NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Statement of

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Before the

Senate Committee on Veterans' Affairs

Concerning

Pending Legislation

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On behalf of the National Organization of Veterans' Advocates (NOVA), I would like to thank Chairman Isakson, Ranking Member Blumenthal, and members of the Committee for the opportunity to offer our views on pending legislation. NOVA will limit its testimony to the draft bill addressing appeals reform and the discussion draft on the evidentiary threshold for medical examinations and opinions.

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 seeking to obtain their earned benefits from VA, and works to develop and encourage high standards of service and representation for all persons seeking VA benefits. 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 operates a full-time office in Washington, DC.

DRAFT BILL TO REFORM THE RIGHTS AND PROCESSES RELATING TO APPEALS OF DECISIONS REGARDING CLAIMS FOR BENEFITS UNDER THE LAWS ADMINISTERED BY THE SECRETARY OF VETERANS AFFAIRS

Background

VA currently reports that there are over 455,000 appeals in the entire system, and estimates the number of appeals will rise to two million over the next decade without reform. In addition, there are more than 60,000 pending hearing requests. Since BVA currently only has the capacity to hold approximately 11,000 hearings per year, a veteran can wait several years to have a hearing.

To address this problem, VA proposed a "simplified appeals process" in its 2017 budget for BVA. The process proposed by VA included several concepts contrary to the veteran-friendly system created by Congress, such as closing the record and denying veterans the due process right to be heard before BVA. Department of Veterans Affairs, *Congressional Submission, FY 2017, Vol. III* at BVA 280-83 (February 9, 2017). VA presented this proposal as a "straw man" designed to draw stakeholders into discussions on reforming the appeals process.

As a result, numerous organizations, including NOVA, participated in a three-day summit with VA officials and continue to participate in ongoing meetings to discuss appeals reform. Deputy Secretary Sloan Gibson charged the group with developing an appeals process that is timely, fair, easy to understand, transparent, and preserves veterans' rights.

One issue raised by NOVA and other stakeholders is the need for all accredited

representatives to have complete access to clients' electronic files. This issue has been a NOVA priority since the advent of the Veterans Benefits Management System (VBMS). On April 13, 2016, VA issued a memorandum instructing regional office personnel to process attorneys and agents for the background checks required for access. While we appreciate VA's response and look forward to implementation, NOVA maintains full access must be achieved for any reform to be successful and VA must commit to ongoing improvements to existing electronic systems that are critical to meaningful representation.

NOVA appreciates the opportunity to have a seat at this table and participate in the dialogue. However, as set forth in more detail below, while NOVA supports the concept of improving the appeals process for veterans and endorses several features of the proposed reform, there remains areas of serious concern that require additional congressional scrutiny.

Legislative Provisions NOVA Supports

Requirements for detailed notice of the decision are included in the statute.

The declining quality of VA rating decisions and notice has been cited by stakeholders numerous times over the years as the primary problem in the claims process. Efforts by VA to improve notice have been unsuccessful. The participants in VA's appeals summit agreed that detailed notice of the rating decision is critical to making an informed decision regarding further review. Proper notice allows a veteran to understand the reasons for the underlying rating decision and enables an advocate to provide a veteran with the best possible advice on the evidence needed to prove a claim.

The proposed language to amend 38 U.S.C. § 5104 is an important first step in reform, but only if properly implemented by VA. VA's proposed process hinges heavily on a change VA has always had the authority to make, but has been unsuccessful to date in doing so. VA will need to commit to extensive training of its regional office employees to provide adequate notice and well-written decisions. Without it, the new process could result in another backlog at the local level.

Effective date protection is extended to BVA decisions.

The draft proposal removes many procedural and due process protections for veterans. To a degree, the removal of these protections is offset by the primary benefit conferred to veterans: the ability to preserve the effective date of a claim denied in a BVA decision by filing a "supplemental claim" within a year of that denial (with no limit to the number of times the veteran can avail himself of this option).

The legislation calls for the same process following a rating decision, but it does not

meaningfully expand a veteran's rights beyond what is already permitted under 38 C.F.R. § 3.156(b). NOVA supports this regulatory provision being included in the statute. Furthermore, NOVA recommends the provisions of 38 C.F.R. § 3.156(c) also be codified in the statute as an important protection for the effective date of claims for veterans who find additional service records after the original claim.

Allowing a veteran to file a supplemental claim following a BVA denial is a positive development, and we believe it must remain part of any reform package considered. It is not without a downside however. As mentioned below, without expansion to denials by the United States Court of Appeals for Veterans Claims, this proposal as written would likely dilute the court's oversight function.

