statutory process of adjudication through which [V]eterans seek benefits may necessarily require that the different issues or claims of a case be resolved at different times”). VA has established a policy reflected in VBA’s Adjudication Procedures Manual, providing that intermediate rating decisions may be made when the record contains sufficient evidence to grant any claim at issue, even when other claimed issues require development for additional evidence. This policy is already in place and is consistent with VA’s existing statutory authority.

We, therefore, do not support the bill because we believe it is not necessary to codify current authority in law. VA also has concerns regarding this bill insofar as it refers to “interim” payments and provides for offset of such “interim” payments from the award made upon “adjudication” of the claim. Under current policy, if VA is able to grant benefits for one or more claimed disabilities, it completes an “adjudication” with respect to that disability and grants disability compensation under the generally applicable compensation authorities in title 38, United States Code, including section 5111 (commencement of period of payment). Such awards do not involve “interim” payments, but regular awards of compensation. Consequently, VA would not need to offset those payments against any subsequent award of benefit. Accordingly, the provisions in H.R. 1414 regarding interim payments and offsets may be confusing and may impose additional and unnecessary procedures.

No costs are associated with this bill, as VA already makes interim payments of disability compensation when VA makes a decision on individual disabilities within the same claim.

H.R. 1569

H.R. 1569 would amend 38 U.S.C. § 5121 to add as a claimant for accrued benefits the estate of a deceased Veteran *after* the Veteran's surviving spouse, children, and dependent parents, unless the estate would escheat. Accrued benefits are benefits that were due the beneficiary at the time of death but not paid prior to death. Under section 5121, upon the death of a Veteran, VA will pay accrued benefits to (listed in priority order) the Veteran's spouse, children, or dependent parents. If there is no eligible spouse, child, or parent, VA pays the Veteran's accrued benefits to reimburse the person who incurred the expenses of the Veteran's last illness and burial. When there is no eligible accrued benefits claimant, VA credits the amount back to VA's compensation and pension appropriation for payment to other Veterans and Survivors.

VA does not support the draft bill. In 1943, Congress enacted Public Law 78-144 and established, in what would become section 5121, a process by which certain survivors could receive some portion of a Veteran's accrued benefits. Since 1943, Congress has generally limited the payment of accrued benefits to surviving spouses, children, dependent parents, and persons who paid for the expenses of the Veteran's last sickness and burial.

By adding estates to the line of succession, Veterans' benefits would end up in the hands of persons or organizations that were not dependents of the Veteran at the time of death, such as adult children, charities, and creditors. In addition, when there is an estate, VA would no longer be able to reimburse persons who incurred the Veteran's last sickness and burial expenses because the estate would have priority over a person who incurred such expenses.

VA estimates that the benefit cost associated with enactment of this bill would be \$45.5 million in 2016, \$199.8 million over five years, and \$406.9 million over ten years. GOE costs are estimated to be \$838,000 in FY 2016, \$4.1 million over five years, and \$8.7 million over 10 years. IT costs are estimated to be \$13,000 in FY 2016, \$67,000 over five years, and \$140,000 over 10 years.

H.R. 1607

VA is committed to serving our Nation's Veterans by accurately adjudicating claims based on military sexual trauma (MST) in a thoughtful and caring manner, while fully recognizing the unique evidentiary considerations involved in such an event. Before addressing the specific provisions of this bill, it would be useful to outline our efforts, which we believe further the intent behind the bill. The Under Secretary for Benefits has spearheaded the efforts of VBA to ensure that these claims are adjudicated compassionately and fairly, with sensitivity to the unique circumstances presented by each individual claim.

VA is aware that, because of the personal and sensitive nature of MST stressors in these cases, it is often difficult for the victim to report or document the event when it occurs. To remedy this, VA developed a regulation (38 C.F.R. § 3.304(f)(5)) and procedures specific to MST claims that appropriately assist the claimant in developing evidence necessary to support the claim. As with other posttraumatic stress disorder (PTSD) claims, VA initially reviews the Veteran's military service records for evidence of the claimed stressor. VA's regulation also provides that evidence from sources other than a Veteran's service records may corroborate the Veteran's account of the stressor incident, such as evidence from mental health counseling centers or statements from family members and fellow Servicemembers. Evidence of behavior changes, such as a request for transfer to another military duty assignment, deterioration in work performance, and unexplained economic and social behavior changes, is another type of relevant evidence that may indicate occurrence of an assault. VA notifies Veterans regarding the types of evidence that may corroborate occurrence of an in-service personal assault and asks them to submit or identify any such evidence. The actual stressor need not be documented in service records. If evidence of a stressor is obtained, VA will schedule an examination with an appropriate mental health professional and request an opinion as to whether the evidence indicates that an in-service stressor occurred.

With respect to claims for other disabilities based on MST, VA has a duty to assist in obtaining evidence to substantiate a claim for disability compensation. When a Veteran files a claim for mental or physical disabilities other than PTSD

based on MST, VBA will obtain a Veteran's service medical records, VA treatment records, relevant Federal records, and any other relevant records, including private records, identified by the Veteran that the Veteran authorizes VA to obtain. VA must also provide a medical examination or obtain a medical opinion when necessary to decide a disability claim. VA will request that the medical examiner provide an opinion as to whether it is at least as likely as not that the current symptoms or disability are related to the in-service event. This opinion will be considered as evidence in deciding whether the Veteran's disability is service connected.

VBA has also placed a primary emphasis on informing VA regional office (RO) personnel of the issues related to MST and providing training in proper claims development and adjudication. VBA developed and issued Training Letter 11-05, Adjudicating Posttraumatic Stress Disorder Claims Based on Military Sexual Trauma, in December 2011. This was followed by a nationwide Microsoft Live Meeting broadcast on MST claims adjudication. The broadcast focused on describing the range of potential markers that could indicate occurrence of an MST stressor and the importance of a thorough and open-minded approach to seeking such markers in the evidentiary record. In addition, the VBA Challenge Training Program, which all newly hired claims processors are required to attend, now includes a module on MST within the course on PTSD claims processing.

All claims processors received new MST training materials in August 2014. Women Veterans Coordinators are located in every regional office to

assist Veterans. In December 2014, MST Coordinators were also assigned at each regional office to address MST-specific concerns of both male and female Veterans. Specialized MST training will be mandatory for Women Veterans Coordinators and MST Coordinators in fiscal year 2016. In addition, VBA recently created a certification checklist that allows VA to collect additional data to better track consistency for MST-related claims. This checklist verifies that all necessary development was completed in MST claims and must be signed by the Veterans Service Center Manager or Assistant Veterans Service Center Manager.

VBA worked closely with the VHA Office of Disability Examination and Medical Assessment to ensure that specific training was developed for clinicians conducting PTSD compensation examinations for MST-related claims. VBA and VHA further collaborated to provide a training broadcast targeted to VHA clinicians and VBA raters on this very important topic, which aired initially in April 2012 and has been rebroadcast numerous times.

Prior to these training initiatives, the grant rate for PTSD claims based on MST was about 38 percent. Following the training, the grant rate rose and in FY 2014 stood at about 49 percent, which is roughly comparable to the approximate 54-percent grant rate for all PTSD claims. In addition, an analysis of MST-related claims denied in 2013 revealed that 53 percent of denials were a result of a claimant not having a PTSD diagnosis.

In December 2012, VBA's Systematic Technical Accuracy Review team, VBA's national quality assurance office, completed a second review of

approximately 300 PTSD claims decisions based on MST. These claims decisions were denials that followed a medical examination. The review showed an overall accuracy rate of 86 percent, which is roughly the same as the current national benefit entitlement accuracy level for all rating-related end products.

In addition, VBA's new standardized organizational model has now been implemented at all of our regional offices. It incorporates a case-management approach to claims processing. VBA reorganized its workforce into cross-functional teams that give employees visibility of the entire processing cycle of a Veteran's claim. These cross-functional teams work together on one of three segmented lanes: express, special operations, or core. Claims that predictably can take less time flow through an express lane (30 percent); those taking more time or requiring special handling flow through a special operations lane (10 percent); and the rest of the claims flow through the core lane (60 percent). All MST-related claims are now processed in the special operations lane, ensuring that our most experienced and skilled employees are assigned to manage these complex claims.

Our efforts have dramatically improved VA's overall sensitivity to MST-related PTSD claims and have led to higher current grant rates. However, we recognize that some Veterans' MST-related claims were decided before our current efforts began. To assist Veterans whose claims were decided prior to 2012, VBA has advised Veterans of the opportunity to request that VA review their previously denied PTSD claims based on MST. VBA contacted over 4,000 Veterans in June 2013 and July 2014. Those Veterans who responded received

reconsideration of their claims based on VA's heightened sensitivity to MST and enhanced training regarding evidence development. VBA also continues to work with VHA medical professionals to ensure they are aware of their critical role in processing these claims.

Turning to the specifics of H.R. 1607, the "Ruth Moore Act of 2015," section 2(a) would add to 38 U.S.C. § 1154 a new subsection (c) to provide that, if a Veteran alleges that a "covered mental health condition" was incurred or aggravated by MST during active service, VA must "accept as sufficient proof of service-connection" a mental health professional's diagnosis of the condition together with satisfactory lay or other evidence of such trauma and the professional's opinion that the condition is related to such trauma, provided that the trauma is consistent with the circumstances, conditions, or hardships of such service, irrespective of whether there is an official record of incurrence or aggravation in service. Service connection could be rebutted by "clear and convincing evidence to the contrary." In the absence of clear and convincing evidence to the contrary, and provided the claimed MST is consistent with the circumstances, conditions, and hardships of service, the Veteran's lay testimony alone would be sufficient to establish the occurrence of the claimed MST. The provision would define the term "covered mental health condition" to mean PTSD, anxiety, depression, "or other mental health diagnosis described in the current version" of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders that VA "determines to be related to military sexual trauma." The bill would define MST to mean "psychological

trauma, which in the judgment of a mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred during active military, naval, or air service.”

Section 2(a) of the bill would require VA to accept as proven the occurrence of MST or a PTSD stressor without what we consider the minimal threshold evidence that is needed to maintain the integrity of the claims process. It would permit a Veteran’s lay testimony alone to establish the occurrence of claimed MST, and service connection for a covered mental health condition would be established if a mental health professional diagnoses the condition and opines that the condition is related to the MST. This would occur whether or not the mental health professional had access to the Veteran’s service records or was otherwise able to evaluate the claimant’s statements regarding the occurrence of the claimed in-service stressor or event.

Through VA’s extensive, recent, and ongoing actions, we are ensuring that MST claimants are given a full and fair opportunity to have their claims considered, with a practical and sensitive approach based on the nature of MST. As noted above, VA has recognized the sensitive nature of MST-related PTSD claims and claims based on other covered mental health conditions, as well as the difficulty inherent in obtaining evidence of an in-service MST event. Current regulations provide multiple means to establish an occurrence, and VA has initiated additional training efforts and specialized handling procedures to ensure thorough, accurate, and timely processing of these claims.

VA's regulations reflect the special nature of PTSD. The provisions of 38 C.F.R. § 3.304(f) currently provides particularized rules for establishing stressors related to personal assault, combat, former prisoner-of-war status, and fear of hostile military or terrorist activity. These particularized rules are based on an acknowledgement that certain circumstances of service may make the claimed stressor more difficult to corroborate. Nevertheless, they require threshold evidentiary showings designed to ensure accuracy and fairness in determinations as to whether the claimed stressor occurred. Evidence of a Veteran's service in combat or as a prisoner of war generally provides an objective basis for concluding that claimed stressors related to such service occurred. Evidence that a Veteran served in an area of potential military or terrorist activity may provide a basis for concluding that stressors related to fears of such activity occurred. In such cases, VA also requires the opinion of a VA or VA-contracted mental health professional, which enables VA to ensure that such opinions are properly based on consideration of relevant facts, including service records, as needed. For PTSD claims based on a personal assault, lay evidence from sources outside the Veteran's service records may corroborate the Veteran's account of the in-service stressor, such as statements from law enforcement authorities, mental health counseling centers, family members, or former Servicemembers, as well as other evidence of behavioral changes following the claimed assault. Evidence of behavior changes following the claimed assault is sufficient to schedule a VA examination and request that the examiner provide an opinion as to whether the evidence indicates that a stressor occurred.

