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PARALYZED VETERANS OF AMERICA

FOR THE

SENATE COMMITTEE ON VETERANS' AFFAIRS

CONCERNING

PENDING LEGISLATION

May 24, 2016

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to submit our views on legislation pending before the Committee. The magnitude of the impact that veterans' health care reform will have on present and future generations of veterans cannot be overstated, and we are proud to be part of this important discussion.

The "SOLVE Act"

The Department of Labor (DOL) administers the Veterans Employment and Training Services Program which is responsible for distributing Jobs for Veterans State Grants (JVSG). Through these grants, states fund two types of positions that can be found in most American Job Centers. Disabled Veterans' Outreach Program (DVOP) specialists provide intensive services to veterans and eligible spouses, designed to facilitate participants' transition into meaningful civilian employment. Local Veterans' Employment Representatives (LVER) perform outreach to local businesses and employers to advocate for the hiring of veterans.

Currently, DOL reviews state applications for JVSG's, but when a provision within the state's proposal is rejected, the entire plan is rejected without explanation. This bill would allow DOL to approve or disapprove certain aspects of a state plan rather than a blanket rejection. It would also ensure that States receive a full explanation as to why the proposal was rejected. This

legislation would also provide Governors more flexibility in deciding how best to utilize the grants. It recognizes that states are in a better position to determine what circumstances constitute significant barriers to employment for their local veterans instead of having DOL establish a few criteria meant to capture all barriers throughout the entire U.S. The bill also encourages states to better coordinate and co-locate with job centers ensuring that DVOPs and LVERs continue to focus on their core mission.

S. 2896, the "Care Veterans Deserve Act of 2016"

PVA's historical experience and extensive interaction with veterans around the country leads us to confidently conclude that veterans prefer to receive their care from the Department of Veterans Affairs (VA). We recognize, however, that while for most enrolled veterans VA remains the best and preferred option, VA cannot provide all services in all locations at all times. Care in the community must remain a viable option.

As we consider legislation designed to reform VA health care, it is important to recognize that VA's specialized services, particularly spinal cord injury care, cannot be adequately duplicated in the private sector. Many advocates for greater access to care in the community also minimize, or ignore altogether, the devastating impact that pushing more veterans into the community would have on the larger VA health care system, and by extension the specialized health services that rely upon the larger system. Broad expansion of community care could lead to a significant decline in the critical mass of patients needed to keep all services viable. We cannot emphasize enough that all tertiary care services are critical to the broader specialized care programs provided to veterans. If these services decline, then specialized care is also diminished. The bottom line is that the SCI system of care, and the other specialized services in VA, do not operate in a vacuum. Veterans with catastrophic disabilities rely almost exclusively upon the VA's specialized services, as well as the wide array of tertiary care services provided at VA medical centers. Specialized services, such as spinal cord injury care, are part of the core mission and responsibility of the VA. As the VA continues the trend toward greater utilization of community care, Congress and the Administration must be cognizant of the impact those decisions will have on veterans who need the VA the most.

PVA, along with our *Independent Budget* (IB) partners, Disabled American Veterans (DAV) and Veterans of Foreign Wars (VFW), developed and previously presented to this Committee a framework for VA health care reform. It includes a comprehensive set of policy ideas that will make an immediate impact on the delivery of care, while laying out a long-term vision for a sustainable, high-quality, veteran-centered health care system. Our framework stands on four pillars: 1) restructuring the veterans health care system; 2) redesigning the systems and procedures that facilitate access to health care; 3) realigning the provision and allocation of VA's resources to reflect the mission; and 4) reforming VA's culture with workforce innovations and real accountability. We believe the proposal included in this legislation to make all veterans eligible for the Choice program is not the best avenue to accomplish the goals and principles laid out above, and we cannot offer our support.

While PVA cannot support the proposal to expand and make permanent the current Choice program, there are productive aspects of this legislation. As technology advances and opens

access to health care for veterans using telemedicine, the legal parameters of that care need to expand alongside the technology. Permitting a licensed health care professional to treat veterans on behalf of the U.S. Government in any location benefits veterans in the form of greater access and the VA by increasing its pool of employees. This is already in practice with attorneys working for or on behalf of the U.S. Government.