The proposed bill eliminates redundant procedural steps.

NOVA has historically supported the amendment of 38 U.S.C. § 7105 to eliminate the redundant requirements of a statement of the case (SOC) and substantive appeal. *See, e.g., Veterans' Dilemma: Navigating the Appeals System for Veterans Claims: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs*, 114th Cong., 1st Sess. 37, 112 (2015)(statement of Kenneth M. Carpenter, Esq., Founding Member, National Organization of Veterans' Advocates). NOVA maintains that, as a result of judicial review, the need for an SOC and affirming substantive appeal no longer exists.

As the number of claims has risen, in turn resulting in more appeals, these procedures have become the source of growing delays. For example, VA reported in 2015 an average of 405 days passed between filing of the notice of disagreement (NOD) and VA's issuance of the SOC. Furthermore, the average days from the time of the substantive appeal to BVA certification was 630 days. *Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs* (January 2015). NOVA maintains that any minimal value in these procedural steps is far outweighed by the delays, which serve to age the evidence in the veteran's file and drive the need for additional development through remand.

Under the proposal, once the veteran determines he or she wishes to appeal to BVA, the NOD will serve as the only requirement to initiate an appeal. Furthermore, the notice elements statutorily required in this provision, if executed properly, improve upon the current notice and SOC. Elimination of post-NOD procedure will not only allow the veteran to get an appeal to BVA faster, it should free up VA personnel to decide and rate claims faster at the agency of original jurisdiction.

A veteran is assured favorable findings made by VA will continue throughout the life of a claim/appeal.

Newly created section 5104A mandates that any favorable findings made on behalf of a veteran are binding on all subsequent adjudicators within VA, absent clear and convincing evidence to the contrary. This provision not only protects a veteran during the adjudication process, it saves VA time because there will be no need to reconsider resolved elements of a claim in subsequent decisions.

A veteran retains the right to engage an attorney.

Under existing 38 U.S.C. § 5904, a veteran may enter into a fee agreement with an attorney or agent at the time the NOD is filed. The proposed bill changes that language to allow a veteran to exercise this right at the time the initial rating decision is issued. Since VA is now providing more than one adjudicatory choice to a veteran after the initial decision, it makes sense that a veteran should have the freedom and personal choice to engage an attorney at that time to obtain counsel on the best option to choose.

Legislative Provisions of Concern to NOVA

The draft bill limits effective date relief after judicial review.

It is inconsistent to limit effective date relief solely to decisions of the agency of original jurisdiction and BVA. Specifically, under the draft bill, a veteran who is dissatisfied with any rating decision has one year to seek higher level review, submit new evidence in the form of a supplemental claim, or file an appeal to BVA, while preserving the effective date of the first claim. The proposal also allows for the same one-year period after a BVA decision to submit new evidence in the form of a supplemental claim. However, there is no such allowance for the same one-year period after a final decision of the United States Court of Appeals for Veterans Claims.

NOVA believes this limitation will result in far fewer veterans exercising their hard-fought right of judicial review, because it is rare that a conscientious advocate would risk the loss of an effective date by appealing to the court when the effective date could be preserved with the submission of "new and relevant" evidence.

NOVA therefore recommends section (a)(2)(E) be added to 38 U.S.C. § 5110: "(E) a supplemental claim under section 5108 of this title within one year of any final decision issued by the United States Court of Appeals for Veterans Claims."

Furthermore, VA has taken the position during its appeals summit meetings that a veteran could not simultaneously seek review of a BVA denial before the United States Court of

Appeals for Veterans Claims and exercise his or her right to submit new evidence before VA within a year of that decision to preserve the original effective date. Under the current appeals structure, a veteran may seek judicial review and file a reopened claim as contemplated under the existing version of section 5108.

By foreclosing the opportunity to pursue both avenues of relief, VA is forcing a veteran to choose between seeking review of legal error in BVA's decision or filing a supplemental claim in the hope of preserving the original effective date. Such a result is not only contrary to the veteran-friendly scheme designed by Congress, it potentially prevents the court from correcting prejudicial legal errors, e.g., statutory violations or misinterpretations of law.

To remedy this situation, Congress should add the following language to 38 U.S.C. § 5108:

> After a decision of the Board of Veterans' Appeals that disallows a claim, nothing in this title shall be construed to limit the right to pursue at the same time both (i) an appeal of such Board decision to the United States Court of Appeals for Veterans Claims under chapter 72 of this title and (ii) a supplemental claim under this section seeking readjudication of the claim disallowed by such Board decision.