The regulatory provisions at 38 C.F.R. §§ 3.303 and 3.304(f) have established equitable standards of proof and of evidence for corroboration of an in-service injury, disease, or event for purposes of service connection. Further, 38 U.S.C. § 1154 requires consideration of the places, types, and circumstances of service when evaluating disability claims and provides for acceptance of lay statements concerning combat-related injuries, provided evidence establishes that the Veteran engaged in combat. This bill would expand section 1154 to require VA to accept lay statements as sufficient proof of in-service events in all MST claims involving covered mental health conditions, based solely on the nature of the claim and without requiring corroborating evidence of the MST that is essential to the effective operation of section 1154. Without the requirement of any evidentiary threshold for the mandatory acceptance of a lay statement as sufficient proof of an occurrence in service, this bill would eliminate, for discrete groups of Veterans, generally applicable requirements that ensure the fairness and accuracy of claim adjudications. VA's current regulations do not permit VA to rely upon a claimant's testimony alone to establish the in-service occurrence of a stressor. Rather, a claimant must first make a factual showing establishing the context of the in-service stressor, such as engaging in combat with the enemy, and only then may the claimant's own lay statement establish that he or she experienced a specific stressor in service. This bill would prohibit VA in most cases from considering the factual basis of a veteran's claim that MST occurred and would create an even more lenient PTSD standard than applies under VA regulations to combat veterans and prisoners of war.

In summary, while we appreciate the intent behind this legislation, we would prefer to continue pursuing non-legislative actions to address the special nature of claims based upon MST.

Section 2(b) would require VA, for a 5-year period beginning December 1, 2016, to submit to Congress an annual report on claims covered by new section 1154(c) that were submitted during the previous fiscal year. Section 2(b) would also require VA to report on the: (1) number and percentage of covered claims submitted by each sex that were approved and denied; (2) rating percentage assigned for each claim based on the sex of the claimant; (3) three most common reasons for denying such claims; and (4) number of such claims denied based on a Veteran's failure to report for a medical examination; (5) number of such claims pending at the end of each fiscal year; (6) number of such claims on appeal; (7) average number of days from submission to completion of the such claims; and (8) training provided to VBA employees with respect to covered claims.

VA does not oppose section 2(b).

Section 2(c) would make proposed section 1154(c) applicable to disability claims "for which no final decision has been made before the date of the enactment" of the bill. The bill does not define the term "final decision." As a result, it is unclear whether the new law would be applicable to an appealed claim in which no final decision has been issued by VA or, pursuant to 38 U.S.C. § 7291, by a court. Benefit costs associated with this bill, as well as costs for information technology and general operating expenses, are still under review.

This concludes my testimony. We appreciate the opportunity to present our views on these bills and look forward to working with the Subcommittee.

STATEMENT OF
ZACHARY HEARN, DEPUTY DIRECTOR FOR CLAIMS,
VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PENDING LEGISLATION

APRIL 14, 2015

Chairman Abraham, Ranking Member Titus, and distinguished members of the subcommittee, on behalf of our National Commander, Michael Helm, and the 2.3 million members of The American Legion, we thank you for this opportunity to testify regarding The American Legion's positions on pending legislation before this subcommittee.

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

To increase, effective as of December 1, 2015, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for the survivors of certain disabled veterans, and for other purposes.

H.R. 675 will provide a Cost of Living Allowance (COLA) effective December 1, 2015. Disability compensation and pension benefits awarded by the Department of Veterans Affairs (VA) are designed to compensate veterans for medical conditions due to service or who earn below an income threshold. With annual increases to costs of living, it is only appropriate that veterans' benefits increase commensurate with those increases.

For nearly 100 years, The American Legion has advocated on behalf of our nation's veterans, to include the awarding of disability benefits associated with chronic medical conditions that manifest related to selfless service to this nation. Annually, veterans and their family members are subjects in the debate regarding the annual cost of living adjustment (COLA) for these disability benefits. For these veterans and their family members, COLA is not simply an acronym or a minor adjustment in benefits; instead, it is a tangible benefit that meets the needs of the increasing costs of living in a nation that they bravely defended.

H.R. 675 is designed to allow for a COLA for VA disability benefits. The American Legion supports legislation "to provide a periodic cost-of-living adjustment increase and to increase the monthly rates of disability compensation."¹

¹ American Legion Resolution No. 18:
<http://archive.legion.org/bitstream/handle/123456789/3524/2014N018.pdf?sequence=1>

Within Section 2 of the bill, it is noted that “each dollar amount increased under paragraph (1), if not a whole dollar amount, shall be rounded to the next lower whole dollar amount.” The American Legion does not support the rounding down of any benefit; through rounding down the benefit, the veterans’ benefits are diluted.

In order for The American Legion to support H.R. 675 The American Legion asks for Congress to remove Section 2 of the bill and allow for veterans to receive the full benefits awarded due to their service.

H.R 677: American Heroes COLA Act of 2015

To amend title 38, United States Code, to provide for annual cost-of-living adjustments to be made automatically by law each year in the rates of disability compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation for survivors of certain service-connected disabled veterans.

According to a February 2015 press release issued by Congressman Ralph Abraham, M.D., and Congresswoman Dina Titus, this act will “authorize the Secretary of the VA to provide an automatic annual increase to the rates of veterans’ disability compensation for surviving spouses and children based on the Consumer Price Index Urban Wage Earners and Clerical Workers.”

In recent years, Congress has been attempting to establish an automatic mechanism to provide an annual increase in veterans’ disability benefits. The American Legion understands and appreciates the efforts to remove the veteran community from the political debate in determining appropriate annual adjustments to Cost Of Living Adjustment (COLA) amounts for disability benefits. Unfortunately, while this bill would likely promote expediency, it could also come with a significant cost to our nation’s veterans.

In December 2012, a similar bill had been proposed linking COLA for VA disability benefits to the Chained-Consumer Priced Index (C-CPI). American Legion Past National Commander James E. Koutz during the discussion of the bill noted that the current COLA formula “already understates the true cost-of-living increases faced by seniors and people with disabilities.”

According to calculations, “a 30-year-old veteran of the Iraq or Afghanistan war who has no children and is 100 percent disabled would likely lose about \$100,000 in disability compensation by age 75 (calculated in today’s dollars), compared with benefits under the current cost-of-living formula. Over a 10-year period, 23 million veterans would lose \$17 billion in compensation and pension benefits.”²

The American Legion opposes “any legislative efforts to automatically index such cost-of-living adjustments to the cost-of-living adjustment authorized for Social Security recipients, non-service connected disability recipients and death pension beneficiaries”³. The reasoning behind this objection is that veterans sometimes have needs and expenses which should be considered

² AARP Bulletin- March 2013: “Chained CPI Change Could Hit Veterans’ Benefits” <http://www.aarp.org/politics-society/advocacy/info-03-2013/changing-the-benefits-formula-could-hit-veterans-hard.html>

³ American Legion Resolution No. 18: <http://archive.legion.org/bitstream/handle/123456789/3524/2014N018.pdf?sequence=1>

on their own merits, rather than being simply lumped in with Social Security for simple expediency. Additionally, The American Legion “expresses strong opposition to using any Consumer Price Index that would reduce the annual cost-of-living adjustment for military retirees, veterans receiving Social Security benefits or Department of Veterans Affairs beneficiaries.”⁴

The American Legion opposes H.R 677

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

To amend title 38, United States Code, to improve the opportunity for Veterans to use video conferencing for hearings before the Board of Veterans' Appeals.

When electing to appeal a claim to the Board of Veterans' Appeals (BVA), often veterans are blindly selecting their method of appeal. Currently veterans are presented with the following options:

- The preparation of a written informal hearing presentation by the veteran's power-of-attorney (POA)
- Video conference hearing from a VA facility with a veterans' law judge (VLJ) in Washington, D.C.
- Travel board hearing that requires the judge to travel to the veteran's local regional office (RO)
- BVA hearing in Washington, D.C.

According to the April 6, 2015, VA Monday Morning Workload Report, 295,601 claims appeals are awaiting adjudication. On April 5, 2010, VA reported having 189,346 appeals awaiting adjudication. In five years, VA's inventory has grown by over 56 percent.

Unless a veteran speaks with a knowledgeable accredited representative or contacts VA, the veteran is unsure of what method is the most expeditious to schedule a hearing.

For veterans that want a hearing before a VLJ, this bill will allow veterans to have a hearing conducted in the most expeditious method available. In January 2015, The American Legion testified that the average veteran is waiting longer for an appealed claim to be adjudicated than the standard four year military enlistment.

It is noted within the bill that if a veteran desires to have a different format for a hearing than the BVA selected, the veteran may request the change and VA shall grant the request. Through this language the veteran maintains ownership of the appeal and the method the appeal is heard.

The American Legion has over 3,000 accredited representatives located throughout the nation. No matter the zip code or time zone where the accredited representative's advocate for veterans,

⁴ American Legion Resolution No. 291:
<http://archive.legion.org/bitstream/handle/123456789/3612/2014N291.pdf?sequence=1>

one of the greatest complaints is the wait time associated with the appeals process. While this bill will not eliminate the exploding appeals inventory, it should assist veterans in having their claims before a Veterans Law Judge (VLJ) and avoid long appellate delays.

The American Legion supports H.R. 732

H.R. 800: Express Appeals Act

To direct the Secretary of Veterans Affairs to carry out a pilot program to provide veterans the option of using an alternative appeals process to more quickly determine claims for disability compensation.

This act, while well-intentioned, may ultimately have a negative impact upon veterans. Under the current proposal, veterans will have the option to elect to pursue a claim in a “*fully developed appeal (FDA)*” format. Through electing to have a claim adjudicated via FDA, a veteran opts to not submit any additional evidence for the record following the submission of the Notice of Disagreement (NOD).

The “*Express Appeals Act*” is designed to expedite the appellate process within VA. With a growing inventory of claims, VA and veterans service organizations (VSOs) have been working to discover a program that reduces the amount of time that veterans wait to have an appealed claim adjudicated.

In order for a veteran to receive benefits for a service connection condition, the following criteria must be met:

- A current diagnosis (exception: Gulf War Illness)
- An incident in service
- A nexus statement linking the current condition to either service or a previously service connected condition

Unfortunately, VA adjudication letters are often incomplete and unclear to veterans. They are uncertain why they were denied benefits; more importantly, they often do not know what information is needed to successfully overturn the previous decision by the VA regional office. Through passage of H.R. 732, VA will be compelled to find the most expeditious means to adjudicate an appealed claim. The American Legion strongly supports increased transparency in the adjudication of claims.⁵

The current bill could allow the following to occur:

- Veteran receives decision denying the benefit with little explanation regarding how VA arrived at its denial
- Veteran elects to appeal via FDA
- Veteran is denied the benefit sought at the BVA due to not knowing what information to submit

⁵ Resolution No. 128 – AUG 2014

While decisions at the VA regional offices are lacking regarding how a claim is decided, Board of Veterans Appeal (BVA) decisions are lengthy and filled with language common in the legal profession, however, it is confusing to veterans who have no legal background. Ultimately, a veteran could file a claim, have it denied at a VA regional office, utilize the appellate process and have a claim adjudicated at BVA meanwhile having little or no understanding of why the claim was denied.