PVA also supports the expansion of operating hours for pharmacies and VA medical facilities to hours comparable to those in the retail industry, and we are glad to see that in this legislation. In a recent survey of PVA members about their experiences with VA health care, one of the most common themes was the lack of access to pharmacy services, particularly beyond normally expected business hours. This provision would alleviate some of those concerns.

S. 2888, the "Janey Ensminger Act of 2016"

PVA understands and supports the intent of S. 2888, the "Janey Ensminger Act of 2016." This legislation would amend the Public Health Service Act with respect to the Agency for Toxic Substances and Disease Registry's (ATSDR) review and publication of illness and conditions relating to veterans stationed at Camp Lejeune, North Carolina, and their families. The bill would require the ATSDR Administrator to review the scientific data pertaining to the relationship between individuals at Camp Lejeune and the suspected resulting illness or condition. The ATSDR Administrator would be required to determine each condition that may be caused by toxic exposure, categorize the level of evidence for these conditions into three categories; sufficient with reasonable confidence that the exposure is a cause of the illness or condition, modest supporting causation, or no more than limited supporting causation. This information would then be published and continually updated on HHS' website. If these evidentiary categorizations are different from previous categorizations those veterans and their families currently receiving care under them would continue to receive that care. Newly registered veterans and family members would receive care based on the list provided by the ATSDR Administrator. Research regarding toxic exposures and the subsequent credibility of presumptive conditions has traditionally been the charge of the Institute of Medicine (IOM). The bill does not discuss the processes should the ATSDR conflict with the findings of the IOM.

S. 2883, the "Disabled Veterans Care Act"

PVA strongly supports S. 2883, the "Disabled Veterans Care Act." This legislation would reinstate the requirement for the Department of Veterans Affairs (VA) to provide an annual report to Congress that details its capacity in selected specialized health care services, particularly spinal cord injury and disease (SCI/D). The report includes information such as utilization rates, staffing, and facility bed censuses. Requiring VA to compile such data into the form of a report to share with Congress annually will lead to more accountability within VA, help ensure more efficient allocation of VA resources, particularly in the area of staffing, and improve veterans' access in VA's specialized systems of care.

Within VA's Spinal Cord Injury and Disease system of care, access to timely care is critical to the health and well-being of this population of veterans. Many of the VA's specialized services and rehabilitative programs have established policies on the staffing requirements and number of

beds that must be available to maintain capacity and provide high quality care. The fact is VA has not maintained its capacity to provide for the unique health care needs of severely disabled veterans. Reductions in both inpatient beds and staff in VA's acute and extended care settings have been continuously reported throughout the system of care, particularly since the capacity reporting requirement expired in 2008.

When VA facilities do not adhere to these staffing policies and requirements, veterans suffer with prolonged wait times for medical appointments, or in the case of PVA members, have to limit their care to an SCI/D clinic, despite the need for more comprehensive care. There have been instances within VA's SCI/D system of care when staffing positions have gone vacant for long periods of time, and as a result, the facility's bed capacity is diminished, thus decreasing access. An annual capacity report, to be audited by the VA Office of Inspector General, will allow VA leadership and Congress to have an accurate depiction of VA's ability to provide quality care in its specialized systems of care.

This critically important legislation has been a top priority for PVA for years. We applaud Senators Brown, Toomey, Murray, Sanders, Casey and Coons for working to ensure VA is able to provide for the unique health care needs of catastrophically disabled veterans. While we certainly appreciate the fact that this issue is included in the recently passed "Military Construction and Veterans Affairs Appropriations Act for FY 2017," we believe this bill must be pursued until this issue is pushed through to final passage.

S. 2679, the "Helping Veterans Exposed to Burn Pits Act"

PVA supports S. 2679, the "Helping Veterans Exposed to Burn Pits Act." This proposed legislation would establish within the Department of Veterans Affairs (VA) a center of excellence in the prevention, diagnosis, mitigation, treatment, and rehabilitation of health conditions relating to exposure to burn pits. The site selected would be equipped to study, diagnose, and treat the health conditions related to burn pits. Additional responsibilities would task VA to determine the best practices for treatment, and to provide guidance for the health systems of VA and DOD in determining the personnel required to enact those best practices. This bill would allow the center to access and use the data accumulated in the burn pit registry.