Furthermore, under 38 U.S.C. § 5110, subsection (a)(3) should be redesignated as subsection (a)(4) and the following subsection (a)(3) be added:

> (3) For purposes of subsection (a)(2), a claim is continuously pursued by filing a supplemental claim under section 5108 of this title within one year of a decision of the Board of Veterans' Appeals without regard to either (i) the filing under chapter 72 of this title of a notice of appeal of such Board decision or (ii) the final decision of the Court of Appeals for Veterans Claims under chapter 72 of this title.

Proper docket management is essential to ensure veterans receive equal treatment.

This proposal creates one docket at BVA for cases in which a veteran requests a hearing or submits evidence following an NOD and another docket for cases in which nothing is added to the record after the NOD. We disagree with the creation of two dockets, as there is simply no good reason to treat these cases differently. We have seen from VA's past treatment of claims not defined as part of "the backlog" that, whatever VA's current intent may be, if a law creates an incentive for one kind of case to be adjudicated over another type of case, that is what will occur. Veterans who request a hearing or submit evidence should not be punished with a longer wait. We therefore recommend that there be only one docket at BVA, and that all cases before BVA be worked in docket order.

At the very least, if two dockets are created, a formula needs to be developed for docket management and included in section 7107. A formula is necessary to ensure every case is in a measurable "lane," so data can be collected and accountability achieved. VA should be required to provide stated goals for timely adjudication of both dockets as well as a formula. In the alternative, there should be language to require VA to create such a formula within a reasonable period after enactment to ensure dockets are maintained fairly.

Furthermore, if two dockets are created, VA should allow a veteran who chooses to submit "evidence only" to join the "non-hearing" docket. Given that this evidence will not trigger any duty to assist obligation for BVA, there is no reason BVA cannot consider these appeals in the "non-hearing" lane. Under this scenario, NOVA recommends 38 U.S.C. § 7107(a) be amended to read as follows:

> (a) DOCKETS – IN GENERAL. – The Board shall maintain two separate dockets. A non-hearing docket shall be maintained for cases in which (1) no Board hearing is requested and no evidence is submitted or (2) no Board hearing is requested and evidence is submitted. A separate and distinct hearing option docket shall be maintained for cases in which a Board hearing is requested. Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the Board's non-hearing docket or hearing docket.

Section 7105 as rewritten unnecessarily burdens veterans.

NOVA maintains section 7105 as rewritten is too restrictive. The United States Court of Appeals for the Federal Circuit recently upheld VA's standard forms regulations, to include 38 C.F.R. § 20.201. *Veterans Justice Group, LLC, et al. v. Secretary of Veterans Affairs*, No. 2015-7021 (April 7, 2016). Under 38 C.F.R. § 20.201(a)(4), a veteran is required to specify those determinations with which he disagrees or "clearly indicate" his intent to appeal all issues.

By contrast, newly drafted section 7105(b)(2) requires the claimant to set forth "specific allegations of error of fact or law." This standard places a higher burden on the claimant as a predicate for a valid NOD. While NOVA understands VA intends for the NOD to be the sole vehicle to initiate an appeal, requiring veterans to provide "specific allegations of error of fact or law" is not veteran-friendly and is particularly detrimental to pro se veterans. Because the current standard NOD form does not require the level of specificity contained in this provision, NOVA recommends the veteran only be required to specify the determinations with which he disagrees in the NOD.

Section 7105(b)(3) also puts a burden on veterans at the time an NOD is filed by requiring the veteran to make a decision at that moment about whether a BVA hearing is warranted

and whether any evidence will ever be submitted. Given that veterans often are unrepresented until after the filing of an NOD, there is no reason to require that irreversible legal decisions be made at that exact moment. NOVA therefore recommends that the proposed language be changed to allow a veteran to decide to submit evidence or request a BVA hearing up until the date a decision is actually issued by BVA.

Related to this concept is the question of "lane-changing," both in the "middle lane" and at BVA. During the appeals summit meeting, VA stated that a veteran would be able to switch lanes. More clarity is needed on the scope of this concept.