The American Legion believes the FDA program is a program that with some adjustments could hold value. Discussions between The American Legion and VA have occurred regarding the adequacy of the adjudication notification letters. VA Secretary Robert McDonald has agreed to formulate a group of concerned veteran's service organizations to draft a letter to create an adjudication notification that properly advises veterans of the information needed to gain service connection for the condition.

The American Legion is working closely with VA and other VSOs to develop an appeals process that is expeditious meanwhile not shortcutting veterans' due process rights. The American Legion could support this legislation provided the working group makes helpful and productive changes to the notification letter process.

The American Legion could support this legislation, provided it follows the caveats mentioned above.

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

To amend title 38, United States Code, to extend the temporary expansion of the United States Court of Appeals for Veterans Claims, to ensure that judges of the United States Court of Appeals for Veterans Claims may enroll in the Federal Employee Group Life Insurance program, and for other purposes.

This bill addresses several aspects of the U.S. Court of Appeals for Veterans Claims (CAVC). Remarks here will be limited to the provision regarding extending the temporary expansion of the number of judges.

The Court is authorized seven permanent, active Judges, and two additional Judges as part of a past temporary expansion provision. Over the next two years a sequence of retirements risks resulting in the Court falling to just five judges right when a new administration and Congress have a thousand other nominations to worry about. Past history tells us that it will take at least two years before anyone notices that the Court is drowning. With the Board growing and its output going up to levels not seen since the Court was created, the CAVC will be in big trouble if allowed to fall to five judges for multiple years. Therefore, this needs to be addressed this year.

The American Legion has a long history of supporting the Court and it would be a great disservice to veterans and the Court to not address this now.

The American Legion supports that part of H.R. 1067 extending the temporary expansion of judges; we do not have a position on the other provisions in the bill.

H.R. 1331: Quicker Veterans Benefits Delivery Act of 2015

To amend title 38, United States Code, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

Many veterans will submit private medical evidence to support their claims for disability benefits. For veterans that require additional medical review or do not provide a statement from a medical professional linking a medical condition to military service, VA provides compensation and pension (C&P) examinations to determine the linkage or severity of medical conditions.

The American Legion has conducted Regional Office Action Review (ROAR) visits for approximately 20 years. Through these visits The American Legion determined and reported to Congress that VA has had instances of scheduling unnecessary and duplicative examinations despite the necessary evidence existing to grant the benefit. This adds further complication to an already complicated process.

The American Legion understands that there are occasions where a veteran would need a second examination after submitting a medical nexus statement. If a private medical provider did not use a VA disability medical questionnaire, then it stands to reason that the provider may not have conducted the necessary tests to accurately rate the veteran.

Unfortunately, these instances did not get noticed solely during ROAR visits. They are noticed far too frequently by American Legion representatives at the Board of Veterans' Appeals. There have been occasions where veterans have been seeking total disability based on individual unemployability (TDIU) benefits. Meanwhile, the veteran had previously been granted Social Security disability benefits for a condition incurred in service and service connected by VA. Despite enduring medical examinations for Social Security purposes and having the benefit granted by the agency, VA would conduct their own examinations to determine the veteran's employability. Some in the veteran community refer to this needless development of disability claims as "developing to deny".

Through passing H.R. 1331, VA would be compelled to release data regarding acceptable clinical evidence and increase transparency regarding the manner claims are developed and ultimately adjudicated. Having Congressional and VA focus upon the manner that private medical evidence is treated, The American Legion believes that the treatment of the evidence received from private medical providers would receive higher consideration. Moreover, this could expedite the adjudication process and increase the overall transparency of the claims process.⁶

The American Legion supports H.R. 1331

⁶ Resolution No. 128 – AUG 2014

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

Reviewing thousands of claims decided at the Board of Veterans Appeals (BVA) The American Legion finds approximately half of these claims will be remanded due to being inadequately developed and prematurely denied by the VA regional offices. As a result, BVA judges direct the Appeals Management Center (AMC) to conduct the necessary claim development which often requires scheduling additional medical examinations, retrieving required federal documentation or other necessities to fulfill VA's duty to assist.

Under the current structure, any development required by BVA is conducted by the Appeals Management Center (AMC). While BVA is independent of the Veterans Benefits Administration (VBA), AMC remains under VBA authority. Despite BVA judges providing clear guidance to AMC on how a claim should be developed, the unfortunate truth is that veterans will have claims remanded on multiple occasions for not properly developing the claim. For veterans and advocates it is extremely frustrating that AMC personnel are routinely unable to fulfill the clear instructions given by the BVA judges. One can sense the frustration of BVA judges in their instructions; it is not uncommon for a judge to note that a particular claim has been remanded on previous occasions. Furthermore, to stress the need to follow these instructions, BVA judges will often indicate the instruction in bold and italicize the font. Without question, the frustration is palpable.

This organization creates an awkward relationship of having BVA direct a VBA agency to conduct the work it deems necessary to have a veteran's claim adequately developed. BVA judges must rely upon VBA employees to conduct the development it notes is needed to fulfill VA's duty to assist. Through BVA inheriting AMC, they could provide the necessary training and oversight to AMC employees.

The American Legion notes within the bill that BVA will no longer be permitted to remand claims for further development; instead, since AMC would fall under BVA's direction, the development would occur prior to a formal decision. We believe that BVA's data regarding grants, remands, and denials are a valuable tool; as a result, we ask that BVA remain required to supply data regarding the number of claims that require additional development upon reaching the BVA by the VA regional office that submits the data. Additionally, we ask that BVA provide this information to the public in a format similar to the Monday Morning Workload Report to gain a fuller understanding of the appeals inventory and accuracy of decisions by the VA regional offices.

A restructure of this level raises many questions. As such, The American Legion is still reviewing whether or not this move would be best for veterans. It has the potential, certainly, to improve the remand process, but a change of this scale could have unanticipated consequences, and thus careful consultation with The American Legion's members and service officers is needed to develop a resolution which would support or oppose such a move. The American Legion will continue to communicate with Congress and the VA as we work to develop a position on such a move.

The American Legion has no position on H.R. 1379

H.R. 1414: Pay As You Rate Act

To direct the Secretary to make interim payments of disability compensation benefits for certain claims for such compensation prior to the adjudication of such claims, and for other purposes.

Veterans seeking disability benefits often seek benefits for more than one issue. An NBC news report from December 2012 stated 45 percent of veterans serving in the Iraq and Afghanistan conflicts are filing for disability benefits. Additionally, on average they are seeking service connection for 8-10 medical conditions, over twice as many conditions than Vietnam veterans.⁷

According to the VA's M21-1MR, Part III, Subpart IV, Chapter 6, Section A, notes:

Except as stated in M21-1MR, Part III, Subpart iv, 6.A.1.b, decide every issue for which sufficient evidence has been obtained and a benefit can be granted, including service connection at a noncompensable level, even when the issue of service connection for other disabilities or entitlement to a higher evaluation on another issue must be deferred.⁸

H.R. 1414 is addressing an issue that already exists within VA's manual for adjudicating claims. While VA may address the issue in the manual, unfortunately it does not universally employ its intent in the adjudication of claims. According to the April 6, 2015, VA Monday Morning Workload Report, over 461,000 veterans are awaiting a decision; 40.9 percent of those veterans have been waiting in excess of 125 days.

Through passage of this bill, VA will be able to deliver the benefits in a more expeditious manner to the veterans. Congress is reminded that through this money in the veteran's bank account is not the only result. Veterans suffering from debilitating conditions can begin to receive care for those conditions and either manage or improve the conditions that confront them. The American Legion supports legislation to grant benefits as they have been adjudicated.

The American Legion supports efforts by Congress to establish interim benefits for veterans awaiting action on claims.⁹

The American Legion supports the HR 1414**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

⁷ NBC News: "Disability-compensation claims for veterans lag as 'VA backlog'"
worsens <http://usnews.nbcnews.com/news/2012/12/04/15652938-disability-compensation-claims-for-veterans-lag-as-va-backlog-worsens?lite>

⁸ U.S. Department of Veterans Affairs: M21-MR Part 1. Claimants Rights and Responsibilities:
http://www.benefits.va.gov/WARMS/M21_1mr1.asp

⁹ Resolution No. 202 – AUG 2014

The American Legion has no position on the bill**H.R. 1607**

To amend title 38, United States code, to improve the disability compensation evaluation procedure of the Secretary of Veterans Affairs for veterans with mental health conditions related to military sexual trauma, and for other purposes.

In early 2014, the Department of Defense (DoD) requested the RAND National Defense Research Institute to conduct an independent survey associated with military sexual assaults and gender discrimination occurring in the military.

The RAND report discovered the following findings:

- 20,000 of the 1.3 million servicemembers were the victims of at least one or more sexual assaults in the past year
- An estimated 26 percent of women and 7 percent of men on active duty experienced gender discrimination or sexual harassment in the past year
- There were significant differences in rates of sexual assaults and sex-based military equal opportunity (MEO) violations by branches of service¹⁰

It has been noted in recent years that DOD's monitoring and adjudication of sexual assaults in the military ranks has been woefully inadequate. No person that is volunteering to serve their nation should have to worry about an assault by enemy forces meanwhile having concerns regarding their safety around their fellow service members.

Because of the nature of DOD's historical response to military sexual assaults, many victims fear approaching their leaders regarding the assault. Many assaults are unreported to proper authorities; in other instances leaders within the servicemembers unit do not properly conduct a thorough investigation regarding the event. Due to this fact, it becomes far more difficult for military sexual assault victims to successfully gain disability benefits related to assaults.

During The American Legion's Veterans Crisis Command Center (VCCC) conducted in August 2014, accredited representatives witnessed first-hand the long term effects of an individual suffering from the effects of military sexual trauma (MST). During the event, a woman approached The American Legion regarding benefits associated with MST suffered during her enlistment in the Marine Corps. Approximately 25 years ago, she had been raped and had reported the event to her superiors. She indicated that no action was taken on the aggressor and lived in fear for the remaining years of her enlistment. No record of the event existed in her military records; upon attempting to gain access to VA benefits that was associated with the rape.

¹⁰ Rand Corporation: "Sexual Assault and Sexual Harassment in the U.S. Military, Top-Line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study"
http://www.rand.org/pubs/research_reports/RR870.html

For 25 years, the woman lived with the lingering effects and never received compensation benefits or health care for MST. She stated she could not “*shake the feeling*”; it was truly heart-breaking. Due to the careful advocacy of The American Legion and the relationship with VA personnel at the Winston-Salem VA regional office, we were able to secure these benefits. Despite having a large retroactive payment and the knowledge that she would be receiving a sizable compensation payment monthly, her joy was not in the dollars in her bank account. Her first response was a simple question, “*Does this mean that I can now get medical treatment for this?*”

In a letter to Representative Dina Titus, Past National Commander Dan Dellinger stated, “*The American Legion is deeply concerned with the lingering effects of MST, a devastating event affecting thousands of brave men and women serving in the armed forces.*” The American Legion urges VA to “*review military personnel files in all MST claims and apply reduced criteria to MST-related PTSD to match that of combat-related PTSD.*”¹¹

The American Legion supports HR 1607

Conclusion

As always, The American Legion thanks this subcommittee for the opportunity to explain the position of the 2.3 million veteran members of this organization.

For additional information regarding this testimony, please contact Mr. Warren J. Goldstein at The American Legion’s Legislative Division at (202) 861-2700 or wgoldstein@legion.org.

¹¹ Resolution No. 67 AUG 2014

**STATEMENT OF BLAKE ORTNER
DEPUTY GOVERNMENT RELATIONS DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
PENDING LEGISLATION**

APRIL 14, 2015

Chairman Abraham, Ranking Member Titus, and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to testify today on pending legislation before the Subcommittee.

