

STATEMENT OF
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BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

REVISING THE VA SCHEDULE FOR RATING DISABILITIES

WASHINGTON, D.C.

FEBRUARY 26, 2008

CHAIRMAN HALL, RANKING MEMBER LAMBORN AND MEMBERS OF THE COMMITTEE:

Thank you for this opportunity to present the views of the 2.3 million veterans and auxiliaries of Veterans of Foreign Wars of the United States on the state of the VA Schedule for Rating Disabilities.

Schedule for Rating Disabilities

Service connected disabilities are evaluated using criteria contained in Part 4 of title 38 Code of Federal Regulations. The first schedule for rating disabilities was written in 1921. The 1925 revision attempted to adjust evaluations based on the occupation of veterans. That approach proved far too cumbersome and inequitable to be of practical value and the rating schedule was rewritten again in 1933. The last complete revision was published in 1945.

A popular misconception is that the current rating schedule has not been substantively revised since its last major overhaul in 1945. While the Institute of Medicine and the Veterans Disability Benefits Commission found that the rating schedule has been revised, often substantively, since 1945, sections of it have been rarely touched and many parts contain medical terminology and evaluative criteria which are significantly out of date.

VA is charged with administering a compensation program that pays veterans in excess of \$30 billion per year for disabilities arising as a result of or coincident with military service. Yet the VBA Compensation and Pension Service has fewer than 140 people including support staff assigned to run this program. When the 26 employees conducting quality reviews of various types are subtracted, along with the 28 people figuring out how to make computer software work more efficiently, the remaining 86 are spread too thin to do most jobs adequately. For many years in the late 1990's only

one person was assigned to review, revise and update the rating schedule. It is little wonder that many sections of the rating schedule are not up to date.

To address this problem, the Commission adopted a number of recommendations advanced by an Institute of Medicine Committee that the Commission had contracted with to study the disability evaluation of veterans. In its report, “A 21st Century System for Evaluating Veterans for Disability Benefits”, the IOM suggested that VA should create a permanent “disability advisory committee, “staffed with experts in medical care, disability evaluation, functional and vocational assessment and rehabilitation, and include representatives of the health policy, disability law, and veteran communities.” The Advisory Committee would meet regularly and offer direction and oversight to the regular review and updating of the rating schedule. In addition to this Committee, the IOM recommended that VA substantially increase the number of staff members permanently assigned to accomplishing the changes directed by the Advisory Committee.

We support these recommendations and believe that its first task should amend the criteria for evaluating Post Traumatic Stress Disorder. The criteria adopted many years ago by VA were intended to encourage consistency in the evaluation of psychiatric disabilities. Unfortunately, the debilitating symptoms experienced most often by veterans with PTSD are not the same as those shown in the rating schedule. As a consequence, rating specialists have been forced to select an evaluation, based not on the symptoms, per se, but, rather, on how disabling they believed those symptoms were. This led to great frustration on the part of rating specialists and inconsistency in evaluations assigned to veterans. This problem has been known for years. It needs to be corrected now.

At the same time, an Advisory Committee could begin the process of reviewing and suggesting changes to those sections of the Rating Schedule that have not been updated in the last 10 years.

Some critics of the current disability compensation program have suggested that the rating schedule can be thoroughly and completely reviewed and updated in as little as 6 months. While it is true that anyone can revise the rating schedule in a few weeks or months, the result will simply be a different rating schedule, almost certainly not a better rating schedule.

It is our considered belief that it will take years of hard work by a competent staff of medical, vocational and legal experts to devise new rating criteria for all the body systems which allow for the accurate assessment of service connected disabilities.

Revision of the rating schedule cannot be a one-time project. A permanent process must be devised and put in place to ensure that you and your successors, and I and mine, never again have to discuss why the primary tool for assessing veterans disabilities is inadequate and antiquated.

Quality of Life

The Veterans Disability Benefits Commission adopted an Institute of Medicine recommendation to “research and develop a quality of life measurement tool and study ways to determine the degree of loss of quality of life, on average, of disabling conditions in the rating schedule.” We concur. Decreases in the quality of life resulting from service-connected disabilities, certainly warrants investigation and research. While VA and Congress have addressed quality of life losses resulting from some disabilities through special monthly compensation, a comprehensive study, or series of

studies, should be conducted to determine which disabilities, and level of disability, adversely affect a veteran's quality of life. To the extent that studies show that service connected disabilities limit the quality of life of veterans VA should consider how best to adjust the Rating Schedule to ensure that veterans are adequately compensated.

