Military-Veterans Advocacy Written Testimony for the Record in Support of Pending Legislation
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Submitted to the United States Senate
Veterans Affairs Committee

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Executive Director

Introduction

Distinguished Committee Chairman Johnny Isakson, Ranking Member Richard Blumenthal and other members of the Committee; thank you for the opportunity to present the Association's views on the pending legislation before the Committee.

About Military-Veterans Advocacy

Military-Veterans Advocacy Inc. (MVA) is a tax exempt IRC 501[c][3] organization based in Slidell Louisiana that works for the benefit of the armed forces and military veterans. Through litigation, legislation and education, MVA works to advance benefits for those who are serving or have served in the military. In support of this, MVA provides support for various legislation on the State and Federal levels and engages in targeted litigation to assist those who have served.

As well as legislative advocacy, Military-Veterans Advocacy represents veterans in all facets of the veterans law system. MVA practices before the Department of Veterans Affairs, the Court of Appeals for Veterans Claims, the Court of Appeals form the Federal Circuit and the Supreme Court of the United States.

Military-Veterans Advocacy's Executive Director Commander John B. Wells USN (Ret.)

MVA's Executive Director, Commander John B. Wells, USN (Retired) is a 22 year veteran of the Navy. Commander Wells served as a Surface Warfare Officer on six different ships, with over ten years at sea. He is well versed in the actual and potential harms caused by toxic exposure in the five military services.

Since retirement, Commander Wells has become a practicing attorney with an emphasis on military and veterans law. He is counsel on several pending cases at various levels in the veterans legal system. He is very familiar with the veterans law rules and actually presents Continuing Legal Education on this subject to other attorneys.

Proposed Veterans Appellate "Reform" Bill

MVA **does not** support the proposed "reform" legislation as currently written.

General Comments

As often happens with the Department of Veterans Affairs, their proposal concentrates too much on form rather than substance. The Secretary seems to be asking Congress to trust them to work for the benefit of the veteran. Repeated scandals including document destruction and falsification as well as criminal conduct on the part of the VA should put the Congress on notice that the Department, in its present form, is not worthy of trust. We hope that this review and our

recommendations will be helpful in crafting legislation that is results oriented.

The proposed legislation does nothing to fix the systemic problems within the VA Appellate system. Instead it seems to make the process easier for the VA, at the expense of the veteran. The proposed legislation flies in the face of the non-adversarial, pro-veteran system envisioned by Congress. Currently the VA takes an adversarial anti-veteran approach designed to provide the illusion of efficiency while denying veterans their earned benefits.

Areas of Concern Not Addressed in the Proposed Legislation

The proposed legislation does not address the pending inventory of over 450,000 appeals. The actions of the VA in clearing the backlog through increased claim denials has expanded the appellate backlog. For some unfathomable reason, the Secretary and Acting Executive of the Board of Veterans Appeals, have failed to take action to resolve this backlog. Currently, the Chairman has the power to appoint temporary Board members from within the VA. This needs to be changed legislatively to remove the qualification that the temporary board member be VA employees. MVA recommends, allowing the appointment of retired Military Judges to adjudicate the backlog near their local residence. While that would require some training in VA law, the retired Military Judges are conversant with the hazard of military service. Additionally, they are trained to make decisions in an equitable and efficient manner.

The proposed legislation does address the Board of Veterans Appeals but it does not speak to the crux of the problem. The key to solving the appellate backlog is addressing issues at the Board. Initially, and as a matter of priority, the President must appoint a qualified chairman of the Board. Secondly, MVA recommends that all members of the Board, acting or permanent, be certified as Administrative Law Judges. The lack of training and learned reasoning in the opinions of the Board members is frankly striking,

The controllable remand rate is definitely unsatisfactory. Too many cases are remanded because the board member simply does not do his or her job. MVA proposes that if more than 30% of any Board member's decisions are remanded within a given year, the Chairman should review the performance and recommend action to the Secretary including probation, suspension or termination. Remands based upon a change in law or regulation would not be considered in computing the remand percentage. Given the high level of remands, MVA recommends that the remand percentage and action taken be included in the annual report to Congress.

Currently, the veterans record is not released to the Court of Appeals for Veterans Claims, the veteran or the veteran's representative until the veteran signs and return by mail a VA form allowing the VA to release the record. Current law, 38 U.S.C. § 7332[b][2] allows exceptions to allow records to be released but des not address the Court proceeding. MVA recommends adding the following subsection to 38 U.S.C. § 7332[b][2].

