STATEMENT OF

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BEFORE THE
THE SENATE COMMITTEE ON VETERANS AFFAIRS

REGARDING TWO DISCUSSION DRAFTS TO AMEND THE VA CLAIMS ADJUDICATION PROCESS

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting us to submit written testimony concerning legislative efforts to reform the veterans claims and appeals process in the United States Department of Veterans Affairs (VA). Our testimony addresses two discussion drafts: (1) the draft bill "to reform the rights and processes relating to appeals of decisions regarding claims for benefits under laws administered by the Secretary of Veterans Affairs, and for other purposes" sent to the Committee for discussion by Senator Blumenthal (hereinafter "VA appeals reform draft") and (2) the discussion draft to amend 38 U.S.C. § 5103A(d)(2) to change the evidentiary threshold for VA medical examinations and opinions.

The National Veterans Legal Services Program (NVLSP) is a nonprofit veterans service organization founded in 1980 that has been providing free legal representation to veterans and assisting advocates for veterans for the last 36 years. NVLSP has represented veterans and their survivors at no cost on claims for veterans benefits before the VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts. As a result of NVLSP's representation, the VA has paid more than $4.6 billion in retroactive disability compensation to hundreds of thousands of veterans and their survivors.

NVLSP publishes numerous advocacy materials, recruits and trains volunteer attorneys, trains 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, and conducts local outreach and quality reviews of the VA regional offices on behalf of The American Legion. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which has, since 1992, recruited and trained 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.

VA Appeals Reform Draft Bill

This part of our testimony focuses on the VA appeals reform draft bill sent to the Committee for discussion by Senator Blumenthal. We very much appreciate the opportunity to share our views on this important piece of potential legislation. Over the last several months, NVLSP has participated with a workgroup of veterans service organizations convened by the VA to find common ground on a set of reforms to address the serious dysfunctions that exist in the current VA appeals process.

We believe the VA appeals reform draft bill is a welcome attempt to address the serious problems veterans and their dependents face in processing appeals in the VA. We are generally favorable to the bill, with several important caveats discussed below. To be clear, we believe the problems we have identified below can be addressed now. If they are, we support this bill as an innovative means of addressing the systemic delays claimants face in the dealing with their VA appeals.

Before we address the merits of the proposed legislation in more detail, we begin with a general point that is important to remember. The proposed structuring of the administrative appeals process envisioned under the bill is far-reaching. As with any change to a complex system, there will clearly be effects that we cannot now predict. We have considered this reality quite seriously. If the system were functioning generally well, a concern with unintended consequences might be sufficient to oppose such a comprehensive change in the system. But we are not dealing with a well-functioning system. Given that state of affairs, we have ultimately concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step. We support it with the changes we discuss below.

I. POSITIVE FEATURES OF THE PROPOSED LEGISLATION

We briefly highlight the significant positive features of the changes envisioned under the proposed legislation. Taken together, we believe these features of the draft bill will decrease appeal times while providing claimants with various options for pursing their appeals. The most significant positive features in the proposed legislation are:

- The draft bill provides for enhanced "notice letters" to veterans and other claimants concerning the denial of their claims. Enhanced notice is critically important to veterans as they make determinations about how to proceed when they are dissatisfied with a VA decision.

- The draft bill also eliminates the requirements under current law concerning the preparation of a Statement of the Case (SOC), the veteran's corresponding need to complete an additional step to perfect an appeal to the Board (i.e., VA Form 9) and VA's subsequent need to certify the appeal by completing VA Form 8. While there may have been a time at which the SOC served a useful function in this system, the enhanced "notice letters" required by the proposal eliminate the need for an SOC. Thus, the SOC process serves only to delay the processing of claims.

- The draft bill lowers the standard necessary for re-opening a claim under Section 5108. The current standard of "new and material evidence" is replaced with "new and relevant evidence." While we address below two concerns – one involving supplemental claims and one involving the wording of the new lower standard -- the lowering of the standard is critically important. In addition, and as we discuss in more detail below, the revised Section 5108 will allow veterans to obtain earlier effective dates in many circumstances than they would be able to do under the current version of this provision.

- The draft bill allows veterans a meaningful choice when they appeal to the Board of Veterans' Appeals (Board). A veteran may elect to forgo the submission of new evidence and a hearing in cases in which he or she determines such an approach is best. This would provide for more expeditious treatment of such appeals. On the other hand, a veteran can elect to proceed on a track in which the submission of new evidence and a hearing is allowed. This dual-track approach recognizes the reality that not all appeals are alike.