Finally, the provision allowing BVA to "dismiss" an appeal because the NOD is deemed insufficient is a troublesome one, as it is unclear what protections a veteran whose appeal is dismissed would receive. NOVA therefore recommends 38 U.S.C. § 7105(d) either be stricken in its entirety or revised to read as follows: "The Board of Veterans' Appeals will not deny any appeal which fails to allege error of fact or law in the decision being appealed without providing the claimant with notice and an opportunity to cure the defect."

The veteran should have the ability to submit evidence until BVA issues a decision.

Section 7113(b)(2)(A)(ii) as written provides for evidence to be submitted at BVA "within 90 days following receipt of the notice of disagreement." This provision is too restrictive; if the case is waiting to be reviewed by BVA, it is more veteran-friendly (and does not unduly burden BVA) for that period to be open until the decision is made. Therefore, NOVA recommends 38 U.S.C. § 7113(b)(2)(A)(ii) be amended to read as follows: "Evidence submitted by the appellant and his or her representative, if any, within 90 days following receipt of the notice of disagreement or until the Board issues a decision."

VA should only require "new" evidence for supplemental claims.

During the course of the appeals summit meetings, there was general agreement that the standard of "new and material" should be eliminated. There was significant discussion on this topic, with the stakeholders generally agreeing the standard should be "new" only. VA has inserted the term "relevant" to replace "material."

Although VA officials have repeatedly stated that the "relevant" evidence standard would be much easier to meet than the "material" standard, NOVA maintains merely trading "relevant" for "material" will not significantly reduce the adjudication burden on VA. Removing "relevant" allows VA to adjudicate the merits every time and eliminates the need to make a threshold determination.

Therefore, NOVA recommends the words "and relevant" be deleted from 38 U.S.C.

§ 5108 and the definition of "relevant" found at 38 U.S.C. § 101(35) be stricken.

It needs to be clear BVA's review is de novo.

While BVA views itself as an appellate body, its function has always been to provide de novo review of the agency of original jurisdiction's decisions. It must continue to conduct de novo review, find facts, apply relevant law, and issue new decisions. Therefore, NOVA recommends the term "de novo" be added as follows:

> 38 U.S.C. § 5103B(c)(2) – If the Board, during a **de novo** review on appeal of an agency of original jurisdiction to satisfy its duties under section 5103A of this title, and that error occurred prior to **notice in accordance with section 5104 of** the agency of original jurisdiction decision on appeal, unless the claim can be granted in full, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.
>
> 38 U.S.C. § 7105(a) – Appellate **de novo** review will be initiated by the filing of a notice of disagreement in the form prescribed by the Secretary.
>
> 38 U.S.C. § 7105(b)(2) – Notices of disagreement for **de novo review** must be in writing……

VA should clarify the veteran's right to be heard and to submit evidence.

The stakeholders participating in the appeals summit meetings insisted VA not eradicate the veteran's right to be heard and submit evidence before BVA. The language needs to be stronger to indicate the right to a hearing and to submit evidence is mandatory, not discretionary. Therefore, NOVA recommends the following sentence be added at the beginning of section 7105(b)(3): "The claimant shall have the right to a hearing before BVA and the right to submit evidence."

Additional Concerns

The current proposal ignores fundamental flaws in the system.

The proposed framework deals largely with the **process** of filing claims and appealing adverse decisions. Successful execution of VA's proposed process hinges on its ability to **consistently meet its goals** of adjudicating and issuing decisions in the 125-day window identified in its "middle lane" and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans.

Furthermore, while focusing solely on process, the proposal is devoid of reform to the foundational underpinning of the claims adjudication and appeals process, i.e., the need for an adequate medical examination and opinion. At the January 2013 hearing addressing the appeals process, BVA acknowledged the problem: "The adequacy of medical examinations and opinions, such as those with incomplete findings or supporting rationale for an opinion, has remained one of the most frequent reasons for remand." *Why Are Veterans Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs of the House Committee on Veterans' Affairs*, 113th Congress, 1st Sess. 23 (2013)(prepared statement of Laura H. Eskenaki, Executive in Charge, Board of Veterans' Appeals). Two years later, the Subcommittee on Disability Assistance and Memorial Affairs requested appeals data from VA, to include the top five remand reasons for the six fiscal years between 2009-2014. While not particularly detailed, in five of the six years, "nexus opinion" was listed as a top five reason. *Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs* (January 2015). Other consistently reported reasons included "incomplete/inadequate findings," "current findings (medical examination/opinion)," and "no VA examination conducted." *Id.*

While VA often cites the veteran's submission of evidence as triggering the need for additional development, the reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance. Without substantive reform to this process, to include consideration of a greater role for private and treating physician evidence, it is unlikely procedural reform alone can solve systemic problems.