(H) To the veteran, the veteran's representative or attorney and the Court of Appeals for

Veterans Claims upon the filing of a notice of appeal and docketing of such appeal by or on behalf of a veteran in the Court of Appeals for Veterans Claims

Although this might seem inconsequential, given the fact that the veteran is often not co-located with the representative, meeting this rather silly requirement can add two to three weeks to the process.

MVA also recommends the addition of a statutory provision that ensures that a change in the interpretation of a statute or regulation which clarifies or explains an existing law or regulation, or merely represents the agency's reading of statutes and rules, rather than an attempt to make new law or modify existing law is to be considered clear and unmistakable error. The clear and unmistakable error (CUE) statute does not address the impact of the VA reversing themselves in an interpretive regulation. The VA, without authority ruled in 38 C.F.R. § 20.1403(e) that such a reversal should not be considered CUE although there was no basis to do so and most courts hold that changes in interpretive regulations are retroactive. *See, Patrick v. Shinseki*, 668 F.3d 1325, 1329 (Fed. Cir. 2011)*; Paralyzed Veterans of Am. v. West,* 138 F.3d 1434, 1436 (Fed.Cir. 1998) and *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001).

Although not addressed in the proposed legislation, MVA recommends the following to streamline the appeal process:

- Promulgate a scheduling order for each appeal with cutoff dates that can be extended for good cause shown.
- Assign a board attorney to monitor the appeal and resolve disputes concerning the events in the scheduling order.
- The board attorney should attend all hearings.
- Absent unique or special circumstances, require the decision to be issued within 30 days of the hearing.
- Hold Veterans Service Managers accountable for improper adjudications.
- Establish and publish a training program for Veterans Service Officers.

MVA specifically recommends the addition of the following section:

§ 7101(f) to read as follows:

[1] Any member of the board conducting hearings shall be a certified Administrative Law Judge.

[2] Any member of the Board whose decisions shall be remanded by the Court of Appeals for Veterans Claims or higher authority shall not be assigned to any subsequent readjudication.

[3] When the Court of Veterans Claims or higher authority remands in excess of thirty percent of any decisions of a particular Board member in any given year, that Board member's performance will be reviewed by the Chairman. If performance is found to be deficient the

Chairman will recommend probation, suspension or decertification to the Secretary. Remands based on changes in the law or regulation, to include judicial action, shall not be considered in computing the percentage of remands.

[4] The Chairman in his annual report to Congress will include a discussion of the number of remands, and actions taken under this paragraph.

Amend Section 7101(c)(1)(A) of Title 38 United States Code by substituting the words *"qualified persons"* for *"employees of the Department.*

Duty to Assist

The proposed legislation guts the existing duty to assist. While the Board normally covers up the failure of the Secretary to perform that statutory duty, this proposal virtually eliminates it subsequent to the initial decision.

The VA proposal seems to limit the entire appellate review to the original record submitted to the agency. While this is common in Administrative Procedures Act reviews, it is not appropriate here. Unlike most administrative hearings, attorneys are not able to engage in paid representation, even if the veteran so desires, until the initial denial has been received. This effectively leaves the veteran without legal representation. Secondly, the system as it currently exists (and would exist under the proposed legislation) does not allow for any discovery. As a result, information and witnesses are discovered throughout the process. Attorneys and appellate level VSOs are trained to prepare a proper record which often results in the discovery and production of new evidence. MVA believes the statute should allow for evidence to be submitted at all stages of the proceeding. It further requires the VA, as part of their duty to assist, to provide reasonable discovery. This would include contact information for decision makers and medical referrals, to allow the veteran to conduct an interview. At the discretion of the veteran the interview could be recorded or otherwise transcribed to be used at the hearing.

As a case in point, an illustrative incident occurred this week. MVA was retained as counsel for veteran WS in late January 2016 and the proper information was submitted within the required 30 day period. A copy of the veterans claims file was requested along with other matters under the duty to assist. Subsequent to faxing this information to the Evidence Intake Center, the case was transmitted back to the Board. In mid-April, the Board mailed out a notification that the case was docketed and that the veteran had 90 days "or until the decision was rendered" to provide supplemental evidence. Still waiting for the claims file, MVA began to gather what evidence it could and prepared to make a submission. Three weeks later the Board acted to deny the claim, without providing the claims file or the information requested under the duty to assist. This was an obvious attempt to "stream roll" a case to prevent MVA from preparing a proper submission.

In the same case, the Board claimed that the veteran withdrew his request for a hearing. The veteran believed he requested to reschedule the hearing. Without access to the Claims file,

there was no way for MVA to address this issue.

Removal of the restriction on attorney representation and the agency of original jurisdiction would help to relieve this matter. More importantly, basic discovery should be allowed. Once a case is docketed at the Board, the use of a scheduling order with milestones would ensure that the case proceeds efficiently. Assigning a board attorney to shepherd the process would help resolve matters. Providing the veteran and his representative with contact information would help expedite the process. Too often there are long delays becaus eof the inability to contact the appropriate VA employee.

