Pending Legislation

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STATEMENT OF
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VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS

WITH RESPECT TO

Pending Legislation

WASHINGTON, DC

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

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 provide our remarks on today's pending legislation.

H.R. 3216, VET Act

The VFW supports this legislation, which would apply the Emergency Treatment and Labor Act to emergency care furnished by Department of Veterans Affairs (VA) emergency rooms.

Last year, several instances of wrongdoing came to light where VA health care professionals refused to go beyond what their position descriptions require them to do and instead chose to deny veterans access to the care they needed. This includes a 64-year old veteran from Kennewick, Washington who drove to the Seattle VA medical center with a broken foot and needed assistance traveling the remaining 10 feet to the emergency room entrance. Instead of assisting the veteran, a medical center employee instructed him to call 911.

VA later issued a mea-culpa for the incident and VA Under Secretary for Health Dr. David Shulkin has instructed all Veterans Health Administration employees to ensure these instances are not allowed to occur again. While Dr. Shulkin is working to eliminate these errors, the VFW believes this legislation would ensure VA has the authority to do so.

H.R. 4150, Department of Veterans Affairs Emergency Staffing Recruitment and Retention

The VFW supports this legislation, which would grant VA medical facility staff the ability to have flexible working hours that best suit the demand for delivering health care to the veterans they serve. In response to last year's access crisis, VA has made a full-fledged effort to increase access for veterans who rely on the VA health care system for their health care needs. Yet, it continues to face numerous challenges in meeting the growing demand on its health care system.

One of those challenges is the statutory 80-hour biweekly pay period limitation for title 38 employees. While most health care providers work a traditional 40-hour work week, hospitalist and emergency room physicians often work irregular schedules to accommodate the need for continuity and efficient hospital care. The VFW supports efforts to eliminate this access barrier and improve VA's ability to recruit and retain high-quality hospitalist and emergency room physicians.

H.R. 4764, Puppies Assisting Wounded Servicemembers Act of 2016

This legislation would establish a pilot program to provide service dogs to veterans suffering from severe post-traumatic stress disorder (PTSD). The VFW supports this legislation, but urges the Committee to allow veterans of all eras to participate in the program, not just those who served after September 11, 2001. PTSD does not discriminate by service era, and all veterans deserve parity in the treatment for this disorder.

With such a high ratio of veterans who have defended our nation being diagnosed with PTSD, VA must provide veterans mental health care options that work best for them. Recent studies show service dogs provide positive health care outcomes in veterans with PTSD. Such studies illustrate a reduction in symptoms from the PTSD Checklist, lowered effects of anxiety and depression disorders, as well as a reduced need for psychopharmaceutical prescriptions. Veterans who have service dogs also experience an increased participation in

social settings, as well as overall satisfaction with life. The VFW supports continued efforts to evaluate the efficacy of using service dogs to treat PTSD and other mental health conditions.

The VFW also strongly supports the continuance of care this legislation requires to maintain eligibility of canine health insurance. Continuance of care is crucial to successfully overcoming any illness, whether it is physical or mental. With VA only maintaining coverage of the service dogs if the veteran continues to see their physician or mental health care provider at least once a quarter, this legislation would ensure more consistent and open communication between the medical provider and veteran.

H.R. 5047 Protecting Veterans Educational Choice Act of 2016

The VFW supports the intent of this legislation, however, we do not believe VA can provide articulation agreements based on the fact that the Department of Education does not track these types of agreements for individual institutions. Because VA would not have reasonable access to this information, it would not be able to fulfill this requirement. The VFW does agree that VA should be required to explain what an articulation agreement is and how the veteran may obtain information about such agreements, and that is why we support Section 1, paragraph (b) of this legislation.

There are reports suggesting some veterans are not receiving a satisfactory education when using their G.I. Bill benefits and other tuition assistance programs. This is because student veterans are bombarded with overwhelming amounts of educational information with little or no training on how to make an informed decision. We believe this issue stems from veterans being unaware of free pre-enrollment counseling services offered by VA. Section 1, paragraph (b) of this legislation would assist in diminishing this problem. By requiring the Secretary of Veterans Affairs to include information with the certificate of eligibility for education benefits on how to request information for counseling services and articulation agreements, we better equip college-bound veterans to make responsible education choices.