H.R. 675, the "Veterans' Compensation Cost-of-Living Adjustment Act of 2015"
PVA fully supports H.R. 675, the "Veterans' Compensation Cost-of-Living Adjustment Act of 2015," that would increase, effective as of December 1, 2015, the rates of compensation for veterans with service-connected disabilities and the rates of dependency and indemnity compensation (DIC) for the survivors of certain disabled veterans. This would include increases in wartime disability compensation, additional compensation for dependents, clothing allowance, and dependency and indemnity compensation for children.

However, consistent with our position in the past, PVA cannot support the rounding down of increases in compensation. While our economy has begun to improve, many veterans continue to struggle, their personal finances affected by rising costs of essential necessities to live from day to day and maintain a certain standard of living. Many veterans and their families depend on their compensation. While this may be a small amount, any reduction can have a critical impact, especially when compounded over time, on low-income veterans.

H.R. 677, the “American Heroes COLA Act of 2015”

While PVA understands the logic behind an automatic increase in the annual COLA for veterans, PVA does not support H.R. 677, the “American Heroes COLA Act of 2015.” Historically, the annual COLA bill has been important legislation that must pass each year. During times of contentious relations in Congress, this critical legislation has been used as a vehicle to pass other important veterans legislation. PVA believes that removing this annual legislative option could potentially be detrimental to veterans. In addition, this annual requirement ensures continued oversight by the Subcommittee and full Committee.

H.R. 732, the “Veterans Access to Speedy Review Act”

PVA supports H.R. 732, the “Veterans Access to Speedy Review Act.” As long as there is the ability to request an in-person hearing that the Board would be required to honor, we believe this will benefit both the claimant and the Board. At veteran service organization forums held by the Board, there has been an ongoing emphasis on holding video conferences whenever possible to reduce time lost for no-shows. Additionally, the grant rate for video versus in-person hearings is the same. In fact, PVA has encouraged service officers to hold video conference hearings and the vast majority of PVA hearings are now held via video conference.

PVA has testified on similar legislation in the past and has always had a concern with the use of the term “may” in the willingness of the Board to grant the request. PVA is

very pleased to see that in Section 2 regarding the appellant requesting a different location the term "shall" is used. This is critical in the case of older veterans, who may feel uncomfortable with video conferencing, believing it is less valid. We appreciate that the Board will defer to the veteran when determining the best course of action in the appeals process.

H.R. 800, the "Express Appeals Act"

PVA is very pleased with the introduction of H.R. 800, the "Express Appeals Act" and for the co-sponsorship of Chairman Miller and Ranking Member Brown as well as Subcommittee Ranking Member Titus. We see this legislation as a good beginning and a framework for critical changes to the appeals process that may help veterans receive benefits they have earned more rapidly.

One concern we have with the pilot program is the opening of the pilot to existing traditional appeals. PVA believes that for the pilot to be a true test of the express appeals process, and allow veterans to receive optimal counseling prior to electing the program, it should only allow entrance into the pilot at the initial Notice of Disagreement (NOD) stage. While we understand that there may be concern about the fairness of allowing only new appeals, to do otherwise may create a flawed process and an imperfect test. In addition, VA should be required to provide more case-specific initial notice to veterans at the time of their denial so they can better understand why their claim was denied and whether election of the pilot program would be advisable.

PVA also wants to draw attention to the requirement of the Secretary to transfer employees from the Appeals Management Center (AMC) to the Board. We see this as a critical requirement to ensure the Board has experts to assist with the pilot program. However, we fear this may become an excuse by the Veterans Benefits Administration (VBA) for why they are unable to complete traditional appeals. While it can be expected that reducing resources or manpower will have an impact on AMC's processing rate, we ask that the Subcommittee apply detailed oversight to ensure that any reduction is

appropriate and acceptable. Furthermore, oversight is critical to ensure transferred staff is properly trained to assist with implementing the pilot.

PVA also wants to ensure that veterans service representatives who are working under a Power of Attorney (POA) for a veteran has the ability to also be notified of actions on the appeal. As such, in section (c)(4)(C) and (D) we believe it should include language that adds "and his or her representative" to ensure a POA receives copies of whatever was done as part of the development and get another opportunity to provide argument.

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

PVA supports H.R. 1067, the "U.S. Court of Appeals for Veterans Claims Reform Act." PVA believes there is a coming flood of appeals due to VA's aggressive efforts to reduce the current backlog of veterans' claims. This legislation will provide the chief judge the flexibility to recall judges to support this potential dramatic increase in workload.

H.R. 1331, the "Quicker Veterans Benefits Delivery Act of 2015"

PVA strongly supports H.R. 1331, the "Quicker Veterans Benefits Delivery Act of 2015." Those veterans with catastrophic disabilities have the greatest need for health care services and this legislation will ensure that they are not forced into delays because the VA will not accept medical evidence from non-VA medical professionals. This bill is a high priority for PVA's members.

PVA has consistently recommended that VA accept valid medical evidence from non-Department medical professionals. The continuing actions of VA to require Department medical examinations does nothing to further efforts to reduce the claims backlog and may actually cause the backlog to increase in addition to delaying vital benefits for disabled veterans. We applaud Mr. Walz efforts to both define what constitutes "sufficiently complete" as well as institute reporting requirements to ensure VA is moving forward and attacking these unacceptable delays due to duplication of medical exams.

PVA would also like to see VA better adhere to its own "reasonable doubt" provision when adjudicating claims that involve non-VA medical evidence. We still see too many VA decisions where this veteran-friendly rule was not properly applied. As prescribed in 38 CFR §3.102, "When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant." More and more often it appears VA raters exercise arbitrary prerogative to avoid ruling in favor of the claimant, continually adding obstacles to a claimant's path without adequate justification for doing so. While due diligence in gathering evidence is absolutely necessary, too often it seems that VA is working to avoid a fair and legally acceptable ruling for the veteran that happens to be favorable. Both the failure to accept and tendency to devalue non-VA medical evidence are symptoms of this attitude.

H.R. 1379

PVA cannot support H.R. 1379 as it is currently proposed. While PVA generally supports modifications to the remand process as it currently exists to allow for more expeditious and accurate resolution of appeals, H.R. 1379 is so vague that we believe it is unworkable. While there may be some advantages to oversight of all remand development by the Board, it will require significant investment of resources to ensure the quality of what is obtained through development is better and results in better decisions. However, it raises significant unanswered questions. The legislation indicates that "The Board may not remand any appeal case to the Veterans Benefits Administration," but does not describe what constitutes a remand. This is a concern because many of the orders from the Board are still going to involve the scheduling and completion of an examination by VBA. Is the process for scheduling examinations, as well as the quality of those examinations, going to be improved? Will the process be adequately funded and staffed? Will there be additional emphasis on private and VA treating evidence? Will the entire SSOC process that the Appeals Management Center/VBA goes through be eliminated? Until these questions are answered PVA cannot offer its support. Additionally, there is an absence of language that directs a pre-

decision review of the case by an appellant's designated Power of Attorney. It will be significantly easier for the Board to shut VSOs out of the process in the name of expediency.

Some of the language from the H.R. 800, the "Express Appeals Act," on the development process is much more clear and this legislation would more appropriately be included in some variation of that legislation with other reforms that improve Compensation and Pension exams, better developed opinions, and more use of private/VA treating evidence on which PVA has previously testified. This legislation has the potential to alter the Board from a decision-making body to an evidence-gathering body.

Perhaps PVA's greatest concern is that it reduces, and almost eliminates, VBA accountability. It allows for errors and poor initial decisions with no penalty or retribution. We already see poor decisions being made, and when remands are sent back to the AMC/Regional Offices, they often return to the Board without the instructions being completed as directed and enter the so-called "hamster wheel." In too many cases, the AMC fails to ensure the specific orders defined by the Veterans Law Judge in his or her opinion are followed and completed. How much worse will it be when VBA can essentially wash their hands of their claims with no repercussions against VBA or incompetent adjudicators who already have minimal accountability when they fail?

H.R. 1414, the "Pay As You Rate Act"

PVA supports H.R. 1414, the "Pay As You Rate Act" with one major concern. It is critical that an interim payment of earned benefits in no way causes the claim to be delayed in any way as it moves toward a final conclusion. It is also important that an interim payment not become the "ceiling" of the claim. The VA may find it easy to grant the "simple" part of a claim to ensure that the veteran is receiving some benefit. This potentially could lead to the granting of a lower claim percentage to move the claim off the table and reduce claims processing numbers.

While PVA like other veterans service organizations is interested in VA providing earned benefits to deserving veterans, we are most concerned with an accurate claim. Historically there have been too many instances of claims being improperly adjudicated, evidenced by the number of remands VBA receives, and this may lead to a quick fix remedy. Due to the number of veterans who do not have capable representation, a veteran may not even realize that the claim has not been completed, or that it may be lower than they deserve. PVA recommends very aggressive oversight by this subcommittee should this legislation be enacted.

H.R. 1569

PVA supports H.R. 1569 to clarify that the estate of a deceased veteran may receive certain accrued benefits upon the death of a veteran. With the extensive delays VA faces in processing claims, and the anticipated dramatic increase in appeals on the horizon, many veterans will continue to pass away before their claims or appeals are settled. PVA does not believe that the family should be denied benefits that are owed to a veteran for their service and these should be paid to the veteran's estate.

H.R. 1607, the "Ruth Moore Act of 2015"

PVA supports H.R. 1607, the "Ruth Moore Act of 2015." According to reports, sexual assault in the military continues to be a serious problem, despite several actions by the Department of Defense (DOD) to combat the issue, including required soldier and leader training. As the military works to reduce the threat and incident of military sexual trauma (MST), it is important that victims of MST, both women and men, have the ability to receive care from the VA and receive timely, fair consideration of their claims for benefits. This is particularly important given the number of MST occurrences that go unreported. While current policies allowing restricted reporting of sexual assaults should reduce the number of incidents which have "no official record," it can still be anticipated that there are those who will not report the incident out of shame, fear of reprisals or stigma, or actual threats from their attacker. To then place a high burden of proof on the veteran, who has experienced MST to prove service-connection,

particularly in the absence of an official record, would add further trauma to an already tragic event.

One particular recommendation that PVA would like to make about the proposed language is a clarification of what constitutes a "mental health professional." We would hope that the intent of this legislation is not to limit "mental health professionals" to only VA health care professionals.

Mr. Chairman and members of the Subcommittee, we appreciate your commitment to ensuring that veterans receive the best benefits and health care available. We also appreciate the fact that this Subcommittee has functioned in a generally bipartisan manner over the years. We look forward to working with the Subcommittee as we continue to provide the best care for our veterans.

This concludes my statement. I would be happy to answer any questions that you may have.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2014

No federal grants or contracts received.

Fiscal Year 2013

National Council on Disability — Contract for Services — \$35,000.

Disclosure of Foreign Payments

"Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies."

**Blake C. Ortner
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Blake Ortner is the Deputy Government Relations Director with Paralyzed Veterans of America (PVA) at PVA's National Office in Washington, D.C. He is responsible for federal legislation and government relations, as well as veterans' budget, benefits and appropriations analysis. He has represented PVA to federal agencies including the Department of Labor, Office of Personnel Management, Department of Defense, HUD and the VA. In addition, he is PVA's representative on issues such as Gulf War Illness and he coordinates issues with other Veteran Service Organizations.

He has served as the Chair for the Subcommittee on Disabled Veterans (SODV) of the President's Committee on the Employment of People with Disabilities (PCEPD) and was a member of the Department of Labor's Advisory Committee on Veterans' Employment and Training (VETS) and the Veterans Organizations Homeless Council (VOHC).