Across Iraq and Afghanistan, military sites commonly used burn pits for waste disposal. The materials burned were varied but can range from batteries to human waste. With limited means for disposing of trash, the burning of waste and the subsequent inhalation of those fumes are an unavoidable certainty. Not unlike the experience of veterans exposed to Agent Orange following the Vietnam War, veterans with conditions likely attributable to burn pits face difficulties proving exposure as well. The scientific linkages have yet to be made conclusive enough. As a result, veterans' access to health care and benefits is compromised. VA maintains that research thus far has failed to provide the link between exposure and long-term disease. Until such research is conducted, affected veterans continue to wait for answers, validation, and treatment. For veterans exposed to Agent Orange this wait lasted decades. This country has a responsibility to determine the cause of and treat the conditions that result from one's service.

S. 2520, the "Newborn Care Improvement Act"

PVA supports S. 2520, the "Newborn Care Improvement Act," a bill to amend Section 1786 of title 38, United States Code, to authorize hospital stays of up to 14 days for newborns under VA care. The current provision allows for a maximum stay of seven days. As the average hospital stay for a healthy newborn is two days, S. 2520 would provide enormous relief for families facing complications immediately after birth or severe infant illness.

S. 2487, the "Female Veteran Suicide Prevention Act"

PVA strongly supports S. 2487, the "Female Veteran Suicide Prevention Act." This bill would direct the Secretary of Veterans Affairs to identify mental health care and suicide prevention programs and metrics that are effective in treating women veterans. Newly published data by VA determined that female military veterans commit suicide at nearly six times the rate of other women. For young women, ages 18-29, the suicides are twelve times as high. The rate among women veterans nearly reaches the rate of male veterans. Of the annual suicide deaths per 100,000 people, male veterans comprised 32.1, and non-veteran men 20.9. Among women veterans they comprised 28.7 compared to just 5.2 among non-veteran women. This is a particularly concerning statistic since men, on average, are far more likely than women to commit suicide. VA is woefully ill-equipped to address women veterans' mental health needs, particularly as relates to risk for suicide. S. 2487 would make a first and giant step in addressing these inadequacies.

S. 2049, to establish in the Department of Veterans Affairs a continuing medical education program for non-Department medical professionals who treat veterans and family members of veterans

PVA supports S. 2049, to establish in the Department of Veterans Affairs a continuing medical education program for non-Department medical professionals who treat veterans and family members of veterans. Veterans suffer from a wide range of medical issues that are not experienced by the majority of the American population. Continuing medical education that focuses on veterans' issues will better prepare these medical professionals to provide care for veterans.

Discussion Draft – Revision of Evidentiary Threshold for Medical Examinations and Opinions

PVA is opposed to the draft bill "Revision of Evidentiary Threshold for Medical Examinations and Opinions." This bill attempts to increase the burden on the claimant, specifically those who have not deployed in combat, to demonstrate evidence of service connection. "Objective" evidence is a high standard, and requiring a veteran to meet it undermines the very purpose of VA's statutory duty to assist. In fact, 38 U.S.C. 5103(a)(2) makes clear that the Secretary's duty to assist is not required only in circumstances where there is no "reasonable possibility" that such assistance would aid in substantiating the claim. If there is a reasonable possibility that an exam would aid a veteran in adequately presenting his or her claim, this provision would block that

assistance unless the veteran first clears this new substantial hurdle of showing objectively that service-connection exists.

It is exceedingly rare for a claimant to have to argue the need for an exam under the current provisions in § 5103(d). This will certainly provoke numerous appeals, right at a time when the VA and VSO community are trying to tackle the appeals backlog. This provision is also somewhat redundant, if not confusing, if one attempts to reconcile it with subsection (2)(c). Veterans should have access to the tools necessary to adequately present their claims. This bill instead appears to be reminiscent of a time when veterans were required to submit "well-grounded" claims.