Individual Unemployability

The Dole/Shalala Commission recommended eliminating individual unemployability. The Veterans Disability Benefits Commission agreed that VA should retain the ability to decide that a veteran's service connected disabilities make them unemployable. It further recommended that the rating schedule be adjusted, allowing more veterans rendered unemployable by their service-connected disabilities, particularly psychiatric disabilities, should be rated 100 percent.

The Center for Naval Analysis found no statistical evidence that veterans were "gaming" the system in order to obtain increased benefits. Increases in the numbers of those receiving individual unemployability are attributed to increasing disabilities as the veteran population ages.

Disability evaluations under the rating schedule are designed to compensate veterans for the average loss of earnings impairment. The rating schedule is not intended to look at a veteran's vocation; whether they practiced law, drove trucks, programmed computers, fixed plumbing or any other occupation prior to or post their disabled. Disability evaluations are assigned based on the severity of disabilities and represent average impairment.

Individual unemployability is the one regulation that allows VA to look at the individual person assessing their education, vocational skills, job history, and experiences to determine whether their service connected disabilities keep them from gainful employment. In our view, this little bit of flexibility allows the VA to adjust evaluations to address any inequities that may result from the automatic application of the rating schedule. This is a good thing. We believe that Individual Unemployability is appropriate, as it currently exists.

It has been suggested that veterans seeking a total evaluation based on Individual Unemployability should be given a vocational assessment. We do not oppose this idea. We agree that it may provide additional information which will help rating specialists make the most correct decision. However, we believe that sufficient resources must be devoted to these assessments so that veterans will experience no delays in entitlement decisions. As we stated in testimony before the Veterans Disability Benefits Commission in July 2007:

"While we do not oppose an employment assessment for veterans who are applying for total benefits based on Individual Unemployability, we do have some concerns about the implementation of this option.

o It is axiomatic that veterans who apply for IU are either unemployed or marginally employed. Generally, these individuals have been unemployed for many months before they apply for benefits. Whatever economic well being they enjoyed before becoming unemployed has evaporated and most are in serious financial distress. *Any* action on the part of the government resulting in a delay of a decision on IU should be avoided at all costs. Therefore, we believe that it is absolutely essential that the staff of VR&E be

expanded and trained long before a requirement mandating an employment assessment is implemented.

o Individuals who are denied Individual Unemployability should be offered, at a minimum, vocational counseling and employment services.”

Traumatic Brain Injury

VA recently published proposed regulations to amend the criteria for evaluating traumatic brain injury (TBI). We view that proposal as a good first attempt at better assessing the impairments caused by TBI. We understand that VA received significant comments to its proposal.

We suggest that the VA publish its next set of regulations as “interim-final” regulations. Considering the increasing number of veterans suffering from TBI, and the difficulty that exists in writing appropriate rating criteria for this multi-faceted problem, leaving the door open to further adjust this regulation makes perfect sense given the evolving nature of this injury.

Presumptions

In August, 2007, the Institute of Medicine Committee Report titled “Improving the Presumptive Disability Decision-Making Process” released. Our views concerning this report, expressed to the Veterans Disability Benefits Commission on August 22, 2007, are as appropriate today as they were then.

Here we have a seminal work: a report from academicians who took your charge seriously: they analyzed the methodologies used to establish a number of presumptions currently written in law and regulation to help VA determine whether diseases were incurred while on active duty, discussed in depth different approaches used by scientists to determine whether a disability is related to various exposures and recommended a structured approach for determining, in the future, whether a disease is caused by some event experienced by veterans while they performed military service.

We do not disagree with the historical analysis of presumptions; nor do we take issue with the structure recommended by the Committee for creating presumptions in the future. We agree that the government cannot simply throw open the doors of Fort Knox to every person who alleges a disability and has a discharge paper. However, we believe that this IOM Committee may be setting the bar too high for men and women who served their country in both peace and war.

You know that many who left to serve never returned and, of those who did, hundreds of thousands returned with wounds and other injuries of both body and mind. Some of those who apparently returned unscathed did not escape their service wholly intact but, in fact, were often found many years later to have diseases acquired while performing military duty.

These men and women should not have to wait years, perhaps decades, suffering painful, debilitating and often deadly conditions, while scientists ponder whether “the evidence is sufficient to conclude that a causal relationship is at least as likely as not, but not sufficient to conclude that a causal relationship exists.”