A native of Moorhead, Minnesota, he attended the University of Minnesota in Minneapolis on an Army Reserve Officer Training Corps (ROTC) scholarship. He graduated in 1983 with an International Relations degree and was commissioned as a Regular Army Infantry Second Lieutenant. He was stationed at Ft. Lewis, WA, where he served with the 9th Infantry Division and the Army's elite 2nd Ranger Battalion. He left active duty in September 1987.

He continues his military service as a Brigadier General in the Virginia Army National Guard and is a 2010 graduate of the US Army War College. From 2001-2002, he served as Chief of Operations - Multi-National Division North for peacekeeping missions in Bosnia-Herzegovina, from 2004-2005 he commanded an Infantry Battalion Task Force in Afghanistan earning 2 Bronze Star Medals, from 2007 to 2008 he served in Iraq as the Chief of Operations - Multi-National Force – Iraq earning a Bronze Star Medal and a Joint Commendation Medal, and from 2011-2012 he commanded a NATO Infantry Brigade Combined Combat Team in Afghanistan earning a Bronze Star Medal and Meritorious Unit Citation. Additional awards include the Legion of Merit, the Combat Infantryman Badge, Combat Action Badge, Ranger Tab, Military Free Fall Parachutist Badge and the Parachutist Badge. He currently serves as the Assistant Division Commander of the 29th Infantry Division for the Virginia Army National Guard.

Mr. Ortner resides in Stafford, VA with his wife Kristen, daughter Erika and son Alexander.



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**STATEMENT OF
 PAUL R. VARELA
 DAV ASSISTANT NATIONAL LEGISLATIVE DIRECTOR
 COMMITTEE ON VETERANS' AFFAIRS
 SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES
 APRIL 14, 2015**

Chairman Abraham, Ranking Member Titus and Members of the Subcommittee:

Thank you for inviting the DAV (Disabled American Veterans) to testify at this legislative hearing of the House Veterans' Affairs Subcommittee 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. 675

The Veterans' Compensation Cost-of-Living Act of 2015, introduced by Chairman Abraham, would increase the rates of compensation, clothing allowance, and Dependency and Indemnity Compensation (DIC), effective December 1, 2015.

Consistent with DAV Resolution No. 024, which calls on Congress to support legislation to provide a realistic increase in disability compensation, we support this bill. H.R. 675 proposes to increase the rates of compensation for wounded, ill and injured veterans, their survivors and dependents, commensurate with that provided to Social Security recipients.

While it has become customary for Congress to determine COLA in parity with Social Security recipients, it is important to note there have been years in which Social Security recipients did not receive a COLA. Those beneficiaries in receipt of compensation and survivor benefits also did not receive a COLA. To resolve this issue, DAV members passed Resolution No. 013, which calls on Congress to support the enactment of legislation to provide a realistic increase in Department of Veterans Affairs (VA) compensation rates to bring the standard of living of disabled veterans in line with that which they would have enjoyed had they not suffered their service-connected disabilities.

DAV has always supported legislation that provides veterans with a COLA; however, DAV is adamantly opposed to the practice of rounding down COLAs to the nearest whole dollar amount. This bill does contain a round down provision, and we oppose the round-down feature of this bill.

H.R. 677

The American Heroes COLA Act of 2015, also introduced by Chairman Abraham, would couple COLAs for wounded, injured and ill veterans, their dependents and survivors to those receiving Social Security benefits. This bill contains what would result in a permanent round down provision.

Consistent with DAV Resolution No. 071, which calls upon our organization to oppose the permanent rounding down of COLAs in veterans' benefits, we oppose this bill. H.R. 677 seeks to permanently link VA compensation payment COLAs to that of Social Security recipients and provide for automatic adjustments whenever an increase occurs, thus negating the need for future legislation to provide an increase each year.

While we do not oppose the automatic adjustment, DAV will continue to oppose legislation that seeks to permanently round down veteran and survivor compensation payments. DAV and our partners in the *Independent Budget* (IB) have documented the cumulative impact on beneficiaries. The cumulative effect has eroded approximately \$10 per month for every veteran and survivor. As an example, a veteran totally disabled from service-connected disabilities would have received \$1,823 per month in 1994 but today will be paid \$2,848 per month. Had this veteran received the full COLA each year for the past two decades, he or she would receive about \$120 extra this year.

DAV and our IB partners call on Congress to permanently end the practice of rounding down COLAs for wounded, ill and injured veterans, their dependents and survivors.

H.R. 732

The Veterans Access to Speedy Review Act, introduced by Mr. Ruiz, would broaden responsibility of the Board of Veterans' Appeals (Board) to determine the locations and types of hearings, whether in person or by videoconference. Appellants would retain the absolute right to choose the hearing venue, if so requested.

DAV is pleased to support this bill because it protects the rights and interests of disabled veterans. H.R. 732 provides that once the appellant is notified of the Board's determination of the type and location of the hearing, the veteran would be afforded the opportunity to request a different hearing type and/or location. If such a request is made, the Board must grant the request while ensuring the hearing is scheduled as soon as possible and without delay.

H.R. 800

The Express Appeals Act, introduced by Mr. O'Rourke and co-sponsored by Chairman Miller, seeks to establish an appeals pilot program. H.R. 800 would direct the Secretary of Veterans Affairs to carry this pilot to provide appellants' with an option of using an alternative appeals process to more quickly determine claims for disability compensation by the Board of Veterans' Appeals (the Board or BVA).

DAV supports this bill in accordance with Resolution No. 192, which calls on Congress to support meaningful reform in the Veterans Benefits Administration's (VBA) disability claims process. If enacted into law, H.R. 800 would provide appellants with an option to bypass some of the processing requirements VBA must perform consistent with protocols established within the current appeals framework.

On January 22, 2015, DAV testified before this Subcommittee and recommended creating a new Fully Developed Appeals (FDA) pilot program. We encourage the Subcommittee to consider the full content of our January 22, 2015, testimony as you deliberate the merits and viability of enacting this legislation.

The FDA pilot proposal continues to have widespread and growing support within the VSO stakeholder community as well as the full buy-in of both VBA and BVA leadership. Several of the leading VSOs responsible for representing the majority of claims and appeals before the VA believe the FDA option holds real promise. It not only provides appellants with different appeal processing options, and addresses some of the overall workload challenges, but also enables Congress and stakeholders to procure tangible information that has the potential to lead to true reform throughout the overall appeals process.

During January's hearing, DAV testified that given the complexity and legal parameters of the appeals process, and the primary role that workload and proper resources will play, no magic bullet solutions exist to address all the challenges associated with the appeals process. A multipronged approach to make measurable and sustainable headway must include reform, innovation and stakeholder collaboration. Submitted for the Subcommittee's consideration at that time was the FDA pilot proposal, which shares many similarities to H.R. 800.

Mr. Chairman, last year, following roundtable discussions on appeals held in the House, the Senate, and at DAV's offices, a core group of VSOs who perform significant appeals work agreed to work informally and collaboratively with both VBA and BVA officials to search for practical improvements to the appeals process. The goal of this group was to explore, analyze and develop consensus ideas on how to improve outcomes for veterans that could also free up VBA and/or BVA resources to further benefit the appeals process for all veterans. The core group would then seek further input and support from additional stakeholders while simultaneously reaching out to Congress to review any such proposals, particularly those that required legislation. Among the ideas the group focused on were strengthening the Decision Review Officer (DRO) program, improving claims decision letters and what has become the FDA pilot proposal.

Our FDA proposal is modeled on the Fully Developed Claims process, in which veterans agree to undertake the development of private evidence in order to enter an expedited processing program. Similarly, to participate in the FDA program, appellants would agree to gather all the additional private evidence necessary for BVA to make its decision on the appeal, thus relieving both VBA and BVA of that workload. When an appellant elects the FDA program for an appeal, he or she would be required to submit all the private evidence they want considered at that time, and may not later submit additional private evidence; such supplemental submission would discontinue participation under the FDA program, with one limited exception. If the Board

develops new federal records not part of the claims record, or orders new exams or independent medical opinions, the appellant will not only be given copies of the new evidence but will also have 45 days to submit additional evidence, including private evidence, pursuant to that newly developed evidence.

In our FDA model, the appellant would agree to an expedited process at VBA that eliminates the Statement of the Case (SOC), Form 9, any hearing and the Form 8 certification process. The elimination of these steps alone could save some veterans up to 1,000 days or more waiting for their appeals to be transferred from VBA to the Board. The veteran would retain the absolute right to withdraw from this program at any time prior to disposition by the Board, which reverts their appeal back to the standard appeal processing model, with the option of DRO review as well as both informal and formal hearing options. The FDA pilot program is not a replacement for either the DRO process or the traditional appeals process; it is another option – a fully voluntary one – that the veteran can withdraw from at any point without penalty.

However, for those veterans who, in consultation with any representatives they may have, determine that the best option is to have the Board review the appeal, and for which they are confident they have the ability to provide sufficient evidence and argument without hearings, the FDA process can save them significant time, plus save VBA and BVA significant processing work. As such, election of the FDA option could free additional resources at both the Board and VBA to increase productivity for processing traditional appeals and DRO reviews, thus benefiting all veterans. Furthermore, by testing this new model with congressionally mandated reporting requirements, Congress and VA could gain valuable insights on potential system-wide reforms that could bring additional efficiencies to the appeals process.

Mr. Chairman, we remain thankful to Mr. O'Rourke and his staff for affording us the opportunity to offer our insights and suggestions while drafting H.R. 800. Their receptiveness to our input will go a long way to ensuring the success of this legislation.

Also, Chairman Miller, who is the lead cosponsor for this bill, has been instrumental moving this legislation forward. His continued leadership and willingness to reach across party lines to support efforts aimed at bettering the lives of our nation's wounded, injured and ill veterans, their dependents and survivors is invaluable.

We believe that several changes would help bolster the successful implementation of H.R. 800 and provide much needed relief to those choosing to appeal their VBA decisions.

Recommendations

To ensure the success of the pilot, while preserving the best interests of appellants, we recommend the following changes to strengthen this legislation.

1. Section (b), subparagraph (2) should be struck in its entirety. Striking this section also negates the need for section (b) (3).

In its current iteration, section (b) (2) permits those with pending appeals to enter into the FDA program; this has the potential to skew data, overwhelm the program and create disparity. Those appellants with active appeals may have received the benefit of additional administrative actions such as hearings, SOCs, SSOCs and development of private medical evidence. Those making elections in the first instance, at the time of their Notice of Disagreement (NOD) filings, do not have the option for these administrative actions, unless they opt out of the FDA program.

In order to obtain the best information possible to validate the success of this pilot, participation should be limited to those individuals at first filing of NODs. These appeals, which would avoid any processing by VBA, would be the best case studies to determine what enhancements could be made within VBA's rating process. It would illustrate the advantages and disadvantages of providing appellants with options to bypass certain VBA appellate procedures.

Furthermore, providing a mechanism for those with pending appeals to opt into this new program midstream in the standard appeals process, could have serious unintended consequences, including the potential to create a backlog within the FDA pilot by causing the program to become overwhelmed with those backlogged appeals that are currently working through the system. This provision alone could cause the FDA pilot to fail.