Discussion Draft – Veterans Mobility Safety Act of 2016

PVA strongly supports the draft bill "Veterans Mobility Safety Act of 2016" submitted for discussion by Senator Moran. The adaptive automobile equipment grant is an important issue for PVA members, as they are the highest users of this particular benefit. Those veterans with catastrophic disabilities have a critical need for mobility to help maintain a high quality of life and allow them to continue to be active members of their community despite their disability. PVA supports the effort to ensure veterans with mobility impairment receive adaptive equipment and adaptations that meet industry standards and specifications. As technology advances, new automotive adaptive devices continue to open the door to more drivers with disabilities. Each person with a mobility issue is unique and has individual requirements and specific features that will allow them to feel confident and comfortable while they drive.

The law as it is currently written requires that before providing an automobile under this section, the Secretary determine that the eligible person is able to operate the vehicle safely. In response to this provision, Veterans currently receive training from the VA Driver's Rehabilitation Program on how to safely operate their new vehicle or equipment before embarking out onto public roadways. VA also has a requirement to monitor the quality of the equipment being installed. But VA is not required to ensure that those installing adaptive equipment on vehicles for disabled veterans are qualified to do so. The bulk of the training and monitoring the quality of equipment being issued is rendered meaningless if the adaptive equipment itself fails. Requiring that vendors offering such services be certified is simply a matter of due diligence in line with the previously mentioned requirements. One can easily recognize the gravity of harm that can ensue upon not only the veteran, but other motorists, passengers and pedestrians when this type of equipment fails due to faulty installation or repairs.

It is also important that VA remain good stewards of tax payer dollars. When a veteran hires an unqualified installer, and the vehicle fails, either the veteran is stuck trying to mend the situation or the VA is stuck with an avoidable secondary bill.

The companion bill currently being considered by the House Committee on Veterans Affairs, H.R. 3471, originally produced inadvertent consequences, particularly with regard to promoting or creating certain conflicts of interest. The text in front of us today mirrors the substantial improvements reflected in the recently amended version of H.R. 3471 that PVA pushed for in the House to ensure that veterans remain the focus of this legislation, not private industry. It brings

together industry stakeholders and the veteran community that stands to be directly impacted to construct a policy which establishes standards without inhibiting industry growth and technological advancement. It also ensures that choice/access remain viable for rural veterans without compromising safety.

Section (3)(e) is unnecessary and, at worst, might contradict the provision in Section (3)(b)(4), which permits the Secretary to designate organizations who meet or exceed the standards developed under this Section to certify providers. The importance of (3)(b)(4) is paramount, as it ensures that providers who already adhere to high quality standards are not penalized by this bill and forced to undergo another round of certification unnecessarily. It also facilitates the implementation of this legislation by having providers available and not awaiting certification. Ultimately the conflicts that arose in the original text in H.R. 3471 were addressed by changing the structure of the bill and removing the construction of standards from the grasp of private industry.

Discussion Draft – To Expand Eligibility For Rural Veterans

With the imminent sunset of Project ARCH in August 2016, this bill would expand eligibility under the current Choice program to any veteran who has at one time or another received health services under Project ARCH. There should be a caveat to this provision which contemplates the possibility of a veteran having moved or will move his or her residence in the future to a location where access to care in the community is unnecessary. As authorities are shifted in statute, the bill should also ensure the resources and ability to preserve existing contracts with the providers who currently serve veterans enrolled in ARCH are also addressed so that services are not disrupted.

Discussion Draft – provisions from the Construction Reform Act of 2016

PVA supports the discussion draft including provisions from the Construction Reform Act of 2016, a bill to make certain improvements in the administration of Department medical facility construction projects. In light of the egregious construction management failures in places like Denver, Colorado, Orlando, Florida, and New Orleans, Louisiana, a serious discussion about VA's responsibility in the construction business has taken place. This bill serves to support steps that have already been taken to improve construction management at VA. We appreciate the Committee focusing on this important issue.

Appeals Reform

PVA has a highly trained force of over 70 service officers who spend two years in specialized training under supervision to develop veterans' claims for both our member and non-member clients. PVA maintains a national Appeals Office staffed by attorneys and legal interns who represent clients at the Board of Veterans' Appeals. We also have attorneys who practice before the Board and before the Court of Appeals for Veterans Claims which enables continuity of representation throughout subsequent appellate court review.