H.R. 5083, VA Appeals Modernization Act of 2016

The VFW has actively participated in a series of meetings with other Veterans Service Organization (VSO) representatives and officials of VA in an attempt to identify opportunities for improvement to the current appeals process. We have worked in good faith to craft an alternative process which might provide speedier decisions without reducing rights and protections currently enjoyed by veterans. While the VFW is supportive of the direction this legislation is taking the appeals process, there are several areas that have not been fully addressed. Solutions to these areas must be found to ensure VA can be as efficient as possible and that veterans' rights are protected under the new system.

Duty to Assist

The duty to assist claimants is well established by both regulation and case law. If a claimant at any point in the process identifies new evidence which is not of record, VA is obligated to assist the claimant in obtaining it. While we all want to see all the evidence submitted at the start of a claim, we understand that is not always possible. Newly discovered service or medical records may point to other evidence which must be obtained. New medical evidence may point to the need for an additional examination.

We have two concerns about limiting the duty to assist at the Board of Veterans Appeals (BVA). First, it is unclear what, if any, action is required if a claimant submits new evidence during the appeal process, either in documentary form or during a hearing. It is likely that additional development may be required. However, this proposal does not address how that is to be accomplished. Should the BVA remand the appeal to the Veterans Benefit Administration (VBA) for development? Should the appeal be dismissed so the evidence can be developed? Or will the BVA make a decision based on the evidence in front of it, assuming that if the appeal is denied the newly submitted evidence will revert to VBA for additional development and decision? This last alternative suggests a legal problem: if the BVA receives evidence which in the center lane would trigger the duty to assist, and if the BVA makes a decision on that evidence without ordering additional development, would the veteran be precluded from bringing the claim back to the center lane for development because the issue was decided on that evidence?

Second, we are concerned that with a limited duty to assist requirement at the BVA, appeals may not be remanded because the BVA decides that the failures are "harmless error" and would not affect the outcome of the appeal. While we agree that there is danger in overdeveloping a record, there is also truth in the old adage, "you don't know what you don't know."

Docket Flexibility

Currently the BVA is limited to only one docket. Under this proposal, BVA would have to maintain at least two dockets in order to have the flexibility to more efficiently work its cases. At the very least, the BVA would need a separate docket for the fast, no hearing/evidence lane so that those appeals are decided as rapidly as possible. In addition, BVA would need at least a second docket for those appeals requiring hearings. Finally, to achieve the greatest efficiencies, the BVA should have a separate docket for appeals wherein the claimant submitted additional evidence but did not request a hearing.

While it may seem a bit extreme, we suggest a total of five dockets during transition. We believe the BVA needs the flexibility to use two dockets during the resolution of its current backlog: one docket for those wherein hearings are requested and a second docket for those appeals without hearings. It needs three additional dockets under this proposal: one docket for the fast appeals lane; one docket for the hearing lane and one docket where evidence is submitted but no hearing is requested.

New Evidence

Under current law, a claimant must submit new and material evidence in order to reopen a claim after a final disallowance. We have long believed that this creates an unnecessary burden on both VA and veterans. In practical terms, VA is required to make a decision as to whether evidence is both new and material. A Veterans Law Judge recently estimated that between 10-20 percent of the appeals he reviews each year are on the issue of whether evidence is new and material.

It is our belief that eliminating the new and material standard would reduce non-substantive appeals by allowing regional office staff to make a merits decision on the evidence of record. With merits decisions, veterans have a better understanding of why the evidence they submitted was not adequate, and any appeal is on the substance of the decision, not on whether the evidence was new or material.

During our discussions with VA on an improved appeals process, we have argued that while a new and relevant evidence standard is potentially lower than the current new and material evidence requirement, it still imposes a bar to merits decisions, creating unnecessary work for regional office staff and unnecessary appeals to the BVA.