2. The word "traditional" should be struck and replaced with "standard" to mean the current appeals process to ensure clarity. "Traditional" has a particular meaning within the current appeals framework and signifies a specific type of appeal processing within VBA;
3. Amend section (e) to include more robust reporting requirements, such as the following:
 - Maintain a list of FDA participants by name and claim number;
 - Track the number of participants;
 - Measure average processing time:
 - For an FDA to reach the BVA from ROs;
 - For an FDA compared against those in the standard appeals process;
 - For the BVA to issue a decision on an appeal;
 - To complete any additional development and issue a subsequent decision;
 - When development is required, reasons for such development;
 - Number of issues decided;
 - Disposition of issues in cases where the record is supplemented with additional evidence:
 - Full grant of benefits;
 - Partial grant of benefits;
 - Denial;
 - Disposition of issues in cases where the record is not supplemented by additional evidence:
 - Full grant of benefits;
 - Partial grant of benefits;
 - Denial;

- Number of cases appealed to the Court of Appeals for Veterans Claims (CAVC) and the determinations on cases involved in the FDA program;
 - When participants are deemed ineligible for FDA processing and reasons for their removal from the program;
4. Section (4) should be amended, to read:
- (4) Reversion.--Any time a claimant who makes an election under paragraph (1) that voluntarily discontinues participation in the FDA pilot, or is otherwise removed from the program consistent with the parameters set forth in this statute, will revert to the standard appeals process without any penalty to the claimant other than the loss of the docket number associated with the fully developed appeal, to include the right to have the appeal reviewed under the Decision Review Officer process.

In the standard appeals process, veterans have two options in which to have appeals processed by the VBA; the DRO process, and the appeal process. In most cases, the DRO process is of greater benefit to appellants; however, a veteran only has 60 days in which to make a DRO election from the date VA mails the veteran the Appeals Process Request Letter.

If an election has not been made within that 60 day timeframe, the appeal defaults to the traditional review process. If the bill were to be enacted in its present form, it is unclear whether FDA participants would simply revert to the traditional appeals process if the appeal is no longer reviewed under the FDA process, thus precluding them from the option of having their appeal reviewed by a DRO.

5. Section (6) should be amended to require VBA to create an online tutorial and provide written notice, in consultation with VSO stakeholders, concerning the advantages and disadvantages of pursuing an appeal under the FDA pilot compared to processing an appeal through the standard appeal model.

The merits of the FDA pilot have been carefully deliberated, keeping veterans' best interests at the forefront of all discussions and any decisions working with major stakeholders, the Board, VBA and VSOs. We have built in as many safeguards as possible within the program to protect veterans, their dependents and survivors if they choose to participate in this program.

The FDA process is not designed for use by a majority of new appellants; it only augments a certain portion of appeals that would otherwise have to be processed by VBA. Instances will occur in which appellants would benefit from additional RO administrative processing. These would be cases of appellants who do not have access to resources to obtain supplemental medical, or other evidence, and when a hearing may be required to provide a more descriptive account of the circumstances surrounding the issues under appellate consideration.

The FDA pilot provides considerable flexibility during its operational period. Changes can be made along the way if deemed necessary and the reporting requirements as recommended would provide Congress with a good body of evidence with the potential to lead to true reform within VA's appeals process.

We are hopeful that Congress will authorize this new option for wounded, ill and injured veterans, their dependents and survivors.

H.R. 1067

The U.S. Court of Appeals for Veterans Claims Reform Act, introduced by Mr. Costello, would extend the temporary expansion of the United States CAVC and ensure that judges of the CAVC could enroll in the Federal Employee Group Life Insurance program.

DAV supports section 2 of H.R. 1067, which would extend the temporary expansion of the number of judges serving on the CAVC to January 1, 2020. The CAVC's caseload averages roughly 4,600 cases per year. As a result, the CAVC has had one of the highest, if not the highest, caseloads per active judge of any federal appellate court in the country. In response, the CAVC was authorized in 2008, as part of the Veterans Benefits Improvement Act, to expand temporarily from seven to nine judges as of January 2010.

The authorization to increase the number of CAVC judges was set to expire at the end of 2012 if the positions were not filled within that time frame. Fortunately for the CAVC, the two available vacancies were filled prior to the expiration date. Due to this temporary authorization the CAVC now stands at nine judges, an increase justified due the growing number of appeals handled by the CAVC.

If these two temporarily authorized appointments become vacant, the CAVC is not authorized to replace them as restricted under title 38, United States Code, §7253 (i) (2), which sets the limit of judges to not more than seven. Allowing the number of judges to drop below nine would adversely impact the CAVC's ability to make timely decisions because the remaining judges would be left to absorb the ongoing workload.

DAV supports section 3 of H.R. 1067 that would authorize the chief judge to recall recall-eligible retired judges for further service on the Court. The chief judge would certify in writing that substantial service would be expected to be performed by the retired judge for a period not to exceed 90 days (or the equivalent), as determined by the chief judge to be necessary to meet the needs of the Court.

It would permit a recall-eligible judge to petition the chief judge to return for a period of service not to exceed 90 days (or the equivalent). The chief judge would approve a request made by a recall-eligible judge unless the chief judge certifies, in writing, that the Court did not possess sufficient work to assign recall-eligible judge; or that there is a lack of sufficient resources to provide such recall-eligible judge appropriate administrative and office support. The chief judge would gain the authority to terminate such recalled service if the chief judge made a written certification at any time during the period.

This provision would also allow the chief judge to recall judges when workload requires such a recall. It would authorize those recall-eligible judges to petition the chief judge for temporary assignment to the CAVC, contingent upon available resources and caseload.

With regard to sections 4, 5 and 6 of this bill, we have no resolution and therefore take no formal position on these provisions.

H.R. 1331

The Quicker Veterans Benefits Delivery Act of 2015, introduced by Mr. Walz, would require the Department of Veterans Affairs (VA) to accept, for purposes of establishing a claim for veterans' disability benefits, a report of a medical examination administered by a private physician. The Veterans Health Administration (VHA) would not be required to confirm this medical evidence by a physician when reports are sufficiently complete.

DAV is pleased to provide our support for this bill, consistent with Resolution No. 192, which calls on Congress to support meaningful reform in the Veterans Benefits Administration's (VBA) disability claims process. The bill defines "sufficiently complete" as "competent, credible, probative, and containing such information as required to make a decision on the claim for which the report is provided." This would eliminate the practice of VA's ordering unnecessary examinations that lead to delays in delivery of benefits, tie up VA resources and add to the frustration of veterans who have provided sufficient medical evidence to support their claims. Requesting a VA examination when acceptable medical evidence has been supplied to issue a rating on a claim gives the impression that private evidence is less valuable than medical evidence procured by VA from its examination providers.

DAV has pressed for changes that improve and streamline the claims processing system, and supports giving due deference to private medical evidence that is competent, credible, probative, and otherwise adequate for rating purposes, as well as legislation and policies that encourage the use of private medical evidence, including allowing private physicians to gain access to all Disability Benefit Questionnaires.

H.R. 1379

H.R. 1379, introduced by Chairman Miller, would authorize the Board to develop evidence in appealed cases. The bill would also prohibit remands to the VBA, thus requiring the Board to issue a decision on the newly obtained evidence.

DAV opposes this bill. In the current process, if the Board determines that additional evidence is required before a final decision can be made in an appellant's case, the Board issues a remand order, to be completed by the VBA. In most remanded appeals, the processing of this additional development occurs at VBA's Appeals Management Center (AMC). Upon completion of any additional development, VBA is required to issue a subsequent decision.

Enacting this legislation would raise several concerns relative to VBA's quality of decisions, finality, and Board capacity.

First, remanding cases to VBA allows another opportunity to correct mistakes VBA may have made during the adjudication. If the Board no longer remanded cases to VBA it would remove accountability for VBA to ensure appealed cases are accurate and complete before

forwarding appeals to the Board. This could create a situation within VBA that once an appeal is under the Board's jurisdiction, VBA would be less concerned with the outcome.

Although VBA mostly addresses remands through the AMC, it affords the VBA the opportunity to correct mistakes made at the local level that have been identified by the Board. This practice enables regional offices to improve upon rating practices locally, avoiding future oversights and mistakes. If such issues are consistently redressed, VBA stands to improve the rating processes for all claims.

Second, requiring VBA to issue another decision helps a veteran avoid finality in more complicated cases. When VBA issues a decision on a claim that is challenged, some element of that decision may not satisfy the appellant. Whether it is a denial of initial entitlement, such as claims for survivor benefits, evaluations assigned for service-connected disabilities, or an effective date, initiating an appeal preserves the status of those issues without reopening a claim. This is particularly sensitive in cases where new and material evidence would be required to reopen claims where initial entitlement is denied and the decision has become final.

H.R. 1379 would create a situation wherein the Board issues a decision based on additional evidence it has obtained in the first instance. Without the benefit of review at the local level, if benefits remain denied, a veteran would have very limited options to seek redress outside of VA because the Board's decision is final and binding on VA. This could be a disastrous scenario for those seeking benefits and medical treatment associated with their appellate issues.

In appeals for increased ratings, the issue continues on appeal until the maximum evaluation is established, or until the appellant expresses satisfaction with the assigned evaluation. As an example in the present framework, the Board could issue a remand order for a new examination; the VBA would carry out the instructions pursuant to the remand and obtain additional medical evidence. Upon the VBA's review of the body of evidence, VBA issues a new decision which could provide for an increase or maintain the current evaluation. The case would then be routed back to the Board for review and disposition that could vary from VBA's findings.

If there are no other procedural or developmental issues impeding the Board's ability to issue a decision, it would complete an assessment of the evidentiary record and issue its final decision. The Board would either grant an increased rating or maintain the previous evaluation. Given the same body of evidence, would the Board and VBA reach the same conclusions? There is a benefit to appellants in the current appeals framework when VBA issues a decision pursuant to the completion of remand orders; it provides appellants with a decision based on VBA's independent assessment of the evidentiary record. H.R. 1379 places this evidentiary assessment and decision making authority solely within the Board.

Third, inherent to H.R. 1379 is the elimination of the AMC, at least in its current VBA capacity. With the elimination of VBA's development/decision capacity, every appeal would be returned to the Board without the benefit of resolution at another point during the appeals

process. For every decision that could have been made within VBA, it would now be required to be made at the Board. This eliminates a potential resolution at an earlier stage of the process, increasing the number of cases returning to the Board. Would the Board have the capacity to efficiently manage this increased workload?

The problems associated with VA's appeals process, particularly the remand process, are certainly complex. However, H.R. 800 does propose a more careful solution to address appeals. H.R. 800 proposes the elimination of remands on a "voluntary" basis. Appellants could choose whether or not to enter into this process and forgo remand by the Board and allow the Board to develop its own evidence. Importantly, if the Board procures additional evidence, the appellant is supplied with a copy to allow a response in kind to this evidence. H.R. 800 also establishes a pilot program that would allow stakeholders the ability to review this process and how well it works.

For all of the above reasons, we oppose H.R. 1379.

H.R. 1414

The Pay as You Rate Act, introduced by Ranking Member Titus, would authorize the Secretary to make interim payments of disability compensation benefits for certain claims, in anticipation of completing the adjudication process.

DAV supports this bill because it would provide the Secretary with authority to issue decisions on each claimed issue during the adjudication process itself, rather than issuing a decision on the entire claim after all the evidence and information has been gathered to make a decision on each issue contained within a claim.

Providing a mechanism for wounded, injured and ill veterans, their dependents and survivors to receive their benefits sooner rather than later is a practical approach in the adjudication of claims, but again, must always be tempered with an emphasis on quality. VA already possesses the ability to issue "intermediate rating decisions" contained within their policy manual. Manual M21-1MR, Part III, Subpart iv, Chapter 6, Section A, provides VBA personnel with guidance on "intermediate rating decisions." VBA's current ability to issue such decisions, prior to the completion of the entire adjudication process, parallels the intent of H.R. 1414.

VBA continues to move toward a more fully automated and paperless adjudication process. VBA may in fact come to obtain the capability to rate individual issues in the near future, rather than the current practice of rating the entire claim only after all the evidence has been obtained. VBA is moving ahead with its National Work Queue (NWQ) initiative, which will provide a paperless claims management system. It will allow claims and appeals to be disbursed throughout all regional offices (ROs).