- The draft bill allows a claimant to seek the assistance of a lawyer for pay after an initial denial but before the filing of a Notice of Disagreement (NOD). This is a change from current law in which a lawyer may not charge a fee before the filing of an NOD. While seemingly a small change, we believe this is significant because the structure of the proposed new system provides claimants with myriad ways in which to proceed. Advice to such claimants will be critical and the proposed change allows more options for that advice.

- We believe the draft bill also reduces the means by which the VA can "develop to deny." NVLSP has reviewed many regional office and BVA cases in which the existing record before the VA supports the award of benefits, but instead of deciding the claim based on the existing record, VA has delayed making a decision on the claim by taking steps to develop additional evidence for the apparent purpose of denying the claim. Certain aspects of the current proposal – for example, the restriction on the application of the duty to assist at the Board – will likely reduce such actions.

II. PROBLEM ONE: The Need to Clarify the Right to Both Appeal to the CAVC and File a Supplemental Claim Simultaneously to Protect the Claimant's Effective Date

NVLSP's support of the critically important positive changes to the administrative appeals process contained in the bill comes with several critical caveats. The first caveat is contained in this part of our testimony.

Currently, after a Board decision that disallows a claim, the claimant may file both (i) an appeal with the Court of Appeals for Veterans Claims (CAVC) under Chapter 72 and (ii) a claim with the Agency of Original Jurisdiction (AOJ) under Section 5108 to "reopen the claim" disallowed by the Board "and review the former disposition of the claim," when the claimant submits "new and material evidence." In other words, the claimant does not have to choose between appealing to the CAVC and filing a claim with the AOJ to reopen under Section 5108. The claimant may freely take both actions.

The draft bill renames a Section 5108 claim as a "supplemental claim" and lowers the threshold requirement to obtain readjudication of the previously disallowed claim by substituting the language "new and relevant evidence" for "new and material evidence." In addition, no language in the draft bill indicates an intent to change existing law allowing a claimant, after a Board decision that disallows the claim, to file simultaneously both a timely appeal with the CAVC and a Section 5108 claim with the AOJ.

Nonetheless, VA officials have repeatedly represented to the veterans service organizations that if the draft bill is enacted as currently worded, the options available to a claimant will change. According to these VA officials, including Secretary McDonald, after a Board decision disallowing a claim, the claimant would now be required by law to make a choice between appealing to the CAVC and filing a supplemental claim with the RO in order to preserve the date of filing the initial claim as the potential effective date if the claim disallowed by the Board is ultimately granted. As background, after a Board decision disallowing a claim,

the claimant may file under the proposed bill a Section 5108 supplemental claim within one year of the Board decision disallowing the claim. If that supplemental claim were ultimately granted, the proposed bill's amendment to Section 5110 would enable the claimant to be assigned the date of filing the initial claim, rather than the date of filing the supplemental claim, as the effective date of the award, as long as the other Section 5110 criterion for assignment of that early effective date is satisfied.

We strongly support this part of the draft bill. Nonetheless, VA officials have repeatedly represented that under the draft bill, if a claimant, after a Board decision disallowing a claim, were to file a timely appeal of the Board decision with the CAVC and lose on appeal, the claimant would incur the following penalty: the claimant could not lawfully be assigned the date of filing the initial claim as the effective date even if the claimant filed a Section 5108 supplemental claim within one year of the Board decision and the VA granted the supplemental claim.

If the draft bill is enacted without a change in language to clarify this matter, and VA continues to insist that a claimant must choose between an appeal to the CAVC and a supplement claim under Section 5108 in order to preserve the date of filing the initial claim as the potential effective date, this matter will inevitably have to be resolved by the federal courts. Final judicial resolution would likely take years. To be clear, we believe the VA's currently articulated approach is not consistent with the draft bill. But we also realize that it is difficult to predict how courts will resolve legal disputes. No matter how this legal dispute is ultimately resolved, during the years this litigation is pending in court, there would likely be a significant disruption to the VA claims adjudication process and further delays experienced by VA claimants.

Congress should clarify this matter before passing this draft bill to avoid litigation and a disruption to the claims adjudication process. We suggest adding the following clarifying language. First, add the following to the end of line 16 on page 8 of amended Section 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.

Second, on line 10 of page 10, redesignate subsection (a)(3) as subsection (a)(4) and add a new subsection (a)(3) containing the following language:

> (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.

It is contrary to the interests of justice and the pro-claimant process that Congress has created to require claimants to make a choice between filing an appeal with the CAVC and filing a supplemental claim with the RO within one year of the Board decision in order to preserve the date of filing the initial claim as the potential effective date. Each of these two options serves an

entirely different purpose. Claimants appeal to the CAVC to correct a prejudicial legal error that they believe the Board made in disallowing the claim, such as a misinterpretation of the law or a violation of the statutory duty to assist by failing to provide the claimant with an adequate medical examination or medical opinion. Claimants file a Section 5108 claim for an entirely different reason. They file a Section 5108 claim in an effort to add positive evidence to the record so that the weight of the positive evidence is equal to or greater than the weight of the negative evidence of record, in an attempt to convince VA that the claim should be granted even under VA's existing view of its legal requirements.