The VFW proposes that the only requirement to obtain reconsideration of a claim should be the submission of new evidence.

Higher Level Review

Under 38 CFR 3.2600, claimants may elect a review by a Decision Review Officer (DRO).

This individual has the authority to conduct a de novo review of the evidence, order additional development as needed, and make a decision. No deference is given to the prior decision.

Under this proposal, a difference of opinion review is provided. The reviewer need not be a DRO but can be anyone of a higher grade detailed to make the review. It is likely that this reviewer will not receive separate training and will have this assignment as an adjunct duty.

The VFW believes that while retention of a difference of opinion review is potentially beneficial to claimants, this change in authority will ensure that less well qualified individuals will conduct these reviews, decreasing quality and increasing the number of claimants denied, thereby increasing appeals.

Further, VA intends to make these reviews based solely on the evidence of record and preclude the authority to order additional development except for duty to assist errors. This presents the same problems for a claimant at a difference of opinion review as it does for

evidence submitted at a BVA hearing described above. Any evidence submitted during a difference of opinion hearing would not be subject to the duty to assist. Once a decision is made, how might a claimant receive assistance by VA as required by the current duty to assist provisions of the law? This problem is not resolved by the language of this proposal. The VFW believes that the difference of opinion reviewers should be able to remand a claim for additional development based on evidence received during the difference of opinion review.

Claims in Different Lanes at the Same Time

One of the unresolved issues is whether claimants may have the same issue in more than one lane simultaneously. Under the proposed appeals process, it appears that the following scenario is not precluded:

A veteran files an appeal in the BVA fast lane (no evidence, no hearing). Several months later, and before the BVA issues a decision, the veteran obtains new evidence which is pertinent to the claim. Since the veteran is precluded from submitting it to the BVA, he/she must submit it to the claims lane for consideration and adjudication. Depending on the nature of the evidence and the relative efficiency of the regional office staff, it is possible that the veteran could receive a favorable decision at the regional office prior to the issuance of the BVA decision.

It is for this reason that we urge Congress to address the permissibility of submitting evidence during the pendency of an appeal and to which entity it should be submitted. The VFW suggests that if the BVA cannot order a remand to properly develop evidence submitted during an appeal, than claimants should have the right to submit that evidence to the center lane while an appeal pends at the BVA.

Reports

The only way to know whether a process is working is by collecting and studying the data generated by it. Noticeably absent from the proposed legislation is any requirement that VA collect data, analyze it and report to Congress and the public. At a minimum, Congress and the veteran community might want to know the following on a regular recurring basis:

- Current backlog The total number of appeals pendingThe subtotals of pending appeals at each stage of processingThe average days pending at each processing stageWhat actions were taken during the reporting period to process and resolve pending appeals in each processing stageThe oldest pending appeals at each stage and what action VA has taken to process them.
- Similar questions could be asked of VA concerning the new claims and appeal process

How many claims are pending in each laneAverage timeliness for processing claims and supplemental claims, by regional officeAverage timeliness for processing claims in the difference of opinion lane, by regional officeAverage days pending of appeals in the fast lane at the BVAAverage days pending of appeals in the hearing lane at the BVAAverage days pending of appeals in the evidence only lane at the BVATotal number of IMO requests made by the BVATotal number of IMO requests approved by the Compensation Service

- And, of course, Appeals granted, remanded and denied under the current appeals processAppeals granted, remanded and denied under the proposed appeals process.

Court of Appeals for Veterans Claims

Veterans could be adversely effected by these changes because they will be discouraged from seeking review by the Court of Appeals for Veterans Claims (CAVC). As this proposal is currently written, the only finality to the process occurs when one of three things happens:

1. The veteran becomes satisfied with a decision and stops seeking additional benefits;

2. The veteran fails to submit new (or new and relevant) evidence within the one year period following a VA decision; or

3. The veteran seeks review by the CAVC and is denied.

Under this proposal, the only possible time a veteran might seek review by the CAVC of a decision is when he/she has completely exhausted every possible piece of new evidence and has absolutely nothing left to submit to VA. One could argue that this is good for veterans and the BVA since it ensures that only those claimants who have no more evidence to submit go to the CAVC. Fewer appeals mean fewer remands.