Unless the duty to assist continues, the VA will be able to suppress information favorable to the veteran. In that event, matters such as the WS case will become even more commonplace

MVA recommends the addition of the following:

§ 5103 C. Discovery.

Upon request by the veteran or his or her representative, the Secretary, as part of his duty to assist, shall provide the following within 60 days of the request:

- *Veteran's Claims File*
- *Copy of the pertinent parts of all documents used in adjudicating the claims. If a document more than 10 pages is provided, all pages that were considered are appropriately marked.*
- *Contact information for the person adjudicating the claim*
- *Contact information and curriculum vitae of any medical professional conducting a Compensation and Pension examination.*
- *A copy of any other document in the possession of Secretary requested by the veteran.*
- *A copy of any other document in the possession of any Department of the United States requested by the veteran.*
- *Copies of any and all documents including but not limited to correspondence, both paper and electronic, between any employees of the Secretary or between an employee of the Secretary and any other person concerning the case. (Ongoing requirement).*

Reasonable discovery will allow the process to be expedited. More importantly, it will ensure that the veteran is given a fair hearing. Additionally if the claims file is provided prior to the appeal, remands should be reduced which will help reduce the backlog.

Information Provided Upon the Denial of Benefits

The proposal requires the notice of certain items as a substitute for the Statement of the Case. In administrative proceedings, the agency is required to explain and justify their decision. *Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). The boilerplate citations to Part 3 of Title 38 of the Code of Federal Regulations

which make up the majority of the present Statement of the Case should be included in an appendix. They are often not material and are sometimes confusing to a non-lawyer. The notification should, however, include a narrative of the reason for denial and in the case of the assignment of a percentage of disability, the diagnostic codes used in the determination of the disability percentage and the proper citation to the appropriate section of Part 4 of Title 38 of the Code of Federal Regulations. Often when there is a disagreement over the percentage of disability, MVA copies the pertinent provisions of Part 4 and provides it to the veteran for evaluation by his or her treating physician. This information is then included in any review. Often the treating physical highlights symptoms consistent with a higher level of disability.

A properly prepared notice should refer to the law as well as policy and allow the veteran insight into the VA position. This is necessary to preparing a proper appeal and to make an intelligent decision as to whether a hearing is required. Currently the VA merely generalizes their decision leaving the veteran to speculate on what type of magical mystery tour was embarked upon by the adjudicator.

MVA recommends that the enumerated notice requirements proposed as § 5104[b] e modified to read as follows:

(1) identification of the issues adjudicated;

(2) a summary of the evidence considered by the Secretary to include a listing of every document relied upon. In the instance where the document is more than 10 pages, the summary will include a citation to the proper page number;

(3) a summary of the applicable laws and regulations which will be included in an appendix to the document.;

(4) identification of findings favorable to the claimant;

(5) identification of elements not satisfied leading to the denial;

(6) an explanation of how and where to obtain or access evidence used in making the decision; and

(7) if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation." This should include the diagnostic codes used in the determination of the disability percentage and the proper citation to the appropriate section of Part 4 of 38 C.F.R.

(8) the appeal rights of the veteran.

Such Form as the Secretary May Prescribe

Without question VA has a form for every use and some of them actually make sense. Many do not. The forms are drafted by VA employees who are more concerned with bureaucratic achievement than helping the veterans. Although the VA is obviously fascinated by their own forms, they are often confusing and require intrusive information that is not material to the claim. Although the forms are available to those who can navigate the VA web site, many veterans cannot. Older veterans and those suffering from PTS/TBI have difficulties with some forms and the inane requests and bureaucratese cause confusion and frustration. While MVA

supports having **sample** forms, their mandatory use is unnecessary. As long as basic contact information is provided, the VA employee needs only to pick up the phone to secure additional information.

Notices of Disagreement

The proposal requires notices of disagreement to be mailed within a year. There should be a provision to allow submission by fax and e-mail.

MVA is also very concerned about the provision requiring the veteran to affirmatively request a hearing or the right to submit additional evidence. The right to a hearing and to submit evidence should be the default. Many veterans are unrepresented at the time they submit the initial notice of agreement. Flexibility is required to ensure that the do not unconsciously waive their rights or bind future representatives to that waiver, as happened in the illustrative case of WS discussed above. For the same reason, the notice of disagreement should not be the vehicle to limit factual and legal issues. Attorneys may develop additional issues not know by the veteran at the time the Notice of Disagreement is submitted. The requirement to define issues should be fixed at a later time in the process.