In March 2016, the Veterans Benefits Administration (VBA), the Board and major veterans service organizations (VSO's) partnered to form a working group with the goal of reforming the appeals process. The number of pending appeals has surpassed 440,000. If the process goes unaddressed, VA projects that the appeals inventory will climb to over two million over the course of the next decade. Experienced Veteran Law Judges (VLJ) who adjudicate appeals are a commodity and form a critical component of the system. This attribute limits VA's ability to scale its resources to the extent necessary to deal with such an inventory. Ten years from now, if the system remains unchanged, veterans will expect to wait six years for a decision. We believe reform is necessary, and we support this legislation moving forward.

PVA is encouraged by VA's ambitious efforts to achieve reform. The haste with which it desires to move, though, invites caution from those who recognize that overhauling such a complex process will produce unintended consequences. While we have a responsibility to serve the veteran community and tackle problems, we also have the responsibility to ensure that in doing so we do not leave veterans worse off. VA has recognized that VSO's have specific concerns and has worked with us to find solutions that move us forward without diluting veterans' rights in the process.

It is important that as we approach this major issue that we do not lose sight of the fact that veterans have earned these benefits through the highest service to their country and have every right to pursue these earned benefits to the fullest. As we promote and seek public support for change, it is easy to use statements such as, "there are veterans who are currently rated at 100% who are still pursuing appeals," to illustrate the problems that pervade the system. PVA will be the first to point out, though, that a veteran rated at 100% under 38 U.S.C. § 1114(j) might also be incapacitated to the point that he or she requires 24 hour caregiver assistance. A 100% service-connected disability rating does not contemplate the cost of this care, and veterans may seek special monthly compensation (SMC) to the tune of thousands of dollars needed to address their individual needs. Few people would disagree that pursuing these added disability benefits are vital to a veteran's ability to survive and maintain some level of quality of life. Without clarification, such statements lead people to believe that veterans are the problem.

This is why PVA believes it is so important to ensure that VSO's remain as involved in the follow-on development process and implementation as they are now if this plan is to succeed. This is a procedural overhaul, and VSO's are the bulwark that prevents procedural change from diluting the substantive rights of veterans. Notwithstanding the strong collaboration between VA and the various stakeholders over the last few months, many important questions remain unanswered at this stage in the development process.

The Framework

There is no shortage of news articles and academic pieces that attempt to illustrate for readers the level of complexity and redundancy in the current appeals process. It is a unique system that has added layer after layer of substantive and procedural rights for veterans over the years. The most notable aspect differentiating it from other U.S. court systems is the ability for a claimant to inject new evidence at almost any phase. While this non-adversarial process offers veterans the unique ability to continuously supplement their claim with new evidence and seek a new

decision, it prevents VA from accurately identifying faulty links in the process, whether it be individual raters or certain aspects of the process itself.

As the working group came together and began considering ways to address the appeals inventory, it became clear that a long-term fix would require looking beyond appeals and taking a holistic view of the entire claims process. The work product in front of us today proposes a system with three distinct lanes that a claimant may enter following an initial claims decision—the local higher-level review lane, the new evidence lane, and the Board review lane. The work horse in this system is the new evidence lane. The other two serve distinct purposes focused on correcting errors.

When a claimant receives a decision and determines that an obvious error or oversight has occurred, the local higher-level review lane, also known as the difference of opinion lane, offers a fast-track ability to have a more experienced rater review the alleged mistake. Review within this lane is limited to the evidence in the record at the time of the original decision. It is designed for speed and to allow veterans with simple resolutions to avoid languishing on appeal.

If a claimant learns that a specific piece of evidence is obtainable and would help him or her succeed on their claim, the new evidence lane offers the option to resubmit the claim with new evidence for consideration. VA indicates that its goal is a 125-day turn around on decisions within this lane. Another important aspect is that the statutory duty to assist applies only to activity within this lane.

The third lane offers an appeal to the Board. Within this lane there are two tracks with separate dockets. One track permits the addition of new evidence and option for a Board hearing. The other track permits a faster resolution by the Board for those not seeking to supplement the record. A claimant within this track will not be permitted to submit new evidence, but they will have an opportunity to provide a written argument to accompany the appeal.