It also means fewer precedent decisions instructing VA that their practices do not conform to regulations and their regulations do not conform to the law. The CAVC has provided a significant and useful function throughout its nearly 30 years of existence –– it has told VA when it was doing things wrong.

This bill is intended to create a new claims and appeals process. VA must write regulations which fill in the gaps and provide additional guidance to both VA employees and veterans. Without judicial review, there exists no entity which can review VA's actions and determine whether they follow the law.

This proposal is designed to significantly reduce the impact of the CAVC on claims

processing with VA by discouraging veterans from appealing to the Court. To ensure that veterans are not discouraged from appealing to the CAVC, we urge Congress to amend this proposal to allow claimants to submit new evidence within one year of a CAVC decision.

This legislation, even if approved with VFW's recommendations, is only one third of the solution. There are two elements missing from this proposal:

- A comprehensive plan by VA to competently and efficiently address the current backlog of pending appeals; and,
- An allocation of sufficient resources by Congress to allow VA to execute its plan.

Plan to Reduce Current Backlog

VA must have a plan in place to process to completion the 450,000 pending appeals. It must be part of the proposed legislation for two reasons:

VA will need additional latitude to process its current backlog of appeals. Changes to claims and appeals processing which VA may wish to consider include:

- Allow the BVA greater flexibility in managing its workload. Specifically, the BVA should be able to maintain a second docket to allow faster processing of non-hearing appeals.
- There are many cases pending BVA review which have additional evidence submitted while the issue was on appeal but not considered by VBA. In order to facilitate efficiencies, VA should be allowed to screen and assign those appeals to regional office staff for the purpose of determining whether the benefit may be granted. We suggest that with the greater number of Rating Veterans Service Representatives available to review those appeals, many could be granted without further appellate review. In the case where a full grant of benefits is not possible, the case can be returned to the BVA for further consideration without loss of place in the docket.
- In the alternative, VA could create a cadre of DRO's who are tasked with pre-screening and deciding cases on appeal. They would have the authority to grant any benefit allowed under the law. They could also identify deficiencies in the record and order a remand. This alternative would free up VLJ's and their staff attorneys to more efficiently process other appeals pending before the BVA.

Staffing

The other fundamental fact which must be acknowledged is that despite substantial increases in VA staffing over the past decade, VA remains unable to adequately process all its work.

VA has received funding to perform only some of the functions assigned to it. If Congress expects VA to fulfill all of its tasks in a timely manner, it must provide the personnel to do so. Without appropriate levels of staffing, VA will continue to fail and veterans will continue to wait for decisions on their claims.

Today, VA has sufficient personnel to process claims to completion in a reasonable time. It has sufficient staff to process appeals expeditiously. However, it does not have sufficient staff to do both functions simultaneously.

The resolution of this backlog requires Congress to adequately staff both VBA and BVA to process the work it has before it.

VA has been working on a plan for maintaining its current claims workload while attacking legacy appeals. Over the past several weeks, VA, at the suggesting of the VFW, reviewed and modified its FTE requirements to attach the legacy workload. While the new projections are more realistic, it remains to be seen whether VA's estimate is sufficient to complete this project by 2022. However, we do know this: allocation of fewer resources by Congress will guarantee that some, perhaps many appellants will wait until 2025 or longer to receive a decision by BVA.

Recommendations:

Our recommendations for amending this proposal are summarized below:

1. Require VA to devise a detailed and comprehensive plan for processing its current work while also processing its current appeals workload. This plan should include an estimate of total staffing required and a projected completion date based on receipt of that additional staff.
2. Congress should provide the additional staffing as required. Failure to do so will ensure that appeals will continue to increase. Congress must properly resource VA to ensure the backlog of appeals is resolved quickly and efficiently.
3. Congress should provide BVA with the flexibility to establish an additional docket to process its current workload.
4. Once a new claims and appeal process becomes effective, provide the BVA with the flexibility to establish up to three additional dockets to handle appeals.