VBA seeks to leverage the NWQ to disburse work from overwhelmed ROs to other ROs with capacity to handle additional claims and appeals. This new tool may give VBA the ability to

rate issues independently and various ROs; however, there have been no decisions to date to rate by separate issue.

We believe significant improvements can be made to this bill if the following changes are made. We respectfully request the Subcommittee consider these recommendations:

1. Amend section (a) to read:
“(a) IN GENERAL.—In the case of a claim described in subsection (b), ~~prior to adjudicating the claim~~, the Secretary shall make interim **monetary** payments of ~~monetary benefits~~ to the claimant based on any disability for which the Secretary **has obtained sufficient evidence to issue a compensable evaluation during the adjudication process** ~~has made a decision~~”
2. Amend section (b) (2) to read:
(2) for which, during the adjudication process, ~~before completing the adjudication of the claim~~, the Secretary obtains sufficient evidence to make a decision on an issue, ~~makes a decision~~ with respect to a disability that would result in the payment of monetary benefits to the claimant **during** ~~upon~~ the adjudication of the claim.”

H.R. 1569

H.R. 1569, introduced by Mr. Zeldin, would authorize an estate of a deceased veteran to receive an award of accrued benefits that would have otherwise been paid to a veteran.

Currently, title 38, United States Code, section 5121, authorizes accrued benefit payments to living spouses, children or dependent parents. This legislation would ensure that estates of veterans would also be authorized to receive accrued benefits.

Unfortunately, there are instances when a veteran dies before a claim or appeal has been finally adjudicated, resulting in an award of benefits, but no qualifying survivor exists to receive them. Nothing can be more disconcerting than in those instances where a veteran may have had a lengthy claim or appeal but died before the completion of the adjudication process.

DAV supports this bill to ensure veterans' receive their due justice so that even in death, those awards that would have otherwise been paid to a living veteran, should also be eligible to be paid to his or her estate. These are benefits that are rightly due to the deceased veteran and should include the estate to ensure that their sacrifices on behalf of our nation are duly recognized, even in death.

H.R. 1607

H.R. 1607, introduced by Ms. Pingee, would improve disability compensation evaluation procedures of the Secretary of Veterans Affairs for veterans with mental health conditions related to military sexual trauma (MST).

The bill seeks to relax the evidentiary standard in MST-related claims. Consistent with DAV Resolution No. 086, which calls for improving the process of establishing service connection for the residuals of MST, we are pleased to offer our support for this legislation.

For decades, VA treated claims for service connection for mental health problems resulting from MST in the same way it treated all claimed conditions—the burden was on the claimant to prove the condition was related to service. Without validation from medical, investigative or police records, claims were routinely denied. More than a decade ago, VA relaxed its policy of requiring medical or police reports to show that MST occurred. Nevertheless, thousands of claims for mental health conditions resulting from MST have been denied since 2002 because claimants were unable to produce evidence that assaults occurred. From 2008 to 2012, grant rates for post-traumatic stress disorder (PTSD) resulting from MST were 17 to 30 points behind grant rates for PTSD resulting from other causes.

Unfortunately, victims of MST often do not report such trauma to medical or police authorities. Lack of reporting results in a disproportionate burden placed on veterans to produce evidence of MST. Full disclosure of incidents occurring during service tend to be reported years after the fact, making service connection for PTSD and other mental health challenges exceedingly difficult.

Establishing a causal relationship between certain injuries and later disability can be daunting due to lack of records or human factors that obscure or prevent documentation or even basic investigation of such incidents after they occur. Military sexual trauma is ever more recognized as a hazard of service for one percent of men serving and 20 percent of women, and later represents a heavy burden of psychological and mental health care for the VA.

An absence of documentation of military sexual trauma in the personnel or military unit records of injured individuals prevents or obstructs adjudication of claims for disabilities of this deserving group suffering the after effects associated with military service, and may interrupt or prevent their care by VA once they become veterans. The VA has issued a regulation that provides for a liberalization of requirements for establishment of service connection due to personal assault, including MST, even when documentation of an “actual stressor” cannot be found, but when evidence in other records exists of a “marker” indicating that a stressor may have occurred. DAV fully supports this relaxed evidentiary practice, consistent with DAV Resolution No. 086.

H.R. 1607 seeks to further relax the evidentiary standard for “stressor” requirements. It provides that any veteran who claims that a covered mental health condition was incurred in or aggravated by MST during active military, naval, or air service would require the Secretary to accept as sufficient proof of service connection, a diagnosis of such mental health condition by a mental health professional, together with satisfactory lay or other evidence of such trauma and an opinion by the mental health professional that such covered mental health condition is related to such MST.

The circumstances of MST would need to be consistent with the conditions or hardships of such service, notwithstanding the fact that no official record exists of such incurrence or

aggravation in such service. Every reasonable doubt would be resolved in favor of the veteran. In the absence of clear and convincing evidence to the contrary, and provided that the claimed MST was consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone would establish the occurrence of the claimed MST.

Service connection of a covered mental health condition could be rebutted by clear and convincing evidence to the contrary. The Secretary would also be required to record, in full, the reasons for granting or denying service connection in each case.

Under this bill, a covered mental health condition would be defined as PTSD, anxiety, depression, or other mental health diagnosis described in the current version of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, that the Secretary determines to be related to MST.

MST would be defined as a psychological trauma, which in the judgment of a mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred during active military, naval, or air service.

Comprehensive reporting requirements have been built into H.R. 1607 that would require the Secretary to provide VA's findings beginning on December 1, 2016, through 2020.

Enacting this legislation would ease some of the evidentiary requirements for those veterans filing claims for service-connection suffering the aftereffects of a MST. It would bolster the weight afforded to lay evidence. When the lay evidence is corroborated by a mental health professional and a diagnosis is made of one of the covered mental health conditions, the Secretary would be authorized to grant service-connection for said claim.

This legislation does create two separate adjudication procedures for those veterans filing claims related to MST under the proposed legislation and those filing claims related to combat, or exposure to hostile military or terrorist activity. Those currently filing claims for PTSD unrelated to MST are required to have their diagnosis confirmed by a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted.

Mr. Chairman, along with our support of this bill, we believe VA should address a disparity in current regulation by making similar the adjudication of all stressor-related mental health disabilities. Accordingly, we recommend the following changes:

1. To ensure parity amongst those veterans claiming mental health related disabilities as a result of MST, combat and exposure to hostile military or terrorist activity, title 38, Code of Federal Regulations should be amended to read as follows:

3.304 Direct service connection; wartime and peacetime.

(3) If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and **a certified mental health professional** a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms

that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder...

2. VA should accept and rate claims using private medical evidence for qualifying disabilities related to MST, combat, or exposure to hostile military or terrorist activity when received by a certified mental health professional, that is competent, credible, probative, and otherwise adequate for rating purposes.

Mr. Chairman, this concludes my testimony. I would be pleased to answer any questions you or members of the Subcommittee might have.

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 represented thousands of claimants before the Department of Veterans Affairs (VA), the Court of Appeals for Veterans Claims (CAVC) and other federal courts. NVLSP's efforts over the last 35 years have resulted in billions of dollars in VA disability and death benefits for veterans and their families.

NVLSP has been assisting veterans and their advocates for thirty years. We publish numerous advocacy materials, recruit and train volunteer attorneys, and 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. On behalf of The American Legion, NVLSP and conducts local outreach and quality reviews of the VA regional offices. 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. If the bill is not amended as discussed below, H.R. 800 would act as a trap for unwary veterans who are focused on seeking a prompt resolution of their appeals. The promise that H.R. 800 holds out – an “express appeal” – should be exceedingly attractive to veterans. Typically, veterans have to wait 3 to 4 years or more after the filing of an NOD to receive a final BVA decision. The decision the veteran has to make under H.R. 800 at the time of the required election is whether he has submitted all of the evidence that he or she needs to submit to substantiate the claim. The main flaw with H.R. 800 as written is that the large majority of the veterans who will be given the opportunity to elect a Fully Developed Appeal press appeal” will have to make the election in the dark – without knowing what the veteran would need to know to make an informed election.

First, in order to make an informed decision whether all of the evidence that the veteran needs to submit to substantiate the claim has in fact been submitted, the veteran obviously needs to know why the RO decided that the evidence in the record at the time of its decision was against the claim and what evidence would need to be submitted to help substantiate the claim. Under H.R. 800 as written, a veteran who elects to a Fully Developed Appeal gives up forever his or her right to the document that would likely provide this information to the veteran – the Statement of the Case. All that the veteran will have in his or her possession at the time the election needs to be made is the notice letters sent by the VA regional offices about its denial of the claim. But these notices are often lacking in crucial detail. The VA, in its notice letters, usually 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 employed by the VA and as an independent advocate) I have encountered veterans who submit evidence after a denial that does no more than prove an element of the claim that has already been proven.

For H.R. 800 to be fair to veterans the VA notice letter must 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. Also 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 that a VA physician has concluded that the current left knee condition did not result from the knee trauma or anything else that occurred in service and that it would help substantiate his claim if he obtained and submitted a positive medical linkage opinion from a medical professional that states that in the professional's opinion, it is as likely as not that the current left knee condition resulted from the knee trauma he suffered during the period of military service.

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 during of the last year and discovered that many of these veterans do not even know why they are getting benefits or what claims have been denied. Therefore, because H.R. 800 invites veterans to give up important procedural rights – like the right to a hearing and the right to submit additional evidence – without having the information they would need to know before giving up these rights, we cannot support this bill as written.

Another problem with H.R. 800 is that it invites, but does not require involvement of the veteran's representative. No veteran should be allowed elect to file a Fully Developed Appeal until his or her representative has been consulted. The VA should require the claimant to submit a VA Form in order to elect the Fully Developed Appeal process. This form must require the claimant, if he or she is represented on the claim, to provide the name of the representative and the representative's organization and affirm

that the appellant's representative was consulted before the claimant can elect to use the Fully Developed Appeal process. This will also help ensure that the veteran's election is a knowing and intelligent one.

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 the evidence that the BVA develops -- such as a possible negative VA medical opinion, -- 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.

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 strongly 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.

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES,
INC.**



Prepared Statement

Kenneth M. Carpenter, Founding Member of NOVA

Before the

Committee on Veterans' Affairs

U. S. House of Representatives

Subcommittee on Disability Assistance and Memorial Affairs

**"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"**

April 14, 2015

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On behalf of the National Organization of Veterans' Advocates, Inc. (NOVA), I would like to thank the Subcommittee Chairman and Ranking Member for the opportunity to share our views.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA's disability claims process. In 2000, the United States Court of Appeals for Veterans Claims recognized NOVA's work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

NOVA is pleased to have been invited to offer testimony before the Subcommittee on Disability Assistance and Memorial Affairs on several bills which concern veterans and their families. Our written testimony will address each bill in numerical order, beginning with the lowest numbered bill and ending with the highest numbered bill.

H.R. 675 “Veterans’ Compensation Cost-of-Living Adjustment Act of 2015”

NOVA supports this bill and urges the committee to report this bill favorably to the full committee with a recommendation for passage by the full House.

H.R. 677 “American Heroes COLA Act of 2015”

NOVA supports this bill and urges the committee to report this bill favorably to the full committee with a recommendation for passage by the full House.

H.R. 732 “Veterans Access to Speedy Review Act”

NOVA supports this bill but feels compelled to comment on the potentially misleading title of the bill. NOVA fully supports the intent of this bill to encourage the use of video conferencing for the conduct of hearings before the Board of Veterans' Appeals. However, the title of this bill, which is “Veterans Access to Speedy Review Act,” could cause some veterans to mistakenly assume that electing to have a video conference hearing instead of an in person hearing before the Board will “speed up” the Board's review.