If the claimant receives an unfavorable opinion at the Board, he or she may either revert to the new evidence lane within one year or file a notice of appeal with the Court of Appeals for Veterans Claims within 120 days. Unfavorable decisions at the Court would be final, and the claimant would no longer have the benefit of the original effective date associated with that claim.

One of the most beneficial aspects of this new plan is the protection of the effective date. Choosing one lane over the other does not limit the ability to later choose a different lane. The decision to enter any of the lanes must be made within one year of receiving the previous decision. Doing so preserves the effective date relating back to the date of the original claim. Another major issue with the claims process that is addressed in this plan is improved decision notices. A thorough understanding of why a claimant received an adverse decision leads to educated decisions with regard to subsequent lane choices or discontinuing the claim altogether.

PVA's Concerns

PVA is concerned with the dissolution of the Board's authority to procure an independent medical examination or opinion (IME) under 38 U.S.C. § 7109. VA originally proposed to dissolve this authority in order to maintain consistent application of the concept of having all development of evidence take place at the Agency of Original Jurisdiction (AOJ) level in the New or Supplemental Evidence Lane. Throughout extended discussions and negotiations on this topic, PVA has worked with the Board to find an alternative authority supported by certain administrative commitments which would collectively preserve the function of § 7109. While we believe the outright removal of § 7109 is a choice of form over substance which disproportionately affects our members, we think if certain provisions are added to this bill they might preserve the core attributes of § 7109 to an acceptable level.

An IME is a tool used by the Board on a case-by-case basis when it "is warranted by the medical complexity or controversy involved in an appeal case." § 7109(a). The veteran may petition the Board to request an IME, but the decision to do so remains in the discretion of the Board. The Board *sua sponte* may also request an IME. VA's standard for granting such a request is quite stringent. 38 C.F.R. 3.328(c) states, "approval shall be granted only upon a determination . . . that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion." The number granted each year usually amounts to no more than 100 with approximately 50% being requested by the Board itself. Experienced Board personnel thoroughly consider the issues which provoke the need for an outside opinion. Complicating the process further, the Court of Appeals for Veterans Claims (CAVC) has carefully attempted to set parameters for the proposed questions to be answered by experts. A question presented to a medical expert may neither be too vague, nor too specific and leading. A question too vague renders the opinion faulty for failing to address the specific issue, while a question too specific tends to lead the fact finder to a predisposed result.

By simply striking § 7109 in its entirety, the current bill proposes to delegate the procurement of an IME to the AOJ under preexisting authority found in 38 U.S.C. § 5109. PVA recommends retaining the authority found in § 7109. By its nature, an IME tends to address the most complex medical scenarios. Removing this tool from the purview of the Board would undermine the reality that properly presenting questions to the participating expert is best left to the judge seeking to resolve the medical controversy or question. VA's recommendation implicitly suggests that AOJ staff members are equipped with the requisite level of experience to carry out this delicate exercise. Even more worrisome is that in the current claims processing system, IME's are almost exclusively requested at the Board level, despite the AOJ's existing authority to procure one. This begs the question of how many rating officers have the experience and expertise to even identify the need for an IME, let alone to draft a nuanced question that would comport with veterans law jurisprudence.

Dissolving § 7109 would have the additional effect of abolishing the centralized office of outside medical opinions. This small staff has played a vital role in facilitating IME's and maintaining their effectiveness by developing relationships with doctors who are experts on particular subjects and willing to do this tedious task for almost no money. This office not only expedites

the receipt of opinions, but it also ensures a high level of quality. Now this concentrated effort conducted by a group of people thoroughly versed in the IME process will simply disintegrate in favor of IME's being requested, maybe, by a savvy rating officer who has the wherewithal to recognize the need. Even in such a fortuitous circumstance, the rating officer will be left to fend for itself in finding a qualified and willing expert to conduct the task—something this office would have done for them.