The proposal fails to address how the pending inventory will be resolved.

Although stakeholders and VA flagged the issue of how the pending inventory will be addressed if extensive appeals reform is passed as an area of concern needing resolution, there was not time to fully consider this issue in the first round of meetings. Although one subsequent shorter meeting was convened for consideration of this issue, no significant agreement was reached. Given that the 455,000 pending appeals are in various stages of the appeals process and greatly affect the resources required by VA, this issue must be resolved. Veterans who have already been waiting for many years must not be denied a fair resolution to their pending appeals while newer appeals are being handled faster in a simplified system.

DISCUSSION DRAFT OF VA PROPOSAL TO MODIFY REQUIREMENTS UNDER WHICH VA IS REQUIRED TO PROVIDE COMPENSATION AND PENSION EXAMINATIONS TO VETERANS SEEKING DISABILTY BENEFITS

NOVA opposes VA's draft proposal to heighten the evidentiary threshold for medical examinations and opinions under 38 U.S.C. § 5103A(d)(2), which was originally added as part of the Veterans Claims Assistance Act of 2000 and clarified VA's duty to assist the veteran in obtaining the evidence necessary to substantiate the claim. VA's proposed changes would require a veteran to provide "objective evidence" of in-service incurrence. VA explained its intent, as well as what constitutes "objective evidence," in its 2017 budget proposal:

> **Clarify Evidentiary Threshold at Which VA is Required to Provide a Medical Examination.** This proposal seeks to amend 38 U.S.C. § 5103A(d) to clarify the evidentiary threshold for which VA, under its duty to assist obligation, is required to request a medical examination for compensation claims. This amendment would clarify section 5103A(d)(2) to require, prior to providing a medical exam, the existence of objective evidence establishing that the Veteran experienced an event, injury, or disease during military service. VA would still consider lay evidence as sufficient to show a current disability or persistent symptoms of a disability. However, except in special circumstances, objective evidence such as medical records, service records, accident reports, etc., must also be of record to trigger an exam. Benefit savings to the Compensation and Pensions account are estimated to be $120.1 million in 2017, $124.9 million in 2018, $650.3 million over 5 years and $1.4 billion over 10 years.

Department of Veterans Affairs, *Congressional Submission, FY 2017, Vol. III* at VBA-78 (February 9, 2017). Not only is this provision in complete opposition to the veterans-friendly benefits scheme designed by Congress, such a heightened standard would effectively shut out many veterans who are not entitled to the relaxed standards of 38 U.S.C. § 1154(b) as combat veterans. Many in-service symptoms or incidents may not be documented because a veteran does not consider them serious enough to require treatment or in some instances, e.g., psychological symptoms, may choose not to report them for fear of demotion or separation.

While VA seeks this change to effectuate cost savings, as noted above, other measures should be considered to improve the system, to ensure veterans obtain adequate medical examinations and opinions, and to ultimately provide cost savings.

Conclusion

NOVA shares VA's concern that veterans wait too long for a final and fair decision on appeal. NOVA welcomes the opportunity to work with VA and this Committee to ensure a fair and comprehensive reform of the system. NOVA further recommends adoption of the revisions outlined in our testimony.

In addition, NOVA opposes VA's draft proposal that revises the evidentiary threshold for medical examinations and opinions.

Mr. Chairman, we would like to thank you again for allowing us to address these proposed bills. I would be pleased to take any questions.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA's office at (202) 587-5708 or by emailing Diane directly at drauber@vetadvocates.org.

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Diane Boyd Rauber is the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA) in Washington, DC. NOVA is a not-for-profit 501(c)(6) educational membership organization, representing more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families who are seeking to obtain earned benefits from the Department of Veterans Affairs.

Prior to joining NOVA in September 2015, Ms. Rauber worked as the Associate General Counsel for Appeals with Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (Board), provided support and training to PVA's service officers, and analyzed cases for potential appeal to the United States Court of Appeals for Veterans Claims (Court).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before the Board and the Court. She has presented at numerous veterans' law conferences, on topics including successful advocacy and military history research.

She also served as a consultant to the American Bar Association (ABA) Center on Children and the Law. In this capacity, she wrote and edited numerous ABA publications on an array of child welfare issues, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communication Disorders from the Pennsylvania State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, as well as a member of the Court of Appeals for Veterans Claims Bar Association and the Maryland Bar Association Veterans Affairs and Military Law Section.