5. Congress should allow VA eighteen months or longer to publish and finalize regulations necessary to implement this proposal.
6. BVA should be required to remand to the center lane for additional development any evidence submitted during the difference of opinion or appeal process which triggers the duty to assist.
7. If Congress limits the duty to assist as shown in the current version of this bill, it should allow the submission of new evidence in the center claims lane while cases are pending in either the difference of opinion or appeals lane.
8. The DRO position should be retained.
9. Congress should eliminate the new and material evidence requirement found in 38 USC 5108 and require only new evidence in order to reopen a claim.
10. Evidence required to file a supplemental claim should be new evidence and not new and relevant evidence.
11. Congress should require VA to provide the reports outlined earlier in this testimony and any other reports it deems appropriate.
12. Considering the critical role of the CAVC in the oversight of VA's rules making and claims processing, we encourage Congress to provide claimants with the opportunity to submit new evidence within one year of a CAVC decision.

H.R. 5162, Vet Connect Act of 2016

This legislation would lift the restriction on VA's ability to share the health care records of certain veterans without written consent from such veterans.

To protect veterans diagnosed with drug abuse, alcoholism, the human immunodeficiency virus, and sickle cell anemia from discrimination based on their health conditions, Congress requires VA to receive written consent from such veterans before sharing their health information with non-Department health care professionals. However, legislation that has been enacted since this restriction was created now protects veterans from discrimination based on their health conditions. That is why the VFW supports efforts to streamline VA's ability to share veterans' health care information with non-Department health care professionals who provide care to such veterans through VA's community care programs.

Proper sharing or exchange of veterans' medical records is imperative if VA is to properly coordinate care for veterans who receive non-VA care through the Choice Program or other community care programs. While we understand patient privacy concerns that have been raised in the past, VA must be authorized to make all health information available to community providers who deliver care to our nation's veterans.

H.R. 5166, the Working to Integrate Networks Guaranteeing Members Access Now Act

The VFW does not support this legislation at this time. While we agree there should be a more efficient way for congressional constituent services staff to assist veterans, there are current controls in place to limit access to veterans' records, and those controls must be preserved under any expansion of access.

The VFW would insist that a release must still be signed before any access to records can be granted. There must be a limitation on access to only veterans who are constituents of the member of Congress. When a Power of Attorney (POA) is held by an individual or organization, that POA must be notified of the request. Any "accredited" congressional employee must be viewed as an "agent" regardless of that employee's status with a State Bar Association. This will ensure the employee's certification includes passing a certification test. Currently, VA provides background checks at no cost to Veterans Service Organizations. If this will also be the case with accredited employees, funding must be provided. If the intent is for congressional offices to reimburse VA for the cost of such background checks, it must be explicitly defined in legislation.

Under current law, there are level-sensitive restrictions on most VA employees, preventing them from viewing certain files without expressed consent. These restrictions must extend to these accredited employees as well. Lastly, VA must have a tracking system to ensure these employees are only assisting their congressional constituents. Additionally, there must be a consequence for congressional staff found to have abused any aspect of their authority.

H.R. 5392, No Veterans Crisis Line Call Should Go Unanswered Act

The VFW supports this legislation which would require VA to develop a quality assurance plan to ensure the Veterans Crisis Line operates according to industry standards.

The VFW was disturbed to learn that many vulnerable veterans who took the important first step towards addressing suicidal thoughts by calling the Veteran Crisis Lines (VCL) were sent to voicemail. According to VA, these phone lines are expected to be answered 24/7 to ensure veterans, service members and their families are able to seek assistance whenever they need it.

In 2015, the VA Office of Inspector General (OIG) reported that the VCL received nearly 1,600 phone calls per day; however, the daily average of answered phone calls was only 1,400. The VFW is glad to see that VA has made a number of improvements to the call center in Canandaigua, NY to address the issues highlighted in the OIG's report. VA now provides VCL employees with additional training and employee wellness programs to ensure they are ready and able to assist veterans contemplating suicide, significantly reduced reliance on backup call centers and redesigned call center layout for maximum

efficiency. While VA's progress is commendable, the VFW supports continued efforts to ensure veterans who turn to VA during their time of need receive the care and service they need.