Nor should the veteran be required to identify all errors of fact or law at the notice of disagreement stage. Most veterans cannot provide such detailed information, especially at such an early stage in the proceeding. The VA seems to be trying to hold the veteran to the standards expected of an attorney by applying requirements that exceed those found in judicial proceedings. This process was designed to be non-adversarial but the VA is trying to adopt strict technical rules that hamper the veteran's ability to present his or her case. Given the lack of discovery, factual and legal issues may be developed after the notice of disagreement is filed.

The proposed legislation also deprives the veteran of the opportunity to have a hearing or submit supplemental evidence. The VA proposal requires the veteran to affirmatively request a hearing and the right to submit additional evidence. This proposal is contrary to the "pro-veteran" approach that Congress has always required. VA forms are often technical and confusing to the veteran and to some service officers. Too often, veterans may fail to request a hearing or the right to submit additional evidence because of a lack of understanding of the form Waiver through inattention or misunderstanding should never be allowed and the default should be in favor of a hearing and the ability to submit additional evidence. While an affirmative waiver should be allowed for both the hearing and additional evidence, the waiver should be knowing and voluntary.

Any waiver should not be required in the notice of disagreement. It is too early in the process. The veteran may well have not secured legal help at that point and additional issues may not have been developed and additional evidence may not have been discovered or constructed. Often attorneys will be able to secure affidavits in support of claims or identify additional issues. A premature waiver would severely limit the attorney or other representative

in pursuing the appeal. If a veteran presented to an attorney after having waived his right to a hearing or to submit additional evidence, it is unlikely that the attorney will take the case. If appellate rights are waived in the notice of disagreement, then attorneys must be allowed to charge a fair fee at the initial claim stage.

A veteran should never be deprived of the right to submit additional evidence to the higher level review at the Agency of Original Jurisdiction or the Board of Veterans Appeals. Once the initial denial has been made the veteran may choose to hire an attorney. At this point a significant amount of evidence may be generated. As an example, MVA has a large library of evidence on the Blue Water Navy issue. Additionally, MVA routinely obtains affidavits from the veteran's family and friends to establish the nexus between the disability and military service. Often that information is missing from the original claim. Trained attorneys often develop supplemental evidence that could change the decision. Finally, the proposal would seem to run afoul of the notice and hearing requirements of the due process clause. Under no circumstances should the veteran be deprived of this right.

While MVA has no objection to the dual docket approach, a case should not be assigned to the non-hearing docket unless and until the veteran makes a knowing and voluntary waiver. The waiver form should encourage the veteran to consult with legal counsel. Additionally, transfers between dockets should be liberally granted.

Conclusion

MVA cannot in good conscience support this bill and asks that the Senate incorporate the recommendations provided herein. Frankly, MVA s amazed at the fact that some Veterans Service Organization support the legislation. MVA takes no position on that support but as an organization designed to defend the veterans against the VA we must most strongly disagree with the supporting comments of the DAV, VFW, American Legion, AMVETS, IAVA and MOPH. . Perhaps more than anything, this underlines the need for attorneys to begin paid representation at the initial claim level to prevent the type of abuse discussed herein.

Discussion Draft of Amendment to 38 U.S.C. § 5103A

Subject to the discovery proposals discussed above, MVA has no objection to the proposed discussion draft.

Discussion Draft on Proposed Construction Requirements

MVA support this provision. MVA also recommends a study comparing the more successful construction at New Orleans with the disaster at Denver.

Janey Ensminger Act of 2016 - S 2888

MVA most strongly recommends the passage of this bill. The VA has been negligent concerning the identification and provision of benefits for the victims of Camp Lejune. As with the Blue Water Navy legislation (S 681) the VA has ignored scientific evidence to support their bureaucratic intrasiegence.

Care Veterans Deserve Act of 2016 S 2896

MVA strongly recommends passage of this bill. MVA believes that this bill is long overdue. Working veterans should not be forced to conform to the whims of VA bureaucrats. This bill will not only expand the "Choice" program but will force the VA to become more responsive to the needs of the veterans.

State Outreach for Local Veterans Employment Act of 2016

MVA supports the praiseworthy goals of the program envisioned by this bill, however is concerned by the lack of additional funding. MVA proposes that a system of grants be made available to States to enact pilot programs at the Governor's discretion. MVA proposes that $300 million be transferred from the Secretary's administrative budget to create a fund to be used to finance these additional pilot programs.

Closing Comments

MVA thanks the Committee for the opportunity to submit comments based on our unique expertise in veterans matters. We hope that our comments have been helpful. May God bless this Committee, the United States Senate and the United States of America.

//s// John B. Wells
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