What VA seeks is to force veterans whose claims are disallowed by the Board to make an unfair choice between two options. According to VA's interpretation of the draft bill, each choice alone has a potentially fatal consequence. If the veteran chooses the option of appealing to the CAVC, the veteran cannot add evidence to the record and is essentially limited to arguing that the Court should vacate and remand the Board's decision due to legal error. A fatal consequence occurs if the Court upholds the Board's interpretation of law (as it does in approximately 30% of all appeals). The veteran's right to the date of filing of the initial claim as the potential effective date is lost forever. While the veteran may be able to file a Section 5108 supplemental claim with new and relevant evidence despite the Court defeat, VA's position is that success on that supplemental claim cannot validly lead to an award of benefits retroactive to the date of filing the initial claim that was disallowed by the Board.

On the other hand, if the veteran gives up the right to appeal to the CAVC to challenge the Board's interpretation of the law by choosing the other option -- filing a Section 5108 supplemental claim within a year of the Board decision -- the veteran enjoys the benefit of being able to add new positive evidence to the record. But the VA's view of what the law requires will most likely be the same as the Board's view of the law when it disallowed the initial claim. Thus, the veteran must shoulder the burden of attempting to convince VA that it should award benefits under an unfavorable view of the law with which the veteran disagrees. Thus, the chance of success is obviously lower than it would be if VA was required to adjudicate the supplemental claim under the veteran's more favorable view of what the law requires.

To be clear then, under the VA's proposed approach, a veteran would need to decide between preserving his or her effective date by filing a supplemental claim or potentially correcting a legal error in the Board's decision through the judicial process. A veteran should not be put in such a position. The interests of justice and maintenance of the pro-veteran claims process that Congress has nurtured for decades should lead Congress to clarify the proposed bill by adding language that makes it plain that after a Board decision disallowing a claim, the veteran has the right to protect the date of filing the initial claim as the effective date by both filing an appeal with the CAVC to correct a prejudicial legal error made by the Board and filing a Section 5108 supplemental claim in an effort to convince VA that the newly added evidence shifts the weight of the evidence so that VA awards benefits even under its unfavorable view of its legal requirements.

III. PROBLEM TWO: The Draft Bill Needs to be Amended to Provide An Effective Date and for Handling the Inventory of Pending Appeals

The draft bill lacks an effective date. In addition, it does not address how VA should integrate the streamlined appeals process contained in the draft bill with the inventory of more than 400,000 currently pending VA appeals. The draft bill needs to be amended to address both of these issues.

During the ongoing discussions between the VA and the veterans service organizations and other stakeholders regarding the reforms contained in the draft bill, the VA recently staked out a position on both of these two important issues. Under the VA's proposal, it appears that the VA would ultimately issue decisions on many new appeals filed after the effective date of the draft bill ***before*** it issues decisions on many of the 400,000 currently pending appeals. Indeed, it appears to us that under VA's recent proposal, many of the currently pending appeals would be decided by VA ***years*** after many new appeals are decided by the VA. NVLSP objects to such an unfair system.

NVLSP has three suggestions regarding the effective date and the need to address the existing inventory of pending appeals. First, NVLSP urges Congress to appropriate a significant amount of additional money on a temporary basis for VA to use exclusively to tackle the backlog of currently pending appeals.

Second, the VA should propose in advance both an effective date for the draft bill and provisions that address the following two issues regarding VA allocation of its resources under the draft bill:

(1) The formula that VA will use to allocate its resources between adjudicating appeals on the non-hearing option Board docket versus adjudicating appeals on the hearing option Board docket under the draft bill's amendment to Section 7107 of Title 38. It is important to address this issue to ensure that BVA decisions on hearing docket cases are not unduly delayed in comparison to cases on the non-hearing option docket due to over allocation of BVA resources to deciding appeals on the non-hearing docket. Transparency in this matter is very important.

(2) Before the bill is passed, it should be amended to provide the formula VA will use to allocate its resources between adjudicating appeals pending at the VA prior to the proposed effective date of the draft bill and appeals docketed after that effective date. It is important to address this issue to prevent the unfairness to veterans with appeals already pending when the bill goes into effect. It would be fundamentally unfair if these appellants have to wait many years longer to receive a BVA decision than do veterans who file appeals after the draft bill goes into effect because the VA assigned most of its resources to deciding appeals filed after the draft bill goes into effect.

Third, after VA submits its proposal on these matters, veterans service organizations and other stakeholders should be given an opportunity to provide Congress with their views on the VA proposal.