The Committee acknowledges that causation is a higher standard than association. It states that while the evidence may show that a disability is associated with an event or exposure in military service, it does not mean that the disability was caused by that event or exposure. According to the Committee, determining that an association exists is only “prima facie evidence of causation but is not sufficient by itself for proving a causal relationship between exposure and disease” and they would have veterans endure additional years of pain and suffering before they might receive medical care and compensation for their service “caused” conditions.

Presumptions are a legal tool; they fill an evidentiary gap or shift an evidentiary burden from one party to another. In the area of veteran’s benefits, they are created as often to ease the burden on the government as well as the veteran. The government’s approach to herbicide exposure in Vietnam and disabilities related to herbicide exposure illustrates these presumptions.

Millions of gallons of herbicides were sprayed over diverse areas of Vietnam from the early 1960’s to 1971. It was sprayed by plane, helicopter and by hand. Nearly all uses were designed to deny cover to the enemy. It was an extremely useful tool and doubtless saved hundreds, perhaps thousands of American and allied soldiers’ lives.

The Department of Defense maintains records of those areas targeted for defoliation. However, we know that because of weather, poor navigation, mechanical malfunction or aircraft emergencies requiring inaccurate or premature dumping of defoliants, we cannot know with any degree of certainty exactly where all these chemicals were dropped. Further, loss of records, or, in the case of hand spraying, failure to keep accurate records, means that we will never know precisely where and when defoliants were used. Finally, although we may know generally where various units were operating during any given period, the military cannot know where every soldier or Marine performed duty while they were in Vietnam.

Consequently, it is not possible to state with any degree of certainty whether a particular service member was exposed to herbicides during their service in Vietnam. Nor is it possible to determine the quantity or level of exposure.

Without a presumption of exposure for those who served in Vietnam, the government would be forced to undertake the Herculean task of determining where each veteran-claimant was located while in Vietnam. As well as, whether patterns and to what degree he or she was exposed to herbicides.

As a consequence of these uncertainties, and to save our government the millions of dollars it would cost to attempt to verify the location of individual veterans and the exposure they received, a presumption was created that conceded that all those who served in Vietnam during certain periods were exposed to herbicides.

Exposure without a disability is simply an exposure; exposure is not a disability under the law. However, we know that Vietnam veterans started experiencing rare cancers and other maladies within a decade of their leaving Vietnam. Casting about for possible causes, these veterans, their advocates and health care providers looked for commonalities to explain these departures from normal health. The one constant soon became apparent: service in Vietnam.

The Agent Orange Act of 1991 was the law, which created the mechanism used today to determine whether a disease should be considered by the Secretary of Veterans Affairs to be presumptively related to herbicide exposure while in the military service.

So long as presumptions of service connection was created for a few rare cancers no one cared to use the term found in the Committee's report, a few "false positives" were compensated along with veterans whose cancers were caused by exposure to herbicides. However, with the extension of presumptive service connection to lung cancer, prostate cancer and, finally, diabetes, legislators and others became increasingly concerned when thousands of Vietnam veterans sought service connection, medical treatment and compensation for these conditions.

The VFW is not deaf to the cacophony of criticism. The GAO, members of Congress, and others believe that the presumptions granting medical treatment and compensation to Vietnam veterans with lung cancer, prostate cancer and diabetes are too costly. In these cases, if we wait for evidence of causation most of these veterans would be dead before the evidence is obtained. Further, their survivors would not just suffer the premature loss of the veteran but would also be denied survivors benefits for years, perhaps decades, while scientists study "causation".

We speak about Vietnam presumptions because it is the specter of thousands of Vietnam veterans flooding the VA with claims for benefits and the medical system that concern our legislators. They are concerned that many of the men and women who volunteer, train, fight, suffer and survive from the conflicts of the present will return asking whether their diseases could somehow be related to their military service.

We should not tell them, as we did in the 1970's, that since there is no medical evidence showing that their disability was "caused" by their military service we cannot help them. We should not deny them health care and benefits even when studies show that an association exists between their disability and service. We accept everything in this report except the bar calling for "causation." "Causation" is not a hurdle to jump over; it is a scientific bar to benefits.

We urge that you adopt the standard found in the Agent Orange Act of 1991 and use it in the same manner as it is today. We urge that presumptive service connection be granted when the Science Review Board suggested by the IOM Committee finds that an association exists between an exposure in military service and a disease arising after service.