If the Committee intends to strike § 7109, we would ask to have included the mitigating language reflected in the House companion bill, H.R. 5083. PVA worked with VA to reduce the impact by supplementing § 5109 with a new subsection (d) and § 5103B(c)(2). This approach, however, still discards a properly functioning organ of the Board in favor of more bureaucracy. IME's generally have a fast turn-around at the Board, and the weight of the opinion is often significant enough to bring finality to a claim. It is possible that VA could preserve the function of the office of outside medical opinions in some fashion, perhaps consolidating it under VBA's authority. The Board has considered our suggestions and alternative proposals in this regard. VA's senior leadership has committed to PVA that it will take the necessary steps to preserve the best practices and resources of this office. PVA highly recommends that if this Committee is entertaining striking § 7109, it should obligate VA to explain how it plans to mitigate against the loss of this office and the Committee should conduct oversight during implementation. Similarly, the decreased efficiency with having the process conducted at the AOJ level is concerning. Instead of the VLJ requesting an IME and receiving the opinion, now a second person must review the claim – the rating officer who received the file on remand. If a veteran wishes to appeal this re-adjudication, PVA has asked for and received VA's commitment to reroute the appeal by default, with exceptions, back to the same VLJ who remanded the case to avoid yet another person having to review a claim with enough medical complexity to warrant the IME.

Under the proposed plan the Board would limit remands to errors related to VBA's duty to assist under 38 U.S.C. § 5103A. There are, however, circumstances where the AOJ received two separate examinations and honored the duty to assist, but an IME is needed to resolve conflicting opinions. The current language in the draft bill does not provide the Board the ability to remand a case with an order to procure an IME to resolve the conflict in evidence. Of course, we would also note that such a situation could easily be resolved if VA would better adhere to its own reasonable doubt provision when adjudicating claims. We still see too many VA decisions where this veteran-friendly rule is not properly applied. More often it appears VA raters exercise arbitrary prerogative to avoid ruling in favor of the claimant, adding obstacles to a claimant's path without adequate justification. While due diligence in gathering evidence is absolutely necessary, too often it seems that VA is working to avoid a fair and legally acceptable ruling favorable for the veteran. Both the failure to accept and tendency to devalue non-VA medical evidence are symptoms of this attitude.

We also recommend an additional jurisdictional safeguard for the Board. In 38 U.S.C. § 7104, it would be helpful to include language that addresses situations where the Board finds that an appeal presents extraordinary circumstances. The Board, in its sole discretion, should be able to retain jurisdiction over a remand of that appeal.

A second concern that must be noted is the fact that the problem that brought us to the table in the first place is not addressed in this plan—the current bloated appeals inventory. It is extremely difficult to place an effective date on this legislation in the absence of a plan to address the inventory. This legislation is a way to prevent the inventory from growing, it is not the answer to reducing the current inventory. Blurring this distinction should be avoided. The question of how this plan should be implemented in light of the current situation deserves serious scrutiny that can only be applied by further collaboration between VA and the stakeholders involved in this process thus far. We have not considered the question of whether this system could be integrated immediately (taking into account the time needed to promulgate the necessary rules and regulations) or if steps to reduce the backlog are needed first.

The plan presented here today is predicated on an expectation that decisions in the middle lane will be adjudicated within an average time of one hundred and twenty-five days. As a result of the Fully Developed Claims process and other efforts that included a surge in resources and mandatory overtime, VBA is currently doing well in achieving this average wait time for initial claims. And while that is encouraging for the plan we are contemplating here, the present state of affairs could be misleading, and we have not had the opportunity to consider the impact on that wait time if the new system were implemented and suddenly altered the current workflow. Also left unaddressed is the resource requirement that might balloon if the plan runs parallel to the current system until all pending claims are phased out and resolved. Adequate resources will be essential to weather the growing pains as this new system is laid in. Leaving these kinds of questions unanswered and moving forward invites the possibility of trading one mangled system for another.

Some stakeholders have expressed concern over the replacement of the "new and material" evidence standard with "new and relevant." PVA believes this is an acceptable standard for veterans to meet. It is true that the number of appeals in the system currently disputing a decision that evidence submitted was not deemed "material" may be as high as 20 percent. The concern is that changing "material" to "relevant" will simply exchange one appealable issue for another. A clever idea was put forward to have VA simply deny the claim if it found that the new evidence submitted was not relevant. This would prevent a veteran from appealing the relevance determination, and thereby significantly reduce the number of forthcoming appeals. However, this discounts two things. The first is that "relevant" is a significantly lower legal threshold than "material." Therefore, most determinations will actually lead to the admission of the evidence, and, therefore, fewer appeals. The second is that it might have the counter-intuitive effect of creating a bigger slow-down as raters are forced to issue full decision notices when they deny a claim instead of simply finding that the evidence was not relevant.