H.R. 5407, Amends title 38, United States Code, to direct the Secretary of Labor to prioritize the provision of services to homeless veterans with dependent children in carrying out homeless veterans reintegration programs.

No veteran deserves to live on the streets of the nation they defended, and their children most certainly should not be forced to either.

That is why the VFW supports this legislation, which would prioritize homeless veterans with dependent children for reintegration programs. This legislation would also require a more thorough analysis of data collected on those using these programs so gaps in access can be identified and addressed.

The VFW conducted a survey of women veterans. In this survey of 1,922 female veterans, 78 reported being homeless. Of these women, 70 percent of respondents specified that they have children, and that having children significantly impacted their ability to receive health care, due to the lack of access to affordable child care. Only 10 percent of women who are not homeless said their children impact their ability to utilize VA benefits, yet 32 percent of women who are homeless said it has an impact. Without child care they struggle to make their VA appointments.

By requiring more extensive reporting and analysis of data regarding homeless veterans who use reintegration programs will allow VA and Congress to more thoroughly understand the obstacles, barriers and needs these veterans face. This pilot program will make it easier to properly treat and prevent veteran homelessness in the future.

H.R. 5416, A bill to amend title 38, U.S.C., to expand burial benefits for veterans who die while receiving hospital care or medical services under the Veterans Choice Program.

Under current law, VA will assist in paying funeral and burial cost of certain veterans. One of these provisions requires VA to assist in paying funeral expenses when a veteran dies in a VA facility. This includes veterans who are receiving care under section 1703 of title 38, U.S.C. However, current law does not allow for VA to provide this benefit if a veterans dies while under the care of the Choice Act.

This bill will allow VA to extend this benefit to veterans who receive care under the Choice Act. The VFW fully supports this bill.

H.R. 5420, A bill to authorize the American Battle Monuments Commission to

acquire, operate and maintain the Lafayette Excadrille Memorial in Marne-la-Coquette, France.

The Lafayette Excadrille Memorial was built to memorialize U.S. pilots who flew combat missions with the French military prior to U.S. entry into WWI. Over the years, the memorial fell into a state of disrepair. A foundation was formed to restore the memorial. At that time the American Battle Monuments Commission (ABMC) provided $2.1 million to the project.

To ensure the memorial receives the care and recognition it deserves, the VFW supports this bill, which calls for the monument to be put under the care of the AMBC.

Military Residency Choice Act

The VFW supports this legislation that would provide military spouses the option of choosing the same residency status as their spouse.

Spouses of our service members are faced with the difficulty of constantly moving to meet the demands of their spouse's military service. Protecting spouses of our military from losing residency in their home-of-record, while also allowing them to elect to have the same residency as their partner will greatly ease some of the stressors military families face. It will also make it easier for them to file taxes and vote.

Draft Legislation to improve the recruitment of physicians in the Department of Veterans Affairs

The VFW supports this draft legislation, which would authorize VA to recruit medical professionals before completing their residency programs.

With more than 120,000 medical trainees receiving their clinical training in VA medical facilities every year, VA is the largest provider of education and training for health care professionals in the country. Unfortunately, VA is currently prohibited from recruiting medical professionals receiving training in its medical facilities until they complete their residency. By that time VA is competing with private sector health care systems that are able to hire new health care professionals sooner and pay them more.

The VFW strongly believes that VA must have the tools to quickly recruit a high performing health care workforce. This includes providing VA the proper authority to recruit health care providers before they complete their residency programs. This legislation would rightfully authorize VA to offer health care providers undergoing the final stages of their training a conditional offer to ensure they can consider VA as a viable option after completing their training.

Mr. Chairman, this concludes my testimony, and I look forward to any questions you or the Committee may have.

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

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any federal grants in Fiscal Year 2016, 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.