In accordance with the provisions of 38 U.S.C. § 7107(a)(1) “each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.” An appeal is docketed following the certification by the agency of original jurisdiction, the VA regional office which denied the claim. Therefore, whether a veteran has an in person hearing before the Board in Washington D.C., or in person before a traveling Board or by video conference, the speed of the review is dictated by the date the appeal is docketed and the number of appeals previously docketed.

H.R. 800 “Express Appeals Act”

In its present form, NOVA cannot support this bill. A pilot program is not what is needed. What is needed is an immediate change in the VA appeal process which improves an appellant’s opportunity for a faster resolution of appeals while ensuring that the right to submit evidence is not forfeited.

There are three reasons why NOVA cannot support this bill. First, this bill would create two separate tracks for appeals. Second, in order to get an express appeal, the veteran must waive the right to submit additional evidence. Third, because there is a very real possibility that this bill will mislead veterans to believe that if they give up their right to submit further evidence, then their appeal will be heard sooner. As written, this bill conflicts with the provisions of 38 U.S.C. § 7107(a)(1) which states in pertinent part: “each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.” NOVA does not believe that creating a pilot program is the best approach.

However, there are two items in this bill which NOVA does support. They are the elimination of the need for a statement of the case and filing of a substantive appeal and the prohibition of remands for development. Please see NOVA’s January 2015 testimony before this committee on eliminating the statement of the case and filing of a substantive appeal. NOVA believes that a better approach would be the immediate implementation of structural changes to the VA appeal process rather than the proposed pilot program approach. NOVA would like to offer the following as amendments to this bill.

NOVA recognizes the problems created under the current statutory scheme by the repeated submission of evidence following an initial denial and during the pendency of an appeal. These problems deal with the need for new decisions by the agency of original jurisdiction. To be clear, NOVA does not want to see VA relieved of its obligation to fully and sympathetically develop the claim to the optimum before VA decides the claim on its merits. However, NOVA would suggest that if this bill were to make immediate structural changes that the goal of a more efficient decision making and appeal process could be accomplished.

NOVA would suggest that in addition to the elimination of the need for a statement of the case and filing of a substantive appeal and the prohibition of remands for development, this bill incorporate the following changes.

First, amend the provisions of 38 U.S.C. § 5904 to adjust the time for the commencement of representation by an agent or an attorney from commencing after the filing of a notice of disagreement to commencing after VA issues an adverse decision. This would allow veterans and other claimants to secure the assistance and advice of an accredited attorney or agent after VA makes its decision on the merits of the claim or claims made to VA. This statutory change is necessary for veterans and other claimants to be advised concerning the need for the submission of additional evidence to substantiate their claim or claims denied.

Second, NOVA recommends that this bill require that the filing of a notice of disagreement in response to an adverse VA decision affecting benefits would be the sole requirement for appealing a decision of VA. Further, that the VA's *de novo* review by a decision review officer be codified. Finally, that the record before the agency of original jurisdiction be closed one year after the VA's decision on the merits or following a *de novo* review by a decision review officer. This bill would also provide that a veteran or claimant would be allowed to file additional evidence to be considered by the agency of original jurisdiction only within the one year following the VA's initial decision. The VA's receipt of such additional evidence would require a supplemental decision from the agency of original jurisdiction. However, thereafter no further decisions will be made by the agency of original jurisdiction.

Third, this bill would permit an appellant to submit additional evidence to VA for consideration by the Board of Veterans' Appeals. There would be no interim decision on such evidence by the agency of original jurisdiction. The Board would make its decision based on all evidence of record at the time of its decision. Additionally, the Board would be authorized to determine if additional evidence development was necessary in order to decide any issue before the Board. The Board would not be permitted to remand to the agency of original jurisdiction for further evidence development. The agency of original jurisdiction would have initial development responsibility to include one decision on evidence received within one year of the initial decision or based on an order for development by a VA decision review officer. Thereafter, any evidence submitted would be considered by the Board.

In the event that the Board determines that additional evidence development is required, the Board will be required to notify the appellant and the appellant's representative and explain what evidence the Board has determined needs to be developed and how the Board intends to develop that evidence. Additionally, the Board will provide the appellant and the appellant's representative a copy of all additional evidence developed and give the appellant an opportunity to respond by submitting additional evidence or argument within 90 days of the Board's notice.

With these changes, all appellants would be treated the same. Congress will have made immediate structural changes to the appeal process which benefit all appellants. These proposed changes would result in faster appeals which would not be conditioned upon a veteran's waiver of the right to submit evidence. Changing this bill from a pilot program to an immediate structural change of the appeal process would benefit all appellants.

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

NOVA supports this bill. NOVA believes that the proposed salary increase for the judges is both necessary and appropriate. Further, NOVA supports the continuation of the expansion of the size of the court as responsible public policy based on sound planning by Congress.

H.R. 1331 “Quicker Veterans Benefits Delivery Act of 2015”

NOVA supports the intent of this bill to place medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation on an equal basis. NOVA is concerned that VA has become disproportionately dependent on VA examinations and uses VA examinations when the veteran’s file already contains competent medical evidence from VA as well as non-VA medical professionals. Reliance on existing medical evidence is being evaded based on an unnecessary dependency on VA examinations which can be completed by VA as well as non-VA treating medical professionals. This would result in significant savings by obtaining information from the medical professionals who are actually providing treatment to the veteran.

Presently, Social Security claimants under the provisions of 42 C.F.R. § 404.1527 receive the benefit from what is known as the treating physician rule. Under this rule, medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions. *See* 42 C.F.R. § 404.1527(a)(2). Also under this rule, a treating source’s opinion is given controlling weight based upon certain specified factors. *See* 42 C.F.R. § 404.1527(c).

NOVA believes that there should not be two different standards for disability claimants. VA has not adopted this rule. NOVA submits that this rule should be codified by Congress for the benefit of veterans. Because this rule is not currently available to veterans, it is NOVA’s view that too often VA gives greater probative weight to the opinions of VA compensation and pension examiners over the evidence from treating professionals. NOVA believes that the treating physician rule as used by Social Security will result in fewer denials and fewer appeals and represents a consistent public policy in this uniquely pro-veteran scheme.

H.R.1379 Authorize the Board of Veterans’ Appeals to develop evidence in appeal cases.

NOVA supports this bill. NOVA believes that the no remand provision will be an especially valuable provision which will ensure that the record has been adequately developed on appeal. Further, NOVA urges the amendment of this bill to require the Board to provide notice to the veteran of the evidence the Board seeks to develop and how the Board intends to develop that evidence. Also, that the Board provides the appellant and the appellant’s representative with a copy of all additional evidence developed and give the appellant an opportunity to respond by submitting additional evidence or argument within 90 days. *See* 38USC7109

H.R. 1414 “Pay As You Rate Act”

NOVA supports the intent of this bill. However, NOVA believes that this bill will simply require by statute what VA is already required to do.

H.R. 1569 Making the estate of a deceased veteran a qualifying survivor and thereby entitled to receive accrued benefits upon the death of the veteran.

NOVA fully supports this bill and urges in the strongest terms its enactment into law. This bill will allow the non-qualifying survivors of the veteran's family to obtain from VA those benefits due to the veteran at the time of death instead of VA retaining those benefits. Veterans would rather have their benefits be paid to their family than to be retained by VA.

H.R. 1607 "Ruth Moore Act of 2015"

NOVA cannot emphasize enough how important this bill is to victims of sexual assaults which occurred while serving on active duty. If Congress does nothing else this year for veterans, it must pass this bill. This bill will restore dignity to victims of assault while serving this country. Under the current law, a victim of assault in service who has been diagnosed with post traumatic stress disorder by a mental health professional is also required to provide evidence that the assault actually occurred. As a result, the veracity of these victims is put at issue by VA. This bill correctly recognizes that the lay testimony alone of these victims should be enough to establish the occurrence of the reported military sexual trauma unless there is clear and convincing evidence to the contrary, provided that the reported military sexual trauma is consistent with the circumstances, conditions, or hardships of the veteran's service.

NOVA hopes that these suggestions will be of assistance to this Committee and to Congress.

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KENNETH M. CARPENTER received a B.A. in History & Political Science and B.A. in Philosophy & Religion, Southwestern College, Winfield, Kansas in June 1970. He received a J.D. from Washburn University, Law School, Topeka, Kansas in 1972; Masters in Adult & Community Counseling from Kansas State University, Manhattan, Kansas in March 1983.

He has been engaged in the private practice of law in Topeka, Kansas since 1973. Admitted to the following courts: Kansas Supreme Court, 1973; Federal District Court for the District of Kansas, 1973; 10th Circuit Court of Appeals, 1984; U. S. Court of Federal Claims, 1987; Federal Circuit Court of Appeals, 1989; Court of Appeals for Veterans Claims, 1990; United States Supreme Court, 1990. The practice of Veterans Law is the exclusive area of practiced by Carpenter, Chartered. He is a founding member of the National Organization of Veterans Advocates.

He is the President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, predominantly veterans with post traumatic stress disorder. The firm also specializes in cases involving total disability ratings and earlier effective dates. The firm also does requests for revisions based on allegations of clear and unmistakable error and survivor claims for dependents of veterans.

STATEMENT OF

ALEKS MOROSKY, DEPUTY DIRECTOR
NATIONAL LEGISLATIVE SERVICE
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.

STATEMENT OF
THE HONORABLE BRUCE E. KASOLD, CHIEF JUDGE
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

FOR SUBMISSION TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

APRIL 14, 2015

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to comment on H.R. 1067. Succinctly stated, the Court supports this legislation. We do have one suggested change to section 3 that we already have coordinated with Committee staff and the staff of Mr. Costello, who introduced the bill, to wit: Change "not to exceed 90 days or the equivalent" in the suggested amendment at 38 U.S.C. ' 7257(b)(1)(B)(i) to read "not less than 90 days (or the equivalent)". A recall-eligible retired judge (Senior Judge) desiring to work for at least 90 days or the equivalent should be recalled so long as the Chief Judge determines there is sufficient work and resources, but recalling a judge for shorter periods presents different staffing and resourcing issues and should be subject to the same high standard laid out in ' 7257(b)(1)(A) for mandatorily recalling a Senior Judge.

With regard to section 2 of H.R. 1067, as I testified on March 18, 2015, before the House Appropriations, Subcommittee on Military Construction, Veterans Affairs and Related Agencies, our current authorization for 9 judges sunsets with the next two judicial vacancies on the Court, which will occur upon the death, retirement, or senior-status election of the next two active judges. One judge has announced that he will take senior status this August, and the terms of appointment for two judges end in December 2016. Although the number of appeals filed at the Court trended down for a period, it has consistently remained above 3,500 and is again on the

rise B a product of the number of decisions by the Board of Veterans' Appeals. For example, in FY 2013, the Board rendered about 42,000 decisions, but in FY 2014, the Board decided over 55,500 appeals. The Board projects that it will decide over 57,000 appeals in FY 2015, with similar and higher projections for the following years. The number of appeals being filed at the Court already is on a path to 4,500 or more this calendar year, with projections of continued growth thereafter. Re-authorization for 9 judges will help the Court continue to manage this significant caseload.

Sections 4, 5, and 6 of H.R. 1067 bring parity with benefit provisions for other federal judges. Section 4 would treat our judges as employees for Federal Employee Group Life Insurance (FEGLI) purposes, which clarifies that our judges may purchase life insurance at the employee rate, and authorizes our retired judges to do so, consistent with other federal judges, active and retired. *See* 5 U.S.C. ch. 87, ' 8701(a)(5). Section 5 would permit our judges to purchase additional service credit for annuity purposes, the same as for other federal judges. *See* 28 U.S.C. ' 376(x). Finally, section 6 would authorize our judges the same pay as all other federal appellate judges.

In closing, on behalf of the Court, I express my appreciation for your past and continued support, and for the opportunity to provide this statement.