PVA was a supporter early on of judicial review, and we believe the availability of that review has improved the appeals process for veterans. We are concerned that this proposal could limit a veteran's access to court review, and would be happy to work with the committee on creating assurances that this path remains an open and effective means to correct error in individual cases as well as to correct agency misinterpretations of the law.

We also have concerns about whether some language as drafted will reflect the promises made in those long meetings. For example, it is our understanding that reform will not impact the

availability of the duty to assist but it will only be enforced on remand to the AOJ, yet as proposed, the language on this issue is confusing. We suggest a clearer approach, so that veterans have the assurance they are not losing any existing protections in this reform.

Finally, this is not simply a VA problem. As stated earlier, PVA has many service representatives and spends a great deal of time, funds, and effort on ensuring they accomplish their duties at a high level of effectiveness. However, it is important that veterans and their representatives also share responsibility when appeals arrive at the Board without merit. A disability claim that is denied by VBA should not automatically become an appeal simply based on the claimant's disagreement with the decision. When a claimant either files an appeal on his own behalf, or compels an accredited representative to do so with no legal basis for appealing, that appeal clogs the system and draws resources away from legitimate appeals. Since 2012, PVA has taken steps to reduce frivolous appeals by having claimants sign a "Notice Concerning Limits on PVA Representation Before the Board of Veterans' Appeals" at the time they execute the Form 21-22 Power of Attorney (POA) form. PVA clients are notified at the time we accept POA that we do not guarantee we will appeal every adverse decision and reserve the right to refuse to advance any frivolous appeal, in keeping with VA regulations.

PVA believes that substantial reform can be achieved, and the time is ripe to accomplish this task. Our organization represents clients with some of the most complex issues, and we cannot stress enough that moving forward should not be done at the expense of the most vulnerable veterans. We must remain vigilant and appreciate the benefits of bringing together the variety of stakeholders who are participating and bringing different perspectives and viewpoints—it is a healthy development process that ensures veterans remain the focus.

Thank you for this opportunity to present PVA's views on the pending legislation before the Committee and I would be happy to answer any questions you may have.

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Carl Blake is the Associate Executive Director for Government Relations for Paralyzed Veterans of America (PVA) at PVA's National Office in Washington, D.C. He is responsible for the planning, coordination, and implementation of PVA's National Legislative and Advocacy Program agendas with the United States Congress and federal departments and agencies. He develops and executes PVA's Washington agenda in areas of budget, appropriations, health care, and veterans' benefits issues, as well as disability civil rights. He has represented PVA to federal agencies including the Department of Veterans Affairs, Department of Defense, Department of Labor, Small Business Administration, the Department of Transportation, Department of Justice, and the Office of Personnel Management. He coordinates all activities with PVA's Association of Chapter Government Relations Directors as well with PVA's Executive Committee, Board of Directors, and senior leadership.

Carl was raised in Woodford, Virginia. He attended the United States Military Academy at West Point, New York. He received a Bachelor of Science Degree from the Military Academy in May 1998.

Upon graduation from the Military Academy, he was commissioned as a Second Lieutenant in the Infantry in the United States Army. He was assigned to the 2nd Battalion, 504th Parachute Infantry Regiment (1st Brigade) of the 82nd Airborne Division at Fort Bragg, North Carolina. He graduated from Infantry Officer Basic Course, U.S. Army Ranger School, U.S. Army Airborne School, and Air Assault School. His awards include the Army Commendation Medal, Expert Infantryman's Badge, and German Parachutist Badge. Carl retired from the military in October 2000 due to injuries suffered during a parachute training exercise.

Carl is a member of the Mid-Atlantic chapter of Paralyzed Veterans of America.

Carl lives in Fredericksburg, Virginia with his wife Venus, son Jonathan and daughter Brooke.