Discussion Draft on Revision to Evidentiary Threshold
for VA Medical Examinations and Opinions

NVLSP strongly opposes enactment of the changes to 38 U.S.C. § 5103A(d)(2) contained in this discussion draft. At the outset, it is important to understand the legislative process that led to enactment of current 38 U.S.C. § 5103A(d)(2). That provision was adopted by Congress as part of the VA Claims Assistance Act of 2000 (VCAA) after a long legislative debate in which all stakeholders participated, including the VA and the major veterans service organizations. It contains a carefully crafted compromise. As discussed below, the case law developed over the last 16 years provides clear guidance to both veterans and the VA on their respective obligations with regard to VA assistance. The only significant problems that currently exist involve individual cases in which the VA regional offices or the Board of Veterans' Appeals fails to comply with VA's clear legal obligations.

Under the current statute, VA is required to assist a veteran in substantiating the claim for benefits by affording him/her a VA medical examination or opinion unless there is no reasonable possibility that a VA medical examination or opinion would help the veteran substantiate the claim for VA benefits. Providing a medical examination or opinion is possibly the most important feature of VA's duty to assist, and in many cases, a VA medical examination or opinion will provide the claimant with the evidence needed to substantiate his or her claim. The U.S. Court of Appeals for Veterans Claims correctly determined a decade ago that under the current statute, a claimant has a "low threshold" to satisfy the threshold requirement to obtain a VA medical examination or opinion. *See McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006).

NVLSP agrees that VA has a legitimate interest in not providing examinations in every single disability claim, including those claims that are frivolous. However, the current statute already has protections in place that adequately serve that interest. Under the current statute, if there is no indication that a veteran's current disability or symptoms may be related to an event or injury in service, then the VA does not have to provide the claimant with an examination or opinion. *See McLendon*, 20 Vet. App. at 81; *see also* 38 U.S.C. § 5103A(a)(2) ("The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim."). Therefore, the VA already has flexibility under the current version of the statute in determining who should be afforded a VA examination. There is simply no need for a revision.

This discussion draft would make it much easier for the VA to deny a veteran's disability claim without the need to provide the veteran with a VA medical examination or opinion. It does so by adding a fourth threshold requirement to the three threshold requirements that already exist in 38 U.S.C. § 5103(d)(2) before the VA is required to provide a VA medical examination or opinion. Under this new fourth threshold requirement, the record must contain "objective evidence" of an in-service injury, disease, or event capable of causing an injury or disease. The discussion draft contains two exceptions to this fourth threshold requirement: cases covered by

38 U.S.C. § 1154(b) involving events that occur during combat and cases involving a disease that became manifest during an applicable presumptive period.

We strongly object to the addition of "objective evidence" to the duty to assist statute because the currently worded statute is working well and the discussion draft suffers from the flaw that it contains no definition of the phrase "objective evidence." The discussion draft inappropriately leaves the task of defining the broad phrase "objective evidence" to the VA in regulations promulgated by the Secretary. That phrase is susceptible to many different interpretations. Thus, nothing would prevent the VA from promulgating regulations that define "objective evidence" of an in-service injury, disease, or event as contemporaneous military department evidence that corroborates the fact that an in-service injury, disease or event occurred – thereby overturning the 2006 Federal Circuit decision in *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006).

Thus, the "objective evidence" requirement could lead to situations where veterans who provide lay statements about in-service events or their symptoms are not provided with VA medical examinations. For example, if a veteran states that he or she was in an in-service jeep accident that resulted in post-service symptoms or disability and provides multiple buddy statements from witnesses to the in-service event, the VA could discredit these lay statements on the ground that the accident is not corroborated by any contemporaneous military medical or other evidence. Military records do not capture every single injury, disease, or event that takes place in the active duty service of military personnel. And even when military records are created that corroborate these matters, these records are often lost or destroyed. This proposed amendment will likely lead to unfair denials placing an insurmountable burden on the veteran. This would, in our view, be unacceptable.

The fact that veterans currently only have to meet a low threshold in order to be provided with an examination is a positive feature of the system. After all, most disability benefits claims need a medical opinion to substantiate the claim, and many claimants lack the financial resources to obtain a medical opinion from a private physician. Therefore, VA examinations are crucial in helping veterans receive the benefits to which they are entitled. The low threshold established by Congress 16 years ago for what a veteran must meet to require the VA to provide him or her with an examination should be celebrated by Congress, not amended. The only logical rationale for this discussion draft is to reduce the number of examinations that VA must provide. Congress should not make things harder for veterans for the bureaucratic convenience of the VA.

Conclusion

Thank you for this opportunity to present our views, and we would be pleased to respond to any questions that Members of the